

**AIMS Human Resources Update
NAA/NMHC Joint Legislative Program**

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IMMIGRATION: EMPLOYEE VERIFICATION REGULATIONS AND LEGISLATION

Absent a determined Congressional effort to enact comprehensive immigration reform, the Bush Administration has made enforcement of existing immigration laws, particularly in the area of employment, a top priority. Well-publicized crackdowns on unauthorized workers, and the companies that employ them, have caused all businesses, including apartment firms, to become more aware of their need to verify the legal status of their employees.

Federal law prohibits employers from *knowingly* hiring or employing an individual who is not authorized to work in the United States. One mechanism the Administration has focused on to enforce this law is the “no-match” letter employers receive from the Social Security Administration (SSA) or the Department of Homeland Security (DHS) advising them that an employee’s Social Security number (SSN) or work authorization documents do not match government records.

SSA has been sending no-match letters to employers for years informing them of discrepancies between employer and government records, but the government has maintained that the no-match letter was merely advisory in nature and was not meant to be used for enforcement purposes. The Administration wants to change that. Last August, DHS issued a new regulation outlining steps an employer must take upon receipt of a no-match letter. Under the proposal, if an employer does not take those steps, receipt of that letter alone may be used as evidence to show that the employer knew that the employee was illegally employed. Because the government’s database is known to contain errors, under certain circumstances the rule could require an employer to terminate an employee who is, in fact, legally authorized to work, if the discrepancy is not resolved within the applicable time period. If the firm does not terminate the employee, it could lead to a legal finding that an employer had *constructive knowledge* that it hired or employed an unauthorized worker, regardless of whether the worker is actually permitted to work, thus subjecting the employer to civil or criminal penalties.

The rule, which was opposed by NAA/NMHC and a variety of business organizations, was set to go into effect on September 14, 2007, but on October 10, the U.S. District Court for the Northern District of California blocked it in response to a lawsuit filed by a coalition of business and labor groups (*American Federation of Labor, et al. v. Chertoff*, N.D. Cal., No. 3:07-cv-04472-CRB, *preliminary injunction granted* 10/10/07). Since then, DHS has been reworking its rule in an effort to overcome the court’s objections. On March 26, DHS issued a supplemental proposed rule (73 FR 15944) that attempts to resolve the three main concerns raised by the court when it struck down the original rule. (The proposed supplemental rule is posted at www.dhs.gov/xlibrary/assets/press_nomatch-snpnm.pdf. (Comments are due April 25, and a final rule is expected this summer.)

One concern cited by the court last fall in blocking the rule was DHS’s failure to justify its conclusion that a no-match letter was sufficient evidence to show that an employer had knowledge of improper hiring or employment. Importantly, the court noted that this standard marked a clear departure from the long-standing policy that receipt of a no-match letter, without additional evidence, was insufficient to show that an employer had knowledge that an employee lacked proper work authorization. The supplemental proposed rule states that there is a “clear connection” between a no-match letter and the employment of unauthorized workers.

The court also found that the rule amounted to an excessive exercise of DHS’s regulatory power because it infringed on the authority of the Department of Justice (DOJ) to interpret and issue regulations under the Immigration Reform and Control Act (IRCA) by claiming that an employer complying with the rule’s safe harbor provisions would not be found in violation of IRCA’s anti-discrimination provisions. Although DHS denied encroaching DOJ’s regulatory authority in the supplemental proposed rule, it recants the anti-discrimination liability language and simply advises employers to refer to relevant DOJ guidance. This change, however, creates even greater uncertainty for employers who may be forced to choose between terminating an employee with a mismatched SSN to comply with the DHS no-match rule or violating the no-match rule’s requirements to avoid a potential discrimination claim by a lawfully employed worker whose mismatch is an error.

The third area of concern for the court was that DHS did not undertake a requisite Regulatory Flexibility Act (RFA) analysis prior to proposing the rule. An RFA analysis examines the cost to comply with a regulatory proposal, as well as the costs of alternative approaches. It is required when a rule is expected to have a significant economic impact on a substantial number

of small businesses. In the original rule, DHS attempted to avoid undertaking an RFA analysis by certifying that the no-match rule would not have a significant economic impact on a substantial number of small businesses. However, the judge found that the rule clearly imposed mandates on employers and that compliance would probably entail considerable costs for small businesses. Responding to the judge's finding that an RFA analysis is necessary, the DHS asserts that the no-match policy is interpretive, not legislative, but nevertheless included an analysis in the supplemental March 26 proposed rule that finds the costs of compliance to be insignificant.

It is unclear at this point whether the latest iteration of the proposed rule will pass judicial muster, but it is clear that in the face of increasing enforcement, apartment firms must be diligent in their efforts to properly screen prospective employees for their legal status and ensure that all employees with hiring and screening responsibilities, including community managers and other site-level staff, are adequately trained.

Lawmakers have not completely ceded this issue to the regulators. Congress continues to debate legislation seeking to alter the federal government's E-Verify system before it expires on December 31. E-Verify (formerly called Basic Pilot) is a voluntary Internet-based system that electronically compares information on I-9 forms against government records to determine an individual's work status. Most of the bills pending would require employers to use the system even though it is fraught with errors. The New Employee Verification Act (H.R. 5515) would make participation in a federal screening program mandatory, but would allow employers to choose between a version of E-Verify or an alternative system that would include background checks and biometric safeguards. The Secure America Through Verification and Enforcement Act (H.R. 4088) would make E-Verify permanent and mandatory. NAA/NMHC will continue to oppose legislation that would require employer participation in a federal program with an unacceptably high error rate.

FAMILY AND MEDICAL LEAVE ACT

On February 11, the U.S. Department of Labor (DOL) proposed revisions to its Family and Medical Leave Act (FMLA) regulations (73 FR 7876). The FMLA generally provides "eligible" employees with up to 12 weeks of unpaid leave in any 12-month period for the employee's own serious health condition, or that of a family member, and the birth or adoption of a child. Among other things, the proposed regulations address a provision of the National Defense Authorization Act of 2008 (P.L. No. 110-181) that amended the FMLA to extend coverage to employees caring for family members injured while on active military duty. Importantly, only injuries sustained while on active duty—not reserve duty—are covered.

The amendment requires employers to provide up to 26 weeks of unpaid leave during a 12-month period to a qualifying employee who is the spouse, child, parent, nearest blood relative, or next of kin to a "covered service member." A covered service member is a member of the armed forces undergoing "medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness." The amendment also requires employers to provide up to 12 weeks of unpaid leave to an employee whose spouse, child or parent is called to active duty if a "qualifying exigency" exists. Since the proposal primarily seeks comment on a host of issues and does not provide much interpretive guidance, it is unclear, for example, what will ultimately be deemed a "qualifying exigency."

In addition to adding the military provisions, the 200-page proposal also makes dozens of significant changes to the existing FMLA regulations with the goal of clarifying and improving a regulatory framework that most agree is overly complex, has resulted in a multitude of unintended and costly consequences and is difficult for employees to understand and employers to implement. The proposed regulations address questions regarding notice requirements for employers and employees, medical certification requirements, the interplay between employer-sponsored paid leave and unpaid FMLA leave, privacy interests related to shared health information, intermittent leave, fitness-for-duty certifications and what constitutes a "serious health condition" under the FMLA. The DOL also recognizes the U.S. Supreme Court's invalidation of a penalty provision of the regulations. In *Ragsdale v. Wolverine World Wide Inc.*, (535 U.S. 81 (2002)), the Court held that a categorical penalty for a violation of employer notice and leave designation provisions exceeds the Department's statutory authority and is contrary to the statute's requirement that an employee show individualized harm. NAA/NMHC will provide a detailed members-only analysis of employer and employee obligations once the final rules are published. The proposed rules are available at www.dol.gov/esa/whd/fmla/FedRegNPRM.pdf.

COMPENSATION SURVEY

NMHC's annual National Apartment Survey of Compensation & Benefits Practices is underway. The questionnaire is available at www.nmhc.org/goto/08CompSurvey. Firms who complete the questionnaire by May 9 will receive a substantial discount on the final results. Published in three separate volumes, the final report will include national, regional, sub-regional, state, consolidated metro area, and metropolitan area data for 68 corporate/regional positions and property management jobs from top executives to leasing consultants. The final report will also cover employee turnover, bonus and incentive programs, leave policies, health benefits, 401(k) and profit-sharing plans