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Court Stops Social Security "No-Match" Immigration Enforcement: Lessons for Congress

James Jay Carafano, Ph.D.

In response to a lawsuit filed by the AFL-CIO, ACLU, and National Immigration Law Center, a federal judge last week issued a temporary restraining order blocking the Department of Homeland Security (DHS) and the Social Security Administration (SSA) from mailing new "no-match" notices to employers. These notices are sent when employers hire new workers whose personal information (e.g., name and social security number) does not match SSA records, and they provide detailed guidance to employers of their legal obligations and the steps that they should take in response to a no-match. Fair and practical workplace enforcement is vital to reestablishing the integrity of American immigration law. The obstacles thrown in the path of the Administration's recent enforcement efforts offer a lesson to Congress about what needs to be done to enforce U.S. laws while ensuring America's employers have access to the workers they need.

Sensible Measures. The DHS and SSA use no-match letters as an immigration enforcement tool. In 2005, SSA mailed out about 10.5 million no-match letters, and by some estimates, upwards of 90 percent of these concerned workers who were not legally entitled to be in the United States. Under the Administration's new no-match rules—now enjoined—employers not complying with no-match letters' guidance would have faced fines.

The new notices blocked by the court appear to do little more than consolidate existing DHS and SSA policies and do not create any new requirements. Rather, they provide guidance to responsible employers on reasonable measures to do the right thing: respect the rights of individual employees while providing a reasonable means to avoid unintentionally hiring unlawfully present persons.

In response to the lawsuit's allegations, DHS says that the new process is practical. Under the new rules, legally present employees and their employers have 90 days to correct their information without being unduly inconvenienced. DHS estimates that the number of individuals required to reconcile no-match data in this way will be modest and manageable. In addition, employers who follow the new procedures would be granted a safe harbor from prosecution for willfully violating workplace enforcement laws.

Questionable Response. Blocking the new procedures will, in some respects, put American employees at greater risk. The new procedures would have helped legitimate workers to correct their data and thereby ensure they and their families were not wrongly denied benefits or made victims of identity theft. That specific avenue is no longer open to them.

The lawsuit also offers Congress a cautionary lesson on what would have happened if a compre-

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hensive immigration and border security bill that put amnesty first had passed. Enforcement measures would have been litigated extensively, while amnesty would have allowed millions to benefit from having violated U.S. laws, undermining any notion that the government could or would enforce immigration laws in the future.

The Next Steps. Though the Administration should receive praise—rather than lawsuits—for trying to do the right thing, even proponents of enforcement acknowledge that merely issuing clear no-match guidance is not the optimum enforcement tool. A far better policy would be for the SSA to routinely share no-match data directly with DHS. This can be done in a manner that does not put individual employees' sensitive information or civil liberties at risk. With this data, DHS could more efficiently target employers who willfully hire unlawfully present labor.

But there is a dispute, present even within the Administration, over whether DHS may automatically receive no-match data under existing law. The Administration should request the Department of Justice's Office of Legal Counsel issue a ruling on this matter. Meanwhile, Congress should pass legislation specifically authorizing SSA/DHS information sharing. This would demonstrate that Congress is serious about seeing laws enforced and show its support for the Administration's enforcement efforts.

Congress also should provide further protection from frivolous private suits against employers by unions and others claiming to represent employee groups. A good policy would be to make employers immune from liability (except perhaps job reinstatement) for good-faith actions to comply with immigration law.

Meanwhile, DHS should continue to provide clarifying guidance to employers with legitimate concerns about how to comply with the laws that they have long ignored, including the option to participate in E-Verify, an online tool for checking Social Security numbers and correcting no-match errors.

—James Jay Carafano, Ph.D., is Assistant Director of the Kathryn and Shelby Cullom Davis Institute for International Studies and Senior Research Fellow in the Douglas and Sarah Allison Center for Foreign Policy Studies at The Heritage Foundation.