IMMIGRATION POLICY CENTER

…providing factual information about immigration and immigrants in America

March 2008

Administration Announces New "No-Match" Regulations:
DHS Regs Pass Burdens to Social Security Administration, Small Businesses, and Citizens

On March 21, 2008, the Bush Administration announced proposed regulations that supplement its August 2007 final rule regarding an employer's legal obligations upon receiving a letter from the Social Security Administration (SSA) stating that the information submitted for an employee does not match SSA records (otherwise known as an SSA "no-match" letter). Implementation of the August 2007 rule was preliminarily enjoined by the U.S. District Court for the Northern District of California on October 10, 2007, after labor, immigrant, and business groups filed a lawsuit charging that the Department of Homeland Security (DHS) did not have the legal authority to implement the rule, and that the changes DHS sought to make to immigration laws can be made only by Congress and not through an administrative procedure. While the 2008 supplemental rule purports to respond to findings underlying the district court decision, in fact, no significant changes were made from last summer's regulations. Unfortunately, if implemented, it will be harmful to native-born and legal workers, and will prove inefficient, ineffective, and costly.

The Immigration Policy Center will soon release a report that provides a detailed examination of the SSA no-match letter policy and the proposed rules. The following is a brief description of the Administration's 2008 supplemental proposed rule and its harmful consequences.

What are SSA "no-match" letters? SSA no-match letters are sent on an annual basis to workers and employers in an attempt to correct discrepancies in SSA's records that prevent workers from getting credit for their earnings. These mismatches can be caused by a clerical error, a name change, or some other problem that is not related to immigration status. Resolving these errors is critical because it affects workers' ability to receive retirement and other benefits in the future. No-match letters were not originally intended to be an immigration-enforcement tool.

What would the supplemental proposed rule do? The new rule would take SSA's process for resolving database errors and turn no-match letters into an immigration-enforcement tool. SSA's position has always been that no-match letters are *not* evidence that a worker is undocumented. However, under the new rule, if an employer does not resolve a data mismatch, the no-match letter can be used as proof that the employer "knowingly" hired an unauthorized worker. If workers are unable to correct their records in a prescribed timeframe, employers must fire them or risk sanctions for violating immigration laws. If implemented, the rule will likely cause unjust firings across the nation, and will exacerbate the ways in which the letters have been misused by unscrupulous employers.

What's wrong with using the no-match letters to enforce immigration laws? For years, SSA has been clear that no-match letters are not a proxy for immigration status, and that there are many legitimate reasons why a worker or employer might receive a no-match letter. While undocumented immigrants are among the millions of workers who receive no-match letters each year, many legal workers—including U.S. citizens—receive letters because of clerical errors, unreported name changes, and other discrepancies in their records. The new rule will not change the fact that a no-match letter is not evidence of an immigration violation. While the new no-match rule will not, and

cannot, solve the problem of undocumented immigration, turning no-match letters into an immigration enforcement mechanism will:

- Cause the firing of employment-authorized workers and U.S. citizens at a time when our economy is highly fragile;
- Impose additional costs on employers;
- Result in increased discrimination and abuses against all workers; and
- Overwhelm SSA by diverting resources away from its primary mission of administering benefits.

Employers who play by the rules will face undue burdens.

- **New responsibilities.** Employers will face the additional responsibility of resolving data mismatches involving their workers, or risk the possibility of sanctions if workers with unresolved data discrepancies are not terminated. This puts employers at risk of being charged with unlawful discrimination if they terminate employees who are authorized to work, but who are unable to resolve SSA-related discrepancies within the prescribed period of time.
- **High costs.** The cost of the no-match letters could run into the hundreds of millions of dollars per year when one includes the resources needed to comply with the letters and the lost productivity of companies attempting to comply. Additional costs would be borne by employers as they seek to replace the workers they have lost due to the no-match letters. Monetary costs could be substantially higher if litigation is initiated against companies for wrongful termination of workers.
- **Large impact on small business.** The no-match letters will have a particularly devastating impact on small businesses, many of which do not have dedicated Human Resources staff to deal with no-match letters. Many small business employers operate out of nonconventional workplaces such as construction sites or agricultural fields where there is no access to computers or employment files. Small business owners argue that they are also more vulnerable to worker disruptions or shortages, and shocks to the workforce could jeopardize their ability to bid for future contracts.
- **Unfair competition.** The new no-match rule will exacerbate the unfair competitive advantage that unscrupulous employers have over those employers seeking to comply with the law. Law-abiding businesses are at a disadvantage when other businesses continue to hire undocumented workers in the underground cash economy to avoid regulation.

Workers will experience discrimination and retaliation.

- **Workers will immediately be fired by employers who mistakenly believe that they are undocumented.** Some employers responding to no-match letters may immediately terminate the workers listed on the letters without giving them an opportunity to correct data discrepancies within the time allotted by the DHS rule, if at all. Many employers have done so in the past despite the strong warnings that appear on the face of no-match letter telling them not to. If the new rule goes into effect, employers may think it is best to simply terminate workers with data discrepancies rather than risk even more government scrutiny. As a result, it is likely that many U.S. citizens and lawful immigrants could lose their jobs as a result of employers misinterpreting the letters.

- **No-match letters can be used to undermine labor campaigns and retaliate against workers who assert their labor rights.** Unscrupulous employers sometimes use no-match letters to stymie organizing campaigns by initially ignoring the letters and then using them as a pretext to fire workers who participate in efforts to improve working conditions and wages, or to retaliate against workers who have been injured on the job or complain of unpaid wages and other labor violations. In some cases, employers knowingly hire undocumented immigrants in order to save money on wages and benefits, and then use the no-match letters to intimidate undocumented workers when they come forward with labor complaints. This, in turn, affects the ability of all workers to exercise their labor rights.

- **Some workers may be discriminated against because they look or sound "foreign."** Employers who believe they will face business disruptions due to no-match letters have an incentive to hire employees they think are less likely to receive the letters. Some employers may also choose to simply dismiss employees who look or sound "foreign" because they fear being penalized for immigration violations.

SSA cannot handle the overwhelming burdens of the new rule.

- **Huge workload.** SSA is already overburdened with its mission of administering critical benefits to the public, such as Supplemental Security Income disability benefits and retirement payments. The SSA Inspector General testified on February 28, 2008, that there are 751,767 cases waiting for a hearing decision, leading to an average waiting time of 499 days in Fiscal Year (FY) 2008. The imposition of even more responsibilities will make it more difficult for SSA to perform its primary mission of administering benefits to Americans.

- **Lack of resources.** SSA's financial resources have not increased at the same rate as its responsibilities. SSA is at its lowest staffing level since the early 1970s, and staffing losses have been felt most profoundly in the Field Offices. Since the beginning of FY 2006, SSA's 1,267 Field Offices have lost over 1,700 Claims Representatives and over 520 Service Representatives.

- **New demands.** The 2008 no-match rule will place new demands on SSA that it may not be able to handle. Increased traffic at Field Offices by employers and workers trying to rectify problems will likely disrupt normal business, require additional staff hours, and add to the already increasing backlogs for disability benefits and other services.

Given the high costs associated with SSA no-match letters—the costs to employers, the negative impact on the economy, the harmful impact on workers, the cost to SSA—use of no-match letters as an immigration enforcement tool is highly questionable. The no-match letters will not magically make undocumented workers disappear from our economy. It will, however, erase them from the payroll records and eliminate their contributions to the Social Security system. Without a practical and workable way to resolve the legal status of the 8 million undocumented workers now in the United States, they will simply dive deeper into the unregulated cash economy, which will result in substantial losses in state and federal tax revenues and unfair competition for employers trying to play by the rules. In the meantime, U.S. citizens and legal immigrants will be mistakenly fired, businesses will face undue burdens, and those seeking SSA benefits will have to wait longer for their disability and retirement claims to be processed.