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VIA ELECTRONIC MAIL

Director
Regulatory Management Division
U.S. Citizenship and Immigration Services
Department of Homeland Security
425 I Street, NW, Suite 1000
Washington, DC 20536

RE: DHS Docket No. ICEB-2006-0004– Rulemaking Proceedings on Safe-Harbor Procedures for Employers Who Receive a No-Match Letter - Clarification; Initial Regulatory Flexibility Analysis

Dear Director:

On behalf of United Fresh Produce Association, we submit the following comments on the supplemental proposed rule cited above. United Fresh includes some 1,200 member companies that distribute and market the large majority of fresh produce sold in the United States. The association is a vertically integrated national trade organization that represents growers, shippers, fresh-cut processors, brokers, wholesalers and distributors of produce, working together with their customers at retail and foodservice, suppliers throughout the distribution chain, and international partners.

We believe the following issues/concerns should be addressed:

- A thirty (30) day comment period is not a sufficient amount of time to review the entire supplemental rule and Initial Regulatory Flexibility Analysis, and provide a well organized and thoughtful response. The initial proposed rule, which did not contain such an analysis, provided for a sixty (60)-day comment period. The comment period should be extended for at least an equal comment period as the initial proposed rule. Considering the complexity of the Regulatory Flexibility Analysis, we suggest a ninety (90) day comment period is reasonable and fair.

- The supplemental rule fails to address the U.S. District Court's decision. The rule fails to address any substantive changes from the Final Rule published in August of 2007. We do not believe that this comports with the decision of the United States District Court for the Northern District of California's injunction and related comments on October 10, 2007.
- The Initial Regulatory Flexibility Act Analysis indicates a significant cost to be borne by small businesses. An initial review using the Department of Homeland Security (DHS) numbers reveal that job losses due to terminations for failure to meet the 90-day correction period for documented US workers could exceed 160,000 per year. Costs to businesses using DHS assumptions exceed \$300 million per year. This is a significant financial impact for small businesses, especially considering that many US workers will be terminated due to government error such as a recent name change or clerical error, and the employers will then face antidiscrimination suits, litigation fees, program and administrative costs, etc. Even meritless or frivolous claims brought by terminated employees will require significant expenses in legal fees and related costs to defend.
- The regulation fails to provide true safe harbor protection. Instead, it defines what constitutes a "reasonable response" by an employer to a no-match letter and mandates specific steps to be taken by the employer within defined periods of time. However, the preamble suggests that taking such measures *may* allow the employer to avoid liability and mitigate or eliminate potential penalties, but leaves much unanswered. Therefore, the employer has no set standard to measure against to determine whether he or she has taken requisite steps to avoid liability, leaving employers completely at risk and gambling on whether they are going to be exposed to liability. A true safe harbor would provide protection from all worksite enforcement actions taken in relation to the no-match guidance.
- The 90 day deadline to rectify no matches is not practical. Regardless of the size of the employer, all employers will be faced with challenges to meet this deadline. Large employers may receive several no-match letters at a time, which are likely to include hundreds of names. The employer has 90 days from the date of receipt of the letter or notice, to ensure and confirm that the discrepancy has been rectified. Thus, an employee has less than three months to work out a resolution if there is an error between themselves and the SSA, which might not be enough time. Many SSA offices can not remedy errors in such a short period. In addition, many employers are unable to force employees to take time off from work and visit the SSA office to rectify the discrepancy. This will result in termination of lawfully authorized workers. In agriculture, many employees are only hired for weeks at a time. Thus, employees will have completed their job assignment and moved on or relocated well before 90 days lapse. (For example, the average harvest time for watermelons is between four to six weeks). How is an employer to resolve a discrepancy when the employee is no longer working?

- Out of fear of non-compliance with DHS's proposed regulation, employers might be extra vigilant in trying to verify an employee's identity and eligibility to work in the U.S. However, there is a fine line for the employer between ensuring that the workforce is legal and violating existing anti-discriminations laws. For example, should an employee present documents other than a Social Security card when completing the I-9 Form and there is subsequently a no-match letter issued, the employer might then confront the employee and request to see the Social Security card. Clearly, this would present an issue regarding anti-discrimination laws already in effect. DHS should provide clarification on how an employer should respond to such a situation and ensure protection from liability.
- The regulation would significantly increase the scope of constructive knowledge in certain circumstances. It states "the employer's obligations under current law, which is that if the employer fails to take reasonable steps after receiving such information, and if the employee is in fact an unauthorized alien, the employer may be found to have had constructive knowledge of that fact." This expansion of the definition of constructive knowledge is not justified in law.
- As previously noted, one of the ways by which an employer can be put on notice is by receiving a written notification from DHS. Unlike SSA, DHS does not have a mechanism in place that regularly checks and reports mismatched immigration documents. Rather, DHS generally is made aware of mismatched immigration documents in the context of an I-9 Forms audit. As noted in the proposed regulation, if an employer receives a letter from DHS, s/he is expected to resolve the issue by "tak[ing] reasonable steps, within 14 days of receiving the notice, to attempt to resolve the question raised by DHS about the immigration status document or the employment authorization document." However, DHS provides no specific guidance as to what those steps should be and what an employer should do to rectify the situation. We request that this process be outlined and explained and that time be provided for further comment.

As explained, the proposed regulations are misguided and will have an adverse effect on the nation's economy and its overall national security.

Respectfully submitted,



Tom Stenzel
President
United Fresh Produce Association