

Social Security No-Match Letters Will Require Special Treatment Starting September 14, 2007

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In mid-August '07 the U.S. Immigration and Customs Enforcement (ICE) Agency, Department of Homeland Security, released a Social Security No-Match Regulation. The regulation, which becomes effective on September 14, 2007, describes the obligations of employers when they receive no-match letters from the Social Security Administration (SSA) or receive a letter regarding employment verification forms from the Department of Homeland Security (DHS). The regulation also provides, what they call, "safe harbors", employers can follow to avoid a finding the employer had constructive knowledge that the employee, referred to in the letter, was an alien not authorized to work in the US. Employers with knowledge that an immigrant worker is unauthorized to accept employment are liable for both civil and criminal penalties.

Employers are required to report social security earnings for their workers to the Social Security Administration. In some cases, the social security number and the name of the employee do not match and the SSA sends an employer a letter informing the employer of the no-match. SSA's practice of sending letters to employers when the agency determines that an employee's name and Social Security Number (SSN) does not match official records is not new and the SSA is not changing its procedures for issuing these letters. What is new is that this new Department of Homeland Security regulation imposes liability on the employer, based on failure to respond to a SSA 'no-match' letter.

While some no-match letters may be as a result of illegal workers using forged and fraudulent documents to obtain work, there are many reasons for a mismatch between employer and SSA records, including, typographical errors, transcription errors, name changes due to marriage/divorce that are not

reported to SSA, the use of multiple surnames and many other, mostly, administrative errors.

Employers should not assume that the mismatch is the result of any wrongdoing on the part of the employee. In addition, an employer who takes action against an employee based on nothing more substantial than a mismatch letter from SSA may place him/herself in legal vulnerability.

Safe Harbor Rules

The Department of Homeland Security's Social Security No-Match Regulation added the receipt of a no-match letter from the SSA and receipt of employment verification forms from DHS as two additional examples that an employer may have "constructive" knowledge that an employee is out of status, i.e., "constructive" knowledge that the employer is in violation of the Immigration Reform and Control Act of 1986 (IRCA), the statute that punishes employers for knowingly hiring unlawfully present workers or violating paperwork rules associated with the I-9 employment verification form.

Department of Homeland Security's Social Security No-Match Regulation provides guidance on how an employer should deal with a no-match letter:

- ◆ Verifying within 30 days that the mismatch was not the result of a record-keeping error on the employer's part. If there is an error, the employer should correct the error and inform the appropriate agency – DHS or SSA depending on which agency sent the no-match letter. The employer should then verify with that agency that the new number is correct and internally document the manner, date and time of the verification.
- ◆ If actions above do not resolve the discrepancy, the employer should request that the employee confirm the accuracy of employment records. If records are not correct, the employer needs to take corrective actions. That would include informing the relevant agency (SSA or DHA) and verifying the corrected records with the agency.
- ◆ If the records are correct according to the employee, asking the employee to resolve the issue with the SSA and bring original or certified copies of required identity documents.
- ◆ The rules provide that a discrepancy is only resolved when the employer has received verification

from SSA or DHS that the employee's name matches the record.

- ◆ Where the information could not be corrected, complete a new I-9 form without using the questionable Social Security number and instead using documentation presented by the employee that conforms with the I-9 document identity requirements and includes a photograph and other biographic data.
- ◆ When 90 days have passed without a resolution of the discrepancy, an employer must undertake a procedure to verify or fail to verify the employee's identity and work authorization. If the process is completed, an employer will NOT have constructive knowledge that an employee is not work authorized if the system verifies the employee (even if the employee turns out not to be employment authorized).

According to some labor consultants, sending out no-match letters for 2006 was delayed this year in anticipation of this regulation. Letters may be released shortly after September 14, 2007 and employers are going to have to immediately act on those, because the rule will be in effect. This may cause a disruption of the labor force, especially when the 90 period expires after receipt of a no-match letter from SSA or an employment verification letter from the DHS.