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THE SOCIAL SECURITY ADMINISTRATION IS SENDING OUT NO-MATCH LETTERS - HOW DOES AN EMPLOYER DEAL WITH A NO-MATCH LETTER?

BY GREG J. NORYS

A no-match letter is a notice sent by the Social Security Administration ("SSA") to employers when an employee's name and Social Security number do not match. The stated purpose of these letters is to ensure that the Social Security payments an employer makes on an employee's behalf are properly credited to the employee's name in the Social Security system. While the SSA warns against making inferences about an employee's immigration status after the receipt of a no-match letter, many Immigration and Customs Enforcement ("ICE") offices consider an employer's receipt of a no-match letter to be an indication that the employer might have questionable hiring and record-keeping practices. An employer's failure to show specific action in response to a no-match letter could, therefore, be considered by ICE as a significant negative factor when considering whether enforcement actions, including fines and criminal prosecution, should be taken.

As indicated by the SSA, employers should take the following steps upon receipt of a no-match letter:

1. Notify the affected employee of the no-match letter in writing.
2. Set up an account on the SSA website under the Social Security number verification system ("SSNVS") or Consent Based SSNVS. You can also use the E-Verify system to check the social security number ("SSN") against the employee's name.
3. Review the Form W-4, Form I-9, SSNVS record, and any other documents currently in your possession that may contain the employee's SSN to ensure that the employee's name and SSN are correctly shown on the documents.
4. Compare the failed SSN with your employment records. If you made a typographical error, correct the error and resubmit the corrected data with form W-2c (Corrected Wage and Tax Statement). If the name is hyphenated, consider trying different versions of the name. If an error is discovered that was submitted to the SSA in the wage report, advise the SSA of any corrections.
5. If your employment records match your submission, ask your employee to check his/her Social Security card and inform you of any name or SSN difference between your records and his/her card. If your employment records are incorrect, make all necessary corrections and resubmit the corrected data (W-2c).

If, however, the employment records reflect the correct name and SSN provided by the employee:

5a. Notify the employee that he/she should immediately contact any local SSA Office to correct any problems with the employee's SSA record. Give the employee a reasonable period of time (90-120 days) to correct the issue, and ask the employee to keep you apprised of the status. We recommend putting this notice in writing.

5b. Once the employee has contacted the SSA Office, he/she should inform you of any changes. However, you should regularly follow up (every 30 days) with the employee to monitor progress in correcting any errors with the SSA record if the employee fails to communicate regarding the status of his/her effort. Document all such follow-up efforts.

If the employee is unable to provide a valid SSN, you are encouraged to document your efforts to obtain the correct information. (Documentation should be retained with payroll records for a period of three (3) years.)

5c. Advise the affected employee that a refusal to provide any documentation or credible explanation of good-faith efforts to correct any problems with his/her SSN or SSA record by the deadline could be grounds for termination. Again, you should document this notice.

5d. When and if the employee is able to provide a correct SSN, advise the SSA of any corrections.

6. If you are unable to contact the employee, you are encouraged to document your efforts.

   In addition to refraining from taking immediate adverse action against the employee, you should avoid the potentially actionable behavior below.

- Do not attempt to immediately re-verify the employee's employment eligibility by requesting the completion of a new Form I-9;
- Do not follow different or inconsistent procedures for certain employees based on apparent or perceived national-origin or citizenship status. Be consistent with all employees;
- Do not require the affected employee to produce specific documents to address the no-match letter; and
- Do not ask the affected employee to provide a written report from the SSA or any other agency verifying the employee's SSN.

7. If you have already sent a Form W-2 with an incorrect name and/or SSN, then submit a Form W-2c to correct the mismatch. W-2c services are available through Business Services Online ("BSO") Wage Reporting. There is no need to re-register for your BSO User Identification Number (User ID).

As noted above, employers must provide employees with a "reasonable period of time" to resolve issues related to a no-match letter before taking any action against the employee. Currently, there is no definition for "a reasonable period of time," but guidance from the SSA and the Immigration and Employee Rights Section ("IERS") of the U.S. Department of Justice indicates a prudent employer would provide an employee with at least 90 to 120 days from receipt of a no-match letter before taking any adverse action. The IERS has indicated in informal guidance that 120 days may be the generally preferred period of time granted to employees to correct a SSN discrepancy, but also notes that the ultimate determination of whether the time given was reasonable depends on the particular circumstances involved under a totality of the circumstances. An employer may consider granting additional time to an affected employee if it appears that the employee is attempting in good faith to correct the reported discrepancy. An employer should document the employee's good-faith efforts and any other justifications for granting the employee additional time.

If an employee refuses to undertake any good faith effort to address the no-match letter, you may be justified in taking adverse action against the employee without having to wait 90 to 120 days depending on the circumstances. An uncooperative employee in this case can create risks for the employer.

For example, an employer cannot file accurate wage statements unless it is given accurate information from its employees, and an employer who continuously files inaccurate wage statements is subject to fines from the Internal Revenue Service. Additionally, an employer who chooses not to terminate an employee who refuses to attempt to resolve a reported discrepancy with the SSA is risking future problems with ICE should the employer's Form I-9s ever be audited. An employer contemplating termination of a recalcitrant employee must ensure that it documents its attempts to work with the employee in good faith on the issue and the employee's subsequent refusal to cooperate.The employer must also make sure that its actions are consistent with its own internal policies, past practices, and any applicable organized labor agreements. Given the risks, such a scenario should, therefore, be handled on a case-by-case basis, and only after consultation with legal counsel. An employee's admission that he or she is not authorized to work in the United States, or the receipt of additional official information from the federal government stating such, should also generally be considered sufficient grounds to immediately terminate employment—regardless of how much time has passed since receipt of the no-match letter.

If an employee is unable to provide a satisfactory resolution within a reasonable period of time, the employer is put into the difficult situation of having to decide whether to terminate the employee without further action, re-verify the employee and terminate only if successful re-verification cannot be achieved, or to continue employment without further action. Once again, such a scenario should be handled on a case-by-case basis, and only after consultation with legal counsel. It is unwise to do nothing in response to such a situation given the continued increased scrutiny of Form I-9s by the federal government. Unfortunately, there has been no clear guidance from any federal agency regarding what employers can or should do if things come to an impasse with an employee who is the subject of a no-match letter.

Yet another dilemma arises when the employee responds to the no-match letter with a new SSN. If an employee provides a new SSN to address a reported problem with a previously reported SSN, an employer should consider verifying the new SSN with the SSA using the SSNVS. Presentation of a new SSN is a potential red flag as SSNs are issued by the SSA in only rare circumstances and therefore accepting a new SSN from an employee without further inquiry regarding the reasons for the new SSN puts an employer at risk. An employer who chooses to accept a new SSN from an employee and does not subsequently verify the SSN through SSNVS should at a minimum document the explanation given by

the employee for the new SSN and should only proceed with use of the new SSN and employment of the employee if the explanation seems credible.

Additionally, if an employee who originally completed their Form I-9 using a Social Security card (as a List C document) later returns to the employer with a new SSN that is different than what was previously presented for Form I-9, the employer should require the employee to complete a new Form I-9 and attach the new Form I-9 to the original Form I-9, along with a written explanation therefore. Similarly, if an employee who during completion of their Form I-9 listed a SSN in Section 1 of their Form I-9 later returns to the employer with a new SSN, name or date of birth that is different than what was listed in Section 1, the employer should require the employee to complete a new Form I-9 and attach the new Form I-9 to the original Form I-9, along with a written explanation therefore. As with any Form I-9 process, an employer may not specify what particular documents from the current List of Acceptable Documents the employee submits to complete the new Form I-9 (i.e., it is of the employee's choice). This means that the employee may legally produce the new Social Security card during the Form I-9 re-verification process, provided the card does not contain language on it stating that it may not be used for employment verification purposes.

If it is determined the employee originally obtained employment through the intentional use of fraudulent documents, the employer may consider termination if the original production of fraudulent documentation or information was in violation of truth in hiring policy in existence at the time of the employer should also immediately review original Form I-9 completion.

However, given the potential risks for claims of discrimination or unlawful termination, the decision to terminate should only be made after carefully considering the termination's potential ramifications and complications with legal counsel. Specifically, an employer may use the SSNVS to electronically verify the names and SSNs of employees against SSA records, or it can enroll in the U.S. Citizenship and Immigration Services' "E-Verify" program, which, among other things, automatically checks a new hire's SSN against SSA records. Unless the employer is a qualified federal contractor, the E-Verify program may only be used to verify work eligibility for employees hired after enrollment into the program. E-Verify cannot be used to prescreen employees. Employers should also ensure that the names and SSNs of current employees are correctly recorded in their business records. Employers can additionally utilize the SSNVS at any time after hiring someone to verify the name, SSN or a combination thereof of current and former employees for purposes of accurate wage reporting. Employers may not, however, utilize the SSNVS to attempt to verify an employee's employment authorization status.

Unfortunately, neither the SSNVS nor E-Verify system is able to detect all instances of SSN fraud. Moreover, as noted above, other events, such as an employee's name change, may also cause the generation of a no-match letter. Employers must therefore not rely on either electronic verification system as a failsafe. Instead, employers must still always have good hiring as well as record keeping practices, policies, and training in place to reduce the likelihood of receiving no-match letters.

Summary

Upon receipt of a no-match letter from the SSA, an employer should immediately notify the affected employee of the no-match letter, in writing. The employer should also immediately review (ideally, in person, with the affected employee) the employee's Form W-4, W-2, Form I-9, SSNVS record, and any other documents it holds that may contain the employee's SSN, to assure the employee's name and SSN are correctly shown on the documents.

The employer should then advise the SSA (via Form W-2c) of any corrections required to eliminate data entry errors. If the employer's records show that the SSN reported to the SSA on the employee's W-2 is the same number provided by the employee, then the employer should notify the employee in writing that he or she must immediately contact the SSA to correct any data entry errors in the SSA's records. The employer should regularly follow up with the employee to monitor the employee's progress in correcting any such errors in the SSA's records, and document all such follow-up efforts. The employer should also advise the affected employee that a refusal to provide any documentation or credible explanation of good-faith efforts to correct any inaccuracies in the SSA's records could be grounds for termination.

If you have any questions regarding the subject of this article, please contact Mr. Norys at (559) 248-4820/(800) 891-8362, or by e-mail at gnorys@ch-law.com

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