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The Return of Social Security No-Match Letters

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Effective April 6, 2011, the Social Security Administration (SSA) has resumed sending employers "Social Security no-match letters" advising employers that the Social Security numbers (SSNs) reported for certain employees do not match SSA records.

These Social Security no-match letters had been put on hold since 2007 when a federal judge issued a preliminary injunction preventing the Department of Homeland Security (DHS) from implementing a proposed rule that would have made employers liable for the continued employment of an unauthorized alien if the employer failed to follow certain steps in responding to a Social Security no-match letter.

Employers are advised not to take adverse action against an employee solely based on the Social Security no-match letter. At the same time, employers cannot ignore these letters and should be sure to follow the instructions in the letters and the general guidelines recently published by DHS and SSA.

The Department of Justice (DOJ) has recently developed general guidelines for responding to SSA no-match letters.The DOJ's guidelines specifically state that:

- The employer should not use the receipt of the SSA no-match notice alone as a basis to terminate, suspend, or take other adverse action against the employee.
- Based on the SSA no-match letter alone, the employer should not reverify the employee's employment eligibility by asking the employee to complete a new Form I-9 or by asking the employee to produce specific documents to address the no-match.
- Based on the SSA no-match letter alone, the employer should not require the employee to provide a written report of SSA verification, as such verification may not be obtainable.

SSA has also issued its own field guidance to its representatives on this issue. The SSA suggests that employers document efforts to obtain the corrected information and retain the documentation for four years.

These guidelines, however, are silent on what the employer should do, if anything, if the employee is unable to resolve the no-match. Under those situations, the employer should consult with legal counsel before taking any adverse action. Of course, if the employee admits that he or she has no work authorization when presented with the no-match letter, the employer is obligated to terminate his or her employment immediately.

The new SSA no-match letters differ slightly from the old letters. Unlike the old letters that listed multiple employees, the new letters identify only one no-match per letter. A

sample of the letter is provided on SSA's website.

Frequently asked questions

The following FAQs, also provided by the DOJ, help clarify exactly what an employer should and should not do in response to an SSN no-match notice:

Q: What is an SSA no-match letter?

A: It is a written notice the SSA sends to an employer, usually in response to an employee wage report, advising that the name or SSN does not "match" a name or SSN combination reflected in the SSA's records. The letter cautions employers against taking any adverse employment action against the employee based solely on receipt of the letter, and explicitly states that the letter makes no statement about the referenced employee's immigration status. Rather, the letter simply reports an apparent error in either the employer's records or SSA's records, and seeks the employer's and, if necessary, the employee's assistance in conforming those records. Please see the SSA's website for more information on the SSA's no-match letter program.

Q: If an employee's name and SSN don't match SSA's records, doesn't that mean the employee is not authorized to work?

A: No. There are many possible reasons for a no-match letter, many of which have nothing to do with an individual's immigration status or work authorization. An employer should not assume that the employee is not authorized to work, and should not take adverse action against the employee. Such action could subject the employer to liability under the antidiscrimination provision of the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1324b.

Q: What might cause a no-match?

A: There are many reasons for a no-match notice, including but not limited to: an unreported name change due to marriage, divorce, or naturalization; input errors by SSA staff; reporting errors by an employer or employee; identity theft; errors in reporting proper culturally based hyphenated or multiple surnames; and fraud.

Q: What action should an employer take upon receipt of an SSA no-match letter or other notice of a no-match?

A: To confirm that a reporting or input error is not the cause of a no-match, an employer, with the assistance of the referenced employee, should confirm that the reported name and SSN are correct. If no error is discovered, the employer should then advise the employee to contact the local SSA office to address the reported no-match. An employer should not use the no-match letter or other no-match notice by itself as the reason for taking any adverse employment action against the referenced employee.

In addition, employers should not use the receipt of a no-match letter or other no-match notice (or the fact that an employee raises any objection to the employer's no-match

response procedures) as a basis to either retaliate against the employee or otherwise subject the employee to heightened scrutiny. Doing so may violate the antidiscrimination provision of the INA or other state or federal equal employment opportunity or labor laws. While not required to do so, an employer may schedule (and document) periodic meetings or other communications with the employee during the resolution period to keep abreast of the employee's efforts to resolve the no-match, and to determine whether the employee needs more time to resolve the no-match.

Q: Do no-match letters or other no-match notices create "constructive knowledge" that an employee is not authorized to work?

A: The mere receipt of a no-match letter or other no-match notice does not, standing alone, constitute "constructive knowledge" on the part of an employer that the referenced employee is not work-authorized. Only the DHS is legally authorized to conclusively determine an individual's authorization to work. An employer should give a referenced employee a reasonable period of time to address and correct information contained in a no-match letter or other no-match notice.

Q: What is a "reasonable period of time"?

A: There are no federal statutes or regulations that define a "reasonable period of time" in connection with the resolution of a no-match notice. As a practical matter, a "reasonable period of time" depends on the totality of the circumstances. Of note, in the E-Verify context SSA has the ability to put a tentative nonconfirmation into continuance for up to 120 days. This recognizes that it can sometimes take that long to resolve a discrepancy in SSA's database.

Q: What is the relationship between E-Verify Notices of Tentative Nonconfirmation (TNC) and SSA no-match letters?

A: Both rely upon SSA databases. However, DHS' E-Verify program is specifically designed to verify an employee's work authorization and provides workers with an opportunity to correct the SSA databases before making that determination. For more information on the E-Verify program, see DHS' website. In contrast reports simply indicating that an employee's name and SSN do not match SSA's records do not make any statement about an employee's work authorization.

Q: How can employers minimize the receipt of SSA no-match letters?

A: Employers can use the Social Security Number Verification Service (SSNVS). SSA offers this free online service that allows registered users (employers and authorized third-party submitters) to verify the names and SSNs of employees against SSA records. Telephone Number Employer Verification (TNEV) is very similar to SSNVS, but it is an automated telephone service that allows registered users to verify names and SSNs over the telephone without speaking to an agent. Verifying SSNs through SSNVS and TNEV allows SSA to properly credit the correct earnings to the correct individual's

earnings record.

These services can only be used for wage reporting purposes. An employer's use of SSNVS or TNEV for any other reason (e.g., to verify work authorization), is improper and may violate the antidiscrimination provision of the INA. For more information, go to the SSN's website, or contact the Office of Special Counsel through its employer telephone hotline at (800) 255-8155.

Q: Do any other types of organizations send notices suggesting possible name/SSN no-matches?

A: Yes. Other organizations issue notices or provide alerts similar to SSA no-match letters. They include:

- Commercial businesses that conduct employee background checks.
- Third-party identity theft inquiries.
- Health providers providing services to an employee under an employer-provided health plan. Employers may receive information from these sources by mail, email, other electronic format, or telephone. Such reports or alerts, however, should be treated cautiously, and should not be used as conclusive evidence of employment authorization, as these third-party reporting entities have no legal authority to determine an individual's work authority and may not have access to current information contained in SSA's databases. However, as in the case of responding to no-match letters originating directly from SSA, an employer should at a minimum follow the same policies, procedures, and timelines as it does for SSA no-match letters.