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SSA No-Match Letters

A year and a half after the U.S. Department of Homeland Security (DHS) rescinded its Social Security Number (SSN) no-match safe-harbor rule, the Social Security Administration (SSA) in April 2011 resumed sending its worrisome no-match letters to employers.

The letter—Form SSA-L4002-C1 (01/2011) and entitled “Request for Employer Information”—advises that employee information reported to SSA by the employer differs from information in SSA’s database. The letter asks the employer to “complete the information on the back of this letter and return it to [SSA] promptly.”

The letter is intended to prompt employer action so SSA can credit reported earnings to the employee’s Social Security account. DHS, however, says it can use a no-match letter for another, unrelated purpose.

In rescinding the no-match rule, DHS reaffirmed its position that it may find an employer has constructive knowledge of unauthorized employment based on the “totality of the circumstances” and that an employer’s receipt of a no-match letter and how it responds to the letter are two of those circumstances. DHS says it can use an inadequate response to help prove the employer constructively knew the employee in question was not employment eligible. By having that knowledge, the employer is in violation of the federal law that prohibits an employer from continuing to employ a person the employer knows is not authorized to be employed.

DHS offered in its rescission statement this guidance to employers wanting to avoid the acquisition of that constructive knowledge: “A reasonable employer would be prudent, upon receipt of a no-match letter, to check [its] own records for errors, inform the employee of the no-match letter, and ask the employee to review the information. Employers would be prudent also to allow employees a **reasonable period of time** to resolve the no-match” with SSA.

But the DHS rescission statement stopped there on that point: It did not advise employers what, if anything, they should do if the no-match remains unresolved at the end of that reasonable period of time. In contrast, the rescinded rule itself directed an employer in that situation to reverify the employee’s identity and employment authorization on a new Form I-9. The rule went on to say that if the employee could not present acceptable documentation to do that, the employer would have to discharge the employee. Otherwise, the employer would continue to employ the employee at the risk that if DHS were to discover the employee was not work authorized, DHS would assert the employer did so with constructive knowledge of the employee’s lack of employment eligibility.

In late 2010, the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) in the U.S. Department of Justice’s Civil Rights Division released guidelines on how employers should handle SSA no-match letters. The guidelines echo the remarks made by DHS in rescinding the no-

match rule.

OSC explained that a no-match letter can result from simple clerical error. It advises an employer to check the employee’s file for clerical errors before taking further action. If the information in the employer’s file is correct, OSC suggests the employer advise the employee of the no-match and ask the employee to verify the employee’s information.

If there is still a problem, OSC recommends the employer give the employee a reasonable amount of time to address the situation with SSA and to stay in contact with the employee until the problem is resolved. While advising employers to report any new information they receive to SSA, OSC does not go so far as to suggest what an employer should do if the information cannot be corrected.

So, what is a *reasonable period of time*, and what should an employer do after a reasonable time has passed and the employee still hasn’t resolved the discrepancy? The agencies hint at two possible answers to the first question—but not the second.

As to what is a reasonable period of time to allow an employee to try to resolve the discrepancy, the rescinded DHS no-match safe-harbor rule specified that if within 90 days of receiving the no-match letter an employer could not verify with SSA the name and SSN of an employee identified in the letter, the employer and employee had three days to, as noted above, reverify the employee’s employment authorization and identity by completing a new Form I-9 without using the disputed SSN to prove that authorization.

The second time period is suggested in the OSC guidelines. They note that in the E-Verify context, SSA may continue a tentative nonconfirmation of a new employee’s work eligibility for up to 120 days. This recognizes it sometimes takes that long to resolve a discrepancy in SSA’s database.

Accordingly, the statements by DHS and OSC point to giving an employee at least 90 but no more than 120 days to resolve the discrepancy with SSA.

More problematic, though, is what to do if the discrepancy remains unresolved. As noted above, the rescinded rule directed the employer to try to reverify the employee’s identity and status. Again, if that could be done, the employer could continue to employ the employee without fearing about constructive knowledge. But if that process could not be completed, the employer would either have to discharge the employee or risk a finding by DHS that the employer had constructive knowledge that the employee was unauthorized.

The point is, despite its rescission, these steps *might* be a valid approach for employers to take now in response to their receipt of no-match letters. But even if DHS would still accept as reasonable the steps it laid out for employers in its rescinded rule (which seems likely), a potential problem remains: One ground on which employee advocates objected to the rule before its rescission was that the reverification step violated the

ban against “document abuse,” which occurs where an employer requires an employee to present more or different documents than necessary to complete the Form I-9 employment eligibility verification process. Such an objection might have even more merit where an employer engages in reverification in the absence of a federal rule purportedly authorizing that process.

It is unclear whether an employer’s policy calling for reverification in a no-match situation—especially if it is applied consistently and without regard to any protected classification such as citizenship or national origin—would in fact amount to actionable document abuse. But before deciding to adopt and implement reverification as a policy, an employer should weigh its potential benefit in satisfying DHS’s call for reasonable steps to resolve no-matches against the potential costs of having to defend a document-abuse charge.

An employer declining to follow the rescinded rule’s last two steps (i.e., contacting SSA to verify the employee’s name and SSN and then, if that fails, reverifying the employee’s identity and employment authorization on a new Form I-9) should not, however, necessarily discharge the employee.

Rather, the employer should discuss the matter with the employee. If the employee admits he lacks and cannot get a valid SSN or is not lawfully in the U.S., then the employer should discharge the employee. But if the employee seems sincere in maintaining he resolved the no-match with SSA, the employer *might* (again, it is unknown what DHS would think) be able to retain the employee without facing a constructive-knowledge claim by DHS—at least until such time as the employer receives another no-match letter about the employee or otherwise gains information indicating the SSN is not the employee’s, the employee is not really who he claims to be, or is not truly employment eligible.

Other No-Match Situations: An employer might learn about an employee’s SSN no-match in ways other than getting a letter from SSA. An employer might receive:

- A garnishment notice for someone whose name is not in the employer’s payroll database but that also includes an SSN associated with the name of one of its employees.
- A phone call from someone claiming one of its employees is fraudulently using the caller’s SSN.
- A letter from a county social services agency or from the Employment Development Department (EDD) because another person filed for unemployment insurance benefits under an employee’s SSN.

Given how DHS applies the constructive-knowledge theory to an employer’s receipt of suspicious information about an employee’s SSN, an employer facing one of these other situations would ignore it at its peril.

In DHS’s eyes, the receipt by an employer of information that an employee’s SSN might not relate to him doesn’t mean the employee lacks employment eligibility. Rather, what DHS considers important is *how* the employer responds to that information.

Should it learn the employee lacks employment eligibility, DHS could assert the employer failed to take reasonable steps to resolve the discrepancy, pointing to that failure as evidence the employer had constructive knowledge the employee lacked employment eligibility. DHS could then claim that by continuing to employ the employee despite having that knowledge, the employer broke the law.

To protect itself from a charge that it had constructive knowledge of an employee’s lack of employment eligibility, an employer should take action believed by the employer to be reasonable to investigate and resolve any SSN discrepancy.

Actions: The lack of full and clear guidance from DHS or OSC as to how an employer should address a no-match letter or other information throwing an employee’s name or SSN in doubt is very frustrating to employers and their advisors. Nonetheless, given the high stakes, employers should consider taking actions such as these (an employer with a unionized workforce should determine if it must notify the union and give it an opportunity to bargain over the employer’s proposed no-match resolution, at least where it could lead to discharges):

A. Establish a company policy on employee SSNs. Below is a sample policy that includes these elements:

1. The company’s procedures for responding to an employee’s request to change in company records the employee’s name or SSN.
2. The company’s procedures upon being notified by SSA of an employee name/SSN no-match.
3. The company’s procedure for responding to an inquiry by a court or government agency for information about a person using an employee’s SSN; this typically arises in the context of a wage garnishment.
4. The company’s procedures upon receiving information about an employee’s use of another person’s SSN. While it isn’t required to act on baseless third-party allegations that an employee is using a fraudulent SSN, the company should investigate a credible claim made by an apparently reliable source.

B. When notified of an SSN no-match—whether by an SSA no-match letter, wage garnishment, third-party notification, or claim by a government agency of SSN misuse—take reasonable steps to try to resolve the discrepancy. Taking these steps (as applicable) *might* suffice:

1. Look at the employee’s SSN card and compare its information with that in your payroll records. (It is useful to photocopy each new employee’s SSN card and attach the copy to the employee’s IRS Form W-4 for future reference. This practice eliminates the need to discuss the matter with the employee prematurely.) If your records don’t match the information on the card, then correct your records. If applicable, complete page 2 of the SSA No-Match letter, make a copy of it for your records, and return it to SSA.
2. If a third party other than SSA is claiming the SSN belongs to someone other than your employee, request documentation of the allegation, and then call SSA to verify your employee’s SSN. When you call SSA, you will need the employee’s name, sex, date of birth and SSN. If SSA verifies the employee’s SSN, advise the employee that someone else is using his SSN.
3. Discuss the matter with the employee. If the employee admits he is using a fraudulent SSN and cannot give you a real SSN because he is not lawfully in the U.S., discharge him.
4. If the employee assures you his SSN is legitimate, tell him to contact SSA to resolve the issue, then return to you with information about the resolution. Your policy should give employees at least 90 but no more than 120 days to do that. Give the employee a letter notifying him of the discrepancy and your advice to resolve the issue with SSA. See the sample letter below.
5. If the employee returns with a new SSN or a new name, contact SSA to verify the SSN. Consider discharging the employee if you determine he obtained or is trying to retain employment by using fraudulent documents.

- C. **Document all steps taken to resolve the discrepancy.**
- D. **Complete Form I-9 for every newly hired employee and periodically review them all.** Audit Forms I-9 for accuracy and to ensure a Form I-9 is on file for each employee hired after Nov. 6, 1986. For each employee, retain Form I-9 for three years after the hire date or one year after the date employment ends, whichever is later.
- E. **Purge outdated documents:** Set a document-review schedule to periodically discard documents that no longer must be kept. For example, you must retain an employee's Form I-9 as specified in paragraph D. After that retention period, destroy the form.
- F. **Establish procedures for handling Forms I-9:** One or two qualified employees should be trained in Form I-9 compliance. Train employees who are responsible for handling Forms I-9 to maintain consistency. Have a second person review Forms I-9. This secondary review shows the employer's good faith in seeking to comply with the law, and it will often catch errors early.
For more suggestions on Form I-9 handling procedures, see the following checklists.

Form I-9 and ICE Inspection Checklists:

Here are two checklists, one with Form I-9 handling procedures, and another for preparing for an inspection by Immigration and Customs Enforcement (ICE):

Form I-9 Checklist:

- Employees who process Forms I-9 are trained before handling them and periodically (at least annually) thereafter.
- A single person has overall responsibility to review every completed Form I-9 before the form is filed.
- Where there are multiple work sites, all Forms I-9 are stored at a central location. Forms I-9 are filed separately from other personnel forms.
- A Form I-9 is on file for every employee, including owners (except sole proprietors) and top management.
- Section 1 of Form I-9 is completed before each employee starts work. Section 2 is completed within 3 days after the day on which the employee starts work. Exception: For employment of fewer than 4 days, section 2 must be completed on the first day of employment.
- Form I-9 will:
 - A. Have all of Section 1 completed (except for SSN, if company isn't using E-Verify).
 - B. Have employee's signature.
 - C. Have Preparer and/or Translator Certification completed and signed (where applicable).
 - D. Not be over-documented in Section 2 by recording more documents than needed to complete it; that is, either (1) a List A document or (2) a List B and a List C document are to be recorded, and no more.
 - E. Be signed by the person who reviewed the documents presented by the employee.

ICE inspection checklist:

- Assign a high-level management person to be the employer's spokesperson.
- Educate supervisors on how to respond when enforcers appear at the workplace.
- Collect in a single location documents likely to be inspected and have them readily available for inspection.

- Develop and educate employees on your "Visitor Policy."
- Implement Form I-9 and Employee Recordkeeping policies & procedures.
- Periodically perform a Form I-9 self-audit.
- Use central hiring procedures to avoid mistakes in completing Form I-9 for new employees.
- Create checks-and-balances procedures.

Sample Employment Policy Employee Records Policy

An employee must immediately notify the Company when a change occurs in the employee's:

- Address
- Phone number
- Person to notify in emergency
- Marital status
- Number of dependents
- Insurance beneficiary
- Military status
- Name

Before any change in an employee's employment data can become effective, documentation of the change must be presented. An employee may not change any employment data for a fraudulent purpose.

Social Security Number (SSN): Every employee must have a valid SSN.

Social Security Fraud: It is possible but rare that an employee would be assigned a new or different SSN. Where an employee notifies the Company of a change in the employee's SSN, the Company will verify the change with the Social Security Administration (SSA).

If the SSA advises the Company that the new SSN is invalid or does not otherwise match the SSA's records, the employee's record will not be changed. Unless the employee provides other credible evidence supporting its legitimacy, the Company will deem the requested change as an act of attempted fraud, and the employee will be discharged.

Further, the Company investigates an employee's SSN if it receives credible evidence from an apparently reliable source that the employee has supplied the Company with an invalid SSN.

SSN No-Match: If the SSA notifies the Company that an employee's SSN is invalid or does not otherwise match the SSA's records, the Company notifies the employee about the discrepancy and asks the employee to resolve the matter with the SSA.

If a no-match is discovered due to a garnishment ordered by a court or governmental agency, the Company directs the employee to resolve the matter with the court or governmental agency.

If the discrepancy is resolved, the employee must notify the Company of the resolution. In the case of a garnishment, the Company processes the garnishment under the SSN specified in the garnishment as if it applied to the employee until the conflict has been resolved with the court or governmental agency.

If the discrepancy is not resolved, the Company may take further action, depending upon the circumstances.

Sample Letter to Employee - Re: SSN No-match

[Date:]

Re: Social Security Number:

Dear [Employee's Name:]

The Company received notification from: [Check appropriate box]

- Social Security Administration (SSA)
- Internal Revenue Service
- State Franchise Tax Board
- Employment Development Department
- A person claiming to have the same SSN that we have on file for you
- Other: _____

that your Social Security number (SSN) shown above might not relate to you.

The entity or person noted above is asking the Company to: [Check appropriate box]

- Garnish your wages
- Resolve the discrepancy
- Discontinue using the SSN
- Other: _____

This letter is to notify you of this issue.

To resolve this problem, please show me your SSN card to verify that the name and SSN we have on file for you is correct. If the name or SSN we have on file for you is not your name or SSN, then give us your name or SSN so we can correct our records. If the name and SSN we have for you are your true name and SSN, then contact the entity or person noted above to resolve the conflict.

You have 120 days to resolve this apparent discrepancy. Promptly report its resolution to me.

If you provide the Company with a new name or SSN, the Company will submit that new information to SSA for verification. (It is possible but rare that a person would be assigned a new or different SSN.) If SSA advises the Company that the new SSN is invalid or does not otherwise match the SSA's records, the Company will not record it in your personnel record. Unless you provide the Company with credible evidence of its legitimacy, the Company will deem the requested change as an act of attempted fraud and discharge you for that reason.

Sincerely,

[Company representative's name:]

I acknowledge I received this notice.

Employee's Signature: _____ Date: _____