

IRS Procedures for Addressing Missing or Incorrect SSNs

For more than five years, many agricultural employers have received a disturbing letter from the Social Security Administration (SSA). The letter notifies employers that they reported on their Internal Revenue Service (IRS) Forms W-2, *Wage and Tax Statement*, Social Security Numbers (SSNs) and/or employee names that do not match SSA records.

According to an SSA publication titled *Employer's Guide to Filing Timely and Accurate W-2 Wage Reports*, an employer receives this letter if it reported more than 10 "no-match" SSNs and names that represent more than 0.5% of the Forms W-2 in the employer's report. (That SSA publication is posted on the SSA's Web site at www.ssa.gov/employer/)

The so-called "Code V" mismatch letter asks the employer to "respond within 60 days with the information that you are able to correct." It includes a sheet titled and advising *How to Correct SSNs* and another enclosure, *Tips on Annual Wage Report Filing*. It is the second paragraph of that second enclosure that troubles employers. It reads:

[The IRS] uses the information we provide to enforce the tax laws, and they could penalize you or your employees for providing incorrect information. Under the Internal Revenue Service (*sic*) Code, the IRS may charge you a \$50 penalty for each time you do not furnish an employee's correct SSN on a wage report. . . . *The IRS may impose [this penalty] unless you . . . can show reasonable cause for not providing the correct information.*

(Emphasis added.) Significantly, the letter does not refer to any penalty the SSA itself can impose on an employer for failing to follow the SSA's suggested steps for correcting SSNs, as there is no such penalty.

In addition to being fined by the IRS, employers fear that their receipt of multiple SSA mismatch letters for an employee could indicate the employee might not be eligible to be employed in the United States, thus requiring the employer to determine the person's work eligibility to avoid sanctions from Immigration and Customs Enforcement (ICE).

The mismatch letter itself notes "this letter makes no statement about your employee's immigration status." Further, ICE's predecessor, the Immigration and Naturalization Service (INS), stated in a 1998 letter to Congressman Robert F. Smith:

Because there may be many reasons for a mismatch between employer records and SSA records that have nothing to do with work authorization, SSA notice of a mismatch does not trigger *by itself* an obligation to reverify work authorization.

(Emphasis added.) Nonetheless, the INS letter continues:

However, the steps an employer *should* take to reconcile the mismatch with respect to SSA and IRS reporting, such as examining the employee's Social Security card and confirming his or her identity and SSN, may provide the employer with

knowledge that is relevant to the employer's [Immigration and Nationality Act] compliance. In particular, if the employee has been given the opportunity to explain and reconcile a discrepancy between the employer's records and SSA's records and has failed to do so satisfactorily, or if the employer learns that the employee is not authorized to work, the employer may be considered by the INS to have violated the prohibition against knowingly continuing to employ an unauthorized alien if it does not take reasonable steps, such as reverification, to ensure that the employee is authorized to work. In those cases, the normal standards that have developed in INS regulations and relevant case law as to what constitutes actual or constructive knowledge of unauthorized status would apply.

(Emphasis added.) Thus, the more an employer investigates and tries to resolve the issue, the more likely it is the employer might inadvertently get actual or constructive knowledge that an employee is not truly work-eligible.

Accordingly, for many employers the crucial question is knowing the minimum steps an employer *must* take - *and when to take them* - to satisfy the IRS requirement of showing reasonable cause for not providing on a wage report correct employee SSN and/or name information.

To establish that reasonable cause, many employer advisors have recommended that employers follow the steps requested by the SSA in the enclosures to the mismatch letter upon the letter's receipt. For example, the SSA asks an employer whose "records match the information on the employee's Social Security card [to] have the employee contact any Social Security office to resolve the issue."

Now, however, IRS Publication 1586, ***Reasonable Cause Regulations and Requirements for Missing and Incorrect Name/TINs***, specifies the steps an employer must take to show reasonable cause and the trigger for doing so. Those steps and their timing differ significantly from the advice typically given employers in the past.

Here is a summary of those steps. Slightly different requirements apply depending on whether an IRS penalty is being assessed for a *missing* versus an *incorrect* SSN.

- An employer must solicit a new employee for the employee's SSN.
- An employer must solicit a new employee to complete and submit to the employer IRS Form W-4, *Employee's Withholding Allowance Certificate*.
- Because Form W-4 calls for the employee to insert his SSN under Item 2, and because the employee must give the employer a completed Form W-4, an employer satisfies its duty to solicit the employee's SSN by asking for and receiving from a new employee completed Form W-4.

- *If an employer receives an IRS penalty notice for failing to include the employee's SSN on Form W-2, the employer may seek a waiver of the penalty based on the employee's failure to provide an SSN. To justify a penalty waiver, the employer must show that in addition to the initial solicitation for the employee's SSN, the employer again solicited the employee for an SSN in the same calendar year (or by Jan. 31 of the next year for an employee who began work in the prior December). If the employer still does not receive the employee's SSN, the employer must by Dec. 31 of the year after the year in which the employee began work ask the employee for it one more time.*
- *If an employer receives an IRS penalty notice for failing to include the employee's **correct** SSN on Form W-2, the employer may seek a waiver of the penalty based on the employee's failure to provide the correct SSN. To justify a penalty waiver, the employer must show it initially solicited the employee's SSN and then used the SSN the employee provided. The employer must re-solicit the employee's SSN only if it receives an IRS penalty notice that it reported an incorrect SSN for the employee. If in a later year it receives a second IRS penalty notice, the employer must then make a second re-solicitation.*
- An employer that has made two solicitations in addition to the initial solicitation need not make any further solicitation of the employee – even if it receives more IRS penalty notices based on the employee's missing or incorrect SSN.

Following the procedures stated in Pub. 1586 should reduce the chance of discovering a problem related to the employment eligibility of an employee for whom multiple mismatch letters are received. That's because the procedures in Pub. 1586 require an employer to ask such an employee for his SSN only twice in addition to the employer's initial request and, very significantly, *only after the employer has received an IRS penalty notice.*

Thus, whether an employer takes any action in response to its receipt of one or more mismatch letters from SSA has no bearing on its success in showing to the IRS reasonable cause for not providing the correct information on Form W-2. Simply stated, what matters is only that the employer can show it made (1) an initial solicitation of a new employee for the employee's SSN and (2) made, as the circumstances may have required, up to two additional annual solicitations of the employee after it received an IRS penalty notice.

Accordingly, when it gets an SSN mismatch letter from SSA (as opposed to an IRS penalty notice), an employer may, without hurting its ability to show the IRS reasonable cause, decide to do nothing more than confirm it used on Form W-2 the SSN provided by the employee when he was hired. To avoid having to ask the employee to show the employer the employee's Social Security card to confirm that, the employer should as part of the hiring process photocopy the employee's Social Security card and attach the copy to the employee's Form W-4. If upon comparing the SSN shown on the photocopy with the number used to report the employee's

wages on Form W-2 the employer discovers the wages were not reported under the SSN shown on the photocopy, the employer should correct its records and complete and file IRS Forms W-2c for the employee's wages.

Despite the foregoing, employers need to be aware that ignorance is not necessarily bliss in this situation. Beyond government enforcement of wage-reporting and immigration laws lie potential legal actions brought by classes of truly employment-eligible employees.

Their lawsuits claim employers engaged in patterns and practices of knowingly hiring illegal aliens, thereby depressing the wages of employment-eligible persons and violating federal anti-racketeering laws. It may be difficult for a representative of an employer defending this type of lawsuit to explain under oath why it choose not to delve into the reason for its receipt of an SSN mismatch letter or multiple letters from the SSA.

“A reasonable law-abiding employer would have at least questioned its employees about the discrepancies. Did it decide not to do so because it didn't want to confirm its suspicions the employees were not truly employment-eligible?” the plaintiffs' attorney would suggest. “Thus, the employer's failure to do so must have been for the nefarious reason of wanting to continue to knowingly employ illegal aliens,” the attorney would argue to a judge or jury.

While the success of such an argument is debatable, it is nonetheless an argument employers need to be aware of and may wish to avoid facing by trying in good faith to determine why they received SSN mismatch letters and to resolve the discrepancies.

IRS Pub. 1586 is located online at <http://www.irs.gov/pub/irs-pdf/p1586.pdf>. Starting on page 8, Pub. 1586 states:

“VII FORM W-2 SSN SOLICITATIONS

“This section specifically applies to employers. An employer must make an initial solicitation for the employee's SSN at the time the employee begins work. The initial solicitation of the employee's SSN may be made in person or by oral or written request. The SSN may also be requested through other communications, by mail, telephone, or other electronic means. The employer may rely in good faith on the number provided by the employee and use it in filling out the employee's Form W-2, Wage and Tax Statement.

“An employer has an obligation to ask for Form W-4, Employee's Withholding Allowance Certificate, from a new employee. Under section 3402(f)(2)(A) of the Internal Revenue Code, an employee must provide a signed Form W-4 (or a substitute form) on commencement of employment, stating the number of withholding exemptions claimed by the employee.

“Since the employee is required to furnish Form W-4 to the employer on commencement of employment, Form W-4 may be used for the initial solicitation of the employee's SSN. An employer who retains the Form W-4 in its records will be able to document that an initial solicitation of a TIN was made, documenting that it acted in a responsible manner.

“Employers have a responsibility to file correct information on their employees' Forms W-2. Failure to do so may result in a penalty of \$50 per incorrect Form W-2. However, the penalty will not apply to any failure that an employer can show was due to reasonable cause and not to willful neglect. Generally, employers want to demonstrate that the failure to provide correct information was due to an event beyond their control or that there were significant mitigating

factors. They also want to demonstrate that they acted in a responsible manner and took steps to avoid the failure.

“If an employer receives a penalty notice based on a failure to include the employee’s social security number (SSN) on the Form W-2, and seeks a waiver of the penalty based on the failure of the employee to provide the SSN, special requirements apply for establishing that the employer acted in a responsible manner. The employer must show that it made an initial solicitation for the employee’s SSN at the time the employee began work - in person, or by mail or telephone. The employer must have also made an annual solicitation for the employee’s SSN during the same calendar year (or by January 31 of the following year for employees who began work during the preceding December). If the employer still does not receive an SSN, the employer must make a second annual solicitation by December 31 of the year following the calendar year in which the employee began work. The annual solicitations may be made by mail or telephone.

“If an employer receives a penalty notice based on a failure to include the **correct** SSN on the Form W-2, and seeks a waiver of the penalty based on the failure of the employee to provide the correct SSN, the special requirements for establishing that the employer acted in a responsible manner are slightly different than in the case of a missing SSN. The employer must show that it made the initial solicitation for the employee’s correct SSN at the time the employee began work, and that it used the number the employee provided. **No additional solicitations for the SSN are required unless the IRS sends a penalty notice to the employer notifying it that the employee’s SSN is incorrect. Following receipt of an IRS notice, the employer is required under the regulations to make an annual solicitation for the correct SSN.** (Emphasis added.)

“If another IRS notice is received in a subsequent year, a second annual solicitation is required. The annual solicitations must be made by December 31 of the year in which the penalty notices are received (or by January 31 of the following year if the notice is received during the preceding December). Solicitations may be made by mail, telephone, electronically, or in person. A solicitation is not required if no reportable payments will be made to the employee in that year. The SSN provided by the employee in response to a solicitation must be used by the employer on Forms W-2 that are due subsequent to receipt of the SSN.

“If the employer receives further IRS notices based on the missing or incorrect SSN of the employee after having made two annual solicitations, the employer is not required to make further solicitations. The employer’s initial and two annual solicitations demonstrate that it has acted in a responsible manner before and after the failure and will establish reasonable cause under the regulations.

“Note: For purposes of establishing reasonable cause in connection with the penalty provisions, it is the solicitation of the employee’s correct SSN that is important. If the IRS notifies the employer that the SSN is incorrect, then the Form W-4 may be used for any required annual solicitations of the employee’s SSN.

“Employers may use Social Security Administration’s (SSA) SSN Employee verification system, known as EVS, to verify its employees’ names and SSNs, but there is no federal tax requirement to do so. EVS is a useful, optional way for employers to identify potential discrepancies and correct SSNs before receiving penalty notices.

“Generally, EVS and IRS records are consistent. However, it is important to note that the database used by SSA to match names and SSNs may not be identical to the IRS database. IRS penalty notices relating to mismatched TINs are based and issued exclusively on IRS system information. Mismatches reported under EVS are not considered IRS notices and do not trigger

any re-solicitation requirements under IRS rules for reasonable cause waivers. If an employer receives a mismatch response from EVS, the employer may wish to resolicit the employee's SSN and try to obtain correct information prior to filing the Form W-2.

"A mismatch determined by SSA's EVS will not necessarily result in an IRS penalty notice and annual solicitation requirements.

"Questions and Answers

"Q. What are an employer's responsibilities for verifying an employee's SSN?

"A. An employer has a requirement to solicit an employee's SSN at the time the employee begins work. Since the employee is required to furnish Form W-4 to the employer on commencement of employment, Form W-4 may be used for the initial solicitation of the employee's SSN. The employer may have to make up to two (2) annual solicitations for the SSN if it receives a penalty notice from the IRS. The Social Security Administration's (SSA) Employee Verification System (EVS) is a useful tool for employers and may alert them to potential penalty situations.

"Q. What is most important for establishing reasonable cause in connection with Form W-2 penalty provisions?

"A. It is the solicitation of the employee's correct SSN on the Form W-4 and the use of that number on the Form W-2 that is important.

"Q. As an employer, what do I do if I receive an IRS notice about an incorrect SSN for an employee?

"A. The employer is required under the regulations to make an annual solicitation for the correct SSN by mail, telephone, electronically or in person.

"Q. When is an employer required to do a second annual solicitation?

"A. A second annual solicitation is required if the employer receives another IRS notice of incorrect SSN for the employee in a subsequent year."