Navigating Your Way Through Social Security No Match Letters

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Due to recent changes in the policy of the Social Security Administration (SSA) and a heightened awareness for immigration violations following 9/11, Social Security no match letters have become thorny problems for many employers and in particular their human resource personnel attempting to respond to the letters. While Social Security no match letters might appear to be straight forward documents from the SSA to help address its record accuracy, these letters raise complicated issues of anti-discrimination, employment verification obligations, federal wage reporting duties and immigration law. This article explains the background and current policy of no match letters, discusses the legal issues presented by no match letters and provides practical guidance for employers in how to respond to no match letters.

THE BACKGROUND OF THE NO MATCH LETTER

In an effort by the SSA to reduce the rate of wage records that can not be matched to SSA name and Social Security Number records, the SSA began in 1993 sending "no match letters" (also referred to as Code V letters) to employers. These no match letters notify employers that the SSA is unable to post earnings for particular employees because of a mismatch between the reported Social Security Number for the employee and the employee's name. No match letters instruct employers on the possible reasons why the W-2 reports do not match SSA's database and provide detailed instructions on correcting the discrepant information. The SSA also asks employers to respond back to the SSA with corrected information.

Previously the SSA would send a no match letter to employers who had at least 10% of their employees with mismatched Social Security information. Up until 2000, this resulted in about 40,000 employers annually receiving no-match letters. In 2001, the number of no match letters rose to 110,000 such that approximately 1 in 60 employers received no-match letters from the SSA. Then in 2002, the SSA drastically changed its policy so that every employer who had simply one or more employee with mismatched information received a no match letter. The number of no match letters sent to employers in 2002 skyrocketed to 900,000, the equivalent of 1 in 8 employers.

CHANGES TO NO MATCH LETTERS FOR 2003

Although approximately 7 million employees were referenced in the no match letters sent in 2002, the SSA received very little corrected information and much of the information it received still did not match its database. Given that the increase in no match letters did not result in an improvement to the SSA's records, the SSA made significant changes to the volume of no match letters it intends to issue throughout 2003. Letters will only be sent to those employers with more than 10 employees with mismatched information or for whom mismatched employees represent .5% to 1% of the W-2 forms the employer files with the SSA. In total, the SSA expects to send out approximately 130,000 no match letters in 2003, around 770,000 less than last year.

The SSA recently revised its Code V no match letters to include more explicit language that employers should not interpret the letters to mean that any employee is not authorized to work in the United States. The revised letters also include more information in Spanish. Previous letters also referred to potential Internal Revenue Service penalties for providing incorrect W-2 information. However, this language has been deleted because of uncertain timing by the IRS for the commencement of the penalty program and concerns by the SSA that such language encouraged employers to take unnecessary adverse actions against employees.

NO MATCH LETTER LEGAL ISSUES

Social Security Act

Upon receipt of a no match letter, an employer has no obligation under the Social Security Act to respond to the SSA or to take any action on the no match letter. The SSA has no enforcement authority against an employer who fails to respond to a no match letter. No match letters are simply classified as a form of educational correspondence from the SSA. Nevertheless, no match letters do raise legal issues for employers under the Immigration Reform & Control Act of 1986, as amended, and the Internal Revenue Code of 1986, as amended.

Immigration Reform & Control Act (IRCA)

An employer's response to a no match letter requires delicate balancing of the two equally important (yet sometimes competing) underlying policies in IRCA - employers must not "knowingly" employ unauthorized workers and employers must not discriminate based on national origin, race or citizenship status. IRCA sets out the I-9 process for the employer to both confirm that an employee is authorized to work while at the same time preventing certain types of discrimination against employees. In the I-9 process, the employee presents documents evidencing his or her employment authorization at the time he or she begins working. On balance, IRCA also sets forth provisions prohibiting discrimination and "document abuse" relating to the I-9 process (e.g., requiring an applicant to produce more or different documents than needed for I-9 compliance or refusing to honor a document that reasonably appears on its face to be genuine). These

antidiscrimination and document abuse provisions of IRCA prohibit employers from rechecking an employee's employment authorization documents except in very limited situations.

Once the I-9 process is completed, the employer has fulfilled its duty to ensure that it employed an authorized worker. No further action is required by the employer unless if the employer receives "actual or constructive knowledge" that an employee does not have employment authorization. If an employer receives "actual or constructive" knowledge that an employee does not have employment authorization, the employee's employment must be terminated. What constitutes "actual or constructive knowledge" is an individualized determination that depends on all of the relevant facts and particular legal standards. Generally, however, an employer should not initiate its own investigation to acquire such knowledge unless prompted by specific outside sources. It is suggested that an employer consult with an immigration attorney to determine whether the employer has received "actual or constructive knowledge" about an employee's alleged unauthorized employment or whether any investigation of the same should be conducted.

Because any person with employment authorization is eligible for a Social Security Number, employers may wonder whether a no match letter constitutes "actual or constructive knowledge" that an employee lacks employment authorization. A letter from the General Counsel of the legacy Immigration and Naturalization Service (n/k/a Bureau of Citizenship and Immigration Services or BCIS) assures employers that receipt of a no match letter does not mean the employer has received "actual or constructive knowledge" of a worker's unauthorized employment. In fact, both the SSA and the BCIS have explicitly stated that receipt of a no match letter should not be construed as a statement on employment authorization, and the listing of an employee on a no match letter should not be perceived as an indication that such employee does not have employment authorization. In addition, IRCA requires that employers have a careful and moderated response to the no match letter to avoid any unlawful discrimination or document abuse claims.

Although the meaning of the receipt of a no match letter is clear, issues raised in the employer's and employee's response process to such letter often present more complicated IRCA issues. The discussion below addresses ways in which employers can avoid claims of unlawful discrimination and how employers might receive actual or constructive knowledge of an employee's unauthorized employment.

Internal Revenue Code

The Internal Revenue Code requires employers to report accurate information, including Social Security Numbers, to the Internal Revenue Service (IRS) on W-2 forms. An employer's mismatched W-2 information is reported to the IRS by the SSA. Although the IRS is authorized by regulation to fine employers $50 for each inaccurately reported Social Security Number, it has generally not imposed penalties up to this point. There were suggestions that the IRS may start to impose penalties beginning with the 2002 wage reporting cycle, but current reports indicate that it may delay the penalties for an additional year. The IRS has

indicated that it is developing a program for imposing these penalties.

The IRS will not impose any penalties on employers for filing incorrect W-2s if the employer acts in a responsible manner and the incorrect W-2 information was provided through no fault of the employer. Currently, employers have certain safe harbors from the penalties. One safe harbor can occur if the employer completed the incorrect W-2 form based on a duly executed, new W-4 form that the employee completed. It is suggested that the employer's retention of this documentation should insulate the employer from liability even if the employee did not provide correct information on the W-4 form. In addition, the IRS has indicated that use of the proposed Social Security Number Verification System, where employers will be able to verify employees' Social Security Numbers via the Internet, may also be considered within the context of a safe harbor.

EMPLOYER RESPONSE GUIDELINES AND SUGGESTED ACTION STEPS UPON RECEIPT OF A NO MATCH LETTER

As employers respond to no match letters, complicated immigration issues frequently arise because of employers' obligations under IRCA to ensure that they employ only authorized workers while at the same time avoiding discriminatory employment practices. This section offers employers some guidelines and practical steps to follow in responding to no match letters.

Response Guidelines

A no match letter's reference to a particular employee does not mean that the employee is engaging in unauthorized employment. The no match letter itself states "this letter does not imply that you or your employee intentionally gave the wrong information about the employee's name or Social Security Number. Nor does it make any statement about an employee's immigration status." The BCIS has also explicitly recognized that a no match letter does not constitute "actual or constructive knowledge" of unauthorized employment. Potential explanations for discrepancies unrelated to the employee's employment authorization, including marriage, divorce, name change or spelling errors, are described in the no match letter. In addition, it is possible that an employee did not have employment authorization at the time he or she first reported a Social Security Number but subsequently did obtain valid employment authorization.

The receipt of a mismatch letter alone is not a basis to take adverse action against any employee referenced in the no match letter, including suspension, laying off, firing or discrimination. The SSA states in the no match letter that the employer "should not use this letter to take any adverse action against an employee . . . doing so could, in fact, violate state or federal law and subject you to legal consequences." Furthermore, the receipt of a no match letter alone does not allow the employer to reverify an employee's employment authorization through an official I-9 reverification or otherwise. A demand for employment authorization documents, including a Social Security card, may likely constitute document abuse under IRCA.

In all actions taken by the employer in responding to a no match letter, all employees must be treated similarly. For example, because certain employees have an accent or may appear to look more "foreign," the employer must not take a different approach or apply a different standard in carrying out its response strategy. Failing to implement uniform policies and procedures may result in a charge of unlawful discrimination under IRCA and other antidiscrimination statutes.

Initial Response Steps

The following are some steps for an employer to take in its initial response to receiving a no match letter.

1. Compare the employer's records to the Forms W-2 it submitted to the SSA.
2. If the employer's records do not match, submit corrections to the SSA using Forms W-2c.
3. If the employer's records match the SSA's information, the employer should provide a copy of the no match letter along with an instruction letter to the employee. The instruction letter should ask the employee to check his or her Social Security card and inform the employer of any name or Social Security Number differences. If the employee informs the employer that the employment records are incorrect, the employer should take a correction action as stated in Step 2. Remember that the employee is not required to show the employer his or her Social Security card and the employer should not ask to review it. In addition, the employer should not require the employee to present any other specific documents, including I-9 documents. Requiring the employee to present such additional documents may constitute document abuse under IRCA.
4. The instruction letter should also tell the employee that if his or her records do not match those of the SSA, the employee should contact any Social Security office to resolve the issue and then inform the employer of any changes after the discrepancy has been resolved. The employer should give the employee a reasonable amount of time, e.g., 30 to 60 days, to resolve the difference. The employer may also offer the employee time off from work to help resolve the issue. It is very possible that the employee will not be able to fully resolve the issue within 30 to 60 days if the Social Security office is busy or requires the employee to obtain additional documentation.
5. If the employee has not otherwise followed up with the employer, the employer may wish to ask the employee about his or her progress. If appropriate, the employer may decide to give the employee additional time to address the no match issue. If after an extended period of time the employee has not taken any action to resolve the no match problem and the employee has not offered a reasonable explanation to the employer for such delay, the employer will want to contact an immigration attorney to discuss subsequent action. It is possible at some point that the employee's refusal to address the no match problem may raise concerns about "constructive knowledge" of the employee's potential lack of employment authorization.

Issues Arising from An Employee's Response to a No Match Letter

Employee reports that the employer has the correct name and Social Security Number. If an employee confirms that the employer's records are correct and the SSA's records are incorrect, the employer should ask the employee if there might be any reason for the SSA's no match report, e.g., marriage, divorce, name

change, etc. Such reason should then be communicated to the SSA. If the employee cannot think of any explanation for the inconsistency, the employer should then report to the SSA that the employer has reconfirmed the employee's information but neither the employer nor the employee can explain the inconsistency with the SSA's records. The employer may also wish to invite the SSA to inform the employer if further company action is required.

Employee reports a new Social Security Number to the employer. The employer should report back to the SSA with a corrected number or new information. The employer may confirm the newly reported Social Security Number using one of the Social Security confirmation services offered by the SSA (www.socialsecurity.gov/employer). To avoid any discrimination claims, however, the employer must conduct such confirmation in an even manner for each employee who presents a new Social Security Number. The employer should also correct the Social Security Number entry on the employee's I-9 document and initial and date the correction. If the employee originally presented a Social Security card using the mismatched Social Security Number as an initial I-9 List C document, the employer should ask the employee to re-present a List C document (or a List A document in the alternative).

Knowing false statements on the Form I-9, or the use of false documents to obtain employment, are felonies that are not excused by subsequent grants of work authorization. If the employer suspects the employee used such false statements or documents and if the employer has any policies that are implemented in a nondiscriminatory manner to address such behavior, the employer may apply such policies to the employee. In other words, if the employer fires the employee for using false documents, it is recommended that the employer have a policy against using false documents or engaging in suspected criminal behavior and that the employer carries out such policy in an even and fair manner. Under no circumstance, however, is the employer required to report any of its suspicions to the BCIS or the SSA.

Employee directly indicates to the employer that he or she does not have employment authorization. Often when an employer presents a Social Security mismatch issue to an employee, the employee will confess to the employer that he or she does not have employment authorization. If this occurs, the employer has actual knowledge of employing an unauthorized foreign worker. The employer must then terminate the employee's employment. The employer does not, however, have any obligation in this situation to report the former employee to the BCIS or SSA.

Employee refuses to follow up with the SSA to address the no match problem, and the employee does not provide any reasonable explanation for the delay. This scenario exemplifies the tension between the two IRCA policies of ensuring authorized employment and not committing document abuse or discrimination. Although upon receipt of the no match letter the employer had no actual or constructive knowledge of any potential unauthorized employment, an employee's refusal to address the no match problem may begin to raise such potential issues. Given the complicated fact-based analysis of "actual or constructive knowledge,

" an employer faced with this situation should contact an immigration attorney to discuss subsequent strategies in dealing with the employee.

This article is provided for general informational purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult a lawyer concerning any specific legal questions you may have.