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Social Security No-Match Letters Resume in 2019

In 2019, the Social Security Administration (SSA) will once again mail no match letters to employers that have submitted a wage report containing a reported name, Social Security number (SSN) or a combination thereof for an employee which do not match SSA's records. The no match letters will advise employers that the issuance of the letter:

does not imply that you or your employee intentionally gave the government wrong information about the employee's name or SSN. This letter does not address your employee's work authorization or immigration status.

You should not use this letter to take any adverse action against the employee, such as laying off, suspending, firing, or discriminating against the individual, just because his or her SSN or name does not match our records. Any of those actions could, in fact, violate State or Federal law and subject you to legal consequences.

As also noted by the SSA in the no match letter, there are many reasons—not just outright fraud—that may cause the SSA to generate a no match letter. These reasons include input errors by the SSA itself, reporting errors by an employer or employee, identity theft, errors in reporting hyphenated or multiple last names, or an unreported name change. An employer must, therefore, resist jumping to the assumption that fraud is the cause for its receipt of a no match letter. As the no match letter itself states, immediate adverse action taken against any employee for whom such a letter is generated could give rise to a cause of action under several anti-discrimination or immigration-related statutes.

However, taking no action in response to the receipt of a no match letter also puts an employer at jeopardy. Immigration and Customs Enforcement (ICE) is conducting Form I 9 audits with greater frequency across the nation. A routine request in every Form I 9 audit is for the production of any and all no match letters received by the employer with regard to current employees as well as sometimes previous employees. While the SSA warns against making inferences about an employee's immigration status after the receipt of a no-match letter, many ICE offices consider an employer's receipt of no-match letters to be an indication that an 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

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factor when determining if enforcement actions, including fines and criminal prosecution, should be taken. In short, receiving a no match letter can create a dilemma that cannot be ignored.

May an employer take immediate adverse action against an employee for whom it has received a no match letter?

No. As noted above, an employer should immediately notify the affected employee of the no match letter, in writing, but take no immediate adverse action. The written notice to the employee will be useful if/when documenting efforts to appropriately respond to the no match letter.

May an employer assume that an employee is unauthorized to work in the United States if the employee's name, SSN or a combination thereof do not match SSA's records?

No. As noted above, there can be many reasons for a no match letter being issued, many of which have nothing to do with an individual's ability to lawfully work in the United States. Conversely, just because an individual has a valid SSN does not mean, in and of itself, that the individual is authorized to lawfully work in the United States. SSNs were never intended by the SSA to be a form of work authorization proof, and the SSA does not relish being dragged into the illegal immigrant debate. Again, a knee jerk assumption that the receipt of a no match letter means the affected employee is not authorized to lawfully work in the United States, and the subsequent (potentially erroneous) termination of the employee, could result in a finding of liability under the anti-discrimination provision of the Immigration and Nationality Act. Possible penalties under this provision include: a requirement that the employer retain the name and address of every person who applies for a job with the employer for a period of three years; reinstatement (with back pay) of the affected individual; payment of a civil penalty for each individual so discriminated against (higher fines apply for repeated violations); a requirement that special anti-discrimination notices and training be provided at the workplace; and attorneys' fees.

What actions should an employer take if it receives a no match letter?

Again, 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, Social Security Number Verification System (SSNVS) record, and any other documents it holds that may contain the employee's SSN, to assure the

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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.

What other actions should an employer avoid when it receives a no match letter for an employee?

In addition to *not* immediately terminating, suspending or taking other adverse action against the affected employee, employers should not:

- Immediately request the affected employee to complete a new Form I 9 based solely on the receipt of a no-match letter in an attempt to reverify the information contained therein;
- Follow different or inconsistent procedures for certain employees based on apparent or perceived national origin or citizenship status;
- Require the affected employee to produce specific form I-9 documents to address the no match letter; or
- Ask the affected employee to provide a written report from the SSA or any other federal agency verifying the employee's SSN.

Does an employer have to keep an employee on the payroll if he or she never responds to a request to address a no match letter, or never obtains a satisfactory conclusion to the no match letter?

Guidance from the SSA and the Immigration and Employee Rights Section (IERS) of the U.S. Department of Justice indicates 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 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 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 upon being given notice of the no-match letter flatly refuses to undertake any good faith effort to address the reported discrepancy then an employer may be justified in taking adverse action against the employee without having to wait 90 to 120 days depending on the circumstances. Employers who continue to file inaccurate wage statements are subject to fines from the Internal Revenue Service (IRS) and therefore continuing to employ an individual for whom accurate required wage reporting cannot be accomplished does put an employer at risk. 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 and documentation of the employee's refusal. 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 either the 90 or 120 day deadline (or an agreed-upon extension period), the employer is put into the difficult situation of having to decide whether to terminate the employee without further action, reverify the employee and terminate only if successful reverification 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 likely 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.

What if the employee comes back with a new SSN after receipt of a no match letter?

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 system described below. 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 completion, 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 therefor. 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 therefor. 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 choosing). This means that the employee may legally produce the new Social Security card during the Form I-9 reverification process, provided the card does not contain language on it stating that it may not be used for employment verification purposes. However, an employer should not during the reverification process re-accept the same Social Security card document which gave rise to the no-match letter.

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 the truth in hiring policy in existence at the time of the 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.

Does the receipt of a no match letter automatically mean the employer has "constructive knowledge" an employee is not authorized to work in the United States?

Probably not, but an employer cannot ignore the letter either. For now, the receipt of a no match letter does not, in and of itself, rise to the level of constructive knowledge. As noted above, both the SSA and IERS specifically warn employers against concluding an employee is unauthorized to work by the mere receipt of a no match letter. However, as also noted above, when conducting a Form I 9 audit, ICE routinely requests to see any and all no match letters regarding an employer's current workforce. There are also several federal cases involving employers that were criminally prosecuted based on allegations of harboring illegal workers after receiving no match letters, either because the employers turned a blind eye to the letters or they had affirmatively advised affected employees of ways to continue unlawful employment and avoid further scrutiny. Employers are therefore well advised to work with their legal counsel to develop specific, consistent, responsive and nondiscriminatory practices and procedures to address the receipt of no match letters.

What may an employer do to minimize its chances of receiving no match letters?

Given the pervasiveness of SSN fraud in the United States, as well as the number of errors that exist in the SSA's records, and the numerous ways in which a no match letter can be triggered even where there is no error in the SSA's records, it may be impossible for some employers to avoid ever receiving a no match letter. However, there are many steps an employer can take to reduce the likelihood of receiving a no match letter. Specifically, an employer may use the SSNVS to electronically verify the names and SSNs of employees against SSA records (see SSNVS), or it can enroll in the U.S. Citizenship and Immigration Services' (USCIS) "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 overly 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.

If you have any questions about responding to a Social Security No-Match letter or have any related concerns involving Form I-9 compliance or worksite enforcement, please contact Benjamin Kurten or your Reinhart attorney.