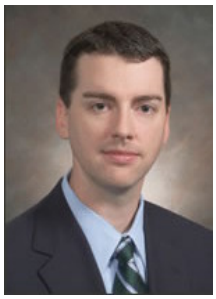
Guidance for No-Match Letters Issued by the Department of Justice and the Department of Homeland Security.

By: Robert J. Baker, Esquire



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On October 28, 2008, the Departments of Justice ("DOJ") and Homeland Security ("DHS") individually issued guidance with respect to the procedures an employer should follow upon receipt of an Employer Correction Request or Educational Correspondence, which is also known as a no-match letter, from the Social Security Administration ("SSA").

By way of background, employee social security numbers are used in a wide variety of situations in the work environment. Social security numbers ("SSN") may be used as part of the verification process confirming eligibility for employment of new employees. SSN's are also used for new hire reporting; enrollment in health, retirement and 401(k) plans; wage and tax information; unemployment compensation; social security; welfare; garnishment orders; child support orders; or other third-party complaints and verifications.

Continuing, annually, the SSA receives approximately 245 million wage reports on Forms W-2 from employers, for approximately 153 million workers.[1] As one would expect with this type of volume and the error implicit in any process requiring the submission of information, the SSA at times is unable to match the SSN to an SSA record; and as a result, the earnings cannot be assigned to the appropriate worker's record. Errors related to the SSN can be the result of any number of reasons, including typographical errors, unreported name changes, inaccurate or incomplete employer records or misuse of an SSN, i.e., undocumented workers or unauthorized aliens.[2]

In these situations, the SSA attempts to address the issue and resolve the items by issuing a no-match letter, to the employers involved. The SSA sends the no-match letters to any employer who reported more than 10 no-matches that represented more than 0.5% of the W-2s submitted by that employer, wherein the employers are requested to correct the errors. No-match letters are not issued to employers with stray mistakes or *de minimis* inaccuracies in their records.[3]

The DHS previously released supplemental proposed rules on March 21, 2008 regarding no-match letters in response to a court injunction prohibiting the DHS and the SSA from implementing certain provisions of the proposed final rules.[4] The amended final regulations are intended to reaffirm the safe harbor provision, protecting employers that follow the procedures from prosecution under the Immigration and Nationality Act of 1952 ("INA"), which expressly prohibits employers from knowingly hiring or knowingly continuing to employ an alien who is not authorized to work in the United States.[5] Further, the

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[1] http://www.ssa.gov/legislation/nomatch2.htm
[2] Id.
[3] Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Initial Regulatory Flexibility Analysis. DHS Docket No. ICEB-2006-0004, p.24.
[4] AFL-CIO, et al. v. Chertoff, et al., No. C 07-04472 CRB (N.D. Cal. Oct. 10, 2007)
[5] 274A(a)(1), (2), 8 U.S.C. 1324a(a)(1), (2).

DHS has concluded additional guidance is necessary to assist law-abiding employers in compliance with the immigration laws.

The final rule issued by the DHS did not make any substantive changes to the rules previously issued.[6] In the final supplemental rules, the DHS again reiterates that the DHS, as well as private employers, have become increasingly aware "of the potential for abuse of social security numbers by aliens who are not authorized to work in the United States."[7] As a reminder, the DHS previously indicated that the objective of the proposed rules is to "provide clear guidance for employers on how to comply with the statutory bar against hiring or continuing employment of aliens who are not authorized to work in the United States" and to eliminate the "magnet effect" of employment opportunities for undocumented workers.

By way of background, the rules recommend, but does not require, that employers retain records of their efforts to resolve the SSA no-match letters. Further, such actions assist the employer in establishing its eligibility for the so-called safe-harbor provisions. The safe harbor provisions details procedures that employers can follow in response to a no-match letter to ensure the DHS will not use the letter against the employer in a future allegation that the employer had knowledge of the employee's unauthorized work status.

After receiving a no-match letter from the DHS, the procedures provides that employers may obtain safe-harbor protection by promptly checking its records to determine whether the discrepancy results from a typographical, transcription, or similar clerical error, or in the communication of the information to the SSA or DHS.

Likewise, if the discrepancy is not resolved, the employee involved may be requested to confirm that the employer's records are correct. If the records are they are not correct, employers would take the necessary actions to correct the information and inform the relevant agencies. If the records are correct according to the employee, the employee to would then pursue the matter personally with the relevant agency, with employers documenting the manner, date and time of verification of the information.

Lastly, the supplemental rule also reviews the termination of employees if the no-match letter is not resolved within ninety days of receipt of the same. If the discrepancy referenced in the no-match letter is not resolved, and if the employee's identity and work authorization cannot be verified using a reasonable verification procedure, employers must then determine whether the employee will be terminated, or if the employee is not terminated, risk a finding by the DHS the employer had constructive knowledge that the employee was an unauthorized alien and a finding that a violation of the INA occurred.

However, to complicate matters, the DOJ Office of Special Counsel has also issued procedures to employer following the safe-harbor provisions. The Office of Special Counsel enforces anti-discrimination provisions, which protect United States citizens and certain work-authorized persons from intentional employment discrimination based upon citizenship or immigration status, national origin, and unfair documentary practices relating to the employment eligibility verification process.

The DOJ has issued the notice to "clarify when the Department, through the Civil Rights Division's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), may find reasonable cause to believe that employers following the safe-harbor procedures have engaged in unlawful discrimination in violation of the anti-discrimination provisions of the Immigration and Nationality Act [of 1952].[8]

The Office of Special Counsel is required to investigate charges of discrimination and determine whether or not there is reasonable cause to believe that the charge is true. The DOJ notes, [i]t is OSC's

[6] Federal Register, Vol. 73, No. 209, October 28, 2008, 63861.
[7] Id.
[8] Id. at 63993.

longstanding practice to examine the totality of relevant circumstances in determining whether there is reasonable cause to believe that an employer has engaged in unlawful discrimination."[9] Further, dependent upon the outcome of its investigation, the DOJ may bring a complaint before an administrative law judge seeking remedial relief for victims, injunctive relief to prevent future violations, and/or civil penalties.

With respect to an employer applying the safe-harbor provisions, if an allegation of discrimination is received, the DOJ will "first ascertain whether the alleged victim is an authorized worker who is protected from discrimination..."[10] If it is concluded that the alleged victim is protected, an investigation will be conducted to determine "whether there is reasonable cause to believe that the employer has engaged in unlawful discrimination."[11]

If an employer that receives an SSA no-match letter terminates an employee without attempting to resolve the mismatches, or who treats employees differently or otherwise acts with the purpose or intent to discriminate based upon national origin or other prohibited characteristics, may be found to have engaged in unlawful discrimination.[12] However, if all of the safe-harbor procedures are followed and it cannot be determined whether or not an employee is authorized to work in the United States, and therefore terminates that employee, and if that employer applied the same procedures to all employees referenced in the no-match letter(s) uniformly, that employer will not be subject to suit.[13]

In summary, to avoid potential charges from the DOJ for unlawful discrimination, employers are encouraged to develop and implement comprehensive policies and procedures in place to address the no-match letters and identified errors. Further, employers should also have policies in place to address discrepancies that may involve an employee's SSN with respect to wage and tax information, unemployment compensation, social security, welfare, garnishment orders, child support orders or other third-party complaints and verifications. Likewise, employers should have policies and procedures to address the employment of employees who cannot provide the requisite documentation necessary for employment. Mr. Baker may be contacted with questions or concerns regarding compliance with this issue. He is also available to assist in the revision/drafting of policies.

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[9] Id.
[10] Id.
[11] Id.
[12] Id.
[13] Id.