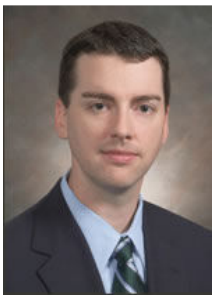
Supplemental Proposed Rules for Social Security Numbers and No-Match Letters

By: Robert J. Baker, Esquire



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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.

Annually, The Social Security Administration ("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 an Employer Correction Request or Educational Correspondence, which is also known as 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 Department of Homeland Security ("DHS") recently released supplemental proposed rules on March 21, 2008 regarding these 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]

Employers may ask how exactly does the requirement to verify SSN's impact daily business operation. The short answer is that federal law requires all U.S. employers confirm eligibility of employment and makes it unlawful to hire or to continue to employ an undocumented worker. The Immigration and Nationality Act of 1952 ("INA") expressly prohibits employers from knowingly hiring or knowingly continuing to employ an alien who is not authorized to work in the United States.[5] Violation of

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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).

federal law subjects the employer to civil liability and criminal penalties. The most common application of this practice is the completion and retention of Form I-9 for each employee hired by an employer.

In issuing the proposed supplemental rules, the DHS stated that it is aware that the "United States is a magnet for illegal immigration"[6] 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.[7]

The proposed rule recommends, 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.

The bottom line is employers should not simply ignore the no-match letters. Rather, employers should develop and implement comprehensive policies and procedures in place to address the no-match letters and identified errors, but also other discrepancies that may involve an employee's SSN, wage and tax information; unemployment compensation; social security; welfare; garnishment orders; child support orders; or other third-party complaints and verifications. By simply ignoring these potential issues, employers may be subject to civil liability and criminal penalties. 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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[6] Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Initial Regulatory Flexibility Analysis. DHS Docket No. ICEB-2006-0004, p.6.

[7] Id. at 32, see also INA section 274A(a)(1), (2), 8 U.S.C. 1324a(a)(1), (2).