



the social security administration revives the employer no-match letters

MSK Client Alert

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Following an extended suspension, the Social Security Administration (SSA) has announced that, effective April 6, 2011, it has resumed issuing the highly controversial Social Security Number (SSN) "No-Match" Letters — also known as Employer Decentralized Correspondence (DECOR) Letters. No-Match letters are written notifications to employees and employers that the social security data reported by the employer does not match the information in the SSA database. The notice is intended to ensure that social security benefits are calculated correctly to provide employers with the ability to credit employee earnings to the correct individual.

No-match letters became very controversial in 2006 and 2007 following a Department of Homeland Security (DHS) proposed rule providing that employers who failed to follow up and resolve the SSN mismatches addressed in the letters could be considered to have constructive knowledge that one of more workers were working without authorization. The rule also provided a set of "safe harbor procedures" for employers to follow when responding to the no-match letters to avoid potential claims of contractive knowledge. However, 2007 litigation over this proposed rule forced SSA to temporarily suspend issuing the no-match letters to employers.

THE NEW SSA NO-MATCH LETTER

The new 2011 SSA no-match letters will be issued for tax year 2010 and will be the first no-match letters seen by employers since 2007. For the last several years, the agency has continued sending no-match letters to employees at their home addresses if the name or social security numbers listed on the employer's W-2s did not match the information in the SSA database. However, it is the employer no-match letter that now shifts the burden back to the employer.

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There are important differences between the 2011 version of the no-match letter and the prior version. For one, the 2011 letters will no longer list all the employees of the employer that the SSA has identified mismatches for — instead, each letter will identify only one employee. More importantly, the new letters will not include the Immigration and Customs Enforcement (ICE) language that cautioned the employer that failure to act upon receipt of the SSA no-match letter could be construed as constructive knowledge of knowingly continuing to employ unauthorized workers. However, this is not a justification for the employer to not act on the letter and is not a basis for an employer to assume that adverse action will not be taken against the employer by Homeland Security as a result of the letter.

THE SIGNIFICANCE OF A NO-MATCH LETTER

The SSA letter will explicitly state that the letter, by itself, is not a justification for termination of an employee. Instead, employers are discouraged from taking immediate adverse action against employees solely on the basis of receipt of the no-match letter as such actions may violate federal anti-discriminatory labor laws. Furthermore, the no-match letters are not to be construed as statements regarding the employees' immigration status — they are simply a statement from the SSA that there is a SSN mismatch in their database. In fact, many common, harmless errors can cause a SSN mismatch. For example, a SSN mismatch can be caused by simple typographical errors, name changes, or incomplete information in the SSA database. Therefore, an employee who is the subject of a SSA no-match letter may be fully authorized to accept employment in the United States.

Under no circumstance should employers ignore a no-match letter. Employers must remember that although the DHS rule relating to safe harbor provisions after receipt of a no-match letter was rescinded in October 2009, **Homeland Security has been very clear that an employer's failure to act upon receipt of a no-match letter can be used in conjunction with other evidence to build a case against the employer that it had constructive knowledge that its employees were unauthorized to work in the United States.**

The letters state that SSA may share information with other government agencies, namely, the IRS and the Department of Justice (DOJ) "for investigating and prosecuting violations of the Social Security Act." Furthermore, ICE's recent enhanced efforts in auditing employer I-9 records will incorporate requests by ICE for copies of all SSA no-match letters received by the employer. Therefore, if an employer fails to react to the receipt of no-match letters, ICE uses the no-match letters in conjunction with the employer's I-9 records in a totality of the circumstances argument for I-9 violations and constructive knowledge of knowingly continuing to employ unauthorized workers.

HOW TO REACT TO THE RECEIPT OF A NO-MATCH LETTER

It is critical that employers implement policies and procedures to react to the receipt of a no-match letter.

We suggest, at a minimum, taking the following steps:

STEP 1 — Upon receipt of the no-match letter, employers should immediately verify that the information originally submitted to the SSA matches the information in the company records. If so, the employer should ask the employee to verify that he or she has accurately reported his or her information and social security number to the employer.



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STEP 2 — If the employer and employee are unable to resolve the SSN mismatch, the employer should allow the employee a "reasonable" period of time in which to try to correct the error with the SSA. To do so, the employee should contact the local SSA office. Thus far, the government has suggested that a reasonable period of time is approximately 90 to 120 days.

STEP 3 — If the mismatch cannot be resolved, the employer should document all efforts made to correct the mismatch with the employee. Documentation of these efforts should be maintained with the no-match letter for a period of four (4) years.

CONCLUSION

Employers must take action upon receipt of the no-match letter. The best way to deal with no-match letters is to work with immigration counsel to develop uniform company policies and procedures for responding to the letters. It is far easier to develop internal policies for dealing with no-match letters than to combat allegations by ICE at a later date. MSK Immigration Attorneys are well versed in I-9 compliance issues and SSA no-match letter procedures that protect employers while ensuring that important antidiscriminatory labor laws are not violated.