New England IN-HOUSE

May 2011 THE DOLAN COMPANY www.newenglandinhouse.com

SPECIAL FEATURE

Guidance for SSA's revived 'no-match' letters

By William E. Hannum III

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After a three-and-a-half-year hiatus, the Social Security Administration started sending "no-match" letters on April 6 to employers if an employee's Social Security number does not correspond with the SSA's records for the 2010 tax year.

The current version of the no-match letter is different from the old letters the SSA sent out until October 2007.

Most noticeably, the current version does not contain the Department of Homeland Security Immigration and Customs Enforcement ("ICE") insert, which stated that an employer's failure to act upon receipt of the letter could be construed as constructive knowledge of continuing to employ unauthorized workers.

Any employer with an employee whose Social Security number that does not correspond with the SSA's records may receive a no-match stating that the discrepancy prevents the SSA from crediting the employee with correct wages, and advising that there can be many reasons for the no-match, such as typographical errors, name changes, and incomplete information.

The letter also includes the following statements: "We may give this information to the Internal Revenue Service for tax administration purposes or to the Department of Justice for investigating and prosecuting violations of the Social Security Act."

The letter also states: "The letter does not imply that you or your employee intentionally provided incorrect information about the employee's name or SSN. It is not a basis, in and of itself, for you to take any adverse action against the employee, such as laying off, suspending, firing, or discriminating against the individual."

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Where an employer receives a no-match letter, it should proceed with caution.

On one hand, if the employer ignores it, and there are other circumstances indicating that the employee is unauthorized to work in the United States, the employer could face liability for knowingly employing an illegal alien.

On the other, if the employer acts too zealously and jumps to conclusions about an employee's legal status, it could face liability for unlawful discrimination against the employee.

What should an employer do if it receives a no-match letter? The SSA has issued guidance for employers, summarized below along with some other recommendations regarding employment verification issues.

How best to respond

Employers should take the no-match letter seriously and proceed with caution. Generally, the employer should first check its records to determine if its records match documentation submitted to the government, and ask the employee to check his or her records to ensure that they have accurately reported their name and social security number to the employer. This will eliminate discrepancies due to incorrect data entry by the employee or employer.

If the employer finds an error, inform the SSA, correct the Form I-9, and contact a tax professional to amend wage and tax statements. If making any corrections to the Form I-9, the employer should take care to ensure that it follows the strict rules for such corrections. Those unaware of the corrections rules should seek experienced legal counsel.

If the employer's records match the employee's (and there does not appear to be a data-entry error by the employer), then the employer should instruct the affected employee to contact a local SSA office to correct and/or update his or her SSA records.

William E. Hannum III is managing partner at Schwartz Hannum PC, a labor and employment firm representing management in Andover, Mass.

The employer should then regularly check in with the employee over a reasonable period of time to determine whether the employee has corrected the discrepancy.

Although the SSA does not define what constitutes a "reasonable amount of time," the SSA has acknowledged through its E-Verify program that it may take up to 120 days to correct a discrepancy in its database.

It is important that the employer follow the same procedures regardless of the race, national origin or citizenship status of the employees.

The employer should carefully and consistently document all actions that it takes to resolve the no-match issue. For instance, if the employer advises the employee to resolve the issue by contacting a local SSA office, the employer should document this advice and document each follow-up communication with the employee.

If the employee is unable to produce a social security card, or if the employee no longer works for the employer, then the employer should document its efforts to obtain the correct information and retain the documentation for four years.

Work authorization

If the employer has a properly-completed Form I-9 on file for the employee, the employer should not ask the employee to resubmit proof of work authorization.

However, if any employee admits to a supervisor or manager — without being asked — that he or she is not legally authorized to work in the United States, then the employer should terminate the employment of the employee immediately, regardless of whether the employer has received a no-match letter for the employee.

If an employer continues to knowingly employ an individual who is not authorized to work in the United States, the employer could face civil fines and criminal fines and charges, which could result in jail time.

It is essential that the employer understand that the receipt of a no-match letter, on its own, is not an indication of the employee's work authorization status, and is not a sufficient basis to terminate or take any other adverse action against an employee.

Practical tips

Even for those employers who have not received a no-match letter, employers can minimize the risk of no-match letters and similar problems by auditing now to ensure compliance.

Employers should establish procedures to eliminate the kinds of typographical errors that lead to no-match letters. If during the compliance audit, or at any other time, an employee voluntarily admits, without being asked, that he or she is not legally authorized to work in the United States, the employer must terminate his or her employment immediately.

Employers should keep the process of responding to SSA no-match letters separate from the process of I-9 compliance. In this regard, the ICE has dramatically increased its employer Form I-9 audits in the past three years. Thus, the utmost care should be taken in completing and storing the Form I-9 properly.

Employers should conduct training for supervisors, managers, and human resources employees involved in the Form I-9 process.

Although separate from the I-9 compliance, ICE may still try to claim that receipt of a no-match letter is evidence of unauthorized work. An employer's accurate records on its response to no-match letters and properly completed Form I-9's are some of an employer's best defenses to a claim that it knowingly employed individuals not authorized to work in the United States.

Whether responding to no-match letters or an I-9 audit, employers should seek experienced legal guidance, as the rules regarding acceptable documents that may be used to complete the Form I-9 and electronic storage have recently changed. NEIH