

SOCIAL SECURITY MISMATCH AND IMMIGRATION 2011: *WHERE DO WE GO FROM HERE?*

FREQUENTLY ASKED QUESTIONS ON ALL THINGS SOCIAL SECURITY

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Bringing you the latest updates on: Immigration Reform, “IRS Desktop Audit Raids”, Immigration Customs and Enforcement (ICE) techniques, Notices of Inspection (“NOI’s”) and the rescission of the “Safe Harbor” regulation.

What Does It Mean For Employers Now That The “No-Match” Rule Was Rescinded?

In 2007 the Department of Homeland Security issued a “no-match rule”, under which, the receipt of a no-match letter from the Social Security Administration (SSA) would have been sufficient to establish the requisite knowledge (i.e., “constructive knowledge”) of undocumented status for employer liability under the Immigration Reform and Control Act (IRCA) unless the employer followed specific procedures set forth in the rule (the “safe harbor” provisions).

Effective November 6, 2009, the 2007 DHS “no match rule” was rescinded. With the rescission of the No-Match Rule, the regulations no longer contain the specific steps the employer must take after receiving a no-match letter. However, employers are still liable under IRCA for having actual knowledge or constructive knowledge of employing someone not authorized to work in the United States. Moreover, employers must still take affirmative steps to resolve a discrepancy in social security mismatches.

In rescinding the rule, DHS did not clarify the legal status of no-match letters. A no-match letter may be an immigration document or it may be just a wage-reporting document. It may be evidence that a worker is employed illegally or it may not, depending on the circumstances. Employers still face discrimination lawsuits for being overly zealous in complying with their obligations under the immigration laws and face civil and criminal sanctions for not being zealous enough.

With the withdrawal of the no-match rule, law-abiding employers continue to face challenges in complying with the immigration laws relating to unauthorized employment. Fraud is rampant. Government agencies have different ideas about, and give different directions concerning, important practical questions; and it appears that further guidance will not be forthcoming any

time soon. The best an employer can do now is to adopt a cautious and consistent policy of responding to suspicious circumstances by investigating and making employment decisions based on the facts as it finds them during the investigation.

What Do You Mean “Constructive Knowledge” That An Employee Is Not Authorized To Work In The United States?

Section 274A of Title 8 of the Code of Federal Regulations defines an Employer’s constructive knowledge as:

- (i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;
- (ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or
- (iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.

In determining whether an employer has knowledge, the “totality of the circumstances” standard is used and the examples in the regulation are not exclusive.

What Does DHS Mean By “Totality Of The Circumstances” When It Talks About Enforcement Factors?

When the DHS rescinded the Social Security “no-match” regulation they noted that the receipt of a no-match letter "when considered with other probative evidence, is a factor that may be considered in the totality of the circumstances and may in certain situations support a finding of ‘constructive knowledge’” on the part of an employer of an employee's lack of employment authorization. The totality of the circumstances includes, among other things:

1. An employer's receipt of a no-match letter;
2. The nature of the employer's response to the no-match letter;
3. Statements made or actions taken by the employee;
4. Information received from credible sources and the employer’s response.

What Do I Do If I Receive A No-Match Letter From The Social Security Administration?

It is unclear if the SSA, which stopped issuing no-match letters to employers during the pending litigation over the now rescinded “no-match rule” (employee no-match letters were still sent), will resume doing so and if so, when. If SSA begins reissuing no-match letters this winter, employers will ignore them at great risk. ICE enforcement officials and plaintiff lawyers bringing immigration-related RICO lawsuits routinely seek no-match letters and related personnel documents in their efforts to establish that employers had constructive knowledge they were hiring unauthorized workers. Employers should consider taking certain practical steps when they receive no-match letters, including the following:

1. Establish Company Policy and Apply it Consistently.

Establish and implement a written policy and procedure for responding to no-match letters and for maintaining records of your response to mismatch letters. ***However, you must be careful to apply the policy consistently to all employees in order to avoid claims of discrimination.***

2. Verify Your Records.

Compare the employee’s SSN with your records. If your records do not match the W-4 form, then correct the W-4 form and report the correction to the SSA. Maintain copies of correspondence submitting corrected information to the SSA.

3. Notify the Employee of the Discrepancy.

If checking your records shows you have been reporting the number as provided by the employee, then inform the employee that the SSA has notified you of the problem and that he or she must resolve it with the SSA. Tell the employee to report the correct information to you once it has been resolved with the SSA.

4. Confirm your Instructions in Writing.

Write a letter directing the employee to resolve the issue with the SSA and asking the employee to provide updated information. Also provide the company’s written no-match policy. Place copies of the letters in the employee’s personnel file. Maintain a list of the names of employees who received the written instructions. Remember, you must continue to pay payroll taxes for each employee, regardless of any mismatch.

5. Do Not Terminate an Employee Just Because They Get a No Match Letter.

Employers should never assume an employee with a reported mismatch is an undocumented immigrant, and should never fire an employee because of a no-match letter. By the same token, employers cannot ignore information they receive when following up on mismatches and must act in a reasonably prompt and prudent manner following receipt of such information to attempt to resolve the issue.

Remember that there are good reasons for a no-match and suspicious ones: Did the employee provide a good reason for the discrepancy? Was there a name change that was not recorded properly? Is the employee's name difficult to spell? Was a number transposed in the documents submitted to SSA? Has there been an intervening immigration-related proceeding that resulted in a name change?

If an employee returns with an entirely different social security number but the same name, this should be a red flag. The SSA usually issues one number to an individual over a lifetime; in extremely limited circumstances related to domestic violence or identity theft the SSA will issue a different number. Similarly, an employee who presents a social security card that has the social security number previously provided but a completely different name should also be a red flag. In these circumstances the employer should inquire about the name and/or social security number change and request documentation showing how/why the change. For example, was there an immigration proceeding such as naturalization resulting in a name change? Was there a court order for a name change? Was there a request to the SSA for a new number?

6. Give Employees a Reasonable Amount of Time to Resolve the Problem.

There is no specific number as to how many days to give an employee to resolve the issue. Keep in mind that dealing with the bureaucracy of the social security administration is not a quick process. Consideration should be given to suspending the employee without pay or termination after an employee has had enough time to correct the problem and fails to do so or shows up on more than one no-match letter.

A self-imposed window to resolve the problem that does not exceed the 120 period that USCIS gives itself to address non-confirmation of work eligibility under E-Verify is probably a reasonable period, recognizing that the circumstances of each individual may vary. Most commentators believe that a 30 day time frame with extensions based on good cause is sufficient.

What Does The IRS Have To Do With Enforcing Immigration Laws?

Under the IRCA employers must ensure they employ only authorized workers in the U.S. Employers are required to report wages annually for each employee on W-2s. Social Security Administration (SSA) processes W-2s as an agent of the IRS. SSA sends processed W-2s to IRS including employer and employee data. Each W-2 record contains an indicator that tells the IRS whether the name/SSN matches SSA's records.

SSA has no enforcement authority, but IRS does in the form of "desktop audit raids". The desktop audit raid is basically a series of IRS audit letters informing employers of inaccurate or omitted SSNs. Under Internal Revenue Code (IRC) §6721, the IRS may impose a \$50 penalty for each inaccurate W-2 (up to \$250,000) unless the employer shows reasonable cause for the inaccuracy. If the violation is deemed "willful", the fine is either \$100 for each violation or 10

percent of the amount per violation, whichever is greater. IRS has been able to do this for a while, but they didn't...until now.

Treasury regulations provide for waivers of the penalties if employers can show they took necessary steps to avoid the inaccuracy. Once employers receive notice from the IRS of a no-match they must show they made annual requests to the employees for the correct social security numbers. What's important is that the employer makes a request, or repeats a request. If the employer does, he/she has performed due diligence and has reasonable cause to believe the SSN is correct. If the employer does not, he/she could become subject to fines.

What Are Notices Of Inspections (NOI's)?

The NOI's are issued by the Immigration Customs and Enforcement (ICE). They basically tell employers ICE will be inspecting their hiring records to determine whether they are complying with employment eligibility and verification laws and regulations. The NOI's usually allow a 72-hour period before the actual workplace inspection of the requested documents. Indeed, an employer should request such a period of time to produce the requested documents if not indicated in the NOI's.

While we do not read the regulations as requiring the employer to turn over the original I-9s to ICE for inspection at the agency's office, ICE is now becoming more adamant about taking the originals to their offices and threatening employers with a court order and stiff sanctions if they do not comply. Federal regulations state that *"At the time of inspection, Forms I-9 must be made available in their original paper, electronic form, a paper copy of the electronic form, or on microfilm or microfiche at the location where the request for production was made."* (8 CFR 274a.2(b)(2)). The regulation goes on to state, *"Inspections may be performed at an office of an authorized agency of the United States."* While inspection of original I-9s at the employer's location has always been expected, employers that receive an NOI must now be prepared to have ICE insist on taking the documents off-site for inspection.

Another recent trend is that U.S. Department of Labor (DOL) agents have been requesting to inspect copies of I-9s as part of their routine field compliance audits, pursuant to a mutuality agreement in effect between the DOL and ICE. DOL's request should be considered a NOI with the same 72-hour notice period. Generally, however, only a sample of three I-9 Forms are being requested during such inspections.

ICE worksite enforcement activities are at an all time high. The President's Fiscal Year (FY) 2012 budget request for ICE is \$5.8 billion, a 1% increase over FY 2011. At testimony before the House of Representative Subcommittee on Immigration Policy and Enforcement in January 2011, the Deputy Director of ICE testified that in FY 2010 ICE initiated a record 2,746 worksite enforcement investigations, more than doubling the cases initiated in FY 2008. It criminally arrested 196 employers for worksite-related violations, surpassing the previous high of 135 in FY 2008. It conducted 2,096 notices of inspection, quadrupling the number in FY 2008. It issued \$6,956,026 in fines, compared to \$675,209 in FY 2008 and recovered over \$36,611,320

in judicial fines, forfeitures and restitutions. It also debarred 97 businesses from federal contracts for worksite violations.

Since July 2009, ICE has launched a new audit initiative issuing approximately 1652 NOI's to businesses. According to an ICE press release this act "illustrates ICE's *increased focus on holding employers accountable for their hiring practices* and efforts to ensure a legal workforce." ICE has identified "form I-9 audits as the most important administrative tool in building criminal cases and bringing employers into compliance with the law." On February 17, 2011, Sources close to the Department of Homeland Security revealed that ICE planned to announce as many as 1,000 I-9 audits. According to these same sources, audits were to target employers suspected of hiring illegal immigrants, and it is highly likely that many employers in California and other Southwest states will be targets of audits, especially in the agriculture industry. These audits come in the middle of a political environment where both the Administration and Congress are trying to demonstrate that they are tough on illegal immigration.

According to ICE the businesses were selected for the audits as a result of investigative leads and intelligence, and their connection to public safety and national security.

Employers are advised to perform their own internal audit of I-9 Forms for all current employees to ensure they are complete in every respect. Compliant I-9 Forms can result in avoidance of costly record-keeping violations under Federal immigration laws, but do not ensure that an employee is ultimately, legally-authorized. A useful resource released on January 5, 2011 by USCIS is the revised "Handbook for Employers" intended to provide guidance to employers regarding I-9 Form compliance. It is more detailed and helpful than previous handbooks and includes helpful information for employers using the H-2A program.

This new handbook includes up-to-date answers for common questions asked by employers, including how to correct a Form I-9, whether a Form I-9 must be updated when there has been an interruption in employment (such as a seasonal layoff or after an extended layoff); requirements for electronic storage of Forms I-9; visual aids for completing a Form I-9 and examples of new documents required for verification of employment status. The revised Handbook for Employers may be accessed on the USCIS website at www.uscis.gov/files/form/m-274.pdf

What Is E-Verify?

E-Verify is a web-based system operated by the Department of Homeland Security (DHS) and the Social Security Administration (SSA) allowing employers to electronically verify the employment eligibility of potential employees. It is not to be used for current employees. E-Verify is currently a **voluntary** initiative except in certain states that require it, and employers awarded federal contracts as of September 8, 2009.

DHS believes "E-Verify addresses data inaccuracies that can result in No-Match letters in a more timely manner and provides a more robust tool for identifying unauthorized individuals and

combating illegal employment.” Homeland Security Secretary Janet Napolitano is now pushing for E-Verify across the board, as she did while Governor of Arizona.

Although DHS is pushing hard for E-Verify, it recognizes that E-Verify may not be appropriate for all employers, especially those in agriculture. “To the extent that agricultural employers are located in rural areas that are not well served with modern internet capability, employers may...comply with the employer verification requirements of the Immigration and Nationality Act by carefully examining the identification and employment eligibility documents presented by the employee at the time of hire.” (*Federal Register*, Volume 74, No. 193 (Oct. 7, 2009), p. 51450, 3rd col-p. 51451, 1st col.).

The biggest problem with E-Verify is that it’s based on SSA’s inaccurate records. SSA estimates that 17.8 million (or 4.1 percent) of its records contain discrepancies related to name, date of birth, or citizenship status, with 12.7 million of those records pertaining to U.S. citizens. That means E-Verify will erroneously tell you that 1 in 26 of your legal workforce is not actually legal.

All U.S. employers, including farmers, packers, shippers and farm labor contractors, should brace themselves for anticipated Electronic Employment Verification (“E-Verify) legislation to be enacted by the U.S House of Representatives this year. If signed by President Obama, California’s agricultural industry will have to E-Verify all new hires similar to the Arizona law that became effective on January 8, 2008, (H.R. 2779 amended Arizona Revised Statutes, Title 23, by adding an amended Chapter 2 to include the employment of unauthorized aliens.

USCIS and ICE are actively encouraging employers to participate in this voluntary program. The President’s budget request for FY 2012 seeks \$102.4 million for E-Verify, which is higher than the \$95.2 million spent in FY 2010. USCIS reports that employer participation in E-Verify increased from 156,659 at the end of FY 2009 to 226,528 at the end of FY 2010. Employers interested in finding out more information on the Federal E-Verify Program may go to the U.S. Customs and Immigration Service website at www.uscis.gov/E-Verify or simply log onto “E-Verify” on your computer server for general information.

What Do I Do If I Get A Letter From EDD Or The Department Of Child Support Services (DCSS) That Makes Me Question An Employee’s Social Security Number?

The classic situation is this: Employer gets an unemployment insurance (UI) claim or a child support wage garnishment for a person the employer has never employed. However, the claimant’s or the garnishee’s Social Security number (SSN) is the same SSN as one of his current employees. What is the employer to do? Employers should handle these types of situations the same as when dealing with a Social Security Administration no-match letter. Also, bear in mind that a California employer may be required to provide such documentation to a law enforcement or taxing agency pursuant to *Civil Code Section 1799.1 (b)*.

What Is The Social Security Number Verification Service (SSNVS)?

The Social Security Number Verification Service (SSNVS) is a free online system provided by the Social Security Administration (SSA). The Telephone Number Employer Verification (TNEV) is the same service but just via telephone. SSA will verify SSNs and names solely to ensure that the records of current or former employees are correct for the purpose of completing Internal Revenue Service (IRS) Form W-2 (Wage and Tax Statement).

It is illegal to use the SSNVS/TNEV to verify SSNs of potential new hires or contractors or in the preparation of tax returns. SSNVS requires that a person register on behalf of the company. After registering the employer will receive an activation code required for accessing SSNVS. Only the employee registered with SSNVS will be able to access SSNVS.

An employer using SSNVS is required by the SSA to use it consistently across all new or current employees. If the SSNVS returns a mismatch employers should treat that mismatch as they would a SSA mis-match letter, discussed above.

Third-party use of SSNVS is strictly limited to organizations that contract with employers to either handle the wage reporting responsibilities or perform an administrative function directly related to annual wage reporting responsibilities of hired employees. For detailed information on SSNVS go to <http://www.ssa.gov/employer/ssnv.htm>. For information on TNEV go to <http://www.ssa.gov/bso/documents/TNEV.pdf>.

Can I Verify My Employee's Social Security Number By Phone?

No. As of November 1, 2009, verification can no longer be done over the phone without the employer registering for the online Social Security Number Verification Service (SSNVS). The Telephone Number Employer Verification (TNEV) is the same service but just via telephone. SSNVS and TNEV are free of charge. Employees registering on behalf of the company will need to disclose private information to the SSA (DOB, SSN). However, the information the employee would have to disclose to the SSA to register for SSNV and TNEV would be information that the SSA already has for that individual (social security number, date of birth). An employee would not be able to make a claim against the employer for an unwarranted disclosure of private information to a third party. SSA already has the information regardless of whether or not the employee registers on behalf of the company.

If the company decides to register for SSNVS/TNEV it should take some precautionary measures to ensure that the employee registering on behalf of the company will only use the verification system according to company policy and procedures. For example, the company could develop an acknowledgement and agreement form for the employee to sign.

Can An Employer Use Third Party Companies To Verify Social Security Numbers For Wage Reporting Purposes?

Yes. However, third-party use of SSNVS is strictly limited to organizations that contract with employers to either handle the wage reporting responsibilities or perform an administrative function directly related to annual wage reporting responsibilities of hired employees. It is illegal for companies conducting identity verification or background checks for employers to use SSNVS.

Some payroll services verify social security numbers for wage reporting purposes for a nominal fee (around \$12 per employee). If an employer wants to use a third-party to verify social security numbers, it must make sure that the third-party is an organization that contracts with employers to either handle the wage reporting responsibilities or perform an administrative function directly related to annual wage reporting responsibilities of hired employees.

What Are The Prospects For Immigration Reform In The New Congress?

The past Congress avoided addressing comprehensive immigration reform, or even more narrow pieces such as the DREAM Act. While hearings on the agricultural labor crisis highlighted the fact, agreed upon by both growers and worker advocates, that U.S. workers won't take agricultural jobs even in a recessionary economy, Congress avoided providing a solution in an election year. In the new Congress with a Republican dominated House of Representatives, it is likely that a serious effort will be made to pass mandatory E-Verify, as early as this year. At the same time, the U.S. Department of Labor has administered the H-2A program in manner so as to make it unworkable, arbitrarily denying grower applications, while the Wage and Hour Division has aggressively targeted H-2A employers and is seeking astronomical fines for technical violations.

This makes it imperative that a workable legal farm worker program be enacted as a safety net, given estimates that over 70 percent of the seasonal agricultural work force is undocumented. Senator Feinstein remains committed to obtaining enactment of some version of the AgJOBS legislation that has enjoyed bipartisan support. It is critical that agricultural organizations immediately make the case to their representatives in Congress that the industry will be crippled if mandatory E-Verify passes without a workable worker program.