



Insights

An Employer's Guide to Social Security Administration Notices Regarding Employee "No-Match" Situations

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The Social Security Administration (SSA) has general authority and responsibility to maintain reported earnings for individuals and to use those reports to determine entitlement to various benefits. Many employers are familiar with the current litigation pending in the U.S. District Court for the Northern District of California regarding the no-match letters and regulations. (See Littler's December 2007 National ASAP, *DHS Appeals No-Match Preliminary Injunction, SSA Forgoes No-Match Letters for 2006, and Updated I-9 Form Must Be Used Beginning December 26, 2007*) In August 2007, the Department of Homeland Security (DHS) tried to bootstrap its new Final Rule (See August 2007 ASAP, *DHS Publishes Final "Safe-Harbor" Procedures for Employers Who Receive SSA "No-Match" Letters and DHS Notices*) by having the SSA send out an announcement with the SSA's annual no-match letters to employees and employers. A TRO and later an injunction regarding the DHS Rule has kept SSA from sending further dual-purpose announcements.

To date, the district court has granted a series of extensions on scheduled status conferences with respect to the litigation. The Supplemental Proposed Rules issued by the DHS were originally scheduled to be finalized June 24, 2008, but they have not been finalized, pending this litigation. As a result of the DHS litigation, the annual no-match letters sent out by the SSA, in its effort to match FICA payments with its SSN base, were scrapped for W-2s covering 2006 wages, and SSA has also announced it would not be sending such notices for 2007 wages.

Normally the SSA sends a notice to employees' last-known useable address when there is an apparent no match between a name and SSN. Such notice is called a DECOR letter standing for "Decentralized Correspondence." Normally such information would also be sent to the employer that issued the W-2 that cannot be matched. This correspondence is called the EDCOR letter for "Employer Education Correspondence." As the letter for 2007 included DHS information and because the SSA has been enjoined from issuing last year's EDCOR notice, SSA has announced that it is only planning on sending the DECOR notice.

While the EDCOR notices will not be sent in 2008, there are a number of lesser-known notices sent to employers by the SSA that also address situations involving a mismatch between the SSA's records and information reported by employers that are still being sent. In order to ensure the proper reporting of wages on individual accounts, the SSA has developed several programs that cross-reference data. These datamatching programs include:

- Decentralized Correspondence letters, which are used when earnings reported show no match between name and Social Security Number (SSN).
- Earnings After Death letters, which are used when earnings reported by an employer show use by an employee of a SSN assigned to a deceased person.
- Young Child Earnings Records letters, which are used when earnings reported by an employer show use of a SSN that was assigned to a child under seven years of age.

Decentralized Correspondence Process (DECOR)

As noted, DECOR letters, also known as Form SSA-L3365-07, are used when an employer reports earnings for an employee to the SSA for which there is no match between the employee's name and SSN. In April 2008, the SSA

announced it would be sending out between eight million and nine million DECOR letters for the 2007 tax year. The DECOR letters are sent to employees only, but they may be sent to an employer's address when the SSA has no useable address for an employee.

The DECOR letter requires the employee to verify information, including his or her name and SSN, and it contains instructions on the form regarding how to do so. While similar in nature to the "no-match" letters that are the subject of litigation, these letters are not part of that process.

Earnings After Death (EAD) Process

EAD letters, also known as Form SSA-L4112, are used when an employer reports earnings for an employee whose SSN shows in SSA records as having been assigned to a deceased person. In such cases the earnings are reported into the earnings suspense file (ESF) and are not recorded to any individual's account. That means that the individual is not credited with the earnings for purposes of building up credits toward his or her eventual benefit levels.

An EAD notice is generally sent to both the employer and employee for verification. Employers have several options for responding to an EAD notice:

- The employer does not respond, in which case a notice is sent to the employee with the purported earnings asking the employee to visit a local SSA field office to resolve the discrepancy with proper identification. The earnings remain in the ESF until the discrepancy is resolved.
- The employer responds that the employee was working for it, in which case a notice is sent to the employee with the purported earnings and the employee is asked to visit a local SSA field office to resolve the discrepancy with proper identification. The earnings remain in the ESF until the discrepancy is resolved.
- The employer responds that employee is deceased, in which case the employer is instructed to refund the employee's share of Social Security taxes to employee's estate or next of kin. The earnings remain in the ESF

Young Child Earnings Records Reinstatement Process (YCER)

YCER notices, also known as Form SSA-L3231, are used when an employer reports earnings for an employee whose SSN shows in the SSA's records as being for a child under 7 years of age. The SSA determines this by cross-checking the date of birth with payroll records. In such cases the earnings go into the ESF and a YCER notice is sent to the employer for verification. An employer has several options:

- The employer does not respond, in which case a notice is sent to the employee with the purported earnings asking the employee to visit a local SSA field office to resolve the discrepancy with proper identification. The earnings remain in the ESF until the discrepancy is resolved.
- The employer responds by stating the employee's name, SSN and date of birth are the same as the SSA's records. In such case the earnings are reinstated to the employee's account.
- The employer responds by stating that the employee's name and SSN are the same as the SSA's records, but the employee has a different date of birth. In such case a notice is sent to the employee (SSA-L3232) requesting that s/he visit a local SSA field office for assistance to correct the discrepancy. The earnings remain in the ESF until the discrepancy is resolved.
- The employer responds that the person is not an employee, in which case a notice is sent to the employee with the purported earnings, asking the employee to visit a local SSA field office to resolve the discrepancy with proper identification. The earnings remain in the ESF until the discrepancy is resolved.

Suggestions for Employers that Receive DECOR, EAD or YCER Notices

While there is no express penalty for failing to respond to a DECOR, EAD, or YCER notice, it is prudent for an employer to do so. Unfortunately, although the DHS safe harbor "no match" rule is presently "on hold" in federal court, DHS maintains that employers that receive (or have received) "no match" correspondence from SSA are on constructive notice that the workers named therein may lack authorization to work. DHS takes the position that the DECOR, EAD, and YCER correspondence informs employers of a "no match" situation and expects employers to take appropriate action. If DHS discovers that an employer received "no match" correspondence and did nothing about it, DHS will be more inclined to pursue criminal sanctions against the employer. Therefore, we recommend that employers follow the DHS safe harbor procedure and give affected workers an opportunity to explain or correct the discrepancy. Ideally, employers should give the worker written notice of the need to fix the problem and that a

failure to fix the problem will result in termination of employment. To be safe, employers should make sure that affected workers get this written notice at least twice and that workers are given a reasonable time frame, e.g., 60 or 90 days, to correct the problem.

In addition, upon receipt of SSA correspondents, an employer should:

- Encourage employees to respond to any notices they receive and to follow the instructions on the notices. Under the YCER and EAD programs, generally employees are directed to a local SSA field office to resolve the matter and are required to appear in person and present certain information or identification.
- Not terminate employees because the employer or the employee has received such notices.
- Continue to pay wages and withhold and remit employment taxes as appropriate until receiving further instructions. If an employer does not have a valid SSN for an employee, the wages should be reported to the IRS using SSN 000-00-0000.
- Coordinate with immigration counsel to determine what effect your policy and response may have on the company's risk management efforts.
- Contact its tax professionals with any concerns or questions about responding to such letters.

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