

Immigration and International Trade E-Alert

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Be Prepared - SSA No Match Letters to Employers On the Way

On April 6, 2011, the Social Security Administration (SSA) Commissioner announced that SSA has resumed sending letters to employers regarding FY 2010 earnings' records (W-2 Wage and Tax Statement), which appear to reflect an incorrect social security number or name. Please refer to the announcement at <http://tinyurl.com/5tsv6on>. These employer letters were stopped in 2008 and 2007, as to tax years 2007 and 2006, respectively, due to the litigation over the Department of Homeland Security (DHS) regulations proposed, which were never implemented, as to safe harbor procedures for employers, who receive no-match letters. SSA announced that it would not send out these letters for tax years 2007 through 2009.

SSA refers to these letters as decentralized correspondence (DECOR) letters. The letters are sent to obtain correct information for SSA to post earnings correctly for social security benefit purposes. These letters were first used back in 1979. A SSA sample no match letter for fiscal year 2010 is provided at: <https://secure.ssa.gov/poms.nsf/lnx/0900901050>.

Why is this relevant to me?

Employers are expected to take appropriate action regarding these letters. A failure to take action can be used by Immigration and Customs Enforcement (ICE) along with other factors to build a criminal case against an employer/management for the knowing employment of an unauthorized worker. In addition, the Internal Revenue Service (IRS) can impose penalties against employers for a failure to correct erroneous W-2 reports.

In the context of erroneous withholdings, a W-2C (Corrected Wage and Tax Statement) form along with a W-3C (Transmittal of Corrected Wage and Tax Statements) are normally required to be filed for correction of the social security number error. In some cases, the 940 Annual FUTA return, state income tax and state unemployment returns, as well as local tax returns may require amendment. The Internal Revenue Service (IRS) may also impose fines of \$100 per information return for failure to file corrections. Please refer to: <http://www.irs.gov/pub/irs-pdf/iw2w3.pdf> as well as to tax counsel.

As an employer, can I be exposed to discrimination penalties from the Department of Justice's Office of Special Counsel (OSC) as well as wrongful termination suits for inappropriate responses to these letters?

YES. The OSC has posted guidance on how to respond to such no-match letters on its website at: <http://www.justice.gov/crt/about/osc/htm/SSA.php>. It is critical that employers establish a standard protocol to use in response to such letters. One of the first warnings from the OSC is that employers must recognize that name/SSN no-match letters can be issued based on simple administration errors. Employees must be provided a "reasonable time" to contact the SSA to correct and/or update his or her SSA records.

Why would a no-match letter be issued?

Typical reasons for a no-match letter to be issued include: (1) an unreported name change due to marriage, divorce or naturalization; (2) input errors by SSA staff; (3) reporting errors by an employer or employee; (4) identity theft; (5) errors in reporting proper culturally based hyphenated or multiple surnames; and (6) fraud.

What should an employer do upon receipt of a no-match letter?

The employer must first follow a consistent protocol. The OSC recommends that the employer first confirm that it did not make an error in its data input. Then, the employer should advise the employee of the problem and provide them a reasonable time frame to try to correct the error. Employers are warned not to use the no-match letter by itself as the reason for taking any adverse action against the employee in question. In addition, OSC recommends that employers schedule and document periodic meetings with employees during the no-match resolution period.

What is a reasonable time frame for the employee to try to correct the error?

The OSC notes that no federal statutes or regulations in effect define this time frame for resolution of a no-match letter. The time frame depends on the "totality of the circumstances." The OSC recognizes that SSA has the ability to put a tentative nonconfirmation of a social security into continuance for up to 120 days, but this time frame certainly does not create an outer limit for no-match resolution. Ultimately, the enforcers in this equation, Immigration and Customs Enforcement (ICE) and the DOJ's U.S. attorneys will formulate an opinion on how long is too long...

What happens if an employee brings in a new social security card with a different number?

That is a question that should be answered by the employer's legal counsel. Recently, the OSC has pursued charges against some employers who fired employees for using fraudulent documents in the past. These cases show that employers must be consistent in their application of any termination policy tied to the use of fraudulent documents related to employment, but the case law development continues in this murky area.

Our immigration compliance group looks forward to assisting you with any questions. Please contact Kathleen Campbell Walker or Edward Rios with questions. (kwalker@coxsmith.com – erios@coxsmith.com).

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