

Immigration Reality

By Barry J. Nadell

In 2007 a new reality show will unfold. The executive producer will be none other than the Department of Homeland Security (DHS). Homeland Security Secretary Michael Chertoff is committed to “identify and prosecute employers who are blatantly abusing our immigration system.”

The reality show will be based upon the Social Security Administration’s (SSA) issued “no-match” letters. The audience will consist of approximately 120,000 employers nationwide who in 2005 received a reported non-matching social security account number (SSN) on approximately 7.3 million employees.

The “No-Match” Game

The SSA began issuing no-match letters to employers in 1993 in an attempt to correct errors in its database and properly credit workers’ earnings. The letters come in varying forms, but all generally inform the employer of the names and/or SSNs of employees that could not be matched to SSA records.

In reality, employers have had little incentive to take any definitive action based on the issuance of no-match letters. But, on June 14, 2006, the Department of Homeland Security stated a specific intent to prosecute and fine employers for failing to take “reasonable steps” to resolve document discrepancies identified by no-match letters with respect to workers who are unauthorized.

This dramatic shift in enforcement and compliance is occurring “under the radar” of most employers. In addition, it is believed that this regulation is the first salvo from DHS in its attempt to effectuate workplace immigration enforcement.

Now that the comment period has expired, this regulation will become effective on an interim basis as soon as it is published.

In a fact sheet published by Karen Herrling of the Catholic Legal Immigration Network, Inc. and Amy Sugimori of the National Employment Law Project with information provided by the National Immigration Law Center, the authors provide answers to several questions (two are listed below).

■ **What Is a SSA “No-Match” Letter?** A no-match letter is one sent by the Social Security Administration notifying an employer that they have submitted reports (Wage and Tax Statements/W-2s) that contain names and social security numbers that do not match SSA records. The letter provides an attachment with the names and/or social security numbers that do not match.



■ **Why Are SSA “No-Match” Letters Sent?** Currently, a no-match letter is intended *only* to help SSA make sure its records and database are accurate and to ensure that SSA maintains an accurate earnings record for each employee. A no-match letter does *not* imply that the employer or the employee intentionally provided incorrect information about the employee’s name or social security number.

The no-match letter indicates that it is “not a basis, in and of itself, for [the employer] to take any adverse action against the employee, such as laying off, suspending, firing, or discriminating against any individual who appears on the list.” It also states, “This letter makes no statement about [the] employee’s immigration status.”

The Rules of the Game Have Changed

With the new DHS ruling, the game has changed. The national law firm of Sheppard, Mullin, Richter & Hampton, LLP in their July client newsletter published three steps that DHS will be requiring:

1. *Within fourteen days of receiving a no-match letter from SSA, the employer should check its records to make sure there have been no typographical, transcription, or other clerical errors in either the employer’s records or in its communications with the SSA that could account for the alleged discrepancies. If there is no such error, the employer should proceed to Step 2. If there is such an error, the employer must correct its records and contact either the SSA to confirm whether the employee’s corrected information produces a match. If the SSA subsequently verifies the employee’s account number, the employer must make a record of the manner, date, and time of the verification. If there is still no match, the employer should proceed to Step 2.*
2. *Within fourteen days of receiving a no-match letter from the SSA, the employer should contact the employee in question and confirm with him/her*

that his/her employment information is correct. If the employee's information is correct, the employer should ask the employee to contact the SSA to resolve the issue. Once the employee has done so, the employer should contact the SSA to confirm the employee's account number. If there is a verified match, the employer should make a record of the manner, date, and time of the verification. If there is no match, the employer should proceed to Step 3. If the employee's information is not correct, the employer should correct its records and contact the SSA to confirm whether the employee's corrected information produces a match. If there is a verified match, the employer should make a record of the manner, date, and time of verification.

3. *Within 63 days of receiving a no-match letter from the SSA, both the employer and the employee should complete a new Form I-9, subject to the following:*
 - a. *Neither the employee's employment authorization, nor his/her identity may be proved with any document containing a social security number or an alien number that was the subject of a no-match letter.*
 - b. *The employee's identity may only be established with a document that has a photograph of the employee on it.*
 - c. *Only a document that has a photograph of the employee on it can be used to establish both the employee's identity and his employment authorization at the same time.*

If the employer and employee cannot complete a new Form I-9 under these restrictions, the employer should terminate the employee or risk being held liable for employing an unauthorized worker.

What Does All this Mean?

Although my associates and I don't have a crystal ball and have long ago given up on predicting, we strongly believe the following:

- This proposed rule will become law in the last quarter of this year.
- No action by an employer who receives no-match letters will be viewed by DHS as "constructive knowledge" and punishable by substantive fines.
- Employers with no-match letters will be targeted by DHS and Immigration and Customs Enforcement.
- Progressive employers should consider acting preemptively by cross-checking their employees' social security numbers, so they know in advance what their ultimate

exposure may become. By doing so, employers can more effectively plan for dealing with these objectively identified exposures.

A Proactive Solution

One organization has proactively developed a simple approach to the problem. Form I-9 Compliance, LLC, an organization that has been formally approved by SSA as a "third-party provider" to assist employers in helping to identify and resolve these employer no-match issues, has developed a program based upon secure electronic protocols in conjunction with SSA submission standards, to materially aid employers with these compliance issues. With the capacity to securely download up to 250,000 names and social security numbers to SSA at a time, their solution is fast and highly economical.

John Hermann, CEO of Form I-9 Compliance, feels employers should be in a "pre-emptive position, not a reactive position." According to Hermann, "The problem is if the employer at the 63rd day needs to complete a new Form I-9 with a different social security number that was originally furnished by the employee, how could any employer be comfortable relying on documents with a new SSN potentially derived from thin air."

Instead, in advance of obtaining any no-match letter, employers utilizing their services download specific data elements that contain the employee's full name, social security number, and other data in a pre-specified, straightforward, simple format.

In turn, data is reformatted and a "pre-process scan" is performed to identify any potential errors that would cause the SSA to reject the employer's entire file. The employer may make corrections prior to Form I-9 Compliance's final submission of their data file to SSA. Upon successfully completing the "pre-process scan," they upload the file to the SSA for master file matching.

Finally, Form I-9 Compliance then obtains the verification results from the SSA and provides the client a confidential, concise report of all no-match social security numbers within 72 hours of the master file submission. Thus, their process identifies no-match social security numbers to assist employers to correct...in advance...employee-related payroll issues.

In the meantime, Congress continues to debate immigration reform with both Houses committed that should any legislation be agreed to, it will contain language requiring all employers, at some phase-in period, to verify absolutely every new employee's right to work in the United States. ■

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