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Employment Law Advisor

A Newsletter by Budd Larner Rosenbaum Greenberg & Sade, P.C.

Social Security "No-Match" Letters

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About the Author

Mitchell Rait is Counsel to the Firm. He concentrates his practice in general business law and litigation, employment law and corporate transactions in a wide variety of fields.

He began his career practicing labor, employment and benefits law on behalf of management handling NLRB, wrongful discharge and employment discrimination cases.

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You have recently received a letter from the Social Security Administration indicating that the social security numbers (SSNs) provided by several employees do not match the Social Security Administration's (SSA) records. Should you terminate these employees for not being authorized to work in the United States?

Introduction

SSNs are used by the SSA, the Internal Revenue Service (IRS), and the Bureau of Citizenship and Immigration Status (BCIS) (formerly the Immigration and Naturalization Service (INS)) for different purposes. Accordingly, each agency has its own interest in, and method for, dealing with such discrepancies.

The SSA has recently sent out an increasing number of "mismatch" or "no-match" letters to employers. Previously, only employers whose wage reports contained mismatches for 10% or more of its workforce received "no match" letters. Now the SSA is sending letters to employers who submit merely one or more "no match" SSNs.



Mismatch letters inform the employer that the SSN supplied by a particular employee is incorrect. Receipt of such a letter does not imply that the employee intentionally provided incorrect information and the letter is not a basis, by itself, for an employer to take any adverse action against the employee.

Additionally, the letter makes no statement about an employee's immigration status. Nonetheless, once a company receives a mismatch letter, it should take steps to ensure compliance with the applicable laws and respond accordingly.

Social Security Administration

An employer who receives a Social Security "no match" letter in fact has no obligation under the Social Security Act to take any action and

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the Social Security Administration has no enforcement authority to act against an employer who fails to act or respond. But see further discussion, below.

Internal Revenue Service

However, employers should note that, under the Internal Revenue Code, an employer is required to report accurate information and the IRS is authorized to penalize an employer when the name and SSN provided on the wage report do not match the SSA’s records.

Equal Employment Laws

The “no match” letter expressly states 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.” Should an employer use a Social Security “no match” letter as the basis for an employment action, it may be in violation of federal and state employment discrimination laws.

As such, do not terminate any employees without additional information. An employer may terminate an employee for employment eligibility violations only if the employer has actual or constructive knowledge that an employee is unauthorized to work in the United States. As stated above, a “no match” letter alone does not constitute actual or constructive knowledge.

Action Steps

1. Do not ignore the “no match” letter. If you were to do so, the INS could construe this inaction against you if the agency were to learn later that you employed an unauthorized worker.
2. Check the company’s records to ensure that the company did not make a typographical error in reporting the employee’s SSN to the SSA. If the employment records and Forms W-2 do not match, submit the corrected information on the appropriate Form W-2C with the correct information for the years that you reported the wrong SSNs. There will be no penalty for filing incorrect W-2s as long as the incorrect SSN was provided through no fault of the employer.
3. If an employee verifies that you have the correct name and SSN, ask the employee if he or she can provide any other reason for the “no match” letter. If no explanation can be given, report back to the SSA that the company has re-verified that the information submitted to the SSA is correct and that neither the employer nor the employee can explain the discrepancy. Ask the SSA to contact the company if any additional employer action is required. Ask the employee to contact the local SSA office to resolve the issue so that he or she can obtain benefits.



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Note that even though it is the employee’s obligation to correct a SSN mismatch, the employer has potential liability under the Internal Revenue Code and immigration law if the mismatch is not corrected.

4. If there is no clerical error, and your employment records do not match the SSN in question, share the “no match” letter with each employee and ask him or her to verify whether the company submitted the correct name and SSN to the SSA. Have the employee inform the company of any differences between the card and the employer’s information. Support documentation can be requested.

As per the items and instructions listed in an I-9 form, if a new document given appears to be valid on its face and relate to the individual, you are required to accept the new document. (Note: Do not require the employee to produce a social security card or other specific documentation, as this could be considered “document abuse” under employment eligibility verification laws.)

Once the employee provides the new information, you can access the SSA’s Number Verification Service, available at www.ssa.gov/employer to verify whether the new information matches the SSA database. If the new information matches the SSA database, then you should submit the correct information to

the appropriate agencies.

When requesting verification, give the employee a reasonable amount of time, including paid or unpaid time away from work if necessary, to investigate and/or correct any errors.

Ask the employee to keep the company posted of his or her progress, but do not be surprised by delays caused by government agencies working to address the error. If there is an error, the employer should correct the employee’s Form I-9 in addition to submitting the correct information to the SSA.

5. If, upon inquiry, an employee admits to a false SSN and/or that he or she is unauthorized to work in the United States, you must immediately terminate the employee’s employment.

Similarly, when an employee verifies that the information given is correct but you later learn additional information during investigation that gives you actual or constructive knowledge that the employee is unauthorized to work in the United States, you must terminate the employee’s employment. Additional information may come in the form of a co-worker’s credible tip, an employee’s admission or job abandonment. Note that the company may be considered to be on notice that an individual is unauthorized to work if the employee



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continually refuses to provide a correct SSN or if he or she gives an entirely different name and SSN in response.

6. At the conclusion of your investigation, write a letter to the SSA indicating that the company investigated and the outcome of the investigation. An employer may state one or more of the following with regard to each employee: (1) the company has verified that it reported the correct name and SSN to the SSA and the employee and the company are unable to explain the discrepancy; (2) it appears there was an error in the company's reporting and the correct name and SSN are being provided; or (3) the employee is no longer employed by the company as a result of job abandonment, voluntary resignation or involuntary termination.

Conclusion

If you receive a mismatch letter from the SSA, do not make any immediate employment decision before doing a good-faith investigation. If at the conclusion of the investigation, you determine that the employee was unlawfully working in the United States, and the employee has not come forward with other acceptable documentation, you must terminate the employee immediately.

If the employee is here legally and merely reported the incorrect SSN, you should file a separate W-2C with the IRS for each year you reported the incorrect information. The employer also may wish to correct the mismatch with the SSA and advise the employee of the situation for his/her benefits purposes. †

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Budd Larner is a law firm of over 100 attorneys with offices in Short Hills, NJ; Cherry Hill, NJ; New York, NY; and Atlanta, GA. Founded in 1934, the firm provides a full range of legal services to individuals, partnerships, corporations - ranging in size from start-up ventures to Fortune 100 multinationals - municipalities, educational institutions, financial institutions, insurers and reinsurers.

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