



ALIENS ON THE PAYROLL? DEPARTMENT OF HOMELAND SECURITY RECOMMENDS SAFE HARBOR ACTION IF YOU GET A "NO-MATCH" LETTER FROM SSA

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THE PROBLEM

Every year, employers file 250 million earnings reports with the Social Security Administration ("SSA"). In 2002 the SSA was unable to match almost 9 million wage reports, representing \$56 billion in earnings. At the end of 2003, the accumulated mismatch since 1936 was \$519 billion. A mismatch can be due to clerical errors by employers or SSA, or name changes, or illegal alien status.

SSA will send a letter to the individual, or the employer, or both to say there is "no match" on its system for the submitted record. If US Immigration and Customs Enforcement ("ICE") cannot verify back-up documents during an employer audit of I-9 Forms, it issues a Notice of Suspect Documents.

Section 274A(a)(2) of the Immigration and Nationality Act (INA), 8 U.S.C.1324a(a)(2), states:

"It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment."

Both regulation and case law support the view that an employer can be in violation by having constructive knowledge that an employee is unauthorized to work. So it's a big concern for an employer when it gets a "No-Match" letter from SSA or a Notice of Suspect Documents from ICE.

The August 15, 2007 regulations issued by the Department of Homeland Security ("DHS") are only meant for employers who do not have actual knowledge that a worker is an illegal alien. The employer who (i) received a "No Match" letter from SSA or a "Notice of Suspect Document" from ICE, and (ii) who follows the regulation, will be deemed not to have constructive knowledge of illegal status.

The regulation is a safe harbor, not a requirement, but it would be very smart to follow its three steps and to keep detailed records.

STEP 1 - THE FIRST 30 DAYS AFTER NOTIFICATION

Within 30 days of the Notification (an SSA "No-Match" letter or an ICE Notice of Suspect Document), an employer must check its records for clerical errors.

If the Notification was from ICE, the employer also must contact the local DHS office in the first 30 days to attempt to resolve the matter. There will be instructions on the ICE Notification.

If the problem is due to a clerical error by the employer, the employer should respond to the Notification promptly and verify the employee's status. The employer should make a record of the manner, date, and time of such verification, and then store the record with the employee's [Form I-9\(s\)](#) The employer may update the employee's Form I-9 or complete a new Form I-9 (and retain the original Form I-9), but the employer should not perform a new Form I-9 verification.

If its error was not the cause, the employer must contact the employee promptly. The safe harbor does not require the employer notification to occur within the first 30 days, but it's good practice to advise the employee as soon as the employer determines the problem is not its fault.

STEP 2 - THE FIRST 90 DAYS AFTER NOTIFICATION

If the employee can point out an error the employer did not notice, the employer should take the corrective action described above and should verify the employee, with SSA or DHS, as appropriate. If there was no employer error, the employer must advise the employee to get it straightened out with SSA in 90 days of the letter or Notice date. If the problem stemmed from an ICE Notice, advise the employee you need better documentation within 90 days of Notification date, and follow the instructions you get from DHS.

In the typical case - a "No-match" letter from SSA - if the employee reports the matter is corrected within the 90 days, the employer should verify with SSA. If the employer does this itself, rather than using a 3rd party service, it can telephone SSA toll-free 1-800-772-6270, weekdays from 7 a.m. to 7 p.m. EST. See <http://www.ssa.gov/employer/ssnvadditional.htm>. For information on SSA's online verification procedure, see <http://www.ssa.gov/employer/ssnv.htm>. Employers should make a record of the manner, date, and time of any such verification, because SSA recordkeeping is not perfect.

SSA advises that almost all cases can be resolved if employer and employee act promptly.

STEP 3 - DAY 91 THROUGH DAY 93

If the matter is not resolved in the first 90 days, should the employer just fire the employee? That raises other issues, so the DHS warns that employers: "should not be tempted to mistakenly terminate employment for citizens and authorized aliens."

During this final 3 day period, the employer should offer the employee a new Form I-9 verification procedure. This should be a uniform practice, in order to blunt charges of discrimination.

"The Form I-9 verification step in the procedure offers the employee one last chance to show the employer that he or she is not an unauthorized alien."

Section 1 of the Form I-9 (employee) and Section 2 (employer) must be completed by the 93rd day. For verification, no document with the suspect SS# can be accepted. The document which establishes identity (or identity and employment) must have a photograph. Documents in this verification process also must not be "facially suspect." For example, if the first three numbers of an employee's claimed SSN are in series which are not used by SSA - "000," "800" or "900" - this should be an automatic tip-off to an employer that something is amiss.

As a practical matter, it's hard to imagine how this last gasp verification process - essentially requiring that the employee show up with documents verifying a new SSN - could be fulfilled, except in the rarest of cases. It's really just a final step to show fair treatment when the employee has failed to produce good evidence during the 90 days following the Notification.

STEP 4 - DAY 94 AND BEYOND

The regulation does not require firing the employee on day 94. However, if the employee is not terminated, the employer has a person on its payroll without proper documentation. The "safe harbor" will not be available, and the employer could be found to have constructive knowledge that it was employing an illegal alien. It takes courage and judgment to continue the employment relationship after that point. Still, there may be supportable reasons (i.e. proof from SSA that it is working on the matter and needs more time), but it would be wise to consult counsel.

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