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AN EMPLOYER'S 7-STEP GUIDE TO NAVIGATING NEWLY REVIVED NO-MATCH LETTERS

Insights
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The Social Security Administration recently resurrected its practice of issuing Employer Correction Request notices – also known as “no-match letters” – when it receives employee information from an employer that does not match its records. If you find yourself in receipt of such a letter, we recommend you take the following seven steps in conjunction with working with your Fisher Phillips counsel.

STEP 1: UNDERSTAND THE LETTER

The first and perhaps most obvious step is to read the letter carefully and understand what it says. Too often employers rush into action before taking the time to read and understand the no-match letter.

WHAT DOES THE LETTER SAY?

The letter usually starts off notifying you that the Administration received one or more W-2s from you on which the employee's name did not match the Social Security Number in the Administration's database. The letter explains that the Administration considers this to be important, as it wants employees to get the benefits they are entitled to receive.

As the letter notes, there are many possible reasons for SSN/name mismatches, including typographical errors (e.g., the name is spelled wrong on the W-4, or a number is transposed in the SSN), name changes that haven't yet been reported (due to marriage, divorce, or other reason), or

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inaccurate input of the SSN on the W-2. There are other possible reasons for a mismatch, including identity theft, domestic violence, and witness protection status. Sometimes no-matches can be generated by a simple missing middle initial or a missing hyphen in an employee's hyphenated last name.

The no-match letter asks you to log onto a website called the Business Services Online (BSO) to learn the names of those who have been identified as no-matches and to provide the Administration with "necessary corrections to the Form W-2C within 60 days of receipt of this letter so we can maintain an accurate earnings record for each employee and make sure your employees get the benefits they are due."

Please note that the requirements for responding to a mismatch notice from the Internal Revenue Service differs from the requirements for responding to a no-match letter from the Social Security Administration. Make sure that you are sure which federal agency sent you this letter and call your counsel with any questions.

WHAT THE LETTER DOES NOT SAY

The no-match letter is **not** a notification that the Administration believes you or the named employee intentionally submitted the wrong name or SSN. **Nor does the letter call into question any employees' immigration status or work authorization.** Indeed, the letter includes an unambiguous warning that you are **not** to take any adverse employment action against any employee because of the letter "such as laying off, suspending, firing, or discriminating against any individual, just because his or her SSN or name does not match our records." Such action, according to the letter, could be a violation of "State or Federal Law and [could] subject you to legal consequences." It would behoove you to take this warning seriously.

STEP 2: GAUGE THE POTENTIAL IMPACT ON YOUR BUSINESS

The no-match letter provides two pieces of useful information right off the bat: (a) the number of alleged mismatches and (b) the tax year at issue. If, on one hand, the letter indicates that a small number of employees have been identified as no-matches, the potential impact of an internal

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review of the no-matches on your business is likely to be small.

On the other hand, if the number is large, operations could be significantly affected by an internal review of SSN no-matches and by interviews with identified employees. Keep in mind that, once word gets out that the company is asking employees about their Social Security Numbers, employees may quit even if they are not in the identified group.

STEP 3: REVIEW YOUR EMPLOYEE RECORDS

Next, take the time to review your records. Specifically, make sure you examine the names provided to the company by your employees and the SSNs provided by your employees on their W-4 Forms, and then compare them to the information provided to the SSA for the year in question. Look for typos, name changes, transposed digits, missing middle initials, or other innocent mistakes. Doing so will help you determine whether the issues are truly clerical or potentially problematic.

Step 4: Determine What Employee Handbook, CBA Provisions, Or Other Policies Might Apply

While some no-matches may turn out to be due to clerical errors or other innocuous reasons mentioned above, some may not. Again, a no-match does not mean that the employee is not authorized to work legally in the United States. What it does mean, however, is that the employee – willfully or not – may have provided you with false information.

Accordingly, it is important to identify the policies in place that may apply to this situation. Check your Social Security Number mismatch policy, if you have one. Check the policies that address candor in the workplace and address the consequences of employees providing you with false information. It is also important to know how those policies have been enforced in recent years. If, for example, an employee provided false information about their prior job experience, degree, date of birth, or any other similar information, what discipline, if any, did your company issue? The key here is consistency and determining before beginning any inquiry what the likely penalty will be in the event it is determined that an employee provided a false SSN at the time of hire. As with all workplace policies,

inconsistent enforcement can lead to claims of discrimination.

Moreover, if your company has employees covered by a collective bargaining agreement or otherwise represented by a labor union, and if there is a possibility of discipline or termination of employment if the mismatch cannot be resolved, the union may get involved. Some courts have held that simply receiving notice of a SSN mismatch does not provide you with sufficient “just cause” to terminate employment under typical labor law analysis, even where the employee is given a chance to resolve the mismatch and fails to do so. Also, employees may invoke *Weingarten* rights if and when called in to meet with HR about the mismatch.

STEP 5: TAKE EXTREMELY CAUTIOUS ACTION

Now that you have gauged your possible exposure, you should consider next steps. Some companies may decide to stick their heads into the sand and not to log onto the BSO website. We strongly recommend against disregarding the no-match letter. If your company has received one or more no-match letters and has done nothing about them, Immigration and Customs Enforcement (ICE) could, permissibly or impermissibly, view your failure to take action as proof that you had constructive knowledge of potential immigration issues. Also, if it turns out that the no-match at issue was due to identity theft, an employee could claim that your failure to log onto the site ended up causing economic damage to the employee.

We anticipate and recommend that most employers will choose to log onto the BSO website and begin the formal process of addressing the no-match letter. If you have not already done so, this would a good time to contact your Fisher Phillips attorney to guide you through the process of responding to the information on the BSO website.

BEFORE NOTIFYING EMPLOYEES OF A NO-MATCH LETTER

- **Check Payroll And Other Records Again.** Now that you have specific information on the employees identified by the Administration, check your records against the Administration’s notice. Is the name misspelled? Are the SSNs close, with one incorrect number or two numbers transposed? Has the employee reported a name change to you but not yet followed up with the Social Security

Administration? Identifying possible reasons for the mismatch before doing anything else is critical.

- **Re-Assess The Potential Impact On Your Business.** Once the employees at issue have been identified, you can more precisely assess the potential impact on your operations in the event some or most of those employees quit. How quickly could replacements be found? Is your business approaching an all-hands-on-deck event or time of year, or could your business tolerate sudden departures with little or no disruption?
- **Do NOT Use the Letter To Demand New I-9s.** Statistically, some 70 percent of no-match letters issued by the Administration involve employees who were not born in the United States. Requiring employees who were identified in the letter to fill out new I-9s runs the risk of claims of discrimination claims and lawsuits.

NOTIFYING EMPLOYEES

Once you have addressed these initial issues, begin notifying the identified employees about the letter. Remember, continue paying payroll taxes for all identified employees, regardless of the no-match notice. Here are some suggested protocols for notifying employees:

- **Meet Individually With Each Employee In A Private Meeting Space.** Two representatives of HR/management should be present (but not the employee's supervisor or anyone in the direct chain of command). Tell the employee that the company has been notified that the SSN you have on file does not match the employee's name. Instruct the employee to resolve the issue with the Social Security Administration and to report back as to their progress within 30 days. As a courtesy, you may provide the employee with the telephone number and address of the nearest Social Security Administration office.
- **Confirm Your Instructions In Writing.** At the meeting, hand the employee a letter (a copy of which you retain) recapping the points covered in the meeting. The letter should include a maximum timeframe by which you expect to hear back from the employee to resolve the issue. The best practice is to ask the employee to try to resolve the issue within 30 days (remember, the SSA requests that you address the issue within 60 days). Take into account

the individual's circumstances and be reasonably flexible if they need to take more than 30 days. Attach to the letter a copy of applicable policies and refer to them in the letter. Have the employee sign and date receipt of the letter and keep that copy in the employee's personnel file.

- **Document And Be Prepared To Take Action.** Take good notes of this meeting, especially of the employee's response to the notification. In the event an employee admits during the meeting (or at any time) that they are undocumented or otherwise admits that they may not lawfully work in the United States, be prepared to terminate their employment immediately. The penalties for knowingly employing a person who is not lawfully permitted to work in the U.S. can include monetary penalties (ranging from \$573 to \$22,927 per undocumented employee depending on whether it is your first, second, or third offense, loss of government contracts, loss of a business license, and even potential jail time of six months to ten years.
- **Keep A Chart Regarding Notice And Timing.** Track the dates of the meeting and when you provided your employees with notice about the no-match letter, and follow up with those who have not reported back at the 30-day mark. Keep good records as to what each employee tells you about their efforts to resolve the issue.

WHAT SHOULD YOU DO IF THE ISSUE IS NOT TIMELY RESOLVED?

If the employee continues to delay reporting progress towards a resolution or seems to be taking an inordinately long time to resolve the matter, consider sending reminders to the employee's home address. The reminder should inform the employee of the date you provided them with the notification (include a copy of the original notice), and any subsequent communications you have had with them about the issue.

If the issue has not been resolved after a reasonable time has passed, and the employee does not appear to be making efforts to resolve the issue, meet with management and legal counsel to discuss next steps. If you have received additional information from any other source that the individual may not be authorized to work in the U.S., you should provide this information to your legal counsel so that you can review the employee's I-9 and the new information

with your counsel to determine if further action is required, including possible termination.

WHAT IF THE ISSUE IS RESOLVED BUT YOU STILL HAVE SUSPICIONS?

This is indeed a challenging question. Remember, there are perfectly good reasons for mismatches: clerical errors, difficult-to-spell names, name changes, domestic violence, etc. But what if the employee produces an entirely new SSN, or presents the same SSN as originally provided but informs you of an entirely new name?

The key is to investigate the circumstances underlying the new number or name. Did the Administration issue a new number because of domestic violence or identify theft? Was the name changed as part of an immigration or other court proceeding? Does the employee have no explanation for the new number or new name?

If there is no plausible explanation for the new number or new name, you must then consider your SSN mismatch policy and your policies relating to the employee's duty to provide true and correct information as part of their employment, as described above. You must also consider your prior enforcement of those policies.

If you make a decision to discipline or terminate the employee, remember that the decision must not be based on a suspicion that the employee does not have the legal right to work in the United States or solely on the Employer Correction Request notice without additional evidence. You may receive evidence of an employee's undocumented status from many different sources, including the IRS, local law enforcement, medical insurance providers, and 401k plan administrators.

STEP 6: RESPOND TO THE SOCIAL SECURITY ADMINISTRATION

After you have reviewed the no-matches on the BSO website and taken action to address the no-matches, the Administration asks that you file Forms W-2C informing the Administration of corrections to employees' names and Social Security Numbers. Be sure to carefully follow the instructions for filing these forms.

In addition to filing forms W-2C for those employees for whom the no-match can be identified and rectified, we

suggest sending a letter to the SSA office that issued the no-match letter, advising it of the status of the remaining identified employees – for example, the employee is not currently employed at your company, the employee notified you and indicated that their SSN is correct, the employee notified you that they are consulting with the SSA to address issue, etc.

STEP 7: ASSESS YOUR I-9 COMPLIANCE

Now that you have a better handle on the number and nature of SSN no-matches, you should engage in a review of your I-9 compliance. This can be a particularly tricky step, given that the stated purpose of the SSN's no-match letter is to track benefits, not call into question immigration status of employees. That is why you should work with their Fisher Phillips attorneys to conduct a review of your I-9s.

Review your I-9 policies and procedures. Does every employee hired after November 6, 1986 have an I-9? Who is responsible for processing I-9s and have those employees been trained? Are all of the required sections filled out? Were they timely completed? Are I-9s for terminated employees being purged in a timely manner? These are just a few of the questions that should be asked about your I-9 records and processes.

Consider conducting a compliance review of a random sampling of I-9s to determine whether a full review is warranted. If a full review is warranted, work with your legal counsel to address and correct errors (to the extent they are correctable). While there is no indication that the Administration's issuing of a SSA no-match letter will trigger an automatic ICE I-9 audit, this is a good opportunity to get a handle on potential liability and address any issues in the event one were to occur.

CONCLUSION

The Social Security Administration's decision to re-start issuing no-match letters places employers in a no-win situation. If you do not log onto the BSO website, the government could infer that you knew of a potential problem with undocumented employees. On the other hand, if you log on to the BSO website, you cannot simply ignore the information contained on the website but rather must make a good-faith effort to address the issue.

Now that the SSA is back in the business of issuing no-match letters, and given that an estimated 11 million undocumented individuals live in the United States, you can get ahead of this issue by taking proactive steps to make sure names and SSNs of new hires match at the time of hiring. Moving forward, well before getting a SSA no-match letter, you should review your I-9s to gauge whether there is any potential exposure and revisit policies and procedures for verifying the accuracy of new hires' I-9s, consider using E-Verify for new hires, and use the Social Security Number Verification Service for payroll reporting purposes.

We will continue to assess the situation and provide necessary updates should any further developments occur, so you should ensure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any attorney in our [Global Immigration Practice Group](#).

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