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The Social Security Administration's "No-Match" Letters are Back, and Employers Must be Careful

The Social Security Administration has resumed the issuance of "No-Match" letters to employers, creating a murky set of obligations to avoid fines or penalties in the event of a Homeland Security Investigations ("HSI") audit, sometimes called a Form I-9 or worksite enforcement audit. Employers who receive "No-Match" letters should act swiftly and deliberately, not only to avoid the consequences of a finding that they knowingly employ unauthorized workers, but also to make sure that they do not run afoul of anti-discrimination laws.

It's no secret that the Trump Administration has made employment eligibility verification a major priority. In Fiscal Year 2018 ("FY2018"), Homeland Security Investigations ("HSI") conducted 6,848 worksite investigations (up from 1,691 in FY2017) and initiated 5,981 Form I-9 audits (compared to 1,360 in FY2017). While the "No-Match" letters are delivered by the Social Security Administration ("SSA"), they may be part of a larger administration crackdown on unauthorized employment. To wit, investigators will often request "No-Match" letters when conducting a worksite investigation, and the action (or inaction) of an employer may be relevant in assessing fines and penalties.

Employer Correction Request Notices, commonly referred to as "Social Security No-Match Letters," are not new. The process began in the early 1990s to notify employers that the SSA was unable to post earnings for some of their workers due to a mismatch. "No-Match" letters were typically sent to employers who had submitted a name and social security number on a wage and tax statement that did not match the SSA's records. In 2006, the Bush administration decided that these discrepancies could assist in combating unauthorized employment.

It issued regulations setting forth specific procedures to follow after the receipt

of a "No-Match" letter. Employers who followed the guidelines would be given safe harbor, and those who didn't risked a finding that they had "constructive knowledge" of illegal employment. However, before the regulations went into effect, they were challenged and enjoined in federal court. In 2012, the Obama administration rescinded the regulations and suspended all communication to employers regarding data mismatches. Many consider the Trump administration's resumption of this program to correspond with its increased worksite investigations and enforcement.

With a lack of clear guidance surrounding the "No-Match" letters, employers are in a difficult position. If they ignore them, they risk potentially adverse consequences when being audited or investigated. If they take adverse employment actions against an employee who hasn't been given sufficient time to resolve the discrepancy, they risk a discrimination charge from the employee. Some employees, even when given a reasonable period of time to address the issue, will be unable to adequately correct or explain the discrepancy. How does an employer navigate this quagmire?

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The U.S. Department of Justice has provided guidance on certain “Dos and Don’ts” here (<https://www.justice.gov/sites/default/files/crt/legacy/2014/12/04/Employers.pdf>). At the outset, it should be noted that there are a number of reasons why a “No-Match” can occur. For instance, mismatches can arise due to clerical or administrative errors, an unreported name change, confusion regarding multiple last names or the inconsistent use of hyphenation, among other reasons. A mismatch between an employee’s name and social security number does not necessarily mean that employee lacks a work authorization, and the government cautions that employers should not use the “No-Match” letter alone to make adverse employment decisions such as suspension or termination.

For each “No-Match” situation, the employee should be given notice of the issue and a reasonable amount of time to rectify the discrepancy. There is no set time period for what is considered reasonable, but the employer should check in consistently with the employee to make sure that he or she is taking steps toward resolution. If the inconsistency cannot be resolved, then the employer has some difficult decisions to make. Those cases will require careful and thoughtful consideration of the various pitfalls, and the advice of competent legal counsel is essential to avoiding liability.

In sum, an employer that fails to address a “No-Match” letter in any way, and fails to follow up with an employee, could face a finding by federal investigators that it had constructive knowledge that it was employing unauthorized workers. In any Form I-9 audit, investigators will specifically look for evidence as to how an employer dealt with such notices. On the flip side, an employer cannot react to such a “No-Match” letter by simply terminating an employee, as it could face a claim of discrimination.

P&A’s Employment and Labor Department is fully capable of addressing these issues both from the immigration law side as well as the employment side.

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