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They're Baaaaaack! "No-Match" Letters Resume After Three-Year Hiatus

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The Social Security Administration recently announced that it would once again be sending "No Match" letters to employers. "No Match" letters are intended to advise employers that there is some discrepancy in the SSA records between the name of an employee and the Social Security number listed for that employee as of the time that the employer submitted payroll taxes.

For years, the SSA routinely sent out "No Match" letters to employers. However, for tax years 2007 through 2009, the agency suspended sending out the letters because of **litigation surrounding a proposed Department of Homeland Security regulation** (later withdrawn) that would have provided a "safe harbor" for employers if they followed certain procedures in responding to "No Match" letters.

The **current version** of the "No Match" letter lists a single employee. In years past, the letters provided the employer with a list of employees who had match problems.

There has long been confusion about how the government expects employers to respond to "No Match" letters.

The usual letter states as follows: "The letter does not imply that you or your employee intentionally provided incorrect information about the employee's name or SSN. It is not a basis, in and of itself, for you to take any adverse action against the employee, such as laying off, suspending, firing or discriminating against the individual."

That's what the SSA says. However, the Department of Homeland Security, **in guidance that it issued in 2008**, advised employers that they should take a more active approach:

Respond to Social Security "Employer Correction Requests" or no-match letters. Check your records to ensure you have recorded the information correctly. Check with your employee to verify the information given to you is correct. Verify any corrections with SSA. Encourage the employee to resolve the issue with SSA and ensure any corrections are valid by checking again with SSA.

And there's yet another county heard from: The Office of Special Counsel of the Civil Rights Division of the U.S. Department of Justice, in its own **recently-issued guidance**, cautioned employers not to *terminate* a worker based solely on receiving information on a no-match, but to *follow up*, giving the employee a "reasonable period of time" to resolve the issue. Interestingly, that same OSC Guidance suggests that employers similarly follow up if they receive information from a *third party* (such as a commercial business that conducts employee

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background checks, a third-party identity theft inquiry, or a health care provider) indicating that there may be issues with an employee's Social Security number or work authorization.

The challenge for employers is that receipt of a "No Match" letter arguably gives the employer "constructive knowledge" that there may be an issue with a particular worker's authorization to work in the United States. Immigration and Customs Enforcement, the enforcement arm of the Department of Homeland Security, routinely requests copies of "No Match" letters during the course of I-9 audits.

So what should employers do when they receive a "No Match" letter?

*Promptly follow up with the employee, as recommended by the DHS and the DOJ.

*Advise the employee that there is an issue with his or her documentation or work authorization, and give the employee a "reasonable" amount of time in which to provide additional documentation. How much time is "reasonable"? Unfortunately, we have conflicting answers. The E-Verify system gives employees eight business days to provide additional documentation. The withdrawn DHS regulations would have given employees 90 days. Although any time frame within this large range might be legally "reasonable," many employers give their employees two weeks.

*Once you receive the additional documentation from the employee, follow up further (either with the SSA or the DHS) to verify any new information or documentation furnished by that worker.

If you need assistance with any immigration law issues, please contact any member of Constangy's **Immigration Law Practice Group**, or the Constangy attorney of your choice.

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