SEYFARTH SHAW LLP
ATTORNEYS

Management Alert

Safe-Harbor for Employers Who Receive Social Security Mismatch Letters

What is a mismatch letter?

The Social Security Administration (SSA) sends a "mismatch letter" to an employer if an employee's name does not match the information in the SSA database - generally, the social security number (SSN). The purpose of the mismatch letter is to solicit the employer's cooperation in correcting the discrepancy to ensure accuracy of payments and benefits to eligible workers. Although there are legitimate reasons for a "mismatch" (including clerical error and name change), it is also the case that use of a false SSN or use of an SSN assigned to someone other than the employee will cause a mismatch.

What is the current law regarding mismatch letters?

Under current law, an employer's course of action upon receipt of a mismatch letter is not entirely clear. Although many practitioners advise that the employer take some action to address the mismatch, the mismatch letter itself cautions the employer that the letter, standing alone, is not a basis for termination of employment. For a full discussion of the current state of the issue, see

http://www.seyfarth.com/dir_docs/publications/AttorneyPubs/immstar01.pdf.

What is changing?

On June 8, 2006, the Bureau of Immigration and Customs Enforcement (ICE) proposed a "safe-harbor" regulation describing what an employer should do if it receives a mismatch letter in order to avoid being charged with "constructive notice" that the employee is an unauthorized worker (if that indeed turns out to be the case).

Under the proposed regulation, what should the employer do to benefit from the safe-harbor?

Attached is a flow chart that depicts the steps to take in order to benefit from the safe-harbor under the proposed regulation.

Click here to see chart

First, the employer should check its records to determine whether the discrepancy results from a typographical, transcribing, or similar clerical error in the company's record or in communication to SSA. If there is such an error, then the employer must correct the record, inform SSA, and then verify

that the corrected record has resolved the discrepancy. The employer should document the manner, date, and time of the verification.

If there is no clerical error, then the employer should ask the employee to confirm the accuracy of the record. If the employee states that the company record is incorrect, then the employer should make the appropriate changes according to the employee, inform SSA of the corrections, and verify that the corrected record has resolved the discrepancy. If, however, the employee maintains that the record is correct "as is", then the employer must ask the employee to pursue the matter directly with SSA. If the employee then provides new information that would change the record, the employer must verify the validity of the new information with SSA.

When should the employer take those steps?

The above steps must be taken within 14 days of employer's receipt of the mismatch letter.

How does the employer verify that the corrected record has resolved the discrepancy?

Once the record has been corrected, the proposed regulation requires that the employer verify the corrected data with the SSA. Alternatively, if the discrepancy arose from a notification that had been sent to the employer by the Bureau of Immigration Customs and Enforcement (ICE) as a result of an audit or investigation, for example, then the corrected record must be verified with the Department of Homeland Security (DHS).

Currently, there are two ways to verify:

- By registering to participate in the Basic Pilot Verification Program, which runs employment authorization verification checks against SSA and DHS databases. An employer can register on-line at http://www.visdhs.com/EmployerRegistration.

- For social security number verification, the employer can telephone 1-800-772-6270 or go on-line to http://www.ssa.gov/employer/ssnv.htm. For more information, visit http://www.ssa.gov/employer/ssnvadditional.htm.

What if the above steps do not resolve the issue?

If the discrepancy is still unresolved 60 days following receipt of the mismatch letter, the employer may have the employee complete another Form I-9, using the same procedures as if the employee were newly hired except that no document containing the SSN or alien number that was the subject of the discrepancy may be used. In addition, no document without a photograph may be used to establish identity. The new Form I-9 must be completed within three days following the initial 60 day period.

What if the employee cannot produce appropriate documents for the new I-9?

Under the proposed regulation, if the new I-9 does not resolve the matter, the employer must either terminate the employment or risk a finding that the employer had "constructive knowledge" that the employee is an unauthorized worker (thereby putting the employer in violation of the Federal Immigration Reform and Control Act).

When will the regulation be finalized and effective?

The ICE regulation is proposed. The comment period closed August 14, after which ICE will either recall the regulation or issue it in final form.

What issues does the proposed regulation raise?

The proposed regulation raises significant concerns for the employer community. Those concerns include:

- the lack of defined SSA mechanism for correcting database errors and the resulting difficulty in verifying corrections within the time limits imposed under the proposed regulation;

- the resource strain that is likely to be experienced by employers with large workforces or with higher percentages of mismatches;

- the possible impact on employer business operations if implementation of the proposed regulation results in loss of a significant portion of the workforce.

Further, the proposed safe-harbor would not protect an employer from a finding by DHS that the employer had actual knowledge that the employee was an unauthorized worker. Rather, the safe-harbor provision only prevents a finding of constructive knowledge. In addition, there are a number of situations likely to arise that are not addressed in the proposed regulation, including:

- What should the employer do where the employment authorization issue is resolved through proper completion of a new I-9 (following unsuccessful attempts to resolve the discrepancy through SSA)? In that situation, the employer still has an incorrect social security number under which to report employee earnings.

- What should the employer do where the employee addresses the discrepancy by providing a social security number that differs from the number initially provided? In that situation, the employee may have provided false information to the employer during the employment application and verification process, perhaps raising the issue of termination due to misrepresentation.

- Should the employer verify (either with SSA or DHS, as applicable) the new I-9 information that is provided by the employee?

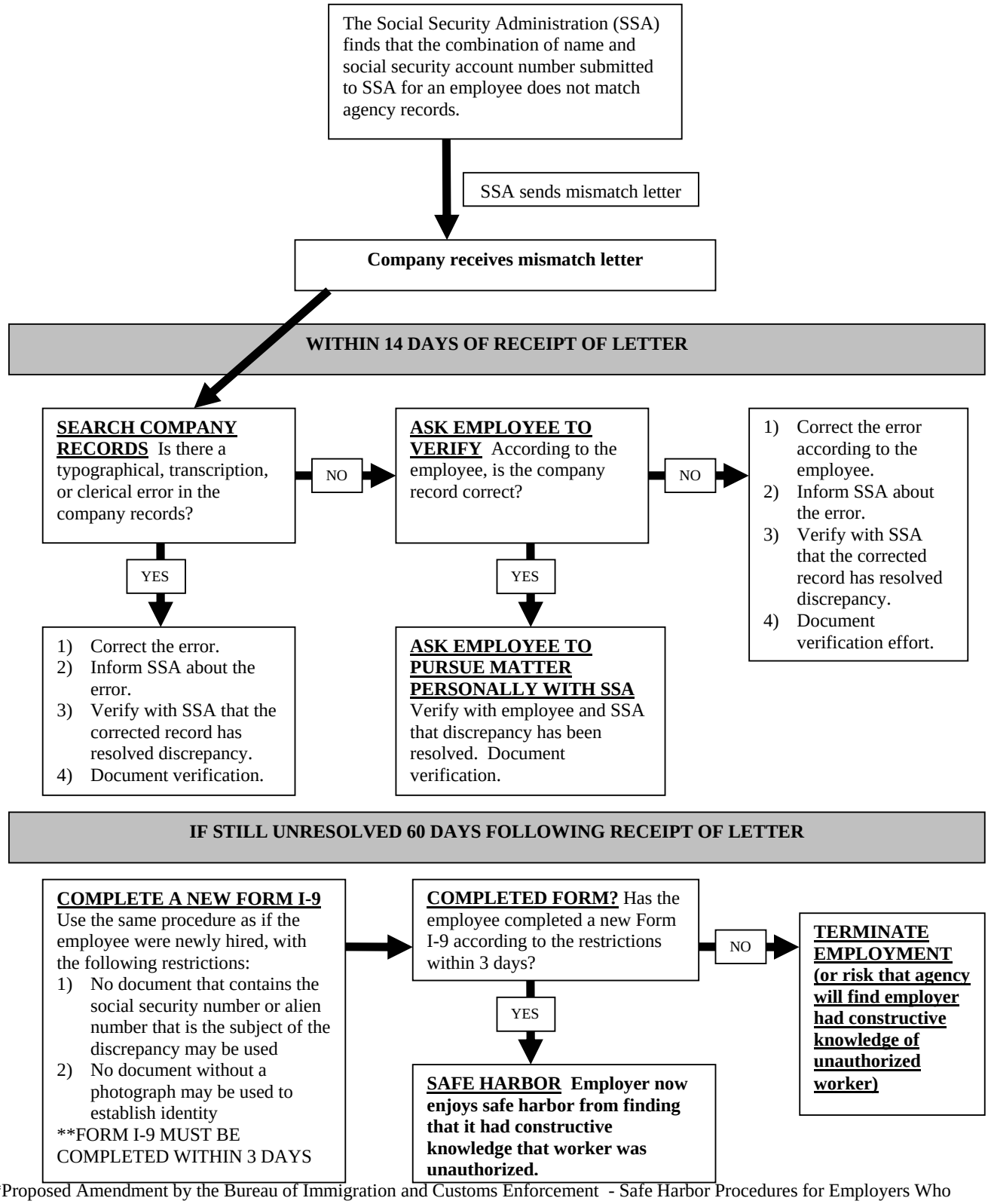
- Does the employer get the safe-harbor if the employer verifies the corrected information with SSA but the verification is not completed within 14 days?

What should employers be doing at this time?

There is a significant increase in worksite enforcement initiatives, from a resource as well as legislative perspective. Employers should ensure that their employment authorization verification policies and procedures are appropriate and sufficient and that they reflect best practices in this arena. Seyfarth Shaw LLP offers extensive immigration and I-9 experience to assist employers in auditing their current I-9s, in training their personnel in the proper completion of I-9s, and in developing and implementing state-of-the-art work authorization policies.

If you have any questions about mismatch letters please contact the Seyfarth Shaw attorney with whom you work or any immigration attorney listed on our website at www.seyfarth.com.

SOCIAL SECURITY MISMATCH LETTER SAFE HARBOR PROCEDURE*



*Proposed Amendment by the Bureau of Immigration and Customs Enforcement - Safe Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 114 (June 14, 2006)(to be codified at 8 C.F.R. pt. 247a)

ATLANTA
One Peachtree Pointe
1545 Peachtree Street, N.E.
Suite 700
Atlanta, Georgia 30309-2401
404-885-1500
404-892-7056 fax

BOSTON
World Trade Center East
Two Seaport Lane
Suite 300
Boston, Massachusetts 02210-2028
617-946-4800
617-946-4801 fax

CHICAGO
131 South Dearborn Street
Suite 2400
Chicago, Illinois 60603-5577
312-460-5000
312-460-7000 fax

HOUSTON
700 Louisiana Street
Suite 3700
Houston, Texas 77002-2797
713-225-2300
713-225-2340 fax

LOS ANGELES
One Century Plaza, Suite 3300
2029 Century Park East
Los Angeles, California 90067-3063
310-277-7200
310-201-5219 fax

NEW YORK
1270 Avenue of the Americas
Suite 2500
New York, New York 10020-1801
212-218-5500
212-218-5526 fax

SACRAMENTO
400 Capitol Mall
Suite 2350
Sacramento, California 95814-4428
916-448-0159
916-558-4839 fax

SAN FRANCISCO
560 Mission Street
31st Floor
San Francisco, California 94105-2930
415-397-2823
415-397-8549 fax

WASHINGTON, D.C.
815 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20006-4004
202-463-2400
202-828-5393 fax

BRUSSELS
Boulevard du Souverain 280
1160 Brussels, Belgium
(32)(2) 647 60 25
(32)(2) 640 70 71 fax

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