SOCIAL SECURITY MISMATCH LETTERS

Many employers throughout the United States have received the now infamous “mismatch letter” from the Social Security Administration (SSA). In essence, the letter advises that employees have a social security number (SSN) which does not match the information appearing in the SSA database. In most instances, the employee’s name does not “match” an otherwise valid SSN. This is a source of frustration for many employers, who have dutifully been making Social Security contributions on behalf of the employee in question.

Under the Social Security program, workers are entitled to benefits depending on the number of credits earned while working. The record of these entitlements is administered and maintained by SSA in its database. A worker’s SSN is the key to tracking information and providing accurate benefits. If an employer’s submissions do not “correlate” with SSA records, a problem is created for SSA, the employer and the employee.

Since 1993, SSA has mailed mismatch letters to employers whose contribution submissions indicated a 10% minimum mismatch rate within the employer’s workforce. Since January 2002, however, SSA has adopted a more aggressive approach and has been sending out mismatch letters to employers where there is any record mismatch. The content and purpose of the mismatch letter is to explain the problem and solicit an employer’s cooperation in correcting these discrepancies in order to accurately maintain SSA records, facilitate control of the system, and ensure the accuracy of payments and benefits to eligible workers. According to the most recently available information, SSA intends to send out about 750,000 additional letters to various employers in the very near future.
Not surprisingly, the mismatch letters have generated concern and confusion among employers regarding if and how to respond to SSA, what to do vis-a-vis its mismatch employees, and whether or not the SSA notification raises any obligations under the Immigration Reform & Control Act of 1986 (IRCA) involving the completion and verification of I-9 forms. In addition to potential exposure to sanctions by the Internal Revenue Service (IRS) as a result of repeatedly inaccurate reporting of such SSN information after notice of inaccuracies, other legitimate concerns include questions of whether investigating the discrepancy could amount to unlawful adverse employment action, potential IRCA sanctions, and prohibited discriminatory conduct.

The type of conduct raising concerns includes whether a company can or should suspend or otherwise discipline an employee; whether an employer can demand to see an employee’s social security card; whether the SSA letter itself triggers an obligation to re-verify the information already on the I-9; and whether the letter is evidence of employee fraud.

+ You are **not** being singled out by SSA: Remember, hundreds of thousands of these letters are being mailed to employees across the country. Additionally, the Immigration & Naturalization Service (INS) is not at your doorstep waiting to pounce on your company, detain your employees and cripple your business!

+ SSA is **not** an enforcement agency; it is an agency that administers the social security program. It cannot prosecute an employer.

+ SSA does **not**, in the normal course of business, provide or share SSA mismatch information with other government agencies including INS. As such, INS will not be visiting you as a result of your receipt of a mismatch letter.

+ As stated in the SSA mismatch letter itself, an employer should not take any adverse employment action against any employee based upon the receipt of the letter alone. Do **not** discipline, suspend or discharge employees referenced in the SSA mismatch letter on the basis of the letter alone.

+ As also stated in the SSA mismatch letter, the SSA correspondence indicates nothing adverse regarding the immigration status of any employee referenced in its letter.
+ SSA mismatch letters do not, in and of themselves, require that an I-9 form be reverified.

+ Do not ignore the letter from SSA.

+ Compare the information contained in the SSA mismatch letter with your internal records.

+ Create a paper trail. Contact your employees to fully advise them as to what you are doing as a result of receipt of the SSA mismatch letter, why SSA is doing it, and what you expect of employees in this regard.

+ Consider providing a copy of the SSA letter to employees or paraphrase its contents in your letter.

+ Explain that SSA is trying to correct its accounts and ensure that employees are properly credited with their social security contributions for their personal benefit.

+ Allow employees a reasonable amount of time to correct any deficiencies by verifying their numbers with SSA or otherwise. You may also provide the local SSA telephone number and address.

+ Do not demand that employees produce their social security cards. Naturally, if an employee voluntarily offers to provide the card you may view it for comparison purposes.

+ Do not automatically assume that the mismatched number is evidence of fraud. Remember, the mismatch letter itself indicates that, in and of itself, the SSA letter advising of the mismatch indicates no wrongdoing. There are many lawful reasons for mismatches, including name changes, data entry error, and others.

+ Do not take any adverse action against any employees unless, in the overall circumstances, you have discovered evidence which would make you constructively or directly aware of problems with an employee’s work authorization status. For example, if during your investigation an employee admits he/she does not have the work authorization documentation required under the I-9 rules, you should terminate that employee.
+ Do follow up with the employee after a reasonable amount of time has passed to assess whether corrective action was taken.

+ Do contact legal counsel if the mismatch has not been resolved, because the INS might assert that the unresolved mismatch situation supports a charge of a knowing unlawful hire.

+ Report your ultimate conclusions in writing to the SSA.

Seyfarth Shaw’s Business Immigration Group provides periodic information alerts about noteworthy developments in the business immigration field. The information that we provide is of a general nature and should not be interpreted as legal advice applicable to a specific factual situation. If you have questions about the information contained in this Immigration Alert, you should contact the member of Seyfarth Shaw’s Business Immigration Group with whom you work. If you would like to receive our business immigration e-mail alerts, contact Amy Huff via e-mail at huffam@seyfarth.com. If you want to know more about Seyfarth Shaw’s Business Immigration Group and our inbound and outbound visa processing capabilities, contact either of our co-chairs: Jim King in Atlanta at jking@seyfarth.com or Russell Swapp in Boston at rswapp@seyfarth.com. Thank you.