Employers Be Ready: Social Security Is Again Sending No-Match Letters

By Ted J. Chiappari and Angelo A. Paparelli*

The Social Security Administration (SSA) announced this month that it would resume notifying employers of discrepancies between employer-submitted payroll data and the agency's own records. The announcement adds a new chapter in the history of SSA no-match letters. This time around, in light of earlier developments, employers should make sure that they are better prepared to take appropriate measures to avoid potential immigration penalties.

The purpose of the no-match letter, according to the SSA,[1] is to allow the agency to obtain corrected information that would help it identify the worker to whom reported earnings belong so that earnings (and payroll contributions) can be properly credited to the deserving worker's Social Security earnings record. By offering reminders that "a no-match between an employee's name and SSN in the employer and SSA's records **DOES NOT** mean that the employee lacks work authorization, nor does it make any statement regarding a worker's immigration status" (emphasis in original), and that documentation of efforts to resolve the no-match should be retained in the event the Internal Revenue Service contacts the employer, is the SSA suggesting that an employer need not worry about properly completing its Forms I-9 (employment eligibility verifications)? Of course not.

SSA is merely returning to its original mission (accurate reporting and crediting of earnings and payroll contributions) before the Department of Homeland Security (DHS) tried using the SSA no-match letters in its I-9 enforcement efforts. In effect, SSA is saying that I-9 compliance is the business of the DHS and not the SSA. SSA had stopped sending its "no-match letters" to employers in 2007 in response to litigation over a Department of Homeland Security regulation that mandated steps an employer had to take whenever an SSA no-match letter was received.[2] The DHS regulation, which also provided a safe harbor to employers that followed those mandated steps, was preliminarily enjoined by a federal court in

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[1] Program Operations Manual System (POMS) Recent Change, RM [Records Maintenance] 01105 TN 06 (Apr. 6, 2011), at https://secure.ssa.gov/apps10/public/reference.nsf/links/04052011011437pm. See also https://secure.ssa.gov/apps10/public/reference.nsf/links/03302011095533am. (All links cited in this article were last referenced on Apr. 18, 2011.)

[2] The DHS final rule was published at 72 Fed. Reg. 157 (Aug. 15, 2007), available at http://www.gpo.gov/fdsys/pkg/FR-2007-08-15/pdf/E7-16066.pdf.

October 2007 and ultimately rescinded by DHS in October 2009.[3] SSA has now resumed its long-standing practice of notifying the employer of the need for cooperation in resolving discrepancies.

The supplementary information to DHS's 2009 notice rescinding its no-match regulation stated that DHS would "focus enforcement/community outreach efforts on increased compliance through improved verification, including increased participation in the U.S. Citizenship and Immigration Services (USCIS) E-Verify [online] employment eligibility verification system, the ICE Mutual Agreement Between Government and Employers (IMAGE), and other programs."[4]

The roughly 2% of U.S. employers that have enrolled in E-Verify will presumably be at less risk of receiving a no-match letter from SSA.[5] This is because employers enrolled in E-Verify are put on notice by a "Tentative Nonconfirmation" or TNC generated by E-Verify right after entering the I-9 data into E-Verify, followed by a referral letter to the employee, instructing both employer and employee on what to do and referring them either to the DHS (if there is a mismatch with DHS records or with the photograph on the document provided) or the SSA (if there is a discrepancy with SSA records). So it seems less likely that SSA will have to follow up with a no-match letter.[6]

But what are the practical consequences of such a letter for the more than 97% of U.S. employers that have not enrolled in E-Verify?

The DHS noted in the supplementary information to its proposed notice rescinding its no-match regulation that no-match letters from the SSA have formed the basis for multiple criminal investigations and prosecutions for harboring or knowingly hiring unauthorized workers.[7] In addition, the E-Verify referral letters mentioned above instruct the employer to attach a copy of the referral letter, signed by both employer and employee to the employee's Form I-9. This is also an indication that an unresolved no-match will be a factor in determining civil fines or criminal prosecution after an I-9 investigation.

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[3] See 74 Fed. Reg. 51447 (Oct. 7, 2009), available at http://www.gpo.gov/fdsys/pkg/FR-2009-10-07/pdf/E9-24200.pdf. A copy of a sample DHS letter that was to be included with SSA no-match letters is still available for review on the SSA website at: http://www.ssa.gov/employer/ICEinsert.pdf.

[4] 74 Fed. Reg. 51448 (Oct. 7, 2009). E-Verify is an Internet-based system administered by USCIS (the benefits division of DHS) that allows employers to check information from an employee's Form I-9 against DHS and SSA records to confirm employment eligibility. IMAGE is a program administered by Immigration and Customs Enforcement or ICE, the enforcement arm of DHS, and designed to encourage I-9 self-policing by private sector employers through the development of best practices for hiring and employment verification. A condition of ICE membership is participation in E-Verify.

[5] Enrollment statistics are for 2009 and are from Westat, THE PRACTICES AND OPINIONS OF EMPLOYERS WHO DO NOT PARTICIPATE IN E-VERIFY, a report prepared for the U.S. Department of Homeland Security (December 2010), p. ix, available at http://www.uscis.gov/USCIS/Resources/Reports/E-Verify/e-verify-non-user-dec-2010.pdf.

[6] A sample DHS-referral letter is at http://www.uscis.gov/USCIS/Verification/E-Verify/E-Verify%20from%20Controlled%20Vocabulary/DHSReferralNotice-EVEnglish_Sample.pdf. A sample SSA-referral letter is at http://www.uscis.gov/USCIS/Verification/E-Verify/E-Verify%20from%20Controlled%20Vocabulary/SSAReferralLetter-English_Sample.pdf.

[7] 74 Fed. Reg. 41801, 41804 (Aug. 19, 2009), available at http://www.gpo.gov/fdsys/pkg/FR-2009-08-19/pdf/E9-19826.pdf, which also includes a summary of cases where prosecutions followed receipt of a SSA no-match letter.

Reports by immigration lawyers around the country confirm that ICE I-9 auditors have in fact demanded the surrender of SSA no-match letters in investigations.[8] For those employers concerned about a possible I-9 investigation in the future, it would be prudent to take the following steps, some of which are similar to those outlined in the E-Verify SSA referral letter mentioned above. The employer should:

1. Review the no-match letter with the employee as soon as possible.

2. Review employer records and have the employee review his or her documents (including the employee's I-9 and W-4 on file, as well as the Social Security card) to insure that the name, Social Security number and date of birth are correct.

3. Let the employee know that both the employer and the employee need the employee's valid SSN for proper tax compliance, and for proper crediting of the employee's earnings for Social Security benefits in the future, that the employer has already reviewed its records to make sure there were no typographical errors made on the employer's part.

4. If the employee confirms that the information is accurate, then ask the employee to appear in person at the local Social Security office to request that the SSA issue a letter clarifying the situation. There may be a logical explanation for the discrepancy, e.g., a typographical error or an unreported name change.

5. Give the employee a reasonable amount of time to clear up the situation at the SSA. What is reasonable, is open to interpretation. Employees of E-Verify participants are given eight federal government work days to visit a SSA or DHS office to resolve the matter, although SSA has the ability to put the TNC into continuance for up to 120 days. The SSA instructions announcing the resumption of SSA no-match letters indicates that it may take up to two weeks, and sometimes longer, to get a new or replacement Social Security card. The 2007 safe harbor regulations (that were rescinded in 2009) gave employers 30 days to take initial steps and 90 days altogether to resolve the matter. The Department of Justice's Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) is the unit responsible for administering the antidiscrimination provisions of the Immigration and Nationality Act. OSC explicitly mentions in its December 2010 guidelines the 120-day time-frame in the E-Verify context: "This recognizes that it can sometimes take that long to resolve a discrepancy in SSA's database."[9]

If, after a reasonable deadline expires, an employee has not presented any acceptable documentation or evidence that the SSN has been corrected and offers no credible explanation of why more time is needed to correct the discrepancy, the employer may well place itself in legal jeopardy. In an I-9 investigation or a criminal prosecution (assuming that the worker is in fact not authorized to work), the government would

[8] Josie Gonzalez, Chair, Verification & Documentation Liaison Committee, Grant Sovern, Marketa Lindt and Kathleen Walker, Resumption of Social Security No Match Letters: Employers Beware, American Immigration Lawyers Assn. (AILA) Liaison, AILA InfoNet Doc. No. 11041231 (posted Apr. 12, 2011).

[9] See http://www.justice.gov/crt/about/osc/pdf/publications/SSA/FAQs.pdf.

likely assert that the employer's failure to resolve the discrepancy through a more diligent inquiry amounts to evidence of the employer's constructive knowledge that the worker lacked employment authorization.[10]

A similar analysis could also apply if an employer is put on notice of an Social Security number discrepancy by a third party, such as a financial institution administering the employer's 401(k) plan, a health provider under an employer-provided health plan, or a commercial business that conducts background checks or identity-theft inquiries. OSC in its December 2010 guidelines cautions that these private-sector sources have no legal authority to determine employment authorization and may not have access to up-to-date information in SSA databases. Nonetheless the OSC suggests that "an employer should at a minimum follow the same policies, procedures and timelines as it does for SSA no-match letters."

Since, in the instance of third-party notification, the employer has not received any official word from the SSA, the employer may have the additional argument that it has no legal duty to take any adverse action against the employee unless and until it is contacted directly by SSA, DHS or some other government agency about the discrepancy. Presumably the risk of being charged with discrimination would be minimized if the employer took no adverse action against the employee based solely on private-sector information. Other than the OSC FAQs, there is no clear guidance on how to proceed in these situations. Prudent employers should nonetheless consider the risk, in the event of an I-9 audit, of being charged with continuing to employ someone while knowing – at least constructively – that the individual lacks work authorization.

Two other aspects of the SSA's recent announcement are worth noting. First, the SSA no-match letters are being issued only for the 2010 and subsequent tax years; letters that were withheld for tax years 2007 through 2009 will not be mailed to employers. Second, another version of the SSA no-match letter called "educational correspondence," which had been sent to employers with a minimum number of employee names and SSNs not matched to SSA records, has been officially discontinued. SSA had also stopped sending these letters as of 2006 in response to the litigation over the DHS's SSA no-match regulation.

When DHS rescinded its SSA no-match regulation in 2009, it justified the action by saying it had "determined that focusing on the management practices of employers would be more efficacious than focusing on a single element of evidence" (i.e., receipt of a SSA no-match letter).[11] With a less than 3% enrollment rate in E-Verify among employers and sporadic (albeit increased) ICE inspections of employers' I-9s, the wisdom of DHS's enforcement efforts remains unproven. For employers whose I-9s are audited by ICE, however, an employer's response to a SSA no-match letter will certainly be an important "element of evidence" that ICE agents focus upon in assessing the employer's I-9 compliance and potential criminal liability.

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[10] 8 CFR § 274a.1(*l*)(1) provides that constructive knowledge is "knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition." While this regulation offers examples of circumstances that warrant a finding of constructive knowledge, the cited examples are offered merely as illustrations and, as the rule expressly notes, are not all-encompassing.

[11] 74 Fed. Reg. 51449 (Oct. 7, 2009).