Mix and Match: Employee ID Regulations May Be Cleaned-Up

Proposed changes in Social Security mean employers may receive "no-match" letters. Here's how to handle one in your office.

LAST YEAR, APPROXIMATELY 128,000 LETTERS WERE SENT FROM THE SOCIAL SECURITY ADMINISTRATION (SSA) TO EMPLOYERS indicating the employer's wage report contained a social security number or employee name that did not match with SSA's records. On June 14, 2006, the Department of Homeland Security (DHS) issued proposed regulations that ready employers with procedures to follow upon the receipt of these "no-match" letters.

Accurate wage information is important to employers so the employee's earnings can be recorded to the proper account. Employees are required—using I-9 forms, which are used to verify employment eligibility when an employee is hired—to keep accurate employee information. Failure to comply can lead to a fine for that employer.

The SSA does not send no-match letters to every employer that submits erroneous information. Instead, SSA only sends letters to those employers who have mismatched information on more than 10 W-2 forms if the total number of mismatched W-2 forms is more than half of the total number of forms submitted by the employer. The SSA also sends letters to all employees who submit mismatched information. In 2005, the SSA sent approximately 8.1 million of these letters to workers.

The no-match letter sent by the SSA indicates that there is a discrepancy, but also notes that it does not imply the employee in question is an illegal immigrant. The letter goes on to instruct the employer that any adverse action taken against the employee solely on the basis of the letter could violate state or federal law. As result of such language, many employers have ignored no-match letters, or merely informed the affected employee of the letter and asked him or her to follow up with the appropriate federal agency.

Although federal law prohibits the knowing employment of unauthorized employees, the language contained in the current version of the no-match letters indicates that receipt of the letter does not place the employer on notice that an employee referenced in the letter was working illegally. However, the DHS has indicated that many of the recent raids and federal criminal charges against those employing illegal workers have been precipitated by the employers' repeated disregard of numerous no-match letters. In light of the inconsistency between recent DHS activities and the language contained in the no-match letters, employers clearly need some guidance on how to deal with such letters.

The rules proposed by the DHS state that an employer must undertake specific steps to avoid a claim that a no-match letter constitutes constructive knowledge that the company is employing an unauthorized worker. Within 14 days of receiving the no-match letter, the employer must attempt to resolve the discrepancy by checking company records for clerical errors. If no errors are found, the employer must then promptly ask the employee if the provided information is correct. If the employee states the information that he or she provided is correct, then the employer must advise him or her to resolve the discrepancy with the SSA.

Under the proposed rules, the mismatch must be resolved within 60 days of receipt of the no-match letter. If this does not occur, then the employer must verify the employee's work eligibility and identity by completing a new I-9 form and requiring different photo identification than what the employee had previously submitted. The DHS has stated that a failure to resolve a mismatch through this reverification process places an employer in a position of "choos[ing] between taking action to terminate the employee or facing the risk that DHS may find that the employer had constructive knowledge that the employee was an unauthorized alien."

Employers are required to retain the I-9 forms, which currently are available in a digitized format, but have expressed frustration with having to store them in paper or microfiche formats. The remainder of the proposed rules will not go into effect until the conclusion of a comment period. MSC

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