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The Approaching Social Security Number No-Match Flood

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Employers should be aware that we anticipate a flood of Social Security Number (SSN) no-match letters in the coming weeks. In the world of I-9 compliance, companies are stuck between the proverbial rock and a hard place. On the one hand, if they fall short in their compliance efforts, they face potential scrutiny from the Department of Homeland Security/Homeland Security Investigations (DHS/HIS). On the other hand, if they go too far in their vetting efforts, they face the wrath of the Department of Justice/Immigrant & Employee Rights (DOJ/IER). A few years ago, DOJ/IER published FAQs on how employers should navigate an SSN no-match notification. Some question whether DOJ/IER under the current administration would continue to enforce such rules, and yet, even if that's true, nobody should question whether the private bar would be willing to take on such cases.

Some of our clients have already reported receiving SSN no-match letters under this new administration. Traditionally, DHS officials have taken the position that a no-match notification does not necessarily place company personnel on notice that an affected employee is unlawfully present. Rather, such notifications create for the employer a duty to inquire further—i.e., to check records to ensure a transcription error did not occur, and if no such error is present, to meet with the employee and inquire about why SSA (or another agency, such as the Internal Revenue Service) would point to this SSN as problematic. In some cases, during such discussions, the employee will either confess that the SSN is invalid (in which case the employer would now need to terminate the employee) or simply not return to work. If the employee contends that the SSN is valid, however, the employer should give the employee a reasonable opportunity (e.g., 60 to 90 days) to visit the local SSA office and attempt to obtain documentation to substantiate that the number is valid. In the end, while a no-match notification itself would not put the employer on notice of a problem (simply because SSA records are admittedly problematic), DHS takes the position that an employee's inaction (e.g., failure to take action to resolve the no-match issue during that reasonable period) could place the employer on notice of a problem with the employee's status.

As an interesting twist, some of the companies we represent have been enrolled in E-Verify. In such cases, employers have already processed the employee's information, including the SSN, through the DHS and SSA databases. The fact that some of these employees are now being flagged as having problematic SSNs has proven to be quite the mystery for these employers.

And yet, employers should not ignore SSN no-match notifications. Over

the years, too many criminal cases have been brought in which DHS has asserted employers repeatedly received SSN no-matches and failed to take appropriate action. Employers who ignore such letters, i.e., fail to inquire further, will face allegations of engaging in willful blindness, deliberate ignorance, etc., relating to the legal status of affected workers. After all, the Attorney General has already mandated that criminal charges be brought against employers who engage in such conduct (e.g., knowingly employing undocumented workers, etc.).

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