

# FELS

Farm Employers Labor Service



Serving Agriculture in Labor Management Relations

2300 River Plaza Drive • Sacramento, CA 95833 • 800-753-9073 • FAX 916-561-5696

## No-Match Rule Recommendations

U.S. District Court Judge Charles Breyer on Oct. 10 stopped the U.S. Department of Homeland Security (DHS) from implementing its rule on Social Security Administration (SSA) no-match letters. The rule offers safe-harbor steps an employer can follow to avoid use by DHS of a no-match letter as evidence of the employer's constructive knowledge that employees identified in the letter lack work authorization. The preliminary injunction also prohibits SSA from including with its no-match letters a DHS guidance letter on the no-match rule.

While the preliminary injunction may be good news for employers, DHS can still audit employers and apply a "constructive knowledge" concept to an employer who received a no-match letter. Under that concept, the DHS says an employer's failure to take reasonable steps to either resolve the discrepancy or reverify work eligibility after getting a no-match letter may impute to the employer constructive knowledge of work ineligibility.

The DHS analogizes this situation to that in a case where a court found an employer had constructive knowledge that some of his employees were not work authorized where, after being told by an INS officer that he suspected them of using fraudulent immigration documents, the employer did not investigate the officer's suspicion.

Along that line, Judge Breyer observed that even without the no-match rule, the attorney general may prosecute violations of the ban on knowingly continuing to employ a work-ineligible person, in that receipt of a no-match letter can support a finding of constructive knowledge under a totality-of-the-circumstances test.

In light of the injunction, employers should:

**1. Follow the guidelines** suggested in the SSA no-match letter to resolve no-match issues. Those guidelines are also stated in the *Social Security Mismatch Protocol* of the Saqui & Raimondo law firm. See page 3 or visit [www.fels.org/find#0710](http://www.fels.org/find#0710).

**2. Give affected employees** a letter discussing the no-match issue. For a letter suggested by the Barsamian & Moody law firm, see page 4 or visit [www.fels.org/find#0710](http://www.fels.org/find#0710), then click on *Sample Letter to*

*Employee (English) RE: SSA Mismatch*. The letter is also available in Spanish.

**3. Establish a company policy** on SSA no-match letters. At the end of this article is a sample policy. The policy includes these elements:

- A. The company's procedures for responding to an employee request to change in company records his or her Social Security number and/or name. The no-match rule's summary states: "An employee who produces different documents with different numbers, then, depending on the circumstances, may put the employer on notice that the employee has committed document fraud. Thus, an employee who provides such notification would not only face general policies that the employer applies to employees suspected of criminal conduct [citation omitted], but the employee could also face federal prosecution for fraudulently completing a Form I-9. Facing possible termination or prosecution, it is unlikely that undocumented aliens will be 'encouraged' by the amended rule to continue to commit such crimes to gain employment."
- B. The company's procedures upon being notified by SSA of one or more no-matches. While the no-match rule, if implemented, would not require an employer to follow its safe-harbor steps, it is still prudent to take at least some arguably reasonable steps to resolve a no-match. As in the past, a deadline for reporting to the employer a resolution of the no-match needn't be set for the employee. For now anyway, the mere fact you inform an employee of the no-match and ask him to resolve the issue may be sufficient to meet the "reasonable inquiry" standard.
- C. The company's procedure for when a court or governmental agency asks for information about a person using one of your employees' social security number. This usually occurs in garnishment cases. The issue was examined in a previous issue of **FELS Newsletter**. Visit



## SOCIAL SECURITY MISMATCH PROTOCOL

**IF YOU RECEIVE A NO MATCH LETTER:**

1. **Verify Your Records:** Compare the employee's SSN with your records. If your records do not match the W-4 form, then correct the W-4 form and report the correction to the SSA. Maintain copies of correspondence submitting corrected information to the SSA.
2. **Notify the Employee of the Discrepancy:** If checking your records shows you have been reporting the number as provided by the employee, then inform the employee that the SSA has notified you of the problem and that he or she must resolve it with the SSA. Tell the employee to report the correct information to you once it has been resolved with the SSA. Do not give the employee a deadline to report the information unless you want to discharge employees who fail to provide corrected information. If you decide to impose a deadline, it must allow a reasonable amount of time to resolve the problem, as the employee may need to obtain a new Social Security card.
3. **Confirm your Instructions in Writing:** Write a letter directing the employee to resolve the issue with the SSA and asking the employee to provide updated information, and include it with the employee's pay check. Retain a copy of the letter for your records. Maintain a list of the names of employees who received the written instructions. Remember, you must continue to pay payroll taxes for each employee, regardless of any mismatch.

If the employee returns with new information, correct your payroll records and send a letter to the SSA notifying the agency of the correction. If the employee returns with information that could indicate a lack of work authorization (i.e., a new name and/or SSN), then you may need to follow up further to avoid having "constructive knowledge" of the lack of authorization.

If the employee does not return with corrected information, do not automatically fire the employee or reverify their authorization to work in the United States. However, this is a good opportunity to review your I-9 records and make sure they are in order. If you do not receive corrected information by the end of the tax year, send a letter to the employee stating as follows:

"On [date], we notified you that the Social Security Administration had advised us of a name/number mismatch in the agency's records of your account. We suggested that you go to the local SSA office to straighten out the problem. Please let us know if any of the information in our records needs to be changed."

If you rehire the employee in the following season, another letter with the same warning should be sent at the end of the next tax year if the employee does not provide corrected information. Once you have requested the update in two successive tax years, you do not need to ask again. As a matter of policy, having employees submit a new W-4 on an annual basis will serve as an annual solicitation for their correct SSN.

**IF THE EMPLOYEE USED THE QUESTIONABLE SSN ON THE I-9, REVERIFY THE I-9 BUT DO NOT ACCEPT ANY DOCUMENT WITH THE QUESTIONABLE SSN UNLESS AND UNTIL THE MISMATCH IS RESOLVED.**

4. **Write a letter to the SSA:** Write a letter to the SSA reporting the steps you took to resolve the SSN conflict for each affected employee, including those you no longer employ.
5. **Establish Company Policy and Apply it Consistently:** You must establish and implement a policy and procedure for responding to mismatch letters and to maintain records of your response to mismatch letters. However, you must be careful to apply the policy consistently to all employees in order to avoid claims of discrimination.
6. **Do not terminate:** Employers should never assume an employee with a reported mismatch is an undocumented alien, and should never fire an employee because of a mismatch letter. In the same token, employers cannot ignore information they receive when following up on mismatches.
  - If an employee admits undocumented status: Immigration law prohibits employers from continuing to employ workers that they know to be undocumented. The employee must be terminated immediately.
  - If an employee shows up with an entirely different "new" name and/or Social Security Number: If a person comes up with an entirely new identity, then the employer must demand an explanation. If the explanation is reasonable, then the employer can accept it and should re-verify the I-9.
  - If an employee repeatedly fails to correct a mismatch: This is a matter of employer policy. If the employer has a policy of terminating for failure to provide accurate information, then the employee should be terminated for failure to provide accurate information on hire. But such a policy must be enforced consistently. Otherwise, the employer can continue to employ the individual, but must be aware that it may not be able to terminate others who provide inaccurate personal data.

Sample Letter to Employee - RE: SSA Mismatch  
[YOUR LETTERHEAD]

Dear \_\_\_\_\_:

We have been informed by the Social Security Administration that the name and/or Social Security number on our company records regarding you do not match the Social Security Administration's records. This could be due to any number of reasons, such as a name change, or even simple typographical errors on our records or their records. The name and Social Security number we have on file is:

\_\_\_\_\_  
[Name]

\_\_\_\_\_  
[Social Security Number]

Please check your Social Security card. If the name and number on your card is the same as the information we have, shown above, please contact any Social Security Administration office to resolve the issue. Once you have done so, please let me know if there are any changes that we need to make to our records.

If the name and/or number shown above are not the same as what is on your Social Security card, please notify me immediately, so that we can correct our records, and so we can let the Social Security Administration know that we have corrected our records. Until this issue is resolved, the Social Security Administration cannot credit your account with your earnings from working here, so you should clear it up as soon as possible.

Further, the Internal Revenue Service may fine us every time we do not furnish your correct SSN on a wage report. So that we may avoid this penalty, we ask that you act to resolve this conflict as quickly as possible.

If you have any questions about this, please contact me.

Sincerely,

\_\_\_\_\_

Estimado(a) \_\_\_\_\_:

La Administración del Seguro Social (ASS) nos ha informado que el nombre y/o número de Seguro Social en los registros de la Compañía para usted no concuerdan con los registros de La Administración del Seguro Social. Esto puede ser a causa de varias razones, como cambio de nombre, o error tipográfico en nuestros archivos. El nombre y número de Seguro Social que tenemos en nuestros archivos es:

\_\_\_\_\_  
[Nombre]

\_\_\_\_\_  
Número de Seguro Social]

Por favor de examinar su tarjeta de Seguro Social. Si el nombre y número en su tarjeta es el mismo indicado arriba, por favor de comunicarse con la oficina de La Administración del Seguro Social para resolver este asunto. Ya que lo ha hecho, por favor de informar a la Compañía si hay cambios que necesitamos hacer en nuestros registros.

Si el nombre o número indicado arriba no es el que esta indicado en su tarjeta de Seguro Social, por favor informémos inmediatamente de modo que podamos corregir nuestros registros y notificar a La Administración del Seguro Social que hemos corregido nuestros registros. Hasta que este asunto se resuelve, La Administración del Seguro Social no puede dar credito a su cuenta de salarios aqui, y debe aclarar esto tan pronto como sea posible.

El Servicio de Ganancias Internas tambien puede multarnos cada vez que no presentemos su número de Seguro Social correcto en el reporte de salarios. De modo que podamos evitar esta multa, solicitamos que usted actúe para resolver este conflicto tan pronto como sea posible.

Si tiene preguntas tocante esto, por favor de comunicarse conmigo.

Sinceramente,

\_\_\_\_\_

Barsamian & Moody - "The Employers' Law Firm,"<sup>sm</sup>  
<http://www.theemployerslawfirm.com>