

THE DO'S AND DON'TS OF RESPONDING TO SOCIAL SECURITY "NO-MATCH" LETTERS

The Social Security Administration ("SSA") and the Department of Homeland Security ("DHS") have stepped up their efforts to prod employers to correct discrepancies between employer-reported employee names/Social Security numbers and the SSA's records. Until recently, an employer might receive an "Employer Correction Request" after the SSA discovered errors in at least 10% of the employer's reported W-2 information. However, once the DHS was established, the number of "No Match" letters increased. Now employers can expect to receive "No-Match" letters if mismatched information is found on more than ten W-2 forms if the total number of mismatched W-2 forms is more than 0.5% of all of the forms completed by the employer. For the SSA, this is simply a wage reporting and attribution issue: the SSA must properly attribute social security contributions to the correct employee to enable employees to collect the proper level of social security benefits once they become eligible. The DHS, however, is concerned that an unusual number of mismatches may indicate that the employer is engaged in unlawful hiring or continued employment of unauthorized aliens, in violation of Immigration and Naturalization Service ("INS") requirements.

Some employers are so worried about the possibility of being penalized for employing illegal aliens that they are simply firing employees without looking at some of the more obvious reasons for discrepancies, such as transposition of numbers, incorrect or incomplete spelling of names, or unreported change in names. Firing employees who are authorized to work in the United States can result in penalties to the employer. Thus, there is a danger that in trying to comply with the law, the employer may violate the law.

About a year ago, the DHS proposed regulations that would provide "safe harbor" procedures for employers to follow in response to "No-Match" letters issued by the SSA or DHS. The proposed regulations describe steps that a reasonable employer would take within 14 days of receipt of a "No-Match" letter:

- The employer should check its records to determine whether the discrepancy stems from a typographical, transcription, or other clerical error in the employer's records or in the employer's communication with the SSA or DHS. If there is such an error, the employer should correct its records and so notify the inquiring agency in writing.
- If the discrepancy cannot be resolved by the employer reviewing its own records, a reasonable employer would ask the employee to confirm that the employer's records are correct. If the employee provides information for the employer to correct its records, the employer would then forward the corrected information to the inquiring agency. If the employee claims the employer's records are correct, a reasonable employer would tell the employee to pursue the matter directly with the inquiring agency.

An employer's response to a "No-Match" letter that complies with the safe harbor procedures would be deemed "reasonable." Therefore, even if the employee, in fact, is an unauthorized alien, the employer would not be deemed to have had constructive knowledge of the employee's ineligibility to work in the United States. On the other hand, if the



verification procedure is not resolved within 60 days of receipt of the “No-Match” letter, and if the employee’s identity and work authorization cannot be verified, the employer must choose between firing the employee or risking that the DHS may determine that the employer had constructive knowledge that the employer had hired or retained an illegal alien. An employer with actual knowledge that an employee is an unauthorized alien cannot avoid liability because it follows the safe harbor procedures.

For further information regarding how to handle “No-Match” letters, please contact **Joan M. Eagle** at 312.845.5439 or jeagle@schwartzcooper.com, or any member of Schwartz Cooper’s Labor & Employment Law practice.