

## “NO MATCH” LETTERS – WHAT’S AN EMPLOYER TO DO?

BY JENNY L. PANKO



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You have just received a letter from the Social Security Administration (SSA) stating that the social security number you provided on an employee’s W-2 form does not match the SSA’s records. Or, you have just received a document entitled “Notice of Suspect Documents” from the Department of Homeland Security (DHS) indicating that the immigration status of one of your employees is in question. What should you do?

In August of 2007, DHS issued regulations regarding procedures employers must follow upon receipt of a “no match” letter from the SSA or a Notice of Suspect Documents from DHS. Those regulations have not yet been implemented due to an injunction that was issued by the U.S. District Court. However, employers should be aware of the regulations and what steps they should take upon receiving either of these notices.

Under present law, employers are prohibited from knowingly hiring or continuing to employ an “unauthorized alien,” or a worker who does not have proper documents verifying his or her eligibility to work legally in the United States. The term “knowingly” includes both actual and “constructive knowledge,” or knowledge which can be reasonably inferred from the circumstances. An employer could be charged with constructive knowledge if the employer fails to address the receipt of a no match letter, or a Notice of Suspect Documents.

The DHS regulations include a “safe harbor” provision, which sets out steps an employer must take to address a no match letter or Notice of Suspect Documents. If the employer follows the steps set forth in the safe harbor procedures, the employer is protected from DHS issuing a finding of constructive knowledge based on those documents.

There are two sets of steps employers should follow to comply with the safe harbor provisions.

### Within 30 Days of Receipt

In the case of a no match letter, the employer must check its records to determine if a clerical error caused the mismatch. If so, the employer must correct the error, notify SSA, retain a record of the manner, date, and time of the verification, and complete a new I-9

Form. If the mismatch is not the result of a typographical error, the employer must contact the employee and ask whether the information the employee provided is correct. If the information is incorrect, the employer must make the corrections, inform SSA, verify a match on the corrected information, and make a record of the actions taken to correct the information.

If the employee verifies that the recorded information is correct, the employer must advise the employee of the date of receipt of the no match letter and advise the employee that he or she must resolve the mismatch with SSA no later than 90 days from the date the employer received the no match letter. There is no legal obligation for the employer to advise the employee as to how to resolve the discrepancy.

If the employer receives a Notice of Suspect Documents, the employer should follow the instructions provided in the notice. The employer must contact DHS about resolving the discrepancy.

### Within 93 Days of Receipt of Notification from the Government

If the discrepancy raised in the no match letter or Notice of Suspect Documents cannot be resolved within 90 days of receipt of the notice, the employer has three days to re-verify the employee’s authorization to work legally. The employer must complete a new I-9 Form and retain it with the original form. When completing the new I-9 Form, the employer cannot accept any document that contains a social security number that is the subject of the no match letter or any document referenced in the DHS notification.

If the employer cannot re-verify the employee’s identity and authorization to work within the three day time period, the employer must determine whether to terminate the employee’s employment or be subject to any DHS enforcement action.

While the DHS regulations have not yet become effective, employers should be aware that it is not wise to ignore no match letters or Notices of Suspect Documents. Employers should consider implementing the above steps, even if not presently required by law. Employers should carefully document all steps taken to reasonably respond to these notices and to ensure that unauthorized workers are not being employed.

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# FMLA CHANGES

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On January 28, 2008, new Family Medical Leave Act (FMLA) leave entitlements to military families became effective. Eligible employees of covered employers may be granted 26 weeks of FMLA leave in a single 12 month period to care for a member of the Armed Forces who is undergoing medical treatment for a serious injury or illness incurred in the line of duty. The FMLA was also amended to allow eligible employees of covered employers to take FMLA leave because of any qualifying exigency arising out of a covered family member's active duty or impending call to active duty. This part of the federal legislation does not become effective until regulations defining qualifying exigencies are promulgated.

Proposed revisions to the FMLA regulations were issued by the United States Department of Labor on February 11, 2008. Since the FMLA became effective in 1993, experiences within workplaces, and litigation as to interpretations of its provisions, have identified several areas in which clarification is desired. Some of the proposed revisions include:

### Prior Service

Prior service may be counted toward an employee's eligibility if the gap in service does not exceed five years. As employers need only retain employment records for three years, the burden of documenting prior service rests upon the employee. Exceptions to the five year gap in the prior service regulation are proposed when the break in employment is due to a military obligation or an approved leave of absence (such as for education, childrearing, or as negotiated under a collective bargaining agreement).

### Serious Health Condition

As to "serious health conditions," if an employee claims a serious health condition as a "period of incapacity of more than three consecutive calendar days plus treatment by a health care provider twice," the two visits to a health care provider must occur within thirty days of the start of the incapacity. Also, the term "periodic visits" for

treatment of a chronic serious health condition is defined as at least twice a year.

### Notice and Medical Certifications

An employer without a handbook or written guidance must annually provide general notice to all employees, even if FMLA leave has not been requested by any employee. The proposed time for an employer to respond to a request for FMLA leave is extended from two days under current regulations to five days, and the notice provisions incorporate notice of eligibility status. Employees must confirm their inability to perform the functions of the job, the anticipated duration of the absence, and whether medical care will be sought.

Employees who fail to properly follow call-in procedures while on leave may have the FMLA leave request delayed or denied and may be subject to whatever discipline the employer's rules provide. If a medical certification is deficient, the employer must notify the employee in writing and, when practicable, allow seven days for the employee to cure the deficiencies. Employers may not ask the health care provider for additional information beyond the medical certification form, but can ask for clarification so long as the request is compliant with the Health Insurance Portability and Accountability Act (HIPAA).

### Joint Employment

Professional Employer Organizations (PEOs) that perform administrative functions, such as employee benefits, payroll, and workers' compensation or regulatory paperwork, would not be considered joint employers with their clients. PEOs that are closely involved in hiring or firing decisions or those assigning or controlling employees, may be joint employers with their clients.

The full text of the proposed regulations can be found at: <http://www.dol.gov/esa/wbd/fmla/FedRegNPRM.pdf>. Public comments upon the proposed changes can be made until April 11, 2008. Instructions for submitting comments are available on the first page of the proposed regulations.



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## Q & A

Q: What are my responsibilities when hiring a foreign worker who does not have a social security number?

A: The Social Security Administration advises that when an applicant does not have a social security number, the employer should advise the applicant that he or she is required to apply for a social security number and card. If the worker applied for but has not received a social security number, you should obtain the worker's full name, address, date of birth, place of birth, gender, father's full name, mother's full maiden name, and the date that the worker applied for the social security number.

Q: What do I do if the worker does not have a social security number at the time the W-2 Forms are due?

A: Per IRS instructions, if filing by paper, enter "Applied For" in Box A. If filing electronically, enter all zeros in the field for the social security number.

Q: What do I do if a foreign worker at my company received his social security card after the wage report was filed?

A: When the social security number is received, file a Form W-2c, Corrected Wage and Tax Statement, to reflect the worker's social security number.

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