SEBRIS | BUSTO | JAMES

425-454-4233
sebrisbusto.com

Employment Law Note

September 2019

Mistaken Identity or Just a Mistake?

By Mariya Khilyuk, mkhilyuk@sebrisbusto.com

Sometimes things just don't add up. And sometimes, there's a reasonable explanation.

Every employer is required to determine employee eligibility to work in the U.S. by using the I-9 form. The current form is set to expire on August 31, 2019, but the U.S. Citizenship and Immigration Services issued an alert directing employers to continue using the form even after expiration date. Presumably, we can look forward to a new form being issued eventually.

Meanwhile, the Social Security Administration (SSA) has resumed its practice of mailing "No-Match" letters to employers who file W-2 Forms for employees if the W-2 contains any discrepancy between the employee's name and social security number from SSA records. While there is a potential connection between worker authorization and social security numbers, a No-Match Letter does not automatically signal that an employee is an unauthorized worker. Rather, No-Match Letters are intended to put employers on notice of the employee information discrepancy and provide an opportunity to correct the "mistake" to properly attribute employee earnings to the correct SSA account.

A. Responding to a No-Match Letter

The SSA No-Match Letter provides employers with 60 days to submit corrections via an IRS Form W-2c. The No-Match Letter instructs the employer to log in to its online system, Business Services Online, to view the report, which will contain the employee's mismatched name and social security number.

Upon receiving the No-Match Letter, the employer should make an effort to resolve the discrepancy with its employee. It is the employer's responsibility to document its efforts in resolving the mismatch in case of a future audit during which an employee's ability to work in the United States may be questioned. Thus, even though the No-Match process is not meant for screening for undocumented workers, the records generated during the process may become evidence in a raid and such records should be maintained by employers for three years.

The Department of Justice (DOJ) has issued guidelines to help employers respond to No-Match Letters without breaking the anti-discrimination laws based on immigration. The guidelines instruct employers to:

1. Recognize that No-Match Letters may be the result of an administrative error.
2. Check the information in the No-Match Letter with the employee's personnel file.
3. Inform the employee of the No-Match Letter.
4. Request that the employee confirm the name and social security number reflected in the personnel file.
5. Advise the employee to contact the SSA to correct information that appears incorrect in the SSA Records – e.g., a name change that has not been updated.
6. Provide the employee with a reasonable amount of time to address the No-Match Letter – the employer is provided with 60 days to respond to the SSA.

7. Follow the same procedures with all employees regardless of the employee's citizenship status or national origin.
8. Request status updates from the employee regarding the status of the employee's efforts in resolving the issues contained in the No-Match Letter.
9. Review the documents an employee offers to resolve the issues contained in the No-Match Letter.
10. Submit the corrections to the SSA.

The DOJ also provides employers guidance on what not to do. Specifically, the DOJ states that the employer should not:

1. Assume that the No-Match Letter relates to an employee's immigration status or legal authority to work.
2. Use the No-Match Letter as a reason to discipline, suspend, terminate, or otherwise take an adverse employment action against an employee.
3. Request that the employee complete a new I-9 Form to reverify the employee's employment eligibility.
4. Follow different procedures for different groups of employees based on their national origin or citizenship status.

B. No-Match Letter with No Resolution

As of June 3, 2019, the SSA does not plan to take any action against employers who do not, or cannot, correct the discrepancies identified in No-Match Letters. However, employers should remain diligent in resolving the discrepancies because of the current political landscape and the Department of Homeland Security's enforcement against unauthorized workers.

Further, even though the No-Match Letters are not a tool for the U.S. Citizenship and Immigration Services or the Department of Homeland Security, the SSA may be ordered by a court to disclose employers' No-Match Letters in an effort to audit the employment of unauthorized workers. Another reason to diligently investigate and respond to No-Match Letters is to avoid commission of a felony: it is a crime to engage in a pattern or practice of knowingly hiring, employing, recruiting or referring unauthorized workers. Receiving a No-Match Letter from the SSA may be sufficient to establish that an employer "knowingly" hired and/or employed an unauthorized worker if a discrepancy is not resolved.

C. Key Takeaways

Employers should make every effort to resolve any issue identified in a No-Match Letter while documenting such efforts, but must do so without singling out employees simply because the employee's name appeared on a No-Match Letter or based on their immigration status or national origin. Any questions regarding discrepancies in I-9 documents, or how to prepare for an audit, should be discussed with legal counsel.

For more information about this month's Employment Law Note
contact us at **425-454-4233**