

AILA BACKGROUNDER

Social Security and Immigration

The Social Security Administration (SSA) has several programs and policies that directly impact our immigrant population. Several of these programs underscore the fact that numerous American businesses depend on foreign workers, many of whom are unable to obtain proper documentation, and these workers are paying taxes and contributing to Social Security. Without comprehensive immigration reform that would enable these workers to regularize their status and obtain proper documentation, the SSA will never be able to achieve important policy objectives such as reducing the earnings suspense fund or correcting its databases and records. Furthermore without this reform, American businesses will be denied the legitimate workers they need, and the undocumented communities that need to be brought out of the shadows in order to separate contributing individuals from those that may be here to do us harm could be driven farther underground.

No-Match Letters: The SSA annually reviews W-2 forms and credits social security earnings to workers. If a name or a Social Security Number (SSN) on a W-2 form does not match SSA records, the Social Security earnings go into a suspense file while the SSA works to resolve discrepancies. In recent years, the SSA has been unable to match employee information with SSA records for 6-7 million workers a year. SSA has deposited \$280 billion dollars in the earnings suspense file as a result of the cumulative effect of these no-matches. The no-match letters are an annual attempt by the agency to reduce the earning suspense file and clean up its database to prepare for the release of its new Internet based Social Security Number Verification System (which is discussed later in this backgrounder).

Previously, the SSA would send no-match letters to employers when information submitted for at least 10% of their employees did not match SSA records. Until 2000, that system resulted in about 40,000 letters sent annually to employers. In 2001, that number jumped to 110,000 letters, with 1 in 60 employers receiving no-match letters. In 2002, the SSA sent a letter to every employer who had at least one employee whose information did not match the SSA's records. This change in practice resulted in the SSA issuing roughly 900,000 letters, the equivalent of 1 in 8 employers receiving these letters. Approximately 7 million workers were included on these letters.

The sheer volume of no-match letters sent out last year, combined with language in the no-match letter indicating that the Internal Revenue Service (IRS) could fine an employer for each incorrectly reported social security number, resulted in panic and uncertainty among both employers and employees. Despite language indicating otherwise, the letters were confused with notification of immigration violations. Even savvy employers were very confused as to how to respond to the letters and at the same time obey the immigrant worker protection laws. Some employers immediately fired individuals appearing on the list. Others gave employees a limited timeframe to correct the inconsistent information. In some cases, employees resigned immediately after being notified of their no-match status. Reports indicate that U.S. employers lost thousands of workers due to the effects of the no-match letter.

For 2003, the SSA has made significant changes to the number of no-match letters it will issue. Letters will only be sent to those employers with more than 10 employees with mismatched information or for whom mismatched employees represented ½ of 1% of the W-2 forms filed with SSA. In total, the SSA is expecting to send out approximately 130,000 letters, roughly

770,000 less than last year. However, even with the change in determining which employers should receive letters, the total number of employees referenced by this year's letters will not drop significantly from last year. The SSA restructured its method for calculating which employers should receive no-match letters because very few employers submitted corrected information to the SSA, and much of the information received still did not match the agency's database information.

This year's no-match letter also contains several content revisions. Most importantly, the 2003 no-match letter does not include any reference to the IRS fines. The letter also explains on the first page that that it is not a statement about the employee's immigration status. As in previous years, the letter informs the employer that some of the information reported on the Form W-2 did not match the SSA's records. This lack of a match could be the result of a typographical error or human mistake. The letter provides a list of the SSNs of all employees with no-match information and requests that the employer provide the correct information within 60 days. The letter also advises employers not to take any adverse action against an employee just because the SSN appears on the no-match list, and that taking adverse action could violate state and federal law and subject the employer to legal consequences.

In addition to the reduction in volume of letters and the content changes to the employer letter, the SSA will also now send a no-match letter to each "no-match" employee about two to three weeks before sending the no-match letter to the employer. If the SSA does not have a valid address listed for a particular employee, the agency will send the letter directly to the employer. Employers should note that even if an employee corrects his or her SSN information before the employer no-match letters are sent, the employer would still receive a letter listing that employee as a no-match. The receipt by the employer of this no-match letter is a function of the process of producing the letters and has nothing to do with the validity of the employee's corrected information.

No-Match Letters and the IRS: Although the SSA does not have any power to enforce its request for corrected information, the SSA is required by law to provide the IRS with information on no-match W-2 forms. The IRS is authorized by regulation to fine employers \$50 for each incorrectly reported social security number and is planning to begin enforcing the regulation after it develops a program for imposing penalties. The agency has indicated that it is currently considering fining employers for infractions that took place in 2002 and issuing the fines as early as 2004. However, current reports indicate that the agency is considering delaying penalties for an additional year.

Until the new program is implemented, employers are still subject to the current regulations that impose penalties if incorrect information is submitted to the IRS. These regulations provide waivers from penalties if the employer acts in a responsible manner and if the events of noncompliance are beyond the employer's control. As currently interpreted by an IRS representative, the regulations carve out a number of safe harbors for employers:

- If less than ½ of 1%, or less than 10, of the W-2 forms issued by a single employer do not match SSA records, the IRS will not assess penalties against the employer.
- The IRS will not fine an employer for incorrect information on the W-2 forms if they are based on a duly executed W-4 form and the employer has shown due diligence in trying to obtain the correct information. Due diligence may be shown if the employer solicits correct information from the employee by requesting that he or she fill out a new W-4 form.

Documentation kept in the employer's files of this solicitation should insulate the employer from liability even if the employee doesn't provide the correct information. If the employer does not receive the corrected information from a particular employee, the employer must re-solicit the information in each succeeding tax year until it receives the correct information.

Once the Social Security Number Verification System (SSNVS) (see below) is operational, employers will be able to verify an employee's social security number via the Internet. The IRS is not requiring that employers use this system, but it will be considered within the context of due diligence. An IRS representative has indicated that discontinued use of the system could be a factor in determining that the employer has not satisfied the threshold of due diligence. It is unclear how these safe harbors will change once the IRS develops its new plan.

Social Security Number Verification System (SSNVS): The SSNVS is an Internet-based system that enables employers to verify that an employee's social security number is correct. Currently, the system has been implemented as a pilot program for a small group of employers. The SSA has proposed broader access to the SSNVS. It remains unclear how the system would comply with the anti-discrimination provisions of the Immigration Reform and Control Act of 1986 (IRCA), safeguard employee's information from unauthorized verifications and prohibit employers from targeting select groups for scrutiny.

Information Sharing with the INS: According to SSA and IRS representatives, neither agency is currently sharing detailed information with the INS. The only information that the SSA shares with the INS is information relevant to investigations between the two agencies and an annual review, required by law, of earnings reported for Social Security numbers that were assigned for purposes other than employment. The SSA is considering a program whereby it would share more information with the INS and possibly grant the INS authority to issue social security numbers (much like a hospital's authority to issue a social security card to newborn infants). The IRS indicates that it does not share any information on no-match letters with any agency, but the new IRS program currently under development would include meetings with the INS.

SSA Verification of Foreign Nationals' Documentation with INS: On September 1, 2002, the SSA implemented a nationwide policy change in the processing of SSN applications submitted by all foreign nationals. The change requires the SSA to verify a foreign national's immigration documents and status with the INS's Systematic Alien Verification for Entitlements (SAVE) information service and database before processing an application for an SSN or a replacement card. Foreign nationals who have been in the country for less than 30 days may still have their SSN applications processed even if the SAVE system does not verify their INS documentation. If the foreign national submits his or her application after the 30-day mark, he or she will have to wait for a positive verification from SAVE before obtaining the SSN. A more rigorous check is required for foreign nationals who were either born in, or most recently resided in, Iran, Iraq, Sudan or Libya.