

Employment Eligibility: How to Handle Questions about Worker Identity

Reports submitted to the U.S. government that include both names and Social Security numbers (SSNs), such as 1095 and W-2 forms, are filtered through U.S. Immigration and Customs Enforcement (ICE), a division of the Department of Homeland Security (DHS). In some cases, employers will receive a No-Match Letter or an Employer Correction Request from the Social Security Administration (SSA) for certain employees. ICE will send a similar letter (the Notice of Suspect Documents) after inspection of files during an I-9 audit when discrepancies are noted.

A mismatch should not be used to take adverse action against an employee, as it may violate state or federal law. It is, however, incumbent on employers who receive such notices to investigate, remediate, and communicate identified errors within established timelines. ICE's "safe-harbor" procedures include the process employers should follow to resolve questions of worker identity and eligibility to work. These steps, if followed, can eliminate the possibility that a no-match letter can be used as part of an allegation that an employer had *constructive knowledge* that unauthorized workers were employed in its workforce.

An employer who knowingly ignores facts and circumstances that would lead a person, through the exercise of reasonable care, to determine worker eligibility may incur penalties of \$216 to \$2,156 per employee, with additional aggregate fines up to an additional 25 percent.

"Actual" knowledge means that an employer willfully employed a worker knowing that they were ineligible to work.

"Constructive knowledge" occurs when an employer fails to attempt to resolve no-match situations through inquiries, or taking appropriate action within a reasonable time. An employer may also be found liable for constructive knowledge if it ignored indicators that called employment eligibility into question.

The following actions should be taken upon receipt of a no-match letter.

Step 1: Review Records

Employers should check their records to determine if the discrepancy is a clerical error, such as typographical and transcription errors and name changes due to marriage. If this is the case, the employer should:

- A. Correct its records. All changes to Section 1 of the I-9 form must be completed by the employee, by drawing a line through the incorrect information and writing in the accurate data. If the

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- B. employee is no longer employed, no correction may be made. An employer can update Section 2 of the I-9. Documents used to verify eligibility to work in the U.S. and identity must meet acceptable requirements of the form in effect when the I-9 was initially completed.
- C. The employer should verify that the updated information matches government records. A free verification service that confirms names and SSNs is available through the Social Security Administration's Business Services Online.
- D. Once verified, the employer should draft a memo that details the manner, date, and time of the verification and attach a signed copy to the employee's I-9 as well as notify the respective agency of those changes.

ICE's safe harbor provisions allow the employer 30 days from the receipt of the letter to resolve questions.

Step 2: Require Employees Identified in No-Match Letter to Confirm Information

If the employer is not able to resolve issues identified by the respective agency, it should promptly request that the employee confirm that the employer's records are correct. A sample employee communication is available at www.ssa.gov/employer/sampleltr.doc.

- A. If the employer's records are not correct, it should (in accordance with the agency letter's instructions) verify the corrected records if new documents are presented, and report the changes to the agency.
- B. The employer should also correct its records. An employer may use Section 3 of Form I-9, or, if Section 3 has already been used for a previous reverification or update, it may complete a new Form I-9. Minimally, page two of the original I-9 should be maintained in addition to the new I-9.
- C. If the employee responds that the records are correct, the employee should be instructed to pursue the matter personally with the SSA and notify the employer of any changes.

Once again, the safe harbor provisions allow the employer 30 days from the receipt of the letter to resolve discrepancies.

A discrepancy will be considered resolved only if the employer can subsequently verify with SSA that the SSN and name match or with DHS that documents used to verify eligibility are valid.

Step 3: Take Action in the Event that Requirements of the No-Match Letter Are Not Met

If discrepancies identified in a no-match letter are not resolved within 93 days of receipt of the no-match letter (90 days to resolve outstanding issues, 3 days to complete/correct the I-9), the employer must choose between two courses of action.

1. Take action to terminate the employee. Note that, due to potential concerns with employment rights under Title VII, it would be advisable to review such a termination with an attorney even though employers who follow the safe harbor procedures uniformly are protected from charges of unlawful discrimination.
2. Take no action against the employee and risk allegations of constructive knowledge by DHS and incur legal consequences, including fines and penalties.

The take away from all requests for verification of worker identity and eligibility is that they follow the same trajectory as initial completion of the I-9.

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Employees – not employers – are responsible for presenting accurate credentials and updating personal information. Employers are required to respond with due diligence and in a timely manner.

Finally, it should be noted that employees are entitled to the same protections under the law after this verification process and should in no way be subject to adverse action as a result.

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