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Your Company Got a Bunch of Social Security Number Mismatch Letters. Now What?

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A few months ago, Boardman Clark reported the Social Security Administration (SSA) planned on resuming its practice of sending Social Security Number (SSN) mismatch letters to employers who have filed at least one Form W-2 containing an SSN and name reported for one or more employees that does not match SSA records. These letters had previously not been sent to employers since 2007.

In Spring 2019, employers once again started to receive SSN mismatch letters, now called "Employer Correction Request Notices" (EDCOR). While these letters were expected to return, what was unexpected was the sheer volume of notices some companies received. In the past, SSN mismatch letters typically identified only one or a small handful of employees with a potential name and SSN mismatch. Now, however, some companies are receiving EDCOR notices containing hundreds of employee names. There are EDCOR notice that identify approximately half of the company's workforce as potentially having a name and SSN that does not match SSA records. In some cases, the notice might identity nearly the entirety of the company's workforce.

Understandably, companies who received these mass mismatch letters have a host of worries: concern for employees' wellbeing, disruption to business operations, fear of future enforcement actions and penalties by U.S. Immigration and Customs Enforcement (ICE), and confusion over what, if anything, the company must or should do in response to the EDCOR notice. Companies also struggle with how to inform affected employees of the notices out of fear that merely informing employees will cause substantial workforce turnover. These concerns are compounded by a lack of updated guidance from the SSA on what obligations companies have to respond to these letters, whether or not any information shared with the SSA or IRS will be given to ICE, or whether ICE will take a company's EDCOR notice response into account when determining whether a company has "knowingly" hired/continued to employ an unauthorized worker.

In the face of such uncertainties, employers have taken a variety of approaches to receiving a mass SSN mismatch notice. Some have adopted uniform policies, while others address each employee's situation on an individualized basis. Here is some practical information to consider when making a business decision on how your company will respond to SSN mismatch letters:

1. **Don't panic**. Take a step back, pause, and do not jump to conclusions. Receiving an EDCOR notice ***does not*** mean employees provided you or the government false information or are unauthorized to work in the United States. Once again: **receiving an SSN mismatch letter does not prove anything about an employee's work authorization or immigration status.** The EDCOR notice specifically instructs companies to "not use this letter to take any adverse action against an employee," and that "this letter does not address your employee's work authorization or immigration status." Firing, suspending, or disciplining an employee solely on the basis of receiving a mismatch letter may in fact violate the Immigration Reform and Control Act's (IRCA) anti-discrimination provisions and create legal liability for the company. A company may receive new or different information after the receipt of an EDCOR notice from an employee that may call an employee's current Form I-9 documents into question. However, the EDCOR notice by itself does not relate to an employee's immigration status and cannot be used as the sole basis to discipline an employee or have them complete a new Form I-9.

2. **Obtain a list of affected employees and verify company records.** Upon receiving an EDCOR notice, companies must use the SSA's online system to view the list of affected employees. The company should then check its personnel records to determine if the company correctly reported the employee's name and SSN as provided by the employee or whether there was a clerical or typographical error on behalf of the company. If a reporting error did occur, the company should correct its records and report that change to the SSA and IRS for Form W-2 purposes.

3. **Inform affected employees.** If the company did accurately report the employee information, the company should inform affected employees on an individual basis about the mismatch letter. By informing an employee on an individual basis about the EDCOR notice, the employee has the opportunity to address the discrepancy with the SSA and provide clarifying information to the company. Providing employee notice may also help to demonstrate the company's responsiveness to the EDCOR notice should the company ever be audited by ICE or another government agency. Companies who choose not to inform employees due to fears of employee "flight" may increase their risk of civil and criminal ICE penalties. The notice should reflect the information in the EDCOR notice. The notice to an employee should inform the employee it is their responsibility to address any potential discrepancy and clearly explain to the employee is not in trouble and the notice does not mean the company or government currently believes they provided false information or are not authorized to work in the United Sates. A sample notice from the SSA can be found here.

4. **Give employees a reasonable period of time to resolve the mismatch.** IRCA requires employers give an employee a "reasonable period" of time to correct a potential SSN mismatch before taking any adverse action against an employee or requiring an employee to complete a new Form I-9. If employers fail to give employees a sufficient amount of time to address the mismatch, they could risk violating IRCA's anti-discrimination provisions. Unfortunately, there is no clear guidance on how much time is a "reasonable period." In practice, employers typically give employees between 60 to 120 days to address the letter before taking any further action. Companies may decide to take further action after the reasonable period has ended, or may give an employee that is making good faith efforts to resolve the issue additional time.

5. **If the mismatch remains unresolved.** If an employee's mismatch remains unresolved after a reasonable period, the company must then decide how it wishes to move forward. The company has a variety of options available.

    a. The company could decide to suspend or terminate the employee on the basis that the employee failed/refused to comply with the employer's directive to communicate with the company about the status of the mismatch resolution after a period of time and/or was unable to resolve the mismatch after a reasonable period of time had elapsed.

b. The company could request the employee complete a new Form I-9. If completing a new Form I-9, the company may request the employee not use the same documents that were the subject of the SSA mismatch letter. Otherwise, companies should follow their normal Form I-9 process. The company should accept all documentation from an employee that appears to be facially valid. Companies are not allowed to require that employees provide specific types of identification (such as a document containing a photograph).

c. If an employee informs the company at any point they are undocumented or unauthorized to work in the United States, the company will then have "constructive knowledge" that the employee is not currently authorized to work in the United States. The company must terminate that individual's employment or face legal liability as IRCA prohibits companies from "knowingly" hiring/continuing to employ an unauthorized worker. ICE imposes strict civil penalties on employers and, in some cases, even criminal penalties.

d. Continue employment without further action. Companies may decide to continue to employ affected employees without any further actions. Absent any contrary information by the employee, the mere receipt of an SSN mismatch letter is not "constructive knowledge" that an employee is unauthorized to work in the United States. If companies do not have constructive knowledge that an employee is not authorized to work in the United States, they may take the position that an unresolved mismatch letter is an insufficient basis to take further action against an employee since the mismatch letter alone does not address an employee's immigration status. This course of action assumes that there is no additional information to indicate the employee may not be authorized to work in the United States.

6. **Response to the SSA.** If a company accurately reported the affected employee's information as provided by the employee and has no corrected information to submit to the SSA after the reasonable period has expired, it has no obligation to report any further information to the SSA. Companies may simply investigate the mismatch, inform the employee, and proceed with their own internal policy and not provide a formal response to the SSA. It is ICE, not the SSA, who has the power to enforce IRCA and conduct Form I-9 audits. Companies who choose to report information back to the SSA should work with legal counsel to draft an appropriate response.

   Responding to an SSN mismatch letter requires companies to carefully balance their legal obligations between IRCA's immigration regulations and its anti-discrimination provisions. When faced with a mass SSN mismatch notice, companies must also align their legal obligations with practical business considerations. No matter how a company decides to respond, each response carries legal risk. Companies should consult with their legal counsel to ensure their continued compliance with IRCA.