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MEMORANDUM

TO: All Employers

FROM: Barsamian & Moody

DATE: April 4, 2019

RE: **SOCIAL SECURITY MISMATCH LETTER COMPLIANCE**

Many employers, particularly agricultural employers, are once again receiving mismatch letters from the Social Security Administration stating that W-2 forms for various employees contain names and/or Social Security numbers that do not match the Social Security Administration records, or that certain Social Security numbers are invalid. The following Memorandum outlines the steps employers should take in response to such letters, contains sample forms to use, and includes resources put out by the federal Department of Justice for further information.

Once you receive such a letter, there are a number of steps you should take, as outlined below. In general, however, the first thing to know is that you cannot simply ignore such letters. Rather, you should check to see if the information you submitted on the relevant W-2 matches the information in your records to make sure there are no typos, etc. If there are errors, submit a Form W2-C with the correct information. If the information you submitted matches your records, you need to provide a letter to each relevant employee (hand deliver or mail to current employees and mail to laid off employees who are expected to return), asking them to verify that the information you have is correct. Keep a copy of such letters in your records. Assuming that the name and/or number you have on your records matches the information the employee has (again keeping in mind that there are typos and transpositions occasionally), all that you are legally required to do is to notify the employee to clarify the situation, and allow them a "reasonable" amount of time to do so. If Social Security comes back about the same employee, let them know that you have written to the employee and told him or her to contact Social Security. If need be, you can supply Social Security with a copy of

the letter you sent to the employee. Also, if Social Security re-contacts you about an employee to whom you have previously sent the letter, you can send the employee another letter, designated as a “second notice.”

Keep in mind that the mere fact that Social Security has said that there is a mismatch does not mean that you should, or even that you are legally entitled to, take any action against the employee. Employers should **not** assume that a mismatch conveys any information regarding employee’s immigration status or actual work authority. There are many reasons an employer may receive a “No-Match Notice,” including but not limited to: (1) an unreported name change due to marriage, divorce or naturalization; (2) input errors by Social Security staff; (3) reporting errors by an employer or employee; (4) identity theft; (5) errors in reporting proper hyphenated or multiple surnames; and/or (6) fraud. As long as you have what reasonably appear to be valid identification documents for an I-9 Form, you should rely on those documents as being valid. Taking improper action against an employee would violate federal law and/or state law and would subject you to penalties.

Social Security Administration Mismatch Letter Checklist

Do not ignore the warning letter. This may expose you to penalties, or the IRS may refuse to accept your tax filings.

Do not terminate an employee simply because of this letter. Presumably, you properly filled out an I-9 Form on the employee. Taking adverse action against an employee based solely upon the Administration’s letter could be a violation of federal and/or state law. Proceed according to the steps listed below.

Check to see if the information you submitted on the W-2 matches the information in your records to make sure there are no typos, etc. If there are errors, submit a Form W2-C with the correct information.

If the information you submitted matches your records, write a letter to the Social Security Administration acknowledging receipt of the letter and stating that you are taking appropriate steps to correct any problem. (A draft form letter is attached.)

Inform the employee, in writing, of the problem with a potential mismatch that it needs to be resolved, and advise the employee to contact the Social Security Administration to correct and/or update his or her records. (A draft form letter is attached.)

Keep a copy of each letter.

Make sure to give the employee a “reasonable” period of time to address the problem. As of now there is no set time frame for what is a “reasonable” period of time, but it is based on the totality of the circumstances (and is probably at least 120 days).

Review any document that the employee offers which demonstrates resolution of the mismatch

If the employee says that the Social Security Administration's information is incorrect, send a letter to the Social Security Administration with the correct information.

If the employee says that your information is incorrect, correct it and send a letter to the Social Security Administration stating that you had incorrect information but have corrected it.

If the employee admits that he or she is not authorized to work in the United States, this is "actual knowledge" and you should contact your labor attorney. You cannot continue to employ somebody who you know is not authorized to work in the US. If the employee tells you that the Social Security Number he or she used does not belong to them, you cannot continue to make Social Security Administration or tax filings knowing that the Social Security Number is incorrect.

If the employee does not provide you with any information by the end of the tax year, send a letter to the employee stating: "On (date), we notified you that the Social Security Administration had advised us of a name and/or Social Security Number mismatch in the agency's records regarding you. We suggested that you go to the local Social Security Administration office to straighten out the problem. Please let us know if any information in our records needs to be changed."

If the Social Security Administration sends you another letter on the same employee, send the same letter to the employee again, labeling it a "Second Notice," and send the Social Security Administration a letter stating that you have previously notified the employee of the problem, and have now re-notified the employee. Attach a copy of the letters.

It is very important that employers follow the same procedures for all employees regardless of citizenship status or national origin.

As mentioned above, the United States Department of Justice has issued a list of "Do's and Don'ts" for Employers dealing with mismatch letters, along with a list of Frequently Asked Questions which provide additional information and background. Both of these documents are attached, and can also be found at the following links:

- Name and Social Security (SSN) "No-Matches" Information for Employers (Do's and Don'ts).
 - <https://www.justice.gov/sites/default/files/crt/legacy/2014/12/04/Employers.pdf>
- Frequently Asked Questions About Name/Social Security Number "No-Matches."
 - <https://www.justice.gov/sites/default/files/crt/legacy/2010/12/29/FAQs.pdf>

The law on this topic is subject to change, so please do not hesitate to contact us to address any particular situations you may face. If you have any other questions or comments, please do not hesitate to contact us.

[FOR YOUR LETTERHEAD]

Social Security Administration
XXXX
XXXX

Re: (Use the reference line from the Administration's letter)

Dear _____:

Thank you for your letter dated _____. We have informed the employee of this issue and instructed him or her to inform us if our records are in any way inaccurate, or to contact the Administration to clarify any discrepancy if our records are accurate.

If you have any further questions, please do not hesitate to contact me.

Respectfully,

[FOR YOUR LETTERHEAD]

Employee
XXXX
XXXX

Dear _____:

We have been informed by the Social Security Administration that the name and/or Social Security number on our company records regarding you do not match the Social Security Administration's records. This could be due to any number of reasons, such as a name change, or even simple typographical errors on our records or their records. The name and Social Security number we have on file is:

Please check your Social Security card. If the name and number on your card is the same as the information we have, shown above, please contact any Social Security Administration office to resolve the issue. Once you have done so, please let me know if there are any changes that we need to make to our records.

If the name and/or number shown above are not the same as what is on your Social Security card, please notify me immediately, so that we can correct our records, and so we can let the Social Security Administration know that we have corrected our records. Until this issue is resolved, the Social Security Administration cannot credit your account with your earnings from working here, so you should clear it up as soon as possible.

Further, the Internal Revenue Service may fine us every time we do not furnish your correct SSN on a wage report. So that we may avoid this penalty, we ask that you act to resolve this conflict as quickly as possible.

If you have any questions about this, please contact me.

Sincerely,



Office of Special Counsel for Immigration-Related Unfair Employment Practices

U.S. Department of Justice Civil Rights Division

Name and Social Security Number (SSN) “No-Matches” Information for Employers

DO:

1. Recognize that name/SSN no-matches can result because of simple administrative errors.
2. Check the reported no-match information against your personnel records.
3. Inform the employee of the no-match notice.
4. Ask the employee to confirm his/her name/SSN reflected in your personnel records.
5. Advise the employee to contact the Social Security Administration (SSA) to correct and/or update his or her SSA records.
6. Give the employee a reasonable period of time to address a reported no-match with the local SSA office.
7. Follow the same procedures for all employees regardless of citizenship status or national origin.
8. Periodically meet with or otherwise contact the employee to learn and document the status of the employee’s efforts to address and resolve the no-match.
9. Review any document the employee chooses to offer showing resolution of the no-match.
10. Submit any employer or employee corrections to the SSA.

DON’T:

1. Assume the no-match conveys information regarding the employee’s immigration status or actual work authority.
2. Use the receipt of a no-match notice alone as a basis to terminate, suspend or take other adverse action against the employee.
3. Attempt to immediately reverify the employee’s employment eligibility by requesting the completion of a new Form I-9 based solely on the no-match notice.
4. Follow different procedures for different classes of employees based on national origin or citizenship status.
5. Require the employee to produce specific I-9 documents to address the no-match.
6. Require the employee to provide a written report of SSA verification (as it may not always be obtainable).

For more information on the anti-discrimination provision of the Immigration and Nationality Act, call OSC through its employer telephone hotline or visit OSC’s Website:

**Employers: 1-800-255-8155 (TDD: 1-800-237-2525)
Website: <http://www.justice.gov/crt/about/osc/>**

FREQUENTLY ASKED QUESTIONS ABOUT NAME/SOCIAL SECURITY NUMBER “NO-MATCHES”

What is an SSA No-Match Letter? It is a written notice issued by the Social Security Administration (SSA) to an employer, usually in response to an employee wage report, advising that the name or Social Security number (SSN) reported by the employer for one or more employees does not “match” a name or SSN combination reflected in SSA’s records. The letter cautions employers against taking any adverse employment action against a referenced employee based solely on receipt of the letter, and explicitly states that the letter makes no statement about the referenced employee’s immigration status. Rather, the letter simply reports an apparent error in either the employer’s records or SSA’s records, and seeks the employer’s and, if necessary, the employee’s assistance in conforming those records. For more information on the SSA’s No-Match letter program, see <http://www.socialsecurity.gov/employer/noMatchNotices.htm>.

If an employee's name and SSN don't match SSA's records, doesn't that mean the employee is not authorized to work? No. There are many possible reasons for a no-match letter, many of which have nothing to do with an individual’s immigration status or work authorization. Because of this, an employer should not assume that an employee referenced in a no-match letter is not work authorized, and should not take adverse action against the referenced employee based on that assumption. Such action could subject the employer to liability under the anti-discrimination provision of the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1324b.

What is the anti-discrimination provision of the INA? The anti-discrimination provision of the INA prohibits discrimination on the basis of national origin, citizenship status or immigration status, document abuse during the employment eligibility verification process and retaliation.

How does SSA determine when a no-match letter should be issued? After SSA processes wage reports submitted by employers, the agency tries to resolve name/SSN discrepancies by sending no-match letters to employees, employers and self-employed individuals to inform them when a reported name or SSN does not match SSA’s records.

Are there sources of information other than SSA no-match letters suggesting possible name/SSN no-matches? Yes. Other organizations issue notices or provide alerts similar to SSA no-match letters. They include:

- commercial businesses that conduct employee background checks;
- third-party identity theft inquiries; and
- health providers providing services to an employee under an employer-provided health plan.

Information from these sources can be received by employers and employees by mail, email, other electronic format or by telephone. Such reports or alerts, however, should be treated cautiously, and should not be used as conclusive evidence of employment authorization, as these third party reporting entities have no legal authority to determine an individual’s work authority and may not have access to current information contained in SSA’s databases. However, as in the case of responding to no-match letters originating directly from SSA, an employer should at a minimum follow the same policies, procedures and timelines as it does for SSA no-match letters.

What might cause a no-match? There are many reasons for a no-match notice, including but not limited to: (1) an unreported name change due to marriage, divorce or naturalization; (2) input errors by SSA staff; (3) reporting errors by an employer or employee; (4) identity theft; (5) errors in reporting proper culturally based hyphenated or multiple surnames; and (6) fraud.

What action should an employer take upon receipt of an SSA no-match letter or other notice of a no-match? To confirm that a reporting or input error is not the cause of a no-match, an employer, with the assistance of the referenced employee, should confirm that the name and SSN reported accurately reflects the referenced employee’s name and SSN. If no error is discovered, the employer should then advise the referenced employee to contact the local SSA office to address the reported no-match. An employer should not use the no-match letter or other no-

match notice by itself as the reason for taking any adverse employment action against the referenced employee. In addition, employers should not use the receipt of a no-match letter or other no-match notice (or the fact that an employee raises any objection to the employer's no-match response procedures) as a basis to either retaliate against the employee or otherwise subject the employee to heightened scrutiny. Doing so may violate the anti-discrimination provision of the INA, or other state or Federal equal employment opportunity or labor laws. While not required to do so, an employer may schedule (and document) periodic meetings or other communications with the employee during the resolution period to keep abreast of the employee's efforts to resolve the no-match, and to determine whether the employee needs more time to resolve the no-match than initially contemplated.

Do no-match letters or other no-match notices create “constructive knowledge” that an employee is not authorized to work? The mere receipt of a no-match letter or other no-match notice does not, standing alone, constitute “constructive knowledge” on the part of an employer that the referenced employee is not work authorized. Only the Department of Homeland Security (DHS) is legally authorized to conclusively determine an individual's authorization to work. It is recommended that an employer give a referenced employee a reasonable period of time to address and correct information contained in a no-match letter or other no-match notice.

What is a “reasonable period of time”? There are no Federal statutes or regulations in effect that define a “reasonable period of time” in connection with the resolution of a no-match notice. As a practical matter, a “reasonable period of time” depends on the totality of the circumstances. Of note, in the E-Verify context SSA has the ability to put a tentative nonconfirmation into continuance for up to 120 days. This recognizes that it can sometimes take that long to resolve a discrepancy in SSA's database.

What is the relationship between E-Verify Notices of Tentative Nonconfirmation (TNC) and SSA No-Match Letters? Both rely upon SSA databases. However, DHS's E-Verify program is specifically designed to verify an employee's work authorization and provides workers with an opportunity to correct the SSA databases before making that determination. For more information on the E-Verify program, see http://www.dhs.gov/files/programs/gc_1185221678150.shtm. In contrast reports simply indicating that an employee's name and SSN do not match SSA's records do not make any statement about an employee's work authorization.

How can employers minimize the receipt of SSA No-match Letters? Employers can use the Social Security Number Verification Service (SSNVS). SSA offers this free online service that allows registered users (employers and authorized third-party submitters) to verify the names and SSNs of employees against SSA records. Telephone Number Employer Verification (TNEV) is very similar to SSNVS, but it is an automated telephone service that allows registered users to verify names and SSNs over the telephone without speaking to an agent. Verifying SSNs through SSNVS and TNEV allows SSA to properly credit the correct earnings to the correct individual's earnings record. These services can only be used for wage reporting purposes. An employer's use of SSNVS or TNEV for any other reason (*e.g.*, to verify work authorization) is improper and may violate the anti-discrimination provision of the INA. For more information, go to www.socialsecurity.gov/employer, or contact OSC at the telephone numbers indicated below.

For more information on the anti-discrimination provision of the Immigration and Nationality Act, call OSC through its employer telephone hotline at **(800) 255-8155** or visit OSC's Website:

<http://www.justice.gov/crt/osc>