

## Proposed immigration rules address Social Security number mismatches

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COLUMNIST  
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Employers over the years have received mixed messages from the Social Security Administration and the Department of Homeland Security (formerly the Immigration and Naturalization Service) about employer obligations upon receipt of a Social Security “mismatch” letter. The Department of Homeland Security recently published proposed regulations that would significantly change employer obligations in response to the letters.

Most employers are familiar with the standard “Social Security mismatch” letter, in which the U.S. Social Security Administration informs the employer that certain employee names and certain Social Security numbers do not match. Employers can be liable if they fail to take appropriate action in response to receiving such correspondence. However, they are also warned in the letter that they can be liable for using the letter itself as the basis for adverse action against the employees, “such as laying off, suspending, firing or discriminating against” the employees.

The law seemed to many employers to present a “Catch-22,” subjecting them to sanctions whether or not they responded to the mismatch letter.

The Bureau of Immigration and Customs Enforcement of the Department of Homeland Security recently issued a proposed amended regulation that clarifies the employer’s obligations in such situations. The proposed regulation applies to mismatch letters issued by either the Social Security Administration or the Department of Homeland Security.

Under the law, employers can be fined if they “knowingly” hire or continue to employ aliens not authorized to work in the United States. The regulations have long recognized that an employer can be in violation of this law by having “constructive” knowledge in addition to actual knowledge. In plain language, “constructive knowledge” includes instances in which an employer should have known there was a problem.

The proposed regulation adds two more examples of situations that may lead to a finding of “constructive knowledge:” (1) The employer receives written notice from Social Security that employee names and SSNs do not match agency records; or (2) the employer receives written notice from Homeland Security that in completing Form I-9 an employee presented documentation that was not assigned to the employee, according to Homeland Security records.

The proposed regulations anticipate that the employer, within 14 days of receiving a mismatch letter or Homeland Security notification, would check its records to determine whether the discrepancy results from a typographical, transcribing or similar clerical error in the employer’s records or in its communications to the SSA or DHS. If the discrepancy does not appear to have resulted from an employer error, the employer is to promptly instruct the employee to pursue the matter with a relevant agency. For example, the employee might visit the local Social Security office and provide a proof of name change.

It is important to note that the proposed regulations provide that the employer could not consider the discrepancy “resolved” unless or until the employer verified with Social Security or Homeland Security the

following: (1) that the employee's name matches both the information in the Social Security records and the SSN assigned to that name; and (2) that the SSN is valid for work, either with or without authorization from Homeland Security.

If the discrepancy is not resolved within 60 days of the employer's receipt of the mismatch letter, the employer must either terminate the employee or risk a finding that it had "constructive knowledge" that it was employing an illegal alien.

The proposed regulation provides that, if the employer fully complies with the above procedure, it cannot be found to have "constructive knowledge" of employing an illegal alien.

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