

LAW OFFICES

RONALD L. TOBIA •▲
JILL TOBIA SORGER •▲■

TOBIA & SORGER ESQS., LLC

A LIMITED LIABILITY CORPORATION OF LAWYERS

COUNSEL

SAL M. ANDERTON • ■

BAR AFFILIATIONS

NJ BAR •
FLA BAR ▲
NY BAR ■

500 SUPOR BOULEVARD
HARRISON, NEW JERSEY 07029

1-973-746-6000

FAX: 1-973-509-1578

EMAIL: RTOBIA@TOBIASORGER.COM
EMAIL: JSORGER@TOBIASORGER.COM
EMAIL: SANDERTON@TOBIASORGER.COM

TRENTON OFFICE

172 W. STATE STREET
P.O. BOX 2041
TRENTON, NJ 08607
609-393-1442
609-393-1990 FAX

FLORIDA OFFICE

4302 HOLLYWOOD BOULEVARD
SUITE 171
HOLLYWOOD, FL 33021
973-746-6000

Reply to: Harrison, NJ Office

September 2007

***No Match For A Letter: An Employer's Duty to Respond to a
Social Security Administration "No-Match Letter"***

By: Jill Tobia Sorger, Esq.

Introduction:

Nearly five years ago, in September 2002, The Labor Relations Corner featured an article on the then recent shift in policy by the Social Security Administration that caused many employers to begin receiving what is now commonly known as a "no-match" letter. A "no-match" letter essentially informs the employer that the social security number submitted by the employer for a particular employee does not match any of the numbers on file with the Administration. Prior to this change in policy in 2002, a "no-match" letter was only generated and sent to the employer if ten percent (10%) or greater of an employer's total workforce were found to have such mismatches. In what signaled a significant shift in practice at the time, the Social Security Administration began to generate and issue "no-match" letters to employers for as few as one failure to match. The end result of this policy change was that over the past few years, more and more employers have received such letters.

However, although at the time it was anticipated by many, including the writer of this column, that these letters would place a higher burden on employers to monitor the legal status of their workers, the Social Security Administration's own approach to these letters caused confusion

as to the exact meaning of such a letter. Even with the shift in policy, the Social Security Administration went to great lengths to inform employers that the receipt of a "no-match" letter did not automatically signal an immigration problem with an employee. In fact, the language of the "no-match" letter cautions the employer not to make any negative inferences based on the letter itself and further emphasizes that the letter, in and of itself, should not be considered evidence that the employee engaged in any improper behavior such as intentionally or knowingly providing false social security information. The letter also explicitly states that it is not intended to represent any conclusion about the immigration status of the employee. Finally, the letter even goes so far as to inform the employer that taking any adverse action solely in response to the letter, such as imposing a suspension on, acting in a discriminatory manner towards or firing the employee, could result in the employer violating state and/or federal law. Accordingly, up until last month the Social Security Administration had firmly maintained that the "no-match" letter was merely to be used for informational as opposed to enforcement purposes.

However, a new regulation issued by the Department of Homeland Security ("DHS") in August 2007 brings to fruition the anticipated burden on employers who receive such letters. Based on this new regulation, employers must realize that the receipt of a "no-match" letter is an indication that false information has been provided and the employer must take affirmative steps to ascertain the legal work status of the employee or face the imposition of sanctions.

TOBIA & SORGER ESQS., LLC
A LIMITED LIABILITY CORPORATION OF LAWYERS

500 SUPOR BOULEVARD
HARRISON, NJ 07029
973-746-6000
FAX: 973-509-1578

EMAIL: RTOBIA@TOBIASORGER.COM
EMAIL: JSORGER@TOBIASORGER.COM
EMAIL: SANDERTON@TOBIASORGER.COM

The New Rule:

Under the new rule, the DHS has expanded the definition of what it considers to be "constructive knowledge" that an employee has provided a false Social Security number to include receipt of a "no-match" letter by an employer. In the regulation, the DHS outlines the process that employers should follow in responding to these letters. Although the DHS does not have access to lists of employers that receive the "no-match" letters from the Social Security Administration, under the new rule employers will receive a general notice from DHS outlining their obligations to follow immigration laws and the steps necessary to prove that they have attempted to satisfy the DHS requirements that employers sufficiently respond to these letters. In particular, employers may be held liable if they disregard the issues raised by a "no-match" letter by failing to take specified steps within ninety (90) days.

If an employer does not comply, the DHS is allowed to use that noncompliance as evidence that the employer had "constructive knowledge" of a possible violation of the immigration laws. Accordingly, the failure to respond to no-match letters can be used by the DHS to establish knowledge in civil and even criminal actions brought against the employer. Such proof as to knowledge of such an improper practice will subject the employer to severe penalties and sanctions which are subject to enhancement according to the number of individuals allegedly employed under these false and illegal circumstances.

TOBIA & SORGER ESQS., LLC
A LIMITED LIABILITY CORPORATION OF LAWYERS

500 SUPOR BOULEVARD
HARRISON, NJ 07029
973-746-6000
FAX: 973-509-1578

EMAIL: RTOBIA@TOBIASORGER.COM
EMAIL: JSORGER@TOBIASORGER.COM
EMAIL: SANDERTON@TOBIASORGER.COM

Advice for Employers:

Prior to its implementation last month, this new regulation had been the subject of an extensive year long debate that prompted over 5,000 comments from such varying sources as immigration groups, labor unions and management organizations. Most problematic is the simple fact that very often, innocuous mistakes will be found to have caused a "no-match" letter to be issued. For example, such common clerical errors as the misspelling of a name, the incorrect transcription of a number, the improper hyphenation of a name or the use of titles all can innocently prompt a "no match." To its credit, the new rule does provide the employer with an opportunity to address any mistakes promptly without facing potential liability from the DHS. Accordingly, employers are cautioned to be cognizant of any signs, including receipt of a "no-match" letter, that a worker may be undocumented and to follow up on any indications of the same in a well-reasoned, thorough and prompt manner. In developing such an approach, legal counsel should be consulted in regards to drafting a policy that is consistent with the DHS requirements while affording appropriate protections against erroneous "no-matches." Awareness of the seriousness of such a letter as well as the fact that a response is required will help the employer avoid an unintended circumvention of the law.

TOBIA & SORGER ESQS., LLC
A LIMITED LIABILITY CORPORATION OF LAWYERS

500 SUPOR BOULEVARD
HARRISON, NJ 07029
973-746-6000
FAX: 973-509-1578

EMAIL: RTOBIA@TOBIASORGER.COM
EMAIL: JSORGER@TOBIASORGER.COM
EMAIL: SANDERTON@TOBIASORGER.COM