

Did You Recently Receive A Social Security Mismatch Letter?

By David Nachman and Debi Debiak

You sit down at your desk, ready to tackle the items on your "to do" list for the day, and notice an internal memo from your company's CEO with a copy of a letter from the U.S. Social Security Administration ("SSA"), which lists several social security numbers. You have heard from your fellow Human Resource colleagues that such letters, called the "Mismatch Letter," are being received all over the country. You were hoping that this type of letter would not find its way onto your desk, but it has. The CEO's memo says that "the organization must have illegal workers" because the letter was received from the SSA, and the CEO wants you to terminate the employees listed in the letter to avoid liability under the Immigration Reform and Control Act of 1986. What do you do? Your first response should be to call your attorney for quick and accurate legal advice.

While the CEO's response may be understandable — it is not necessarily legal. The Mismatch Letter should not be treated as an indication that an employee does not have work authorization. Aside from the possibility that an employee may be an illegal worker, there are a number of reasons why an employee's name and social security number do not match. Some of the reasons for the mismatch may include an unreported name change, a change in marital status or a stolen identity. If these types of mistakes are not corrected, they could have ramifications for employees and employers alike.

The Reason For Concern

The SSA is sending out Mismatch Letters because it cannot post the earnings reported for the employees listed in the Mismatch Letter to Social Security

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accounts. This results in employees not receiving proper credit they have worked for and deserve.

The immediate concern for employers is that listed employees may not be authorized to work in the United States. The SSA Mismatch Letter also creates confusion because of the potential conflicting federal wage reporting and U.S. immigration laws. Employers must remember that SSA's reporting requirements are not directly related to work authorization. The duty of employers and employees to report social security numbers arises under 26 CFR §31.6011(b)-2. This regulation says that employees are required to give employers a valid social security number or a receipt showing that an application for a social security number has been submitted when they start working. The employer is then required to include the employee's social security number on the W-2 wage report filed with the Internal Revenue Service ("IRS") concerning wages paid to the employee. This process is unrelated to the verification of work authorization conducted by the employer on the Immigration and Naturalization Service ("INS") I-9.

A discrepancy between information submitted by an employer and the information on file with the SSA also raises an issue as to whether the employer correctly completed its I-9 Forms in the first place. In connection with the employment eligibility verification process, employers are required to complete an I-9 Form for each employee within three days of the hire date. If an employer does not follow these rules, the employer may be fined. Annually, the INS conducts in excess of 60,000 Form I-9 audits. These audits are often brought about by complaints from disgruntled employees. The INS also engages in random audits. Random audits occur in certain industries that are deemed by the INS as being at "high risk" for having unauthorized workers.

N&A anticipates that the number of

Form I-9 audits will increase because the INS is presently being restructured to split the "benefits" and the "enforcement" divisions. A split in these divisions is likely to invigorate the "enforcement side" of the INS.

What To Do?

Receipt of the SSA Mismatch Letter should immediately trigger a company's HR Manager(s) to undertake a "diligent" review of the documents prepared or provided when the employee, whose Social Security number appears on the SSA Mismatch Letter, was hired, such as the I-9 Forms. Next, an organization should review the completed employment application (if any) to ensure that the information provided on the application is consistent with the information contained on other hiring documents. The organization also should review a mismatched employee's IRS W-4 Form (and any other employment-related documents in the personnel file) to be sure that the data is consistent with other information provided.

N&A recommends that companies perform internal audits of the I-9 Forms to measure compliance and risk of potential liability. While the organization's staff may undertake such audits, including the noting of deficiencies, it is important to note that auditing is difficult and time-consuming. In addition, if deficiencies are properly corrected, an employer can reduce the risk of administrative fines by providing a "good faith" defense to the INS' allegation of either "paperwork" or "knowing hire" violations. For several years, N&A has been assisting clients with these types of audits by either performing them itself or by training the HR staff to properly perform internal I-9 audits.

What If We Have Illegal Workers?

Once the company has provided notification to affected employees about the SSA Mismatch Letter, it is likely that some of the employees may leave the company. Alternatively, following an audit of an orga-

nization's employment eligibility verification documentation (and other documentation), it may be determined that some of the employees are not authorized to work. It goes without saying — that if an HR Manager or other agent of an organization becomes aware that an employee is not authorized to work, the organization is required to terminate the employment of that employee (unless the organization has a collective bargaining agreement that requires other steps first).

In addition, some of the employees that are, or become, unauthorized to work may be "key-employees" and/or some of them may possess "specialized skills." Under certain circumstances, an organization may be able to sponsor such employees for a visa. The ability for such a person to work for the organization entails a complicated analysis of the employee's education, experience, and immigration-related background.

Other Concerns

Receipt of the SSA Mismatch Letter also raises the issue for employers as to whether or not they have consistent employee policies. N&A has found it beneficial to explain to employers that they should consider revising employee handbooks to address sponsorship issues and consider including a policy in their employee handbook that states that an employee who presents false information to the employer will be terminated. In order to avoid allegations of discrimination on the basis of "citizenship" and/or "nationality," employers should also consider preparing and disseminating policies relating to the sponsorship of foreign nationals, and including such policies in an employee handbook.

Conclusion

If you have received a Mismatch Letter, would like counsel, or desire to establish a training program for your HR Managers, please contact, David H. Nachman at (973) 994-7800.

New HIPAA Regulations Regarding Protected Health Information

By Keith McMurdy

The U.S. Department of Health and Human Services has now issued final regulations regarding the privacy of individual health information. (45 CFR §164.501 - .) These new regulations substantially alter the way that health plans and plan sponsors may deal with patient records. The regulations also substantially impact the role of an employer as plan sponsor and as plan administrator. While compliance with the new regulations is not required until April 13, 2003, plan sponsors and administrators should now begin to consider how to amend their current procedures to comply with these regulations.

Generally, the new rules provide that covered entities may not disclose protected health information except as authorized by the individual who is the subject of the

information, or as explicitly required or permitted by the regulation. "Covered Entities" include employee health plans and third-party administrators of plans. "Protected Health Information" means any individually identifiable health information that is transmitted or maintained in any form that is created or received by a health care provider, employer, plan or administrator to the extent such information relates to the physical or mental health condition of an individual.

In order for a covered entity to disclose this information, it must be by consent or authorization by the individual unless otherwise required by the regulations. Generally, the information may be disclosed for treatment, payment or healthcare operations. However, a general consent should be obtained to ensure that this information can be properly utilized. Specific authorizations are required before covered entities may release information for any reason

not necessary for payment or healthcare operations.

It should be noted that the function of healthcare operations encompasses those activities necessary for the covered entity to complete its required function. For example, protected health information may be revealed to a plan administrator for the purposes of securing payment of a particular claim, or for the purposes of considering an appeal. However, the general consent does not permit release of information to individuals or entities not essential to the completion of the health care operation.

The difficulty in complying with the new regulations is that they do not provide a specific framework for plan administration that would act as a guide for designing an operation that completely protects the health information. Instead, the code merely provides requirements that must be met. For example, there are specific dis-

closure requirements that provide that a covered entity must specify the purposes for which protected information is requested and how it will be used. Individuals must be provided with the ability to review, inspect and copy information, and that they have the right to refuse to authorize disclosure of information. And individuals must be given assurances that the information will only be used for the purposes designated by the covered entity.

Based upon these new regulations, it appears that health plans will now have to take a very calculated and pragmatic approach to dealing with protected health information. To that end, plan sponsors should consider amending their plans, as well as adjusting their procedures to ensure compliance and avoid violating these new privacy regulations. If violations occur, there is potential for the incurring of substantial monetary penalties either by the day for non-compliance or by each occurrence.

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