

A No-Match Letter is No Match for Independent Thought

by John Rotterman

In this era of increased immigration enforcement, employers are reminded to avoid unauthorized employment. Yet employers must also be sure that they are not overzealous in their efforts to avoid breaking laws that govern the unauthorized employment of aliens.

For more than 20 years, the Immigration Reform and Control Act has prohibited employers from knowingly hiring or employing unauthorized individuals. The term *knowing* includes actual or constructive knowledge. Constructive knowledge is knowledge that may fairly be inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain condition.¹

The Social Security Administration (SSA) is not charged with responsibility for immigration enforcement. Rather, the SSA routinely sends the letters when an employer's W-2 records differ from the SSA's database regarding an employee's social security number ("SSN"). When there is a discrepancy, the SSA cannot post an employee's social security earnings to his or her account, and instead must deposit the funds into a national "earnings suspense fund," which is a very large fund

¹ 8 CFR § 274a.1

containing more than 250 million mismatched records and totaling more than \$500 billion.²

When the Social Security Administration (SSA) determines that a specified social security number does not match the social security number that they have in their records, the SSA will send out a No-Match Letter to the employer. The no-match letter, itself, does not mean anything more than the information that the SSA has does not match the information that the employer provided with respect to a given employee or employees. Often it is as simple as a transcription error.

This year the United States District Court of Appeals for the Ninth Circuit dealt with the significance of No-Match Letters as they pertain to the possibility of immigration violations in the case of Aramark Facility Services v. Service Employers International. In that case, the employer, Aramark, received letters from the SSA which indicated that 48 of its employees at the Staples Center in downtown Los Angeles had specified social security numbers which did not match the numbers in the SSA's own records. Aramark, suspecting immigration violations, told the listed employees that they had three days to correct the mis-matches by proving that they had begun the process of applying for new Social Security cards. Less than 10 days later, Aramark fired the 33 employees who had not provided evidence that they had applied for a Social Security card within the stipulated three-day period. The Union representing the fired employees filed a grievance on behalf of the fired workers. In essence this case can be distilled to a single issue, does a no-match letter on its own provide

² *Number High-Risk Issues: Hearing Before the Subcomms. On Social Security and Oversight of the H. Comm. on Ways and Means*, 109th Cong. 60 (Feb. 16, 2006) (statement of Patrick P. O'Carroll, SSA Inspector General), available at <http://waysandmeans.house.gov/hearings.asp?formmode=printfriendly&id=4710> (last visited June 9, 2008) as cited by Aramark Facility Services v. Service Employes International Union, Local 1877, No. 06-56662 (9th Cir. 6/16/2008) (9th Cir., 2008)

constructive notice that an employer is employing an undocumented worker? The Ninth Circuit answered the question definitively. A no-match letter by itself is not enough.

It is important to keep in mind that in this case all 48 of the employees for whom no-match letters were sent had, at the time they were hired, properly completed the federal employment eligibility verification form I-9. In effect at the time of their hire they presented Aramark with documentation sufficient to satisfy Aramark that it was hiring an individual legally permitted to work in the United States.³ What that means in the context of this case, is that Aramark attempted to justify the termination of these employees solely on the basis of the no-match letter. The Ninth Circuit clearly states that a no-match letter in of itself proof of constructive knowledge and this not sole grounds to terminate an employee. The court stated pointed out that it could be indicative nothing more than a typographical error and further stated “[a]n SSN discrepancy does not *automatically* mean that an employee is undocumented or lacks proper work authorization. In fact, the SSA tells employers that the information it provides them “does not make any statement about . . . immigration status” and “is not a basis, in and of itself, to take any adverse action against the employee.” Social Security Number Verification Service Handbook, *available at* http://www.ssa.gov/employer/ssnvs_handbk.htm (last visited June 9, 2008).⁴

In sum, a no-match letter by itself is only notice of a discrepancy. If, however, the no-match letter corroborates with other facts which place the employee’s work authorization in doubt, then action up to and including termination may be appropriate. It’s up to the employer to independently evaluate the whole of each situation. It would be prudent for an employer to speak with either immigration or

³ *id.* at 6918.

⁴ *id.* at 6928.

employment counsel so as to ensure that they are acting within the perimeters of the regulations and case law.

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