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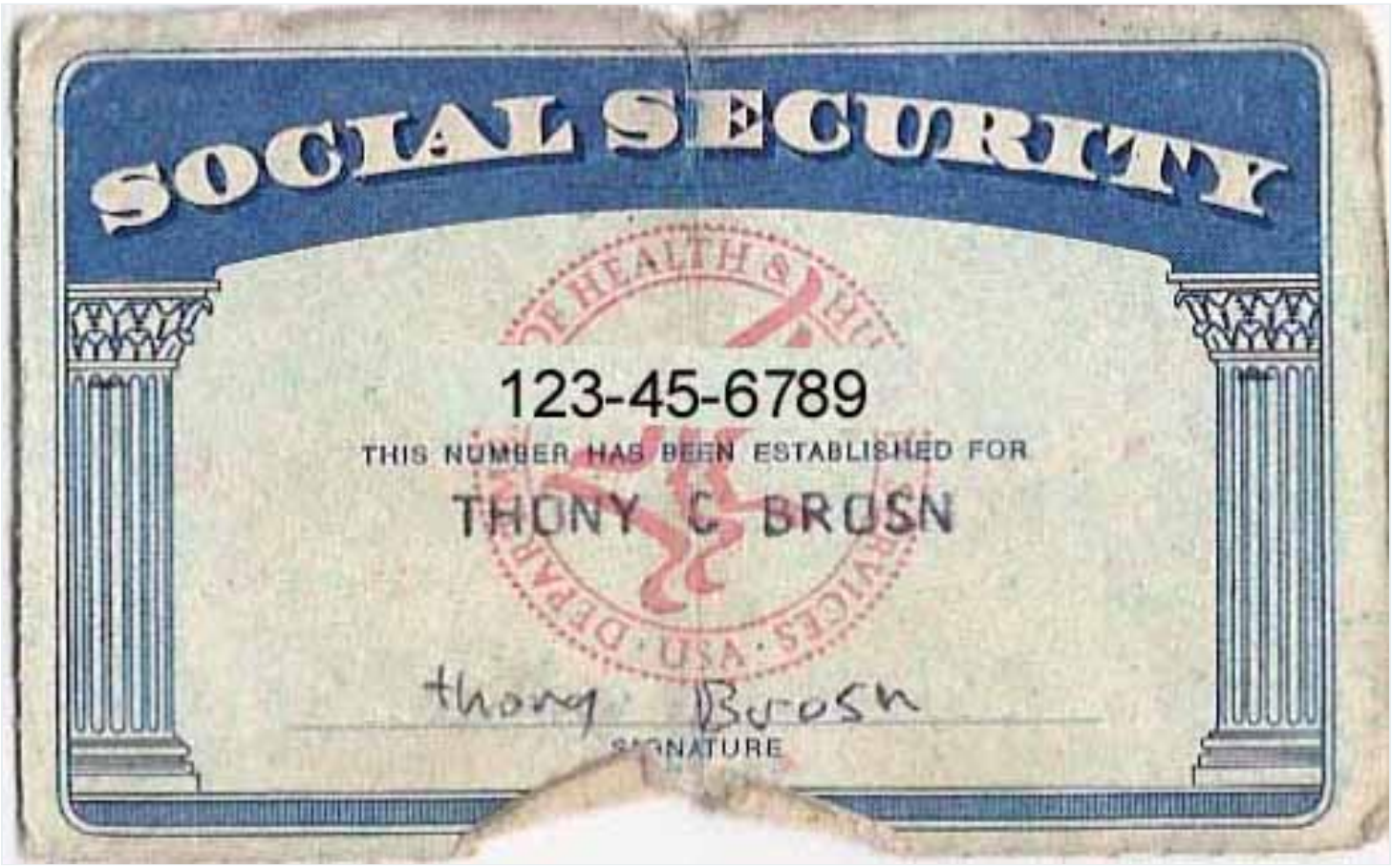
Richard D. Alaniz • Mar. 19, 2019



Many employers still recall opening a letter from the Social Security Administration (SSA) informing them that the name or Social Security number (SSN) reported on a recent wage report does not match a name or SSN in the SSA's records. At times the letter listed numerous individuals with a mismatch. The question for employers was what to do and when to do it. The answers were not always clear.

They're Back

Immigration and Customs Enforcement (ICE), integral parts of the administration's all-encompassing focus on illegal immigration.

What Can Be Done If You Get a Letter

So, the question of what to do and when upon receiving a no match letter will again arise very soon. The guidance on what an employer must do is provided in the SSA's Frequently Asked Questions about no-match letters. What must be done is relatively clear. The first step is to try "to confirm that a reporting or input error is not the cause of a no-match". To do this the employer, is conjunction with the employee, should try to confirm that the name and SSN submitted correctly reflect the employee's name and SSN. This can be accomplished by a brief meeting with the employee to review the relevant documents. If no error in the information is apparent, the employer should refer the employee to the local SSA office to attempt to resolve the no-match. The step of attempting to confirm apparent errors in name or SSN should occur relatively quickly after receipt of a no-match letter. While no specific time frame is mandated, an employer wants to act reasonably to such a government notice in case questions arise later regarding the employer's conduct in and whether it employed someone that was not authorized to work.

The question of how long an employer should wait for final resolution of the no-match notice before taking action is more difficult. As the SSA guidance notes, there are no regulations that set out any specific time frame or define what would be a reasonable period of time to address and correct information or otherwise resolve the mismatch. They do note that in the E-Verify context, SSA can provide a continuance of 120 days for a tentative non-confirmation of work authorization. That would therefore seem to be the outside limit that might be considered reasonable. When no-match letters were arriving on almost a monthly basis many employers used a ninety (90) day rule of thumb as a reasonable period for lack of

more definitive guidance. There are no reported cases where that was deemed to be

identity theft or fraud. A name change by the employee, usually because the employee recently married, is usually a common cause of a no match letter. Employees that have hyphenated last names also seem to receive no match letters more frequently. Ultimately, the discrepancy must be resolved.

If it is a simple incorrect recording error the employer can correct its records and submit Form W-2c, a Corrected Wage and Tax Statement. Sometimes employees merely quit or fail to respond when confronted about the mismatch by the employer. On some rare occasions an employee will admit to being unauthorized to work. The only reasonable employer response at that point is immediate termination. And in some cases an employee may claim that after checking with SSA, they are unable to explain the discrepancy. Here an employer can either risk continuing to employ the individual or terminate employment and hope that no viable legal complaint is raised. Neither option is the ideal response and probably warrants consulting with counsel or other professionals on immigration matters before taking action.

A No Match Letter is Not Evidence that an Employee Lacks Work Authorization

It is clear that a no-match letter, in and of itself, cannot constitute "constructive knowledge" of lack of work authorization. Only the Department of Homeland Security (DHS) can make such a legal conclusion, which usually involves a totality of the circumstances review. If an employer were to rely upon the no-match letter as a basis for taking adverse action against the employee at issue, it could violate the anti-discrimination rules of the Immigration and Nationality Act.

Can You Reduce the Chance of Getting a Letter

The SSA guidance does suggest at least one proactive step that employers might want to take to try to minimize receiving a no-match letter. It would involve the employer

using the Social Security Number Verification Service (SSNVS). This is a free online

Conclusion

If you receive a no-match letter in 2019 or thereafter, it is best to be as responsive as possible since you will be under the scrutiny of two agencies of the federal government, SSA and IRS. Neither is fun to deal with!

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