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E-Verify Errors: Unintended Consequences Of The ACA

Law360, New York (September 6, 2016, 12:03 PM ET) -- The Affordable Care Act commonly known as Obamacare is a federal statute that was signed into law by President Barack Obama on March 23, 2010.[1] The purpose of the law is to increase the quality and affordability of health insurance so that all Americans may receive health care.[2] An unintended consequence may be unwittingly informing employers that their employees are using an improper Social Security number. That an employee may be using an invalid SSN raises troubling issues for the employer.



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Applicable large employers (ALEs) are required to offer a qualified health plan to their full-time employees or risk paying fines.[3] An ALE is a single employer who employs 50 or more full-time employees or their equivalent.[4] For the 2015 tax year it became mandatory for employers filing over 250 reports to do so through the Affordable Care Act information returns (AIR) system.[5] The electronic AIR system provides a real-time assessment of an employee's SSN and whether it corresponds to the stated employee's name.

Employer Submissions

Employers are required to submit a Form 1095-C for all of their full-time employees, even for those that do not accept the employer-offered insurance.[6] Form 1095-C requires the employee's name and tax identification number (TIN), which is almost always a SSN.[7]

Employers that are filing less than 250 Forms 1095-C may elect to paper file.[8] Employers with more than 250 Forms 1095-C must file electronically.[9] AIR is a new system built by the IRS for electronic submission of these forms and verifies that the name and TIN listed on the Form 1095-C match Social Security Administration (SSA) records.[10] If the name and TIN do not match, the IRS will issue an error message.[11]

AIR System Error Messages

The error messages vary. A message that simply states, "accepted" means there were no errors and no obvious corrections that need to be made.[12] A message stating, "accepted with errors" means that the employer must make corrections and refile, but that the filing was accepted so they have not missed the filing deadline.[13] A message stating, "rejected" means that the employer must refile and that none of the information submitted was accepted, which means the employer could miss the filing deadline if they do not refile prior to the deadline.[14]

The error message when the TIN and name do not match is an "AIRTN500."^[15] Adding to the confusion of this new system is the fact that the AIRTN500 error message could be referring to the employee or one of his or her covered dependents in certain situations. The error message does not indicate which. For the purposes of this article, we will focus on situations where the AIRTN500 message is based on an employee's TIN number.

There are multiple reasons an employer would receive an AIRTN500 error message: marriage, divorce, typos or the employee could have provided a fake TIN. A common administrative error happens when the employer does not know how the system will be verifying last names. The AIR system checks the employee's TIN number with the first four letters of their last name.^[16] For example, if an employee's name is Jane Smith Jones the AIR system will match "Jone" with the TIN number.^[17] If the employee's name is hyphenated, Jane Smith-Jones, the AIR system will match "Smit" with the TIN number.^[18]

Common errors with regard to Spanish names occur during the verification process when an employee has a name similar to Elena de la Rosa. The AIR system will match "dela" with the TIN, which can lead to a multitude of errors.^[19] In addition, in Mexico an individual named Juan Lozano Cruz would use the last name Lozano, whereas in the U.S. their last name would be assumed to be Cruz. If there is no hyphen the AIR system would check "Cruz" as opposed to "Loza" with the TIN.

Before deciding on a plan of action it is best to check your records to ensure that the mistake was not a typo or an administrative error. Assuming there are no administrative errors or typos it is important to resist a knee-jerk reaction; i.e., demanding to see the employee's Social Security card or terminating the employee. Demanding a Social Security card might be tempting but the ACA is not the only law at play here.^[20] Immigration law, specifically the Information Reform and Control Act (IRCA), imposes restrictions on asking employees for specific documents.^[21]

I Received the Error Message, Now What?

When receiving an error message stating that the name and TIN on Form 1095-C do not match the information on file with the SSA the employer must follow steps to prove they acted in a reasonable manner.^[22] The regulations that discuss how an employer can show they acted in a reasonable manner are geared towards when the employer does not have a TIN for the employee, but are also being used for when the employer receives an error message for an incorrect TIN. The guidance is not especially helpful and assumptions need to be made when the employer has been given a TIN, it is just not the correct TIN.

Assuming the employer already has a TIN for the employee, they have satisfied the first solicitation requirement. The second solicitation requirement is to be made a reasonable time after the first.^[23] The third solicitation should be made by Dec. 31 of the year following the initial solicitation.^[24] This means that when the employer is informed of the incorrect TIN they would be on the second solicitation and should do it within a "reasonable time." As corrections need to be made, it is best to make this solicitation within one month of being notified of the incorrect TIN.

The third solicitation is to be made on Dec. 31 of the year following the first solicitation, this can be assumed to be interpreted as Dec. 31 of the year following the notification of the incorrect TIN. The method of soliciting the correct TIN can be done by mail, phone or in person. It is important to document the steps that were taken to rectify the incorrect TIN.^[25]

The employer's responsibility is to solicit the information from the employee, they are not required to repeatedly demand the information nor are they required to see documents proving the employee's TIN.

No-Match Guidance

The U.S. Department of Justice has previously issued guidance on how to handle a no-match letter. Although the AIRTN500 error message is not an actual no-match letter, it is somewhat similar. The no-match letter indicates that the name and SSN of an employee do not match SSA records and they advise giving the employee a "reasonable period of time" to rectify the situation with the SSA.[26] The DOJ specifically states that the employer should not require the employee to produce specific I-9 verification documents nor should the employer require the employee provide a written report of SSA verification. [27]

U.S. Immigration and Customs Enforcement previously issued guidance on how to handle a no-match letter. Their guidance added a no-match letter to the list of situations that might create constructive knowledge that an employer has regarding the immigration status of their employee. An employer receiving a no-match letter and not taking reasonable steps to resolve the matter was one of the situations added to the list.[28]

An AIRTN500 is slightly different in that it is informing the employer that the name and TIN do not match. The TIN is more than likely the employee's provided SSN. The IRS guidance does not expressly indicate that the employee must resolve the error message, although penalties may apply for incorrect data on the reports. Instead, the IRS has set out a procedure the employer should use to solicit the employee for the information, but does not give a time frame in which the employer must have the correct information. Keep in mind there are filing deadlines, though. Based on what ICE has previously issued, it is important to take reasonable steps to resolve the incorrect TIN, which has been established as soliciting the information from the employee.[29]

The guidance issued by the DOJ states, "the mere receipt of a no-match letter or other no-match notice does not, standing alone, constitute 'constructive knowledge' on the part of an employer that the referenced employee is not work authorized." [30] That means, the AIRTN500 error message will not be treated, on its own, as "constructive knowledge" on the part of the employer. This is important because employers are barred from hiring individuals not legally authorized to work in the U.S., [31] but the standard is that of having actual knowledge or constructive knowledge of the employee's immigration status. While the mere receipt of an error does not mean that the employer should know that employee is undocumented, an error notice coupled with lax I-9's or other immigration violations could place the employer on notice that the employee is undocumented.

I Cannot Obtain the Correct TIN, Now What?

What the employer should do when they are unable to obtain a correct TIN is not entirely clear, but as stated above, a knee-jerk reaction is not the correct answer. It is important to remember that the employer is not allowed to pick which I-9 verification documents the employee provides. [32] This means the employer may have never seen the employee's Social Security card. Demanding to see your employee's Social Security card comes with its own risks, discrimination being one.

The Office of Special Counsel has issued guidance on asking an employee for their Social Security card when it is for a purpose other than I-9 verification. They state that employers should keep all I-9 documentation requests and all non-I-9 documentation requests separate and inform the employee the reason for the request. [33] They do not state the employer cannot ask to see the employee's Social Security card for a non-I-9 purpose but state, "employers should be advised that workers who believe that request was made for employment eligibility verification purposes may allege discrimination in violation of the anti-discrimination provision." [34] This guidance does not specifically state that you may not ask your employee for their Social Security card, but the risk of doing so

may outweigh the benefit.

Avoiding I-9 Document Abuse

The AIR system is essentially functioning as a backdoor to E-Verify, which is not mandatory in every state and in fact a few states have laws that specifically limit the use of E-Verify. During the I-9 verification process when the employee was hired they were required to provide documents to prove their identity and eligibility to work in the U.S.[35] There are multiple combinations of documents that can be provided, and the employer is not allowed to require certain documents over others.[36] It is illegal to discriminate against individuals based on their citizenship or immigration status. Document abuse is one of the forms of discrimination.[37] Document abuse covers asking for more documents than are necessary, different documents than those which were presented, requesting specific documents, or rejecting documents that reasonably appear to be genuine.[38] Since there are penalties associated with ACA compliance an employer might want to ask for a Social Security card, but for the above reasons should not do so.

ACA Filing Penalties

This year, the first year, the IRS has stated they will be more lenient and there is a higher probability of getting the penalties waived as long as the employer acted in a reasonable manner. It is not known if the IRS will continue to be lenient or if next year the fines will be strictly enforced. If an employer knows they have employees that are not legally allowed to work in the U.S. there are a few options that they can look into, but those options are highly dependent on the individual company and an experienced attorney should be contacted.

In the second year and the years that follow it is not clear how strict the enforcement will be. The IRS makes it clear that an error message is neither an assessment of a penalty nor is it "constructive knowledge" the employee is not working legally in the U.S.[39] It is not known if sending in the same incorrect information for the same employee more than one year will equate to constructive knowledge.

Conclusion

The combination of the laws against discrimination and complying with ACA can leave an employer stuck between a rock and hard place. Employers cannot discriminate against their employees, but also need to make corrections to the Forms 1095-C to reduce or lower penalties and avoid broaching the possibility of "constructive knowledge." There is no one-size-fits-all answer as to what the employer should do when they are not going to be receiving a correct TIN; the solution varies depending on the size, needs and demands of each employer to find the best plan for moving forward.

The lack of a solid plan of action can make things more difficult for employers, but there are others in the same situation and there will be more information as things unfold. The good news is that the IRS is being lenient this year, which will give employers a year to consult with an experienced attorney for guidance on how to move forward with ACA compliance.

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taken as legal advice.

[1] President Obama Signs Health Reform Into Law, The White House, <https://www.whitehouse.gov/photos-and-video/video/president-obama-signs-health-reform-law> (last visited Aug. 12, 2016).

[2] Affordable Care Act Facts, Obamacare Facts, <http://obamacarefacts.com/affordable-care-act-facts/> (last visited Aug. 12, 2016).

[3] 26 U.S.C. § 4980H(a)-(c).

[4] 26 U.S.C. § 4980H(c)(2)(A).

[5] Affordable Care Act Information Returns (AIR) Program, Affordable Care Act Information Returns (AIR) Program, <https://www.irs.gov/for-tax-pros/software-developers/information-returns/affordable-care-act-information-return-air-program> (last visited Aug. 12, 2016).

[6] Information Reporting by Applicable Large Employers, Information Reporting by Applicable Large Employers, <https://www.irs.gov/affordable-care-act/employers/information-reporting-by-applicable-large-employers> (last visited Aug. 11, 2016).

[7] Id.

[8] Id.

[9] Id.

[10] Affordable Care Act Information Returns (AIR) Program, Affordable Care Act Information Returns (AIR) Program, <https://www.irs.gov/for-tax-pros/software-developers/information-returns/affordable-care-act-information-return-air-program> (last visited Aug. 11, 2016).

[11] "Affordable Care Act (ACA) Information Returns (AIR) Working Group Meeting June 14, 2016,, General Affordable Care Act Information Returns (AIR) Program Topics". 2016. Presentation.

[12] Id.

[13] Id.

[14] Id.

[15] Id.

[16] I.R.S Pub. 1586 (February 2016).

[17] Id.

[18] Id.

[19] Id.

[20] 8 U.S.C. 1324b(g)(2)(B)(iv)(IV).

[21] Id.

[22] Affordable Care Act Information Returns (AIR) Program, Affordable Care Act Information Returns (AIR) Program, <https://www.irs.gov/for-tax-pros/software-developers/information-returns/affordable-care-act-information-return-air-program> (last visited Aug. 12, 2016); 26 U.S.C.A. § 6724.

[23] I.R.S Pub. 1586 (February 2016).

[24] Id.

[25] Id.

[26] SSA No-Match Guidance Page, U.S. Department of Justice, <https://www.justice.gov/crt/ssa-no-match-guidance-page> (last visited Aug. 11, 2016) (The duration of the term a "reasonable period of time" depends on the totality of the circumstances or in other words, is situation specific as the term is not defined by any federal statute or regulation. For example, it has been recognized in the E-Verify context that it can sometimes take up to 120 days to resolve a discrepancy in the SSA's database.).

[27] Id.

[28] Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Rescission, 74 FR 51447-01

[29] Affordable Care Act Information Returns (AIR) Program, Affordable Care Act Information Returns (AIR) Program, <https://www.irs.gov/for-tax-pros/software-developers/information-returns/affordable-care-act-information-return-air-program> (last visited Aug. 12, 2016); 26 U.S.C.A. § 6724.

[30] Frequently Asked Questions About Name/Social Security Number "No-Matches" available at: <https://www.justice.gov/sites/default/files/crt/legacy/2010/12/29/FAQs.pdf>.

[31] 8 U.S.C.A. § 1324a.

[32] 8 U.S.C.A. § 1324b.

[33] Frequently Asked Questions (FAQs), U.S. Department of Justice, <https://www.justice.gov/crt/frequently-asked-questions-faqs> (last visited Aug. 12, 2016).

[34] Id.

[35] 8 U.S.C.A. § 1324a.

[36] 8 U.S.C.A. § 1324b.

[37] Id.

[38] Id.

[39] "Affordable Care Act (ACA) Information Returns (AIR) Working Group Meeting July 19, 2016, General Affordable Care Act Information Returns (AIR) Program Topics". 2016. Presentation.