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Worksite Enforcement Through the Lens of the No-Match Letter

Becki Young*

Abstract: Between March and May 2019 the Social Security Administration issued no-match letters to nearly 600,000 employers, resuming a controversial practice that had been in place for nearly 20 years, before the Obama administration terminated it in 2012. The current no-match effort appears to be directly related to President Trump's Buy American and Hire American Executive Order, and this administration's aggressive worksite enforcement actions. This article examines the historical context in which no-match letters arise, discusses best practices for employers who receive no-match letters, and looks at the potential legal implications of no-match letters, including information sharing between federal agencies.

Between March and May 2019, the Social Security Administration (SSA) mailed no-match letters to nearly 600,000 employers—with the greatest impact falling on the hospitality, construction and agriculture industries.[1]

We are unaware of any official statistics about the total number of workers affected (most letters related to multiple employees), but we can make an estimate using recent statistics. Reportedly, there are about 11 million undocumented immigrants in the United States, about 8 million of whom participate in the labor force.[2] Studies have estimated that about half, or 4 million, pay federal income taxes[3] and about half again are working on fake or stolen social security numbers (SSNs).[4] The SSA announced that this time around it is sending no-match letters to employers with even a single mismatch, meaning the current round of no-match letters could affect roughly 2 million workers—and their employers.

What Is a No-Match Letter?

Annually, employers send SSA millions of earnings reports (W-2 Forms) in which the combination of employee name and SSN does not match SSA records. In some of these cases, SSA sends a letter, such as an Employer Correction Request Notice (EDCOR),[5] that informs the employer of the mismatch. This letter is commonly referred to as a "no-match letter." There can be many causes for a no-match, including clerical errors and name changes.[6] One potential cause may be the submission of information for an individual

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who is unauthorized to work in the United States and who may be using a false SSN, or an SSN assigned to someone else.[7]

This article examines the history of U.S. worksite enforcement preceding the current wave of no-match letters and considers the potential implications to employers who received such a letter in 2019.

History and Context: Why Is the Government Sending No-Match Letters?

The question of who should be allowed to immigrate to, and work in, the United States is nearly as old as the country itself.

When U.S. immigration laws were first organized into a single body of text, the Immigration and Nationality Act of 1952 (INA) (also known as the McCarran–Walter Act), the law did not include employer enforcement provisions. The Act stated that it was a crime to aid, harbor, or abet an undocumented person, but specifically excluded employment from that definition under something called the Texas Proviso, named for the delegation demanding its inclusion.[8]

1981–1989 Ronald Reagan

It was not until the 1986 passage of the Immigration Reform and Control Act (IRCA), under President Reagan, that federal law prohibited the hiring and employment of undocumented workers.

Among other things, IRCA required employers to complete Form I-9 to verify the work authorization of all employees, and included employer sanctions provisions criminalizing the knowing hire, or continued employment of, unauthorized immigrants. The law also addressed concerns that employer sanctions might cause increased discrimination against legal immigrants and "foreign-appearing" U.S. citizens with provisions providing new protections from national origin and citizenship discrimination.[9] Finally, the law granted a one-time amnesty to about 3 million undocumented immigrants.

1989–1993 George H.W. Bush

During George H.W. Bush's presidency, the level of immigration enforcement actions was low. Two significant developments during this administration were:

- Executive Order 12781, authorizing the creation of demonstration projects on alternative employment eligibility verification systems (the predecessors to E-Verify).

- Formation by Congress of the Commission on Immigration Reform (CIR) (as part of the Immigration Act of 1990) to examine U.S. immigration policies critically. This bipartisan commission was chaired by the late Congresswoman Barbara Jordan, the highly esteemed civil rights advocate, and is often referred to as the Jordan Commission.[10]

1993–2001 Bill Clinton

Immigration enforcement was a mixed bag during the Clinton years.

Beginning in 1993, the SSA began sending out no-match letters, a practice that would continue for nearly two decades. The stated purpose of this effort was to ensure the accuracy of earnings records used to determine social security benefits.

By 1994, both the CIR and the Government Accountability Office (GAO) (in testimony before Congress) confirmed the decline of government resources (funding and staffing) for employer sanctions efforts, and the consequent decrease in overall numbers of investigations in recent years.[11] The CIR recommended a national computerized registry using data from INS and SSA as the most promising employment eligibility verification system.

On February 7, 1995, President Clinton agreed to take up the CIR's recommendation for an employment eligibility verification system and directed the heads of all executive agencies to develop and test such a system. The Joint Employment Verification Pilot (JEVP),[12] created by INS and SSA, was a direct result of this effort. Piloted in July 1997 in Chicago with 38 volunteer employers, it never came to fruition as it was superseded by the new pilot programs established under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[13]

IIRIRA required, among other things, that the Immigration and Naturalization Service (INS)—which became part of the U.S. Department of Homeland Security (DHS) in 2003—conduct three distinct pilot programs for employment eligibility verification.

In 1999, INS adopted a new interior enforcement strategy focusing on cases with a "clear nexus between alien smuggling and the employment of unauthorized workers."[14] In turn, the enforcement focus shifted away from worksite investigations not involving suspected alien smuggling. This focus on employers involved in migrant smuggling or other criminal activities, and employers at worksites vulnerable to terrorism, continued for the next two decades.

In 2000, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) reversed its long-held position in favor of employer sanctions bill, calling for the repeal of employer sanctions, not only because of employment discrimination but also because they believed some employers

were using sanctions (or the threat of sanctions) as a tactic against labor organizers[15] and employees asserting other workplace rights.

2001–2009 George W. Bush

After the terrorist attacks of September 11, 2001, worksite enforcement focused heavily on national security, including infrastructure industries and strategic targets (*e.g.*, airports, nuclear power plants, and military bases).

In 2003, INS's investigations division, which was responsible for sanctions enforcement, was reorganized into Immigration and Customs Enforcement (ICE), part of DHS. The following statistics illustrate immigration enforcement trends in the late years of the Clinton administration and the early years of George W. Bush's presidency.[16]

Employer Audit Statistics

Figure 1 shows the number of employers subject to I-9 audits each year from FY 1988 to FY 2003 by the immigration authorities.

The number of audits per fiscal year dropped 77 percent[17] from a peak of almost 10,000 in FY 1990 (when some critics were already expressing a concern that the level of audits was too low to be effective) to less than 2,200 in FY 2003.

Warnings and Fines

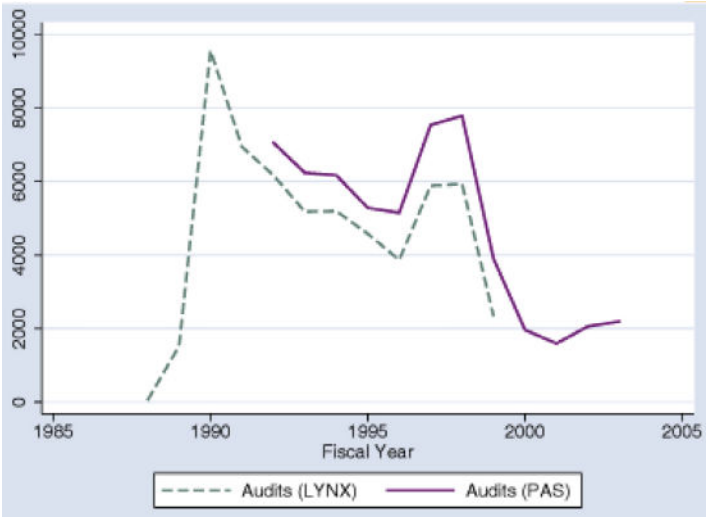
In the event an audited employer is found non-compliant, they may receive a warning (if violations are minimal and future compliance is anticipated) or they may be fined (if violations are more serious or there are charges of knowingly employing unauthorized immigrants).

Figure 2 shows the overall trend in the number of warnings issued from FY 1988 to FY 2003. The decrease is evident here as well, with a 62 percent decline from a peak of nearly 1,300 warnings in FY 1990 to fewer than 500 in FY 2003.

Figure 3 shows the number of Final Orders[18] (orders to fine serious immigration violators). Again, there is a strong downward trend, dropping 82 percent from a peak of nearly 1,000 in FY 1991 to a total of 124 in FY 2003.[19]

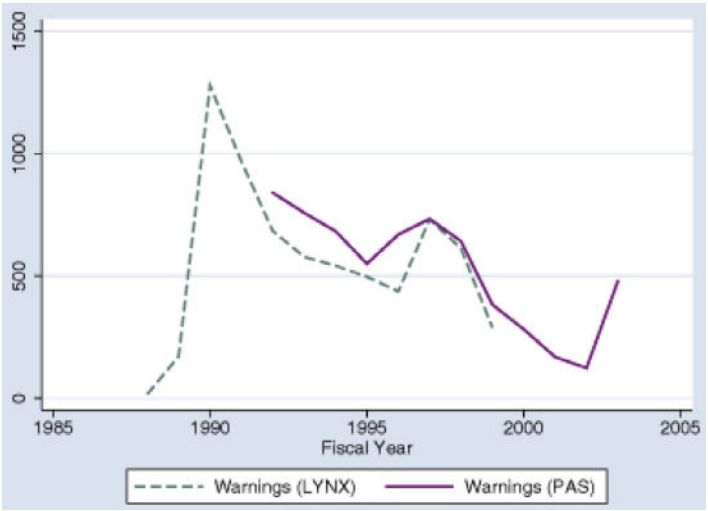
While overall worksite enforcement was decreasing during these years, the federal government continued its expansion of employment eligibility verification. In August 2007, the government rebranded the Basic Pilot created under IIRIRA as E-Verify, and the federal Office of Management and Budget issued a memorandum stating that all federal departments and agencies would be required to use the program. On June 6, 2008, President George W. Bush issued Executive Order 13465, mandating that certain businesses that contract with the federal government use E-Verify for employment verification.[20]

Figure 1. Employer Sanctions Investigations for FY 1988 to 2003



Source: Office of Immigration Statistics Performance Analysis System G-23.19 and author's calculations from the Center for Immigration Studies Employer Sanctions Database.

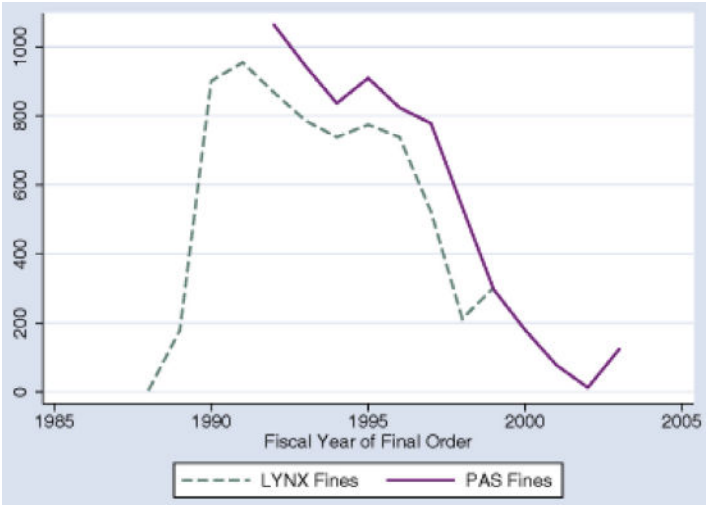
Figure 2. Employer Sanctions Warnings Issued for FY 1988 to 2003



Source: Office of Immigration Statistics Performance Analysis System G-23.19 and author's calculations from the Center for Immigration Studies Employer Sanctions Database.

As the government expanded E-Verify, it also increased its no-match efforts. Before September 11, only employers with about 10 percent or more mismatches received no-match letters. Beginning in 2002, SSA began sending no-match letters to employers with even a single mismatch. As the volume of

Figure 3. Employer Sanctions Cases Resulting in Fines for FY 1988 to 2003



Source: Office of Immigration Statistics Performance Analysis System G-23.19 and author's calculations from Center for Immigration Studies Employer Sanctions Database.

no-match letters sent grew from 110,000 to 750,000, employers and employees alike were unsure of the correct follow-up procedures.[21]

2007 No-Match Rule

Beginning in 2006, the administration sought to define the legal obligations of employers who receive no-match letters from SSA or letters regarding employment verification forms from DHS. On August 15, 2007,[22] the government published a final rule aimed at refining the concept of "constructive knowledge" in this context, and creating a safe harbor for employers to ensure that the government would not use the receipt of a no-match letter as part of an allegation that the employer had constructive knowledge that an employee was unauthorized to work in the United States.

The federal government was never able to implement this regulation, however, because it was blocked by a court order in a lawsuit filed by the American Civil Liberties Union, United States Chamber of Commerce, unions, and trade groups.

Although the Bush administration's no-match rule never took effect, its provisions are instructive to modern-day employers seeking guidance on how the federal government may view no-match letters; how it may interpret DHS's regulations relating to the unlawful hiring or continued employment of unauthorized aliens; and how it may construe constructive knowledge in the no-match letter context.

Safe-Harbor Procedure

The regulation sought to provide a safe harbor against allegations of constructive knowledge for employers who received a no-match letter from SSA.

The current regulation says constructive knowledge can be found when the employer fails to complete (or completes incorrectly) Form I-9; in some cases, when an employee asks the employer for immigration sponsorship; and when an employer "acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf" (this last point would cover the situation where an unauthorized employee departs, and the employer then rehires him as a contractor).[23]

The 2007 rule would have added two additional cases in which the government could find employers to have constructive knowledge, unless they followed prescribed safe-harbor procedures. Those cases were receipt of a no-match letter from SSA, and receipt of a "Notice of Suspect Documents" from ICE.

Once an employer completed the safe-harbor procedures, even if they were found to have an unauthorized employee, the receipt of the no-match letter alone would not have constituted constructive knowledge. However, the rule indicated that the government would still look at the totality of the circumstances. If other factors besides the no-match letter pointed to an employee being unauthorized, it would not allow employers to ignore these considerations. Further, the safe-harbor procedure did not protect employers who had actual (as opposed to constructive) knowledge that an employee was unauthorized to work; if the employer gained actual knowledge of lack of work authorization during the safe-harbor procedure, they were required to terminate the employee immediately, or risk being found liable for "continuing to employ" an undocumented worker.

Interestingly, though the safe-harbor procedure required employers to create a new I-9, it did not require verification of the new SSN with SSA.

The safe-harbor procedure, in the case of a no-match letter, included the following steps:

(A) **Check Internal Records**: Within 30 days of receiving the no-match letter, the employer must check its records to confirm whether the discrepancy resulted from an internal error and, if so, must correct the error, inform SSA, and verify the correction with SSA. The employer may update the employee's Form I-9 or complete a new Form I-9 (and retain the original Form I-9)[24] but should not perform a new Form I-9 verification.

(B) **Ask Employee to Confirm/Correct**: If the employer determines the discrepancy is not due to an error in its own records, within 90 days of receiving the no-match letter the employer must either correct, inform and verify the accurate information with

SSA (if the employee states that the employer's records are incorrect) or instruct the employee to resolve the discrepancy with SSA (if the employee confirms that the employer's records are correct).

(C) **Complete Special I-9 Verification Procedure**: If the employer is unable to verify with SSA within 90 days of receiving the written notice that the employee's name and social security account number matches SSA records (including cases where the employee takes action but receives no response in 90 days, and cases where the employee takes no action), the employer must (by Day 93 after receiving the no-match letter) complete a new I-9 under the following special rules:

- The employer must not accept any document referenced in the no-match letter, any document that contains a disputed social security account number or alien number referenced in the no-match letter,[25] or any receipt for an application to replace such document, to establish employment authorization or identity or both; and
- The employee must present a document that contains a photograph[26] in order to establish identity or both identity and employment authorization.

If the discrepancy referred to in the no-match letter was not resolved, and if the employee's identity and work authorization could not be verified using a reasonable verification procedure, the employer was given the choice to terminate the employee or risk being found to have constructive knowledge and to have violated the rules regarding continuing to employ an unauthorized worker.

This last part of the safe-harbor procedure (instructing employers to request, or refuse to accept, specific documents) directly contradicted the anti-discrimination provision of the I-9 regulations (which were put in place to prevent discrimination based on, for example, foreign appearance or accent). Although the regulation attempted to justify its diversion from the anti-discrimination provisions, in the end this was one of the main points that prevented it from being implemented.

Constructive Knowledge

The current regulatory definition of constructive knowledge, "knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition" first appeared in the regulations on June 25, 1990 at 8 CFR 274a.1(l)(1).[27]

The government likened this definition of constructive knowledge to that in *Mester Mfg. Co. v. INS*, 879 F.2d 561, 567 (9th Cir. 1989), holding that

an employer who received information from INS that some employees had presented false documents to for work authorization, and failed to make any inquiries or take corrective action, had constructive knowledge. In *Mester*, the court cited its previous opinion, which stated that "deliberate failure to investigate suspicious circumstances imputes knowledge."[28] DHS also compared its definition of constructive knowledge with that in *Black's Law Dictionary*, which states "constructive knowledge" is "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person."[29]

Critics of the 2007 no-match rule argued that it impermissibly extended the reach of constructive knowledge, citing *Collins Food Int'l v. INS*, 948 F.2d 549 (9th Cir. 1991). In *Collins Food*, the Ninth Circuit held that a finding of constructive knowledge could not be based on (1) the employer's offer of employment prior to conducting a Form I-9 verification, or (2) the employer's acceptance of a social security card as evidence of employment authorization when the back of the card did not match the social security card example pictured in the INS Handbook for Employers.[30]

Opponents of the no-match rule argued that *Collins Food* limits findings of constructive knowledge to situations in which DHS has explicitly warned employers that an employee may be an unauthorized worker. Thus, they suggested, DHS was impermissibly expanding constructive knowledge by including receipt of written notice from SSA as an example of a situation that may lead to a finding of constructive knowledge.[31] The government countered that what mattered was that the employer had "positive information" about potentially unauthorized employment and not whether that information came from DHS or SSA.

Federal Lawsuit and Injunction

In the end, these fine points about constructive knowledge were never resolved because the rule was enjoined by a federal court within two weeks of publication. On August 29, 2007, the AFL-CIO and others filed suit seeking declaratory and injunctive relief in the U.S. District Court for the Northern District of California.[32] The district court granted the plaintiffs' initial motion for a temporary restraining order against implementation of the August 2007 Final Rule.[33] On October 10, 2007, the district court granted the plaintiffs' motion for preliminary injunction.[34]

The court raised three issues regarding DHS's rulemaking action implementing the no-match final rule; whether DHS had:

1. supplied a reasoned analysis to justify what the court viewed as a change in the Department's position—that a no-match letter may be sufficient, by itself, to put an employer on notice and thus impart constructive knowledge that employees referenced in the letter may not be work-authorized;

2. exceeded its authority (and encroached on the authority of the Department of Justice (DOJ)) by interpreting the anti-discrimination provisions of the Immigration Reform and Control Act of 1986 (IRCA), Public Law 99-603, 100 Stat. 3359 (1986), INA §274B, 8 U.S.C. 1324b; and
3. violated the Regulatory Flexibility Act, 5 U.S.C 601 et seq., by not conducting a regulatory flexibility analysis.

DHS subsequently published a supplemental notice of proposed rulemaking (SNPRM) and supplemental final rule to clarify certain aspects of the 2007 no-match final rule and to respond to the findings underlying the court's injunction.[35] Neither the SNPRM nor final rule, however, changed the safe-harbor procedures or applicable regulatory text.[36] Regardless, the 2007 rule never went into effect; it was rescinded by the Obama administration before the injunction was lifted.

2009–2017 Barack Obama

During his 2008 campaign, Obama promised to "remove incentives to enter the country illegally by cracking down on employers who hire undocumented immigrants."

One commentator described the Obama administration's worksite enforcement strategy as follows:

> Workplace Immigration and Customs Enforcement (ICE) raids by gun-wielding agents resulting in the mass arrests of dozens and sometimes hundreds of employees that were common under the George W. Bush administration appear to have ceased under the Obama administration.... Enforcement in this regime would focus on employers who hire undocumented workers, not on the workers themselves.
>
> Worksite enforcement-related deportations decreased under the Obama approach in contrast with that under George W. Bush, but [total] deportation numbers did not. The Obama administration deported record numbers of undocumented immigrants. According to ICE, the increase was partly a result of deporting those persons picked up for other crimes and expanding the search through prisons and jails for deportable immigrants already in custody.
>
> Employers say the audits reach more companies than the work-site roundups of the Bush administration. The audits force businesses to fire every suspected undocumented worker on the payroll—not just those who happened to be on duty at the time of a raid—and make it much harder to hire other unauthorized workers as replacements. Auditing is effective in getting unauthorized workers fired for sure.[37]

The Obama administration focused its worksite enforcement efforts on employers whose business models relied on an unauthorized workforce (and

who engaged in human smuggling, identity theft, and social security number fraud), and employers who risked national security by employing unauthorized workers in sensitive critical infrastructure industries.

Upon taking office in January 2009, DHS Secretary Janet Napolitano conducted a review of existing programs and regulations to determine areas for reform or improved efficiency. Pursuant to this review, DHS determined that improvements in E-Verify, along with other DHS compliance programs, including the ICE Mutual Agreement between Government and Employers (IMAGE), were the most effective tools for worksite enforcement. On September 8, 2009, the final rule implementing Executive Order 13465, requiring use of E-Verify by federal contractors, went into effect. It requires certain employers that contract with the United States not only to check the employment eligibility of all newly hired employees, but also to confirm the employment eligibility of existing employees "assigned to the contract."[38]

Because of this policy shift and the renewed focus on compliance programs such as E-Verify and IMAGE, on July 8, 2009, Napolitano announced the administration would rescind the Bush-era No-Match Rule. And in 2012, the Obama administration stopped sending no-match letters altogether.

2017–Present Donald Trump

On April 18, 2017, President Trump signed the Buy American and Hire American Executive Order (BAHA), the stated purpose of which is "to create higher wages and employment rates for U.S. workers and to protect their economic interests by rigorously enforcing and administering our immigration laws."[39]

On April 12, 2018, the Immigration Reform Law Institute (IRLI), on behalf of the Federation for American Immigration Reform (one of the largest anti-immigrant groups in the United States) filed suit against SSA, seeking records related to the Obama-era decision to halt the sending of no-match letters to employers.[40]

According to IRLI, the FOIA records produced by SSA through the lawsuit showed that, from 2012 to 2016, there were 39 million instances where names and SSNs on W-2 tax forms did not match corresponding social security records.[41] Additionally, SSA's Earnings Suspense File (ESF), which holds uncredited wages that cannot be correctly matched to SSA's database, increased by over $409 billion. From 1937 to 2005, $519 billion was reportedly sitting in the ESF. In tax year 2016, that number rose to over $1.5 trillion.[42]

In July 2018, likely in response to BAHA, SSA re-started the practice of sending no-match letters, starting with a series of "informational notifications" to employers and third-party providers informing them of mismatches on their 2017 W-2 forms and explaining where to find resources. The plan was to send 225,000 of these notices every two weeks. In March 2018, SSA

began sending the current batch of no-match letters, relating to the 2018 tax year.

The latest letters attempt to avoid the legal pitfalls identified in the 2007 litigation because, unlike those drafted under the Bush program, the new no-match letters do not threaten employers with enforcement action or penalties. (The Bush-era letters contained the following provision, which current letters do not: "You should not ignore this letter and do nothing. That could jeopardize your employee's future benefits and, as the Department of Homeland Security has advised us, expose you to liability under the immigration laws."[43])

Although BAHA does not explicitly mention SSA or no-match letters, it contains several broad provisions, which the federal government has subsequently relied upon to implement sweeping policy changes, including the resumption of no-match letters. Those provisions include:

> In order to create higher wages and employment rates for workers in the United States, and to protect their economic interests, it shall be the policy of the executive branch to rigorously enforce and administer the laws governing entry into the United States of workers from abroad.[44]
>
> [T]he Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security shall … propose new rules and issue new guidance … to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse.[45]

The policy rationale behind this new batch of no-match letters seems shortsighted to say the least. The individuals targeted in the current round of letters are gainfully employed immigrants, who are paying taxes but cannot reap the benefits, and who are in many cases long-standing and valued employees of U.S. companies. Unemployment is at 3.6 percent,[46] well-documented labor shortages exist in the industries most affected by no-match letters, and the federal government has no apparent plan for an immigration system that provides unskilled/low-skilled labor.

The no-match letters and their fallout, while perhaps encouraging some undocumented workers to depart the United States, will unquestionably push many more workers into the cash economy, creating opportunities for exploitation of those workers, driving wages down, and depriving the federal government of an existing source of revenue.

Practical Guidance: What Employers Should Do upon Receiving a No-Match Letter

An employer who receives a no-match letter must walk a fine line—avoid discrimination while acting in good faith to resolve any questions regarding employment authorization.

First and most importantly, every employer should have a written policy detailing how it will respond to no-match letters and should maintain records of all responses. Additionally, employers should implement other best practices for I-9 compliance, including an annual internal audit of I-9 files, participation in E-Verify, and use of the Social Security Number Verification Service (SSNVS). Employers might also consider participation in the IMAGE program.

Once an employer receives a no-match letter, the employer must (if not already registered) register for SSA's Business Services Online (BSO), as instructed in the no-match letter. This will enable the employer to check whether the names and SSNs of its employees match SSA records using the SSNVS. The employer may also view any related errors in its W-2 file.

Upon identifying the workers impacted by the no-match letter through BSO, employers should check their internal records, and make corrections if necessary. If the information reported by SSA matches the information in the employer's records, they should inform the employee of the discrepancy via a written letter that includes a copy of the company's no-match policy. SSA has posted a sample letter that employers can use.[47] The employee should retain copies of all related correspondence in the employee's personnel file.

Practically speaking, employers should expect that some employees may resign, or simply disappear, at this point in the process. This is also the point at which some employers may gain actual knowledge (if the employee discloses that he is unauthorized to work in the United States) or constructive knowledge that a particular employee may not be authorized to work.

What Is a "Reasonable" Period of Time to Resolve a No-Match Issue?

The law requires employers to resolve no-match issues in a "reasonable" period of time.

The 2019 version of the no-match letter contains the following language: "Please review the name and SSN information you submitted on the Form W-2 and provide us necessary corrections on the Form W2-C within 60 days of receipt of this letter."[48] Many employers have interpreted this to mean that they must resolve all no-match issues, and notify SSA of the resolution, within 60 days of receiving the no-match letter.

However, SSA has no enforcement authority, so the request in the no-match letter is simply that—a request. Notably, the sample employee letter provided by SSA for employers includes no deadline for the employee to resolve the issue. There are no federal statutes or regulations that define a "reasonable period of time" in connection with the resolution of a no-match notice. Thus, what qualifies as a "reasonable period of time" depends on the totality of the circumstances.

Some employers rely on the 90-day period for resolution of no-match issues found in the 2007 regulation. Other employers have noted that in the E-Verify context, employers are given 120 days to address a Tentative Non-Confirmation, and SSA has the ability to put a Tentative Non-Confirmation into continuance for up to 120 days.[49] This recognizes that it can sometimes take that long to resolve a discrepancy in SSA's database.

It is recommended that employers determine what constitutes a reasonable period of time based on their particular facts and circumstances, while consulting qualified immigration counsel. Once this number has been determined, employers should ask affected employees to resolve the issue within the specified time frame; it is also advisable to provide interim deadlines for affected employees to show they have taken action, even if the issue has not yet been resolved.

If, in the course of addressing a no-match letter, an employee advises an employer that they are not authorized to work, or the employer otherwise learns definitively that the employee is unauthorized to work, then the employer has actual knowledge and must terminate the employee to avoid liability. Even in the absence of actual knowledge, if after the deadline the employee is unable to provide proof that the discrepancy has been rectified or that they are actively addressing it with SSA, the employer may be imputed with constructive knowledge of lack of employment authorization.

Interestingly, the 2007 rule stated, "If the individual is no longer an employee at the time the employer receives the no-match letter, the employer need not act on the SSA no-match letter because the employer is no longer employing the individual."[50] However, from a practical perspective, it may sometimes be in an employer's interest to notify SSA of departed employees included in a no-match letter, to reduce SSA's focus on that employer.

Avoiding Discrimination in the No-Match Resolution Process

All no-match letters begin with a clear warning about discrimination and adverse action, as follows:

> IMPORTANT: This letter does not imply that you or your employee intentionally gave the government wrong information about the employee's name or SSN. This letter does not address your employee's work authorization or immigration status. **You should not use this letter to take any adverse action against an employee, such as laying off, suspending, firing, or discriminating against that individual, just because his or her SSN or name does not match our records**. Any of those actions could, in fact, violate State or Federal law and subject you to legal consequences. (Emphasis added)

Requesting proof of immigration status or employment eligibility simply in response to a no-match letter (without completing the additional notification requirements described above and giving the employee a reasonable time to remedy the issue) may be a violation of the law.

Potential Implications: How No-Match Letters Could Affect the Legal Rights and Responsibilities of Employers

Currently, SSA is authorized to share information with DHS for various reasons. As the administration continues its vigorous worksite enforcement and employer compliance efforts, employers can expect increased information sharing between agencies. It would not be surprising if employers who received no-match letters become the targets of I-9 audits and immigration raids.

Legally speaking, no-match letters implicate four main areas of concern for employers: the SSN mismatch itself (overseen by SSA), tax-reporting obligations (overseen by the IRS), employer compliance requirements (overseen by DHS), and anti-discrimination provisions (overseen by the Immigrant and Employee Rights Section (IER) of DOJ or Equal Employment Opportunity Commission (EEOC)).

SSA Requirements

As stated, SSA has no enforcement authority and cannot penalize employers for reporting incorrect information. Because of this, some lawyers advise clients not to register for the BSO system or respond to the no-match letters. The fact that the new letters do not provide any identifying information regarding the employees in question could support an argument that the no-match letters do not impart constructive knowledge that any worker is unauthorized for employment, and that they do not create a duty on the part of the employer to take action.

However, in the current enforcement climate in which DHS's employer-compliance activities have quadrupled in the past year,[51] this is a very aggressive legal position to take. As explained below, the issuance of these no-match letters could be a harbinger of more targeted enforcement efforts to come. For employers who make compliance a priority, ICE will likely view the employer's registering for BSO and addressing the mismatch issues as evidence of good faith, in the event of an eventual audit or raid.

On a separate but related note, employers may register through BSO to use the Social Security Number Verification System.[52] This optional compliance tool enables employers to verify current or former employees for wage-reporting purposes, and ICE considers its use to be a compliance best practice.

IRS Fines

Employers have an obligation to avoid liability for inaccurate wage reporting under the Internal Revenue Code and, unlike SSA, the IRS has the authority to impose fines for incorrectly reported data. IRS Publication 1586[53] lays out the rules and potential penalties. IRS can fine employers $50 for each failure to file a complete and accurate Form W-2, up to a maximum of $100,000 or $250,000.[54]

IRS Publication 1586 states the following regarding SSA no-match letters:

> Generally, SSA and IRS records are consistent. However, it is important to note that the database used by SSA to match names and SSNs may not be identical to the IRS database. IRS penalty notices relating to mismatched TINs are based and issued exclusively on IRS system information. Mismatches reported under SSA verification systems are not considered IRS notices and do not trigger any further solicitation requirements under IRS rules for reasonable cause waivers. However, if an employer receives a mismatch notice from SSA, the employer may wish to re-solicit the employee's SSN and try to obtain correct information prior to filing the Form W-2.

Employer Sanctions

In addition to IRS liability, no-match letters raise the specter of future DHS enforcement actions, including I-9 audits and raids. The concern is twofold: (1) does the no-match letter create actual or constructive knowledge that any foreign national is not authorized to work in the United States, and (2) will SSA engage in information sharing with other federal agencies that may use this information to take action against the employer?

With the 2009 rescission of the Bush-era safe-harbor rule, there is no definitive authority regarding when ICE could find receipt of a no-match letter to create constructive knowledge. The current rule regarding constructive knowledge looks at the totality of the circumstances, so while receipt of a no-match letter alone may not be sufficient to create constructive knowledge, in determining whether an employer had constructive knowledge that a particular individual was unauthorized to work the government will consider it alongside other factors such as:

- the nature of the employer's response to the no-match letter;
- statements made, or actions taken by the employee;
- information received from credible sources and the employer's response; and
- the employer's overall compliance practices, the completeness and accuracy of its I-9 files, and the percentage of undocumented workers in the employer's workforce.

The most prudent route for an employer upon receiving a no-match letter is to register with BSO, retrieve the list of mismatches, and take reasonable steps to inquire and correct the mismatch(es).[55] ICE regularly requests no-match letters in the context of an I-9 audit and USCIS General Counsel has indicated it would be much more likely to find that the employer violated I-9 provisions if after receipt of a no-match letter it continues without reverification and the employee is indeed unauthorized.[56] Further, the federal government has used no-match letters against employers in past immigration-related lawsuits to establish that employers had constructive knowledge they were employing unauthorized workers.

Information Sharing

The question remains: Will SSA engage in information sharing with other federal agencies in the no-match letter context?

According to the National Immigration Law Center, "Currently, we have no reason to believe that SSA is sharing specific information (regarding the issuance of no-match letters) with DHS. If SSA began sharing this no-match information with DHS, this practice would likely be unlawful."[57]

SSA states its current policy regarding information sharing as follows: "DHS has responsibility for making determinations regarding an employee's legal status. We do not disclose information regarding our W-2 suspense file or any information concerning whether a particular employer would have received, did receive, or was qualified to receive, a [no-match letter]."[58]

The Internal Revenue Code (IRC § 6103[59]) limits the ability of agencies to share SSN/tax-related information, stating that "no officer or employee of the United States … shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section."

However, there is a provision of federal law requiring SSA to share certain information (name, SSN, date and place of birth, address) with DHS if it will "help DHS identify and or locate aliens in the United States" as required under 8 U.S.C. 1360(b):

> (b) Information from other departments and agencies
>
> Any information in any records kept by any department or agency of the Government as to the identity and location of aliens in the United States shall be made available to the Service upon request made by the Attorney General to the head of any such department or agency.

Also, there is an exception to IRC § 6103 for law enforcement/criminal investigations. Specifically, IRC 6103(i)(1) provides that, pursuant to court

order, return information may be shared with law enforcement agencies for investigation and prosecution of non-tax criminal laws.

Finally, under the Privacy Act, DHS may be able to request information from SSA/IRS to identify and locate undocumented workers while enforcing civil or criminal laws in certain circumstances. Specifically, the law allows a federal agency to provide such information if disclosure of the record would be:

> to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought.[60]

It remains to be seen what degree of information sharing may occur between federal agencies regarding no-match data (and what actions zealous advocates may take in response).

Anti-Discrimination

When deciding how to respond to a no-match letter, employers must walk the fine line between good faith compliance and non-discrimination. Under U.S. immigration laws, U.S. citizens, Legal Permanent Residents (except those who do not apply for naturalization within six months of eligibility), asylees and refugees are protected classes and their rights are enforced by the IER of the DOJ and the EEOC under 8 USC § 1324b(a)(3).

Employers could potentially face discrimination lawsuits for being overly zealous in responding to no-match letters. As such, it is recommended that employers establish and implement a written policy and procedure for responding to no-match letters. Employers must apply the policy consistently to all employees in order to avoid claims of discrimination. Most importantly, employers should never assume an employee with a reported mismatch is undocumented and should never fire an employee because of a no-match letter.

Conclusion

Immigration enforcement and employer sanctions are a high priority for the current administration; such actions have more than quadrupled since January 2018. Of all the enforcement actions taken by the administration, SSA no-match letters are likely the one that has caused the most confusion and consternation among employers for two reasons:

1. the minimal cost of mailing the letters as composed to conducting an in-person audit or raid has enabled the Administration to send an unprecedented number of them, affecting hundreds of thousands of employers and millions of employees; and
2. there has never been a clear understanding regarding what actions the letters require employers to take to comply with immigration and tax laws (and in contrast what actions could expose employers to a discrimination claim), and neither the SSA nor any other federal agency has provided clear guidance on what is expected of employers who receive these letters.

By providing the historical context in which these letters arise, practical tips for employers on what to do when they receive a no-match letter, and an overview of how these letters could impact the legal rights and responsibilities of employers, we hope to have shed some much-needed light on the subject of no-match letters.

Notes

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