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No-Match Letters Raise 4 Areas Of Concern For Employers

By **Becki Young** (May 8, 2019, 11:56 AM EDT)


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If you are an attorney who works with corporate clients in any capacity, your clients have almost certainly been impacted by the spate of "no-match" letters that the Social Security Administration mailed out in the past few weeks.

For nearly two decades beginning in 1993, the SSA sent out no-match letters with regularity. In 2012 they stopped due to various complaints and lawsuits from labor unions, immigrant advocates and the business community. In the past few weeks, no-match letters have returned with a vengeance.

We have not seen any official statistics about the total number of no-match letters mailed, but we can make a guess using recent statistics. There are reported to be about 11 million undocumented immigrants in the U.S., about 8 million of whom participate in the labor force.[1] It is estimated that about half, or 4 million, pay federal income taxes[2] and about half again are working on fake or stolen social security numbers.[3] Since the SSA has announced that this time around it is sending no-match letters to employers with even a single mismatch, that is about 2 million workers — and their employers — who could be impacted by the current round of no-match letters.

This article addresses some of the many ways that no-match letters could impact the legal rights and responsibilities of U.S. employers.

First, and importantly, receipt of a letter alone does not mean that an employee is not authorized for employment. A no-match could result from a variety of innocuous causes including a typographical error by the employee, employer or the SSA, a name change, a hyphenated name or even identity theft.

The new no-match letters contain the following warning:
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 (emphasis added). Any of those actions could, in fact, violate State or Federal law and subject you to legal consequences.
The old no-match letters (2012 and before) listed the Social Security numbers at issue. The new no-match letters do not provide any identifying details such as employee names or SSNs. Rather, they indicate the total number of mismatches and invite employers to register online through the SSA's business services online system.[4]

Legally speaking, no-match letters implicate four main areas of concern for employers: the SSN mismatch itself (overseen by the SSA); tax reporting obligations (overseen by the Internal Revenue Service; employer compliance requirements (overseen by the Department of Homeland Security; and anti-discrimination provisions (overseen by the Immigrant and Employee Rights Section of the U.S. Department of Justice or the Equal Employment Opportunity Commission. I will address each of these in turn.

SSA Requirements

The 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 to respond to the no-match letters. The fact that the new letters do not provide any identifying information with regard to the employees in question could support an argument that the no-match letters do not provide employers constructive knowledge that any worker is unauthorized for employment.

However, as explained below, the issuance of these no-match letters could be — and in the current enforcement climate almost certainly is — a harbinger of more targeted enforcement efforts to come. For employers who make compliance a priority, registering for BSO and addressing the mismatch issues is likely to be seen 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.[5] This optional compliance tool enables employers to verify current or former employees for wage reporting (Form W-2) purposes, and its use is considered a compliance best practice.

IRS Fines

Unlike the SSA, the IRS has the authority to impose fines for incorrectly reported data. IRS Publication 1586[6] lays out the rules and potential penalties. Notably, any discrepancies related to information returns such as the W-2 Wage & Hour Statement or the 1095-C Employer-Provided Health Insurance Offer and Coverage Insurance Statement can result in fines beginning at $50 per return or statement. 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 U.S. Department of Homeland Security enforcement actions, including I-9 audits and raids. The concern is two-fold: does the no-match letter create actual or constructive knowledge that any foreign national is not authorized to work in the U.S., and, will the SSA engage in information-sharing with other federal agencies, who may use this information to take action against the employer?

Whether receipt of the no-match letter could result in constructive knowledge that an employee is not authorized to work in the U.S. is an open question. In 2007 the Department of Homeland Security issued a "no-match rule" under which the receipt of a no-match letter from the SSA would have been sufficient to establish the constructive knowledge unless the employer followed specific procedures set forth in the rule (the "safe harbor" provisions). This rule was rescinded in 2009; however, employers are still liable under the Immigration Reform and Control Act for having actual or constructive knowledge of employing someone not authorized to work in the United States.

Section 274A of Title 8 of the Code of Federal Regulations defines an Employer's constructive knowledge as:
(i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;

(ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or

(iii) 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.
Under the "totality of the circumstances" standard, the DHS could also consider additional factors including:

- An employer's receipt of a no-match letter;

- 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.

An argument could be made that the new no-match letters, which do not provide any identifying details, do not trigger a duty to investigate or implicate constructive knowledge. However, in the current climate of heightened immigration enforcement in which DHS' employer compliance activities have quadrupled in the past year,[7] the more conservative route upon receiving one of the new no-match letters is to register with BSO, retrieve the list of mismatches and take reasonable steps to inquire and correct the mismatch.[8] In the event of an I-9 audit following receipt of a no-match letter, United States Citizenship and Immigration Services' general counsel has indicated it would be much more likely to find that the employer violated I-9 provisions if it continues without reverification and the employee is indeed unauthorized.[9]

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

According to the National Immigration Law Center: Currently, we have no reason to believe that the SSA is sharing specific information (regarding the issuance of no-match letters) with the DHS. If the SSA began sharing this no-match information with the DHS, this practice would likely be unlawful.[10]

The Internal Revenue Code (IRC § 6103)[11] 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."

With regard to no-match letters, the SSA states its current policy 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, an [no-match letter].[12]
Despite the above statement, the SSA does engage in information sharing with the DHS under certain circumstances. There is an exception to IRC § 6103 for law enforcement/criminal investigations. And the SSA shares certain information (name, SSN, date and place of birth, address) with the 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.
At this point, it remains to be seen what degree of information sharing may occur between federal agencies with regard to 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 nondiscrimination. 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 Immigrant and Employee Rights Section of the Department of Justice (formerly the Office of Special Counsel for Immigration-Related Unfair Employment Practices) and the Equal Employment Opportunity Commission.

Employers could potentially face discrimination lawsuits for being overly zealous in responding to no-match letters. For this reason it is recommended that employers establish and implement a written policy and procedure for responding to no-match letters and for maintaining records of their responses. Employers should be careful to 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 an undocumented immigrant, and should never fire an employee because of a no-match letter.

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[1] https://www.nytimes.com/2018/12/11/us/undocumented-immigrant-workers.html

[2] https://www.vox.com/policy-and-politics/2017/4/17/15290950/undocumented-immigrants-file-tax-returns

[3] https://www.ssa.gov/oact/NOTES/pdf_notes/note151.pdf

[4] https://www.ssa.gov/bso/bsowelcome.htm

[5] https://www.ssa.gov/employer/ssnv.htm

[6] https://www.irs.gov/pub/irs-pdf/p1586.pdf

[7] https://www.ice.gov/news/releases/ice-worksite-enforcement-investigations-fy18-surge

[8] https://www.restaurant-hospitality.com/back-house/what-do-after-receiving-no-match-letter

[9] Social Insecurity: Aliens, Employers, and Social Security Requirements, AILA, Immigration & Nationality Law Handbook, Vol. 2 (2004-05 Ed.) (2004).

[10] https://www.nilc.org/issues/workersrights/no-match-letter-toolkit/social-security-no-match-letters-faq/

[11] https://www.law.cornell.edu/uscode/text/26/6103

[12] https://secure.ssa.gov/poms.nsf/lnx/0203313095