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WALK THE LINE

Employers who receive no-match letters must avoid discrimination.

By Becki Young

Since March 2019, the Social Security Administration (SSA) mailed no-match letters to nearly 600,000 employers – with the greatest impact on the construction, hospitality and agriculture industries. These so called "no-match" letters notify employers of a discrepancy between an employee's name and social security number (SSN) against agency records.

SSA first sent these controversial letters in 1993, with the stated purpose of ensuring the accuracy of earnings records used to determine social security benefits, but soon the use of no-match letters became an enforcement strategy.

After September 11, 2001, worksite enforcement focused heavily on national security including infrastructure industries. Under President Obama worksite enforcement expanded, but the no-match letter program dwindled due to law suits from labor unions, the business community, and immigration activists until it was eventually halted in 2012.

In July 2018, along with Trump's Buy American, Hire American Executive Order, SSA announced it would restart sending no-match letters in spring of 2019, now called Educational Correspondence Notices (EDCOR), at a planned rate of 250,000 every two weeks.

Now, no-match letters have returned with a vengeance and create a duty on the employer to take action. It is important to understand that these notices are not evidence that an employee is unauthorized to work in the U.S.

According to Pew Research Center, unauthorized workers are employed throughout the economy though they are particularly overrepresented in the agriculture (17%) and construction (13%) sectors. In 2014, unauthorized workers held a disproportionate share of construction jobs (15%), given their overall share of the workforce (5%).

Because of the connection to an immigrant workforce, the no-match resurgence is putting the spotlight on the construction industry and threatening potentially catastrophic impacts to some businesses.

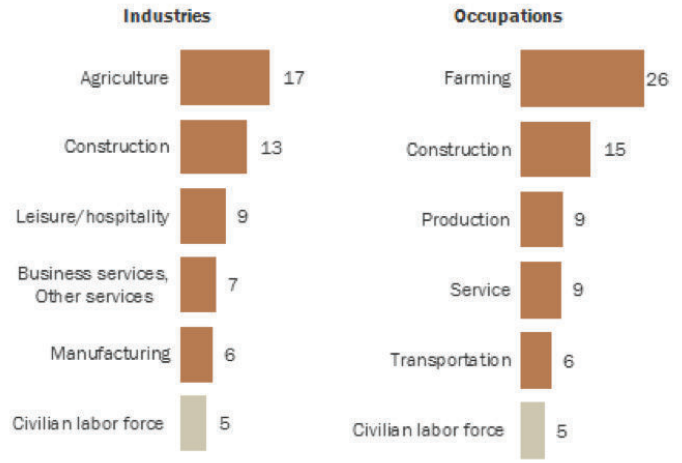
What to do if you received a no-match letter from SSA?

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.

Our Firm regularly consults with employers who receive no-match letters or are subject to I-9 audits. Our most critical advice to any employer regarding I-9 compliance is to be proactive. A company ought to have a written policy detailing how it will respond to no-match letters, and how it will organize and maintain records of all responses. Additionally, companies should consider implementing other best practices for compliance, including an annual internal audit of I-9 files, participation in E-Verify and use of the Social Security Number Verification Service (SSNVS).

Some U.S. industries and occupations have high shares of unauthorized immigrant workers

% of workers in ___ industry/occupation who are unauthorized immigrants, 2014



Note: Percentages calculated from unrounded numbers. Rankings based on unrounded percentages. The industry/occupation groups shown correspond to the Census Bureau classifications for major industry/occupation groups. The names have been shortened for display purposes. See Methodology for full Census Bureau classifications.
Source: Pew Research Center estimates from augmented 2014 American Community Survey (IPUMS).
"Size of U.S. Unauthorized Immigrant Workforce Stable After the Great Recession"

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Once you receive a no-match letter, here are some things you can do to resolve the issue:

- Register for Business Services Online (BSO). This will enable you to check whether the name and SSN of your employees match SSA records using the SSNVS.
- Compare the no-match letter to your internal records, or W-4. If there is a mistake, correct the record with the IRS using form W-2c, and report the correction to SSA. You can file the revised W-2c electronically through your BSO account.
- If the information reported by SSA matches the information in your records, inform the employee of the discrepancy via written letter

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that includes a copy of the company's no-match policy. Keep copies of all correspondences in the employee's personnel file.

- Identify a deadline by which the employee must provide proof that the error has been rectified, or that steps have been taken action to rectify the problem. Previously, no-match letters did not specify a deadline. Now, employers are required to provide updated information within 60 days of receipt of the letter. Because SSA is a large bureaucracy, it can take more than 60 days for the agency to update its records. Employers should be prepared to present evidence to corroborate that action has been taken, and/or ask for an extension from SSA when needed. Because follow-up on a no-match letter requires employee action, be sure to present affected employees with the letter as soon as possible to ensure that they have ample time to rectify the issue.
- If an employee advises you that they are not authorized to work, you receive other credible information that the employee is unauthorized to work, or if after the deadline the employee is unable to provide proof that the discrepancy has been rectified or that they are taking steps to address it with SSA, consult with a qualified immigration lawyer regarding next steps.

As an employer presented with a possible immigration violation, you may feel panicked and eager to take action right away; but employers who are overzealous in responding to no-match letters could face discrimination lawsuits. Importantly, all no-match letters begin with a clear warning about discrimination and adverse action. Because the scope of the letter does not directly address an employee's work authorization or immigration status, terminating or penalizing an employee on the basis of a no-match letter could violate state or federal law and subject the company to legal consequences.

Further, Immigration and Customs Enforcement (ICE) regularly requests no-match letters in the context of an I-9 audit, and they have been used against employers in past lawsuits to establish that employers had "constructive knowledge" they were employing unauthorized workers, which is how the government determines an employer's liability for violations. 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, the government will consider it alongside other factors in determining whether an employer had constructive knowledge that a particular individual was unauthorized to work.

As the administration continues its vigorous worksite enforcement and employer compliance efforts, we 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 in the coming months. Hence, our advice – be proactive.

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