SOCIAL SECURITY "NO MATCH" LETTERS: FAQs and Strategies

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Recent reports from the field indicate the Social Security Administration (SSA), continues to send "Employer Correction Request" letters, also known as "no-match letters," to employers that have at least one Social Security number "no-match". The recent letters appear to take a slightly different approach than those that were received in the spring of 2019 but the objective seems to be the same—intimidate, or at a minimum confuse, employers into believing they should be concerned and take some action, despite including language later in the letter that it does not have anything to do with any specific employee's "work authorization or immigration status". That implied action includes accessing a government website related to employee social security numbers to address the issue. As explained below, employers should carefully evaluate their response, if any, depending on the wording of the letter.

What are SSA no-match letters?

Each year, employers file a Wage and Tax Statement (Form W-2) with the Social Security Administration and the Internal Revenue Service (IRS) to report how much they paid their employees and how much they deducted in taxes from employees' wages throughout the year. SSA sends a no-match letter when the names or Social Security numbers (SSNs) listed on an employer's Form W-2 do not match SSA's records. The no-match letter may list one or more workers whose personal information does not match SSA's records.

The letter's stated purpose is to notify workers and employers of the discrepancy and to alert workers that they are not receiving proper credit for their earnings, which can affect future retirement or disability benefits administered by SSA.

Who receives no-match letters?

[1] This memo was revised with the assistance of Lynn Jacquez, Esq., of the law firm of CJ Lake, LLC, who serves as outside employment law counsel for AmericanHort. The following summary is intended to provide general guidance regarding SSA "no-match" letters. The reader should recognize that every employer has its own unique circumstances and if one is uncertain as to what his/her rights and responsibilities are, help from an expert or lawyer should be sought.

In the past, SSA has sent two types of no-match letters: (1) a letter sent directly to workers at their home; and, (2) a letter sent directly to employers listing an employee (or multiple employees) with no-match issues. The current round of letters beginning in April 2019, are directed at employers. The letters give a total number of possible no-match issues **but do not identify any specific employee.**

Why does the SSA send a no-match letter about a worker?

According to SSA, there may be several reasons why information submitted for a worker does not match SSA records, including:

- A typographical or clerical error was made on a Form W-2 or Form W-4, such as misspelling a name or transposing a number in the SSN;
- The worker's name has changed (due to marriage, divorce, or other reason);
- Information provided on either the Form W-2 or W-4 Is incomplete or incorrect; or
- The worker's middle name was transposed (for example, "David Juan Jimenez" instead of ''Juan David Jimenez").

What actions does SSA want an employer to take in response to receiving a no-match letter?

The no-match letter directs employers to:

- Review the names and SSN information submitted by the employer to SSA;
- Provide any necessary corrections to SSA on the Form W2-C within 60 days of receiving the no-match, or
- Respond to SSA that the employer has confirmed that the names and SSN information provided match the information provided by its employees

While the letters only provide the total number of "no-matches" without the employee name, they suggest that an employer can create a login and check SSNs via the Business Services Online ("BSO") web portal to get specific employee names.

What actions *should* an employer take in response to receiving a no-match letter?

Although the letter suggests that employers can login in to the BSO portal in order to determine which specific employees have name and/or number discrepancies, ***this is not required by law, and we are advising employers not to do so.***

At this time, we are recommending that employers check their internal documents to identify any errors or transposed digits in transmitting the employee-provided information along to SSA, then respond to SSA that all of the information provided matches the employer's records or sending a W2-C correction for any discrepancies found internally.

If an employer elects to create a BSO account and use the Social Security Number Verification Service, the employer will be given the names of the affected employees. That potentially leads to "constructive knowledge" that a particular employee may not be work authorized. This creates unnecessary risk for the employer. Although checking each employee's name/SSN internally may

take longer than using BSO and checking only a handful of names, it is the safer course of action for the employer to follow.

The letters do not provide the names and numbers of the employees that allegedly do not match as the SSA should be prohibited from disclosing numbers. That information only comes from the employer voluntarily utilizing the website cited to conduct a match process him or herself. That is, essentially, electronic employment verification and, technically, it is not required by law or the no-match letter. The catch is that once employers do access the website, which the government is intending them to believe they have to by using this tool, and start comparing, they are now acquiring knowledge of the specific employee and number with an issue and at that point become exposed for potential unlawful employment. The only responsibility under the SSA for the employer is to ensure that the records provided to the IRS/SSA match the records provided by the employee so that accurate deposits are made to the individual SSA accounts. Nothing more. If the SSA were truly concerned with the accuracy of crediting an individual's account, then these letters would be going to the individuals, not to employers. This is an attempt to frighten employers into taking employment action against their employees based on a fear of government action. Employers should do what is required, but should not volunteer to do more and by so doing create more problems for themselves.

Unlike the SSA no-match letters from a decade ago, these new letters do not carry a requirement to retain them in your personnel records. Retaining the letter creates an unnecessary risk in the event of a future ICE document audit. As such, we recommend that you not retain the no-match letter once you have taken the steps described above.

FAQ'S: IF AN EMPLOYER CHOOSES TO USE SSNVS OR IF SSA STARTS NAMING NAMES

If the law changes and SSA begins specifically identifying employees with a no-match, or if the employer voluntarily chooses to use the SSNVS system or otherwise learns of a specific employee having a no-match situation, what should the employer do and what should they avoid doing?

Does being named in a no-match letter indicate that a worker lacks work authorization or is undocumented?

NO. The no-match letter itself states that it does not make any statement about an employee's immigration status, and there is agency guidance and legal authority stating that an SSA no-match makes no statement about the worker's immigration status.

In fact, according to a 2006 report by the SSA Office of the Inspector General, errors in SSA's database impact immigrants and native-born U.S. citizens. At the time of the report, the Inspector General noted that out of the estimated 17.8 million records in SSA's database that would generate a no-match letter, 12.7 million (or over 70 percent of the records with errors) pertained to native-born U.S. citizens.

Should an employer terminate an employee based solely on the employee being named in a no-match letter?

NO. An employer should not terminate a worker based solely upon the employee being named in one or more SSA no-match letters received by the employer. The SSA itself advises employers not to take adverse action against an employee named in a no-match letter. Such adverse action may include "laying off, suspending, firing, or discriminating against that individual" just because their Information does not match SSA records.

According to the SSA, "Any of those actions could, in fact, violate State or Federal law and subject [the employer] to legal consequences. Specifically, taking such adverse actions could violate the Immigration and Nationality Act's (INA's) antidiscrimination provisions and subject an employer to enforcement from the U.S. Department of Justice and monetary penalties. In addition, an employer could be found liable and subjected to monetary penalties under other state and federal employment laws.

That a person is named in an SSA no-match letter does not provide information about the person's immigration status. The SSA does not maintain immigration status records and is not an immigration enforcement authority. Therefore, if an employer receives multiple no-match letters for the same worker (using the same SSN), this indicates only that a discrepancy at SSA remains unresolved, not that the worker lacks employment authorization.

Do no-match letters affect workers' employment or labor rights?

NO. For workers who have filed an administrative labor claim or workplace-based lawsuit against an employer, the no-match letter does not impact the worker's right to continue the proceeding, nor does it diminish the worker's right to engage in protected concerted activity. Workers who are members of a labor union may have additional rights (in addition to those discussed here) and should contact their union representative immediately when they learn that they have been named in a no-match letter.

In the past, employers have misunderstood the letter's Implications and unnecessarily fired workers named in no-match letters. In addition, unscrupulous employers have misused receiving the letter as an excuse to interfere with labor organizing campaigns or to retaliate against workers who have been injured on the job or who complain of unpaid wages or other labor violations. The fact that one or more employees are named in a no-match letter does not warrant or justify such actions by their employer and, depending on the underlying facts, it is likely that such actions are unlawful.

Should an Employer re-verify an employee's I-9 immigration status if that Employee is named in an SSA no-match letter?

Employers have no legal obligation to re-verify a worker's immigration status based solely on having received an SSA no-match letter that names the worker. In fact, an employer who requires employees of certain national origin, racial, or ethnic groups to re-verify their immigration status or employment eligibility based solely on having received a no-match letter may be liable for

committing national origin discrimination in violation of the anti-discrimination provisions of federal immigration law.

If an employer conducts a non-discriminatory workplace-wide reverification, then employees must be allowed to choose which documents to provide their employer in that process. Workers do not have to provide an SSN to legally obtain or maintain employment in the United States, unless their employer uses E-Verify.

What Does our Company Do If We Decide to Use SSNVS or If We Receive A No-Match Letter From The Social Security Administration Naming Names?

If your company receives a SSA letter ***that identifies specific names of the affected employees***, ignoring it may be at great risk. ICE enforcement officials and plaintiff lawyers bringing immigration-related RICO lawsuits routinely seek no-match letters and related personnel documents in their efforts to establish that employers had constructive knowledge they were hiring unauthorized workers. Employers should consider taking certain practical steps when they receive no-match letters, including the following:

1. Establish Company Policy and Apply it Consistently. Establish and implement a written policy and procedure for responding to no-match letters and for maintaining records of your response to mismatch letters. However, you must be careful to apply the policy consistently to all employees in order to avoid claims of discrimination.

2. Verify Your Records. Compare the employee's SSN with your records. If your records do not match the W-4 form, then correct the W-4 form and report the correction to the SSA. Maintain copies of correspondence submitting corrected Information to the SSA.

3. Notify the Employee of the Discrepancy. If checking your records show you have been reporting the number as provided by the employee, then inform the employee that the SSA has notified you of the problem and that he or she must resolve it with the SSA. Tell the employee to report the correct information to you once it has been resolved with the SSA.

4. Confirm Your Instructions in Writing. Write a letter directing the employee to resolve the Issue with SSA and asking the employee to provide updated information. Also provide the company's written no-match policy. Place copies of the letters in the employee's personnel file. Maintain a list of the names of employees who received the written instructions. Remember, you must continue to pay payroll taxes for each employee, regardless of any mismatch.

5. Do Not Terminate an Employee Just Because They Get a NoMatch Letter. Employers should never assume an employee with a reported mis-match is an unauthorized immigrant, and should never terminate an employee because of a no-match letter. By the same token, employers cannot ignore information they receive when following up on mis-matches and must act in a reasonably prompt and prudent manner following receipt of such information to attempt to resolve the issue.

Remember that there are good reasons for a no-match and suspicious ones: Did the employee provide a good reason for the discrepancy? Was there a name change that was not recorded properly? Is the employee's name difficult to spell? Was a number transposed in the documents submitted to SSA? Has there been an intervening immigration-related proceeding that resulted in a name change?

If an employee returns with an entirely different social security number, but the same name, this should be a red flag. The SSA usually issues one number to an individual over a lifetime; in extremely limited circumstances related to domestic violence or identity theft SSA will issue a different number. Similarly, an employee who presents a social security card that has the social security number previously provided, but a completely different name should also be a red flag. In these circumstances the employer should inquire about the name and/or social security number change and request documentation showing how/why the change. For example, was there an immigration proceeding such as naturalization resulting in a name change? Was there a court order for a name change? Was there a request to the SSA for a new number?

6. Give Employees a Reasonable Amount of Time to Resolve the Problem. There is no specific number as to how many days to give an employee to resolve the issue. Keep in mind that dealing with the bureaucracy of the Social Security Administration is not a quick process. Consideration should be given to suspending the employee without pay or termination after an employee has had enough time to correct the problem and fails to do so or shows up on more than one no-match letter.

A self-imposed window to resolve the problem that does not exceed the 120 day period that USCIS gives itself to address non-confirmation of work eligibility under E-Verify is probably a reasonable period, but the circumstances of each individual may vary. Most commentators believe that a 30-day time frame with extensions based on good cause is sufficient.

As a reminder – this advice is only in the event that the employer acquires information identifying **specific employees**. The current SSA letters do not provide any such information, and the only action required is checking the employer's own records for accuracy.

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