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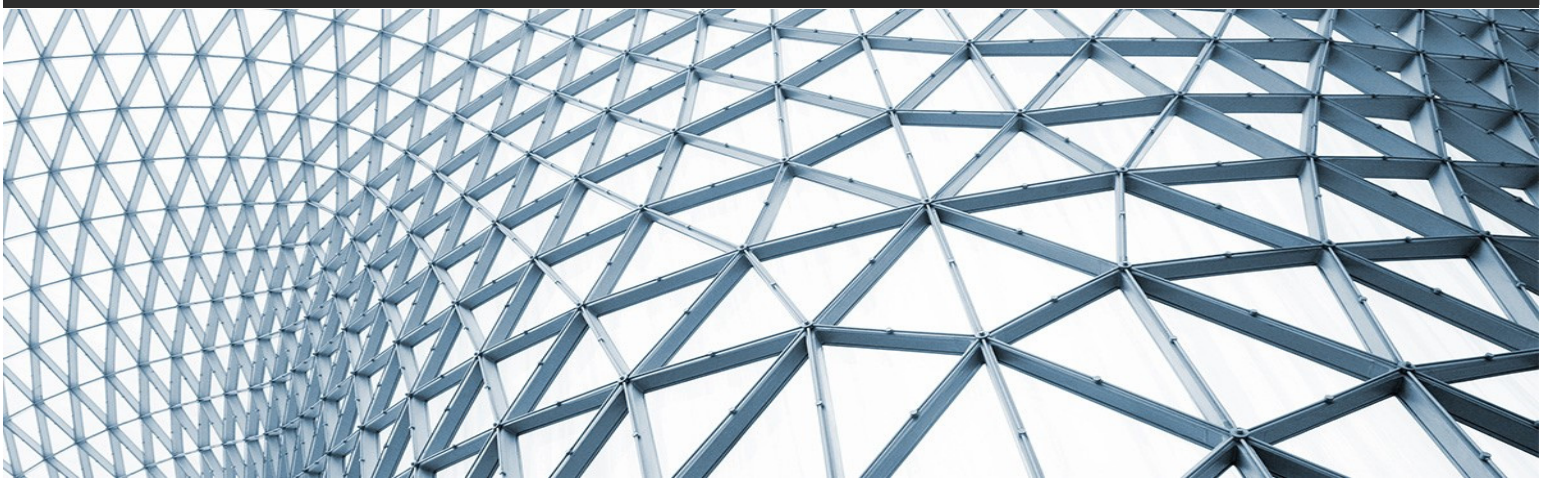
What Every Employer Needs to Know About SSA No-Match Letters



By Kate Kalmykov and Nataliya Rymer| November 14, 2019 | New Jersey Law Journal

Over 600,000 employers this year received Employer Correction Request letters from the Social Security Administration (SSA), commonly known as "No-Match Letters." These letters alert employers to discrepancies between employees' Social Security numbers (SSN) and SSA records related to that SSN. Specifically, notifications are sent to employers identified as having at least one employee name and SSN combination submitted on wage and tax statement Form W-2 that do not match the agency's records. The purpose of these letters is to advise employers that corrections are needed for the SSA to properly post employees' earnings to the correct record.

Common reasons that reported names and SSNs may not agree with SSA records include typographical errors by the employer, unreported name changes for employees, hyphenated names, identity theft, and inaccurate or incomplete employer records.

SSA first began sending out no-match letters to employers in 1993—a practice that lasted for almost 20 years. However in 2012, the agency stopped because of lawsuits and complaints from labor unions and the business community, along with other stakeholders. The initial practice included two types of letters—ones sent to employees and employers. This year, the SSA has resumed sending out no-match letters to employers in an unprecedented quantity, and it is estimated that about 2 million employees and their employers could receive no-match letters.

Upon receipt of a no-match letter, it is critical for an employer to handle a response to the SSA properly for it to be effective, and to do so without violating the anti-discrimination guidelines of the Department of Justice (DOJ). The best way to do this is by consulting experienced counsel well versed in immigration,

employment and tax law to assist in responding to the SSA and reviewing internal records. Working together with counsel, employers will need a four-prong strategy for handle these letters effectively.

The first prong requires employers to request from the SSA information about the specific Social Security numbers and names of employees for whom the SSA has identified a "no match." The new no-match letters do not list employee names or their corresponding social security numbers as they had in the past. Instead, they advise the company of the total number of mismatches found by the SSA in reviewing their employment records and require registration online by the employers in order to obtain a record of the specific Social Security numbers and names identified as a "no match." Likewise, the response to the no-match letter is required, within 60 days, to be via this platform, by making corrections on the Form W2-C.

The second prong requires a review of employers' internal records to rule out typographical errors within the information provided to the SSA by the employers. After all, as a reminder, some of the common reasons for no-match include typographical errors and unreported name changes and, therefore, it's important to ensure that those are reviewed and ruled out first.

The third prong involves developing and executing a strategy of meeting with those employees whose Social Security records were identified as erroneous to obtain corrections or to give opportunity to the employees to address and correct errors and problems directly with the SSA. As the no-match letters themselves remind employers, the no-match alone does not indicate that any given employee is not authorized to be in the United States or is ineligible for employment. As such, employers cannot take any adverse action against the employee such as terminating their employment, laying them off, suspending, or discriminating against them in any way, solely on the basis of receipt of the letter. Such actions, could in fact subject the employer to liability for violation of both federal and state laws, including important nondiscrimination requirements established by the Immigrant and Employee Rights Section of the DOJ. https://www.justice.gov/sites/default/files/crt/legacy/2014/12/04/Employers.pdf

It is critical for employers to establish and implement a written compliance policy and procedure for responding to no-match letter requests. Once established, they must be followed consistently for all employees regardless of citizenship status or national origin. Where employees request time to address no-match issues directly with the SSA, they must be provided a reasonable amount of time to do so, and the SSA has stated that a period of 120 days is a reasonable period within which employees may be expected to be able to make corrections.

The fourth prong involves creating records of the process, demonstrating that it has not taken any anti-discriminatory steps against employees on the basis of no-match letter information only, as well as developing a larger-scope strategy to address inconsistencies and problems within the larger compliance system. This last prong can be the most important in order to ensure that this seemingly small and insignificant letter from the SSA does not create large problems for employers with respect to their compliance records and practices, including their Forms I-9.

The no-match letter may appear to be relatively harmless, but it has the potential of causing extensive issues and complications for employers in the I-9 compliance arena. This is a complex situation that involves the interplay of federal and state anti-discrimination laws, SSA instructions regarding isolating the no-match from the affected employees' work authorization and immigration status, as well as the DHS expectation of affirmative actions taken as a result of no-match letter receipt. Therefore, while the SSA itself has no enforcement authority in enforcing responses to the no-match letters and cannot penalize employers for submission of incorrect information, employers should be aware that the issuance of these letters often leads to data sharing and, as a result, full-scale audits or worksite investigations by other agencies, including the U.S. Department of Homeland Security's (DHS) Immigration and Customs Enforcement (ICE), and the Internal Revenue Service (IRS), which do have the authority to investigate and impose penalties.

To minimize liability and exposure in worksite enforcement audits and investigations, it is important to show compliance with the no-match letter. Investigating agencies also view favorably employers who use a SSN verification system as part of their HR protocols to enable them to verify employees for Form W-2 wage reporting purposes. In short, in the current enforcement climate, employers should ensure that their compliance protocols are in line with all requirements. While in its no-match practice prior to 2012 the SSA indicated that it does not communicate no-match issues with other agencies, in the current environment of agency intercommunication and information-sharing, this cannot be ruled out.

The most common type of audit or investigation that can occur after receipt of a no-match letter is an I-9 enforcement action by ICE. In the course of reviewing employers' Form I-9 and compliance practices, ICE investigates if under the Immigration and Reform and Control Act of 1986 (IRCA) the employer had actual or constructive knowledge that any of its employees were unauthorized to accept employment in the U.S. and thereby violated the Form I-9 employment eligibility verification requirements, where constructive knowledge is defined as failure to or improperly completing Forms I-9, having information indicating an employee may not be authorized to be employed in the U.S., and acting with "reckless disregard" for the legal consequences of employing unauthorized aliens. See, 8 C.F.R. Section 274A.

ICE could also look at the "totality of the circumstances" to determine whether an employer had constructive knowledge its employees were not work authorized. This includes:

- Receipt of a no-match letter by the employer;
- If and what the employer's response to the no-match letter was;
- Employee's statements related to their status or any actions taken by them to confirm status/ work eligibility;
- Employer's responses to the audit/investigation request; and
- Any other credible information from third parties.

With the marked increase in the Administration's worksite enforcement investigations, employers must be both proactive and demonstrate care in addressing SSA's no-match correspondence. Procedures must be developed and followed consistently with respect to addressing the no-match issues. Furthermore, employers must be aware of the potential, likely, and very serious implications on their Form I-9 practices and should conduct internal audits of their records to ensure compliance.

This article reflects the opinions of the authors, and not of Greenberg Traurig, LLP. The article is presented for informational purposes only and it is not intended to be construed or used as general legal advice nor as a solicitation of any type.

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