

Why the Employer SSA No-Match Program Should be Terminated

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■ Background

In July 2009, Department of Homeland Security (DHS) Secretary Janet Napolitano announced that the Obama administration would rescind the Bush administration rule regarding Social Security Administration (SSA) “no-match” letters.¹ Though the rescission was a huge victory, the SSA no-match program itself remains. The program was temporarily suspended over the last two years pending the outcome of the litigation,² but it may resume in early 2010. If the program does resume, it will result in irreparable harm to workers — a harm that will be exacerbated due to the rule. On a practical level, the employer no-match letter program does not serve its intended purpose of helping SSA keep its database accurate to ensure that workers receive credit for their earnings. SSA has electronic operations designed to fix its databases that are far more effective.

■ The employer no-match letter is the least effective means that SSA has to fix database errors.

- The purpose of the employer no-match letter is to notify employers that their records do not match SSA’s. If the records aren’t corrected, their workers will not receive proper credit for their earnings, which can affect future retirement or disability benefits administered by SSA.
- Unfortunately, the program has fallen far short of its goal; according to SSA’s Office of the Inspector General, in 2006 only 6 percent of the employer letters resulted in corrections to SSA’s records.³
- SSA has far more effective methods to correct database errors and ensure that workers will receive their benefits.⁴ For example, a procedure to correct information in SSA databases called the “single select edit routine” resulted in 65 percent of records being corrected.⁵

¹ The final rule rescinding the no-match rule was published on Oct. 7, 2009, and became effective Nov. 6, 2009. See 74 FR 51447–52 (Oct. 7, 2009). Under the original DHS no-match rule, “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter,” 72 FR 45611–24 (Aug. 15, 2007), SSA no-match letters would have been proof that an employer has “constructive knowledge” that it hired undocumented workers. The rule included “safe harbor” procedures for an employer to follow in order to avoid liability under immigration law. In October 2007, a federal judge issued a preliminary injunction against the rule. See Order Granting Preliminary Injunction (Oct. 10, 2007, N.D. Cal.), *AFL-CIO v. Chertoff*, No. C 07-07772 (N.D. Cal. filed August 29, 2007).

² See note 1, *supra*.

³ Office of the Inspector General, Social Security Administration, *Audit Report: Effectiveness of the Single Select Edit Routine*, A-03-07-17065, Sept. 2007.



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- Moreover, over 5 million workers of the over 9 million workers subject to no-matches sent to employers in a given year have moved to other jobs and therefore cannot take action to fix their records.⁶

■ The SSA employer no-match letters hurt U.S. citizen and lawful workers.

- Many employers mistakenly assume that a no-match letter provides information about workers' immigration status and immediately fire or demote workers without giving them a chance to correct discrepancies.⁷
- DHS itself conservatively estimated that up to 70,781 lawful immigrant and U.S. citizen workers would have been fired due to the now-rescinded rule.⁸ The U.S. Chamber of Commerce estimated this to be 165,000 workers.⁹
- Though the rule is not in effect, employers will still implement it out of confusion or caution. Management-side attorneys are advising their clients to follow the rule to decrease liability, and DHS itself tell employers to “establish a protocol for responding to no-match letters received from the Social Security Administration” to comply with best hiring practices under the IMAGE (ICE Mutual Agreement Between Government and Employers) program.¹⁰

■ Unscrupulous employers use the no-match letter as a tool to retaliate against workers.

- Some employers have used no-match letters to selectively retaliate against workers when they try to organize a union or otherwise exercise their workplace rights (e.g., file complaints for unpaid wages, workers' compensation, sexual harassment, discrimination, etc.).
- For example, in 2006, after months of intensive organizing, a group of nursing home workers in California demanded that their employer recognize the union as their collective bargaining representative. That same afternoon, a head manager called one of leaders into his office, pulled out a photocopy of the worker's Social Security card, and wrote “NO GOOD” in bold letters across the photocopy, claiming that he had received a no-match letter. He suspended the leader without pay, but the employer had never told her about a no-match letter nor did he show her one.

⁴ Office of the Inspector General, Social Security Administration, *Audit Report: Effectiveness of the Single Select Edit Routine*, A-03-07-17065, Sept. 2007.

⁵ *Id.*

⁶ Econometrica, Inc., *Final Report: Small Entity Impact Analysis: Supplemental Proposed Rule “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter*, Jan. 15, 2008.

⁷ For example, a 2003 national survey of 921 workers who were subjects of no-match letters found that 53.6 percent of employers fired workers listed in the letter. See Chirag Mehta, et al., *Social Security Administration's No-Match Letter Program: Implications for Immigration Enforcement and Workers' Rights* (Center for Urban Economic Development, University of Illinois at Chicago, Nov. 2003).

⁸ In its economic analysis of the supplemental proposed rule for DHS, Econometrica, Inc., *supra* note 6, estimated that 3.9 million employment-authorized and U.S. citizen workers will be the subject of an employer no-match letter.

⁹ Richard B. Belzer, Ph.D., “Comments on DHS's Safe-Harbor Interim Regulatory Flexibility Analysis.”

¹⁰ <http://www.ice.gov/partners/opaimage/>.

- These unscrupulous employers will likely still ignore the no-match letters when it is convenient for them, but will claim that they are following DHS's rule (even though it is not in effect) to legitimize their adverse employment actions against workers.

■ SSA has the authority to terminate the program without public notice.

- The no-match letters sent to employers are a waste of SSA resources. Less than half of the workers subject to the letters are still with their employer. Additionally, the program is the least effective tool used by the agency to keep its records accurate.
- No law mandates that SSA send no-match letters to employers; it is a voluntary program that was started to help SSA fix database errors. There is no need for a formal rule or announcement if the rule is terminated.
- The employer no-match letter was suspended during the litigation, resulting in a two-year hiatus of the program in 2008 and 2009. If not terminated, however, the program will resume in early 2010.

■ Background on SSA no-match letters

Each year, SSA sends no-match letters to workers and employers, informing them that information employers have submitted on their W-2 reports does not match the agency's records. There are three types of no-match letters: one that is sent to workers at their homes; one that is sent to employers when the worker's home address is incorrect; and one that is sent to employers when information for more than ten workers and more than 0.5 percent of the total workforce did not match SSA records. Employers receive no-match letters for reasons that have nothing to do with their workers' immigration status, including name changes due to marriage and divorce, as well as employer errors in entering data.

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