

# FREQUENTLY ASKED QUESTIONS

## Social Security No-Match Letters

### A RESOURCE FOR WORKERS AND EMPLOYERS

MARCH 2019

The Social Security Administration (SSA) announced in July 2018 via its **Employer Correction Request Notices (EDCOR)** webpage that, beginning in the spring of 2019, it will send “**Employer Correction Request**” letters, also known as “**no-match letters**,” to every employer that has at least one Social Security “no-match.”<sup>1</sup>

The SSA announcement reflects a *significant change in policy*.

#### 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.<sup>2</sup> 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.<sup>3</sup>

The letter’s 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?

In the past, SSA has sent two types of no-match letter: (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.<sup>4</sup> This spring, SSA will reinstate the practice of sending the *second type* of letter.

#### 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:

<sup>1</sup> <https://www.ssa.gov/employer/notices.html>.

<sup>2</sup> Form W-2, Wage and Tax Statement, <https://www.irs.gov/forms-pubs/about-form-w-2>.

<sup>3</sup> <https://www.ssa.gov/employer/notices/EmployerCorrectionRequest.pdf> (hereinafter “Employer Correction Request”).

<sup>4</sup> *Id.*

**The information in this document does not constitute legal advice and does not replace the advice of an experienced employment or immigration attorney.**

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- a typographical or clerical error was made on a Form W-2 or Form W-4,<sup>5</sup> 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 action(s) should an employer take in response to receiving a no-match letter?

The no-match letter suggests that employers:<sup>6</sup>

- review the employee's name and SSN information that was submitted on the Form W-2 and
- provide any necessary corrections on the Form W2-C within 60 days of receiving the no-match.

If the employer asks an employee to make corrections to the information that was submitted on the Form W-2, the employer should give the employee a reasonable amount of time to do so.<sup>7</sup> "Reasonable amount of time" is not defined by statute or regulation in the SSA no-match context, but 120 days is likely a reasonable amount of time.<sup>8</sup>

### 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,<sup>9</sup> and there is agency guidance and legal authority stating that

<sup>5</sup> Form W-4, Employee's Withholding Allowance Certificate, <https://www.irs.gov/forms-pubs/about-form-w-4>. Employees complete the Form W-4 so their employers can withhold the correct amount of income tax from their pay.

<sup>6</sup> Employer Correction Request, footnote 3 (above), p. 2.

<sup>7</sup> *Frequently Asked Questions about Name/Social Security Number "No-Matches"* (Immigrant and Employee Rights Section, U.S. Dept. of Justice; document undated) (hereinafter "DOJ FAQ"), <https://www.justice.gov/sites/default/files/crt/legacy/2010/12/29/FAQs.pdf>, p. 2. (The Immigrant and Employee Rights Section was previously called the Office of Special Counsel of Immigration-Related Unfair Employment Practices, or OSC.)

<sup>8</sup> *Id.* The DOJ FAQ states that a "reasonable period of time" depends on the totality of the circumstances" and notes that "in the E-Verify context SSA has the ability to put a tentative nonconfirmation into continuance for up to 120 days," because it can take that long to resolve a discrepancy in SSA's database.

Additionally, in the context of immigration enforcement (I-9 Employment Eligibility Verification Form audits, not SSA no-matches), joint guidance from the U.S. Dept. of Justice (DOJ) and U.S. Immigration and Customs Enforcement (ICE) states that an "employer should recognize that some documents may take up to or more than 120 days to obtain. The reasonableness of a timeframe should be determined on a case-by-case basis." *Guidance for Employers Conducting Internal Employment Eligibility Verification Form I-9 Audits* (U.S. Immigration & Customs Enforcement and Office of Special Counsel for Immigration-Related Unfair Employment Practices; document undated), <https://www.ice.gov/sites/default/files/documents/Document/2015/i9-guidance.pdf>, p. 5.

<sup>9</sup> "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." Employer Correction Request, footnote 3 (above), p. 1.

inclusion of a worker's name on an SSA no-match letter makes no statement about the worker's immigration status.<sup>10</sup>

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.<sup>11</sup>

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

No. An employer should not fire 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.”<sup>12</sup> 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. Justice Department and monetary penalties.<sup>13</sup> 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.

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<sup>10</sup> “There are many possible reasons for a no-match letter, many of which have nothing to do with an individual's immigration status or work authorization. Because of this, an employer should not assume that an employee referenced in a no-match letter is not work authorized, and should not take adverse action against the referenced employee based on that assumption. Such action could subject the employer to liability under the anti-discrimination provision of the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1324b.” DOJ FAQ, footnote 7 (above), p. 1.

And in *Aramark Facility Services v. SEIU, Local 1877*, the Ninth Circuit Court of Appeals stated that SSA no-match letters “do not indicate that the government suspects the workers of using fraudulent documents. Rather, they merely indicate that the worker's earnings were not being properly credited, *one explanation of which* is fraudulent SSNs” (emphasis in the original). *Aramark Facility Services v. SEIU, Local 1877*, 530 F.3d 817, 828 (9th Cir. 2008).

<sup>11</sup> Marielena Hincapié, Tyler Moran, and Michele Waslin, “The Social Security Administration No-Match Program: Inefficient, Ineffective, and Costly,” *Immigration Policy In Focus* (Immigration Policy Center, May 2008), p. 4, citing *Congressional Response Report: Accuracy of the Social Security Administration's Numident File* (report no. A-08-06-26100, Office of the Inspector General, Social Security Administration, Dec. 18, 2006), <https://oig.ssa.gov/congressional-response-report-accuracy-social-security-administrations-numident-file>.

<sup>12</sup> Employer Correction Request, footnote 3 (above), p. 1.

<sup>13</sup> See footnote 10, above.

## 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's likely that such actions are unlawful.

## What was the Department of Homeland Security "safe-harbor" no-match rule, and why did DHS rescind it?

In August 2007, under the George W. Bush administration, the U.S. Department of Homeland Security (DHS) finalized a **proposed rule** regarding an employer's legal obligations upon receiving an SSA no-match letter.<sup>14</sup> Under that rule, U.S. Immigration and Customs Enforcement (ICE) could have used an employer's receipt of a no-match letter as evidence that the employer had "constructive knowledge" that the employee named in the letter was not authorized to work in the U.S. The rule included procedures that such an employer would have to follow to avoid liability under immigration law.

NILC and several partners filed a lawsuit challenging the rule on several grounds.<sup>15</sup> On October 10, 2007, the U.S. district court issued a preliminary injunction stopping the rule from going into effect because of a series of flaws in the rule. DHS **rescinded the rule** effective November 6, 2009.<sup>16</sup> The rule never took effect.

## Are SSA no-match letters a form of immigration enforcement? Can a no-match letter lead to immigration enforcement at a worksite?

No. No-match letters are not a form of immigration enforcement, and SSA does not have any authority to enforce immigration law. A worker's inclusion in a no-match letter does not provide information about the worker's immigration status.

Currently, we have no reason to believe that SSA is sharing specific information (regarding the issuance of no-match letters) with DHS. If SSA began sharing this no-match information with DHS, this practice would likely be unlawful.

## What should workers do if their employer tells them that their names and SSNs appear in an SSA no-match letter?

Workers whose employers tells them that their personal information appears in an SSA no-match letter should not panic. Being listed in a no-match letter does not mean they are

<sup>14</sup> 72 FR 45611 (Aug. 15, 2007), <https://www.govinfo.gov/app/details/FR-2007-08-15/E7-16066>.

<sup>15</sup> *American Federation of Labor v. Chertoff*, 552 F. Supp. 2d 999 (N.D. Cal. 2007).

<sup>16</sup> 74 FR 51447 (Oct. 7, 2009), <https://www.govinfo.gov/app/details/FR-2009-10-07/E9-24200>.

ineligible to be employed in the U.S. If possible, such workers should review the information contained in the Form W-2 (that the employer originally submitted for the employee) and provide any needed corrections.

However, a worker should not provide an employer with an SSN that is not their own. Providing such an SSN exposes the worker to possible criminal liability under federal law. If the SSN the worker gave the employer at the time they were hired is not theirs, the worker should not provide that same SSN to the employer as part of a no-match inquiry or subsequent reverification of employment eligibility.

In addition, a worker's *immigration status* is a *private* matter. Workers should avoid talking to anyone at their workplace about their immigration status.

### **What should a worker do if their employer tries to reverify their immigration status after they are named in an SSA no-match letter?**

Employers have no legal obligation to reverify a worker's immigration status based solely on having received an SSA no-match letter that names the worker.<sup>17</sup> In fact, an employer who requires employees of certain national origin, racial, or ethnic groups to reverify 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 antidiscrimination provisions of federal immigration law.<sup>18</sup>

If an employer conducts a nondiscriminatory 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.<sup>19</sup>

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<sup>17</sup> In a 1997 letter, the general counsel of the U.S. Immigration and Naturalization Service, the agency that formerly administered U.S. immigration law and regulations, stated that the agency would not consider an SSA no-match "by itself to put the employer on notice that the employee is unauthorized to work, or to require reverification of documents or further inquiry as to the employee's work authorization." Letter from David A. Martin, General Counsel, Immigration & Naturalization Service, to Bruce R. Larson, Esq. (Dec. 23, 1997).

<sup>18</sup> See 8 U.S.C. § 1324b.

<sup>19</sup> Employees may voluntarily provide their Social Security numbers on Form I-9 unless the employer participates in the E-Verify program. Employees whose employers use E-Verify must provide their employers with their Social Security numbers. Employees who can satisfy Form I-9 requirements may work while awaiting their Social Security numbers. "Completing Section 1 of Form I-9," *Handbook for Employers M-274* (U.S. Citizenship & Immigration Services), <https://www.uscis.gov/i-9-central/30-completing-section-1-form-i-9>.