



Labor & Employment ADVISORY ■

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A Slightly Different Twist on the Social Security Administration's Resurgent No-Match Letters

In spring 2019, the Social Security Administration (SSA) began sending "Employer Correction Request" notices (also known as "mismatch"/"no-match letters") to employers identified as having at least one mismatch between the name and Social Security number (SSN) combination provided for an employee on the employer's Wage and Tax Statements (Form W-2) filings and the employee's name and Social Security number in the SSA records. These letters apprise the employer of the discrepancy and provide a list of one or more employees whose personal information does not match the records of the SSA. The letters instruct the employer to review the information previously provided to the SSA on Form W-2 for the named employees and, if needed, to make any SSA record corrections on Form W2-c within 60 days of receipt of the SSA letter.

The reasons for a mismatch vary. The mismatch may be attributable to typographical errors, inaccurate or incomplete reporting, or failure to update name changes, among other things. When an employer receives a no-match letter, the employer should not assume that the listed employees lack U.S. work authorization. Although some employers may conflate the duties of the SSA and the Department of Homeland Security (DHS), which is charged with administering and enforcing U.S. immigration laws, especially upon receipt of a no-match letter, the employer needs to follow an established protocol without making any assumptions or panicking. In some situations, there may be potential ramifications related to immigration law and to IRS, discrimination, and Equal Employment Opportunity Commission (EEOC) consequences. Therefore, it is important to ensure that an established protocol is uniformly followed.

To provide some historical context, in 2007, DHS attempted to include these types of no-match letters as examples of an employer having constructive knowledge of an employee's lack of work authorization under 8 C.F.R. § 274a.2 (the regulations governing verification of identity and employment authorization). However, the proposed rule was challenged in court and rescinded in 2009. Then, in 2012, the Obama Administration stopped reviewing SSA discrepancies and stopped sending these letters to employers. Based on reviews of 2018 W-2 filings, this practice is again underway.

Today, however, the SSA practice is *slightly different*. Previously, the SSA letter came by U.S. postal mail and included an attached list of employees' names and data. Today, the letters are not accompanied by an attached list. Rather, the letters instruct the employer to register an account with the SSA's Business Services Online (BSO) system to access, view, and print the names and Social Security numbers of employees for whom there is a discrepancy/mismatch in the SSA records.

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What Should an Employer Do After Receiving a No-Match Letter?

- Register with the BSO, if it does not already have an account. The employer may choose to have someone in its human resources department, an executive, or payroll manager register on behalf of the company. The account must be in the name of an individual person who is registering on behalf of the company.
- Access and review the name and Social Security information of the employees identified by SSA as having a mismatch.
- Follow or establish a *protocol* that the employer will use consistently for all employees upon receipt of an SSA letter. First, compare the SSA information with the employees' other employment records. Often, one may detect a mere typographical error or digit transcription. Then, if still needed:
 - Notify the employee of the SSA mismatch notification in a consistent, concise communication.
 - Inform the employee that the SSA has instructed that a Form W-2c record correction be submitted.
 - Ask the employee to review the name and number on their Social Security card and compare it to the information provided on their W-2 and/or the BSO information provided to ascertain the discrepancy or to confirm an exact match.
 - Allow the employee a reasonable amount of time to complete the review.
- If the information on the employee's Social Security card *matches* the information provided by the BSO, suggest that the employee contact the SSA to resolve the issue/record with the SSA. If the information on the employee's Social Security card *does not match* the BSO's information, and the employee provided updated or corrected information from their Social Security card, then the employer should submit the Form W-2c to correct the SSA record.

What if the Employee Has a Period of Lack of U.S. Employment Authorization?

On occasion, an employee may inform the employer that the employee, at some point, lacked work authorization but has now acquired lawful work authorization. The employee may even provide a new name and/or a new Social Security number to the employer. In that case, the employer should submit the Form W-2c and address its application of an honesty policy, if it has one. In certain cases, the employer also needs to address, through a certain process, the employee's existing Form I-9 employment verification record. All should be done with the advice of counsel adept in U.S. immigration law employment verification requirements, including the related statutory antidiscrimination provisions of 8 U.S.C. §1324b, and in light of EEOC issues. If the employee shares that they are not currently authorized to work in the U.S. for that employer, the law requires the employee to cease working.

A Special Note on Today's Slightly Different SSA No-Match Letter Process

On more than one occasion I have heard reputable attorneys suggest that an employer has no obligation to act on receipt of the SSA no-match letter; the employer could just "toss it in the trash." This advice ignores not only the potential IRS fines but potential DHS consequences. With this new BSO registration, SSA, per a memorandum of understanding with DHS, could share with DHS the names of those employers that fail to register and access the SSA no-match records.

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