



JUSTICE FOR LOW-WAGE AND IMMIGRANT WORKERS PROJECT

SOCIAL SECURITY NO-MATCH INFORMATION
AND EMPLOYER SANCTIONS: QUESTIONS AND ANSWERS

In order to correct errors in its database and properly credit workers' earnings, the Social Security Administration (SSA) sends letters to certain employers with a list of employees whose names or Social Security numbers (SSN's) on their W-2 Forms do not match SSA records. This fall, 2007, SSA will send out about 140,000 of these letters nationwide. SSA sends the letters to businesses where more than 10 workers, representing more than .5 % of a W-2s filed by that employer, have shown up as "no-matches."¹

A recent national survey shows that the no-match letters are a poor tool both for immigration enforcement and for correcting SSA records. Additionally, the letters have created confusion among well-meaning employers, who believe that they may result in employer sanctions under the immigration laws or employer fines under the tax laws. A newly-adopted rule by the Department of Homeland Security, which has been blocked by a federal court, will further complicate matters if it goes into effect.

What is the SSA no-match program? The Social Security Administration's (SSA's) job is, of course, to pay benefits to disabled and retired workers. SSA is frustrated by a large amount of money -- as of the end of 2003, 255 million wage items totaling approximately \$519.6 billion -- that it cannot match up to a correct account number. There are many reasons why a particular person's name or number might show up in the list of unmatched names or numbers with the SSA. Common errors resulting in a no-match include incorrect name or SSN; misspelled names; using nicknames or shortened names, using titles before or after the name; hyphenated names and name changes. One strategy employed by SSA to reduce the amount of money in the Earning's

¹ Social Security Administration, *Overview of Social Security Employer No-Match Letters Process*, <http://www.ssa.gov/legislation/nomatch2.htm>.



Suspense File, is to issue “no match” letters, which it calls “educational correspondence,” to employers who submit W-2s containing name and/or SSN information that does not agree with SSA’s records. Social Security sends out letters directly to employees each year, to the address listed on their W-2 form. About two weeks later, it sends out letters to employers.

The employer no-match letters are not a particularly effective way of correcting the problem of the Earnings Suspense Fund – Social Security’s Office of Inspector General found in 2002 that the letters account for only about 2% of corrections, as opposed to other means, including the letters directed to employees.

Social Security Administration’s clearly stated position is that an employer should not take adverse action against any employee because of a no-match letter. The 2007 letter, which is available on the agency’s website, indicates:

You should not use this letter to take any adverse action against an employee, such as laying off, suspending, firing, or discriminating against that individual, just because his or her Social Security number appears on the list. Doing so could, in fact, violate state or federal law and subject you to legal consequences.²

What Social Security no-match information is NOT. SSA’s purpose in issuing no-match information is unrelated to immigration law enforcement. The Social Security Administration has no authority to issue fines to employers who fail to correct social security no-match information. Nor is there disclosure from SSA to immigration authorities on receipt of information showing that a social security number given by a worker does not match SSA’s files.

How does DHS plan to hijack SSA’s process? As advocates know, it is illegal under the Immigration Reform and Control Act (IRCA) for an employer to hire, recruit or refer for a fee someone that employer “knows” is not authorized to work in the country.³ Potential fines range from \$275 - \$2200 fine for each unauthorized worker, for a first offense, but these are typically

² The Social Security no-match letter can be found on-line at <http://www.ssa.gov/legislation/FINAL%20TY2006%20EDCOR%20Code%20V%2008202007.htm>
³ 8 U.S.C. § 1324a(a).



reduced significantly in negotiation with ICE.⁴ ICE's enforcement activity generally focuses on criminal activities at worksites.⁵ ICE has in the past pursued, and the courts have ruled on employer sanctions only in cases where the employer received *specific and detailed information* regarding their workers possible unauthorized status *from the INS* and failed to take appropriate steps to reverify their workers' employment eligibility.

DHS has proposed a way to turn the SSA no-match letters into immigration enforcement tools.⁶ In summer 2006, DHS proposed a new rule, which is set to become final on September 14, 2007.⁷ However, the rule has been blocked by a federal court, and it is uncertain whether or when it will take effect.

What would the blocked Homeland Security rule do? It has been the case since employer sanctions were first enacted in 1986 that "constructive knowledge" of unlawful immigration status can subject an employer to sanctions. The rule that DHS published on August 15, 2007 specifies that constructive knowledge includes some new situations: these are where an employee requests that an employer assist in filing a labor certification or employment-based visa petition on his/her behalf, where the employer receives information from DHS that I-9 data is incorrect, and **where the employer receives a Social Security no-match letter**. The rule goes on to set up a process that an employer can follow in order to be certain it won't be liable for "constructive knowledge" of unlawful immigration status.⁸ Thus, in order to avoid employer sanctions, DHS tells employers that they must take several steps:

⁴ ICE's reports of its civil enforcement activities, including amounts assessed and amounts corrected per employer per year, can be found at:

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=f75fd0676988d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=34139c7755cb9010VgnVCM10000045f3d6a1RCRD>.

⁵ ICE publishes accounts of enforcement activities at: <http://www.ice.gov/pi/investigations/worksites/newsreleases.htm>

⁶ *Noel Plastering, Stucco, Inc. v. OCAHO*, 15 F.3d 1088 (9th Cir. 1993) (summarily affirmed constructive knowledge determination); *New El Rey Sausage Co., Inc. v. US INS*, 925 F.2d 1153, 1158 (9th Cir. 1991); *Mester Mfg. Co. v. INS*, 879 F.2d 561, 566-67 (9th Cir. 1989); *U.S. v. Fragale*, 1999 WL 816254 (E.D. Pa. 1999).

⁷ The new rules are in the Federal Register at Vol. 72, Number 157, p. 45615 (August 15, 2007), http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2007_register&position=all&page=45611.

⁸ DHS's proposed insert to the SSA no-match letter is on-line at: <http://www.ssa.gov/legislation/ICEinsertletter.pdf>



1. The employer must check their own records to determine whether there is an error regarding an employee's social security number. ICE will consider that the employer has acted appropriately if it does this within 30 days of receipt of the no-match letter.
2. If the employer cannot resolve the discrepancy through a check of its own records, it must contact the worker.
3. If the worker indicates that the records are correct, then the employer must ask the worker to pursue the matter with SSA.
4. If after 90 days, the employer has not been able to resolve the issue with SSA, the employer has three days to complete a new Form I-9. The employer may not accept any document that was the subject of the SSN no-match letter, or that contains the disputed number. The employer must present a document that contains a photograph in order to establish identity or both identity and employment authorization.

What would be the rule's impact on other verification processes, such as the Basic Pilot Program and Social Security Number Verification System (SSNVS)? Even if the rule goes into effect, it would apply only to Social Security no-match letters. Employers enrolled in the Basic Pilot program would not be allowed to use the Basic Pilot program to reverify workers' status, since the Basic Pilot program is not designed for reverification of immigration status. Employers who use other electronic verification processes, such as SSNVS, would have no obligation to use SSNVS information to fire workers.⁹

If the new rule takes effect, would a no-match letter trigger an ICE investigation? Not directly. SSA cannot disclose no-match information to DHS. Because SSA processes wage records as an agent for the Internal Revenue Service, it is bound by IRS privacy rules and may use the information that it receives only for purposes of determining eligibility for benefits. However, should an ICE enforcement action take place at the employer's place of business, ICE can ask for the social security no-match information.

⁹ Social Security's description of the SSNVS process is on-line at: <http://www.ssa.gov/employer/ssnvrestrict.htm>. SSA specifically advises employers, "Do not use SSNVS to take punitive action against an employee whose name and Social Security number do not match Social Security's records."



If the new rule takes effect, would an employer who follows the process be safe from employer sanctions? Not necessarily. If the employer has actual knowledge that a worker is unauthorized, there is no shield.

If the new rule takes effect, could an employer who follows the process be guilty of discrimination? If the new rule takes effect, an employer who follows it will not be subject to discrimination under the IRCA anti-discrimination law. However, an employer can still face liability under both IRCA's anti-discrimination provisions and the anti-discrimination provisions of other laws if it fires workers selectively on the basis of their foreign appearance or accent, if it requests more or different documents than those required under the law, or if it uses the no-match information to retaliate or discriminate against workers.

Can't employers also get into trouble with the IRS if they get no-match letters? Prior to the blocked DHS rule, the IRS had made clear that an employer's failure to correct SSN's in response to an SSA no-match letter will NOT subject employers to fines.¹⁰ At most, an employer, after receiving specific notification directly from the IRS, is obligated to solicit an SSN number from the employee on an annual basis, in order to establish a "good faith" defense to imposition of sanctions.¹¹

What has been the experience with Social Security no-match and discrimination? The current employer sanctions regime has resulted in discrimination against workers who look or sound foreign. For example, the United States Commission on Civil Rights found "clear and disturbing indications that IRCA has caused at least a 'pattern of discrimination,' if not widespread discrimination." Turning the SSA no-match process into an immigration enforcement tool will exacerbate this problem, as concerned employers refuse to hire foreign workers or citizens who look foreign.

Can workers rely on SSA's record-keeping system to be accurate? The Social Security database used to cull suspicious numbers contains erroneous records on 17.8 million people, including 12.7 million native-born U.S. citizens, the Social Security Administration's inspector

¹⁰ Letter dated September 23, 2003, from Thomas B. Dobbins, Director, Partnership Outreach, to Michael O'Neill, Chairman, Information Reporting Program Advisory Committee, at 2. (on file with author).

¹¹ *Id.*, at 3.



general reported last year. If the new rule takes effect, errors in the verification process will undoubtedly result in job losses.

What else might happen if the new rule takes effect? Using no-match letters as an immigration enforcement tool will have widespread effects on workers, employers and communities:

Vulnerable workers, such as victims of domestic violence or trafficking, in the process of regularizing their immigration status, will lose their jobs because their documentation is not finalized;

Unscrupulous employers will use the social security no-match letters as a sword against workers who have suffered workplace abuses and spoken up about them. A national study found that up to twenty-five percent of workers listed in no-match letters reported their employer fired them in retaliation for complaints or union activity. Other workers were retained, but at reduced wages and benefits;

Scoff-law employers will hire more workers "off the books," opening up more opportunities for abuse of workers, and further increasing the tax gap at the state and national levels, a large portion of which is due to unreported payroll taxes, like Social Security taxes themselves.

Even when the rules are correctly followed, they will result in continual churning of the labor market, as workers move from job to job, trailed by no-match letters.

What is the lawsuit about? The lawsuit, filed by the AFL-CIO, the ACLU and NILC, says that the rule DHS proposes is beyond its authority, since it expands the meaning of "constructive knowledge" and the scope of the employment verification system far beyond what Congress intended when it enacted employer sanctions.¹² The lawsuit says that only Congress can decide how SSA should use tax reports, and whether DHS can tell employers how to respond to an SSA process.

What is the status of the lawsuit? The judge granted a preliminary injunction in the lawsuit on October 10, 2007. This means that the rule cannot take effect until the court makes a final ruling,

¹² AFL-CIO, et al. v. Chertoff, et al. (N.D. Cal. Case No. C 07 4472 CRB)



after trial, on whether or not the rule is legal. In the meantime, SSA cannot send out no-match letters that refer to the rule, to any employer in the country.

What should advocates do in the meantime? Advocates can join with many in their communities who are asking SSA not to send out the letters. For a sample letter, see the

Washington State advocates' letter to the Region X Administrator.¹³ For other activities going on around the country, go to www.lwiw.org

What should workers do in the meantime? Workers should continue to follow NELP's advice on no-match: Whether the rule eventually takes effect or not, workers should always ask to see a copy of any social security no-match letter their employer states that it has received, in order to determine that the letter exists, and in order to determine the timing of it. Check your records for errors, and consult with a trusted community group, your union, or a lawyer. See NELP's Questions and Answers for Workers.

What should employers do in the meantime? Employers should continue to follow NELP's advice in its Top Ten Tips for Employers. Employer organizations have also been actively fighting the rule.¹⁴

Given the prevalence of discrimination based on employer receipt of Social Security no-match letters, and SSA's admission that no-match letters do little to reduce the Earnings Suspense File, SSA should stop its practice of sending the letters to employers.

¹³ For SSA's estimate of the number of no-matches to be sent in your area, see www.ssa.gov/legislation/EDCOR%20Notices%20By%20State%20TY06%20-%20080407.pdf

¹⁴ See <http://www.millerlawoffices.com/2007/08/washington-post-no-match-lawsuit-seeks>.



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