

SSA No-Match Program & DHS No-Match Final Rule

**Program by CLINIC for
Catholic Charities USA
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Topics for Discussion

- Basic Information on SSA No-Match Program
 - A Look at the No-Match Letter
 - The DHS Final Rule
 - Implementation of the Final Rule
 - Advocacy Efforts
 - Questions and Answers
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Basic Information

No Match Letters



Two No-Match Letters for Discussion

- DHS No-Match Letter
 - SSA Employer No-Match Letter
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What Is a DHS No-Match Letter

- These letters are issued after DHS has performed an audit and inspected an employer's Employment Eligibility Verification forms (Form I-9).
 - During the audit, if DHS determines that the immigration status or employment authorization document presented or referred by the employee in completing the Form I-9 was not assigned to that employee, DHS issues a no-match letter.
 - Letters are sometimes referred to as "Notice of Suspect Documents."
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What Is a SSA No-Match Letter?

- ❑ Quick Definition: A letter sent from SSA to an employer when the name and Social Security Number (SSN) on the employer's Wage and Tax Statement (Form W-2) does not match the information in SSA's database.
 - ❑ Note: Actually 4 SSA no-match letters but our discussion is about the Employer Letter and the Final Rule effects ONLY the SSA Employer Letter.
 - ❑ Other SSA letters: employee, employee that goes to employer, and self-employed individuals.
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Overview of the No-Match Letter Process

- ❑ Employers are required to report wages annually for each employee on Forms W-2 (Wage and Tax Statements).
 - ❑ Generally, employers provide the W-2s to SSA between January 1 and March 31 of each year.
 - ❑ Each year SSA receives approximately 245 million wage reports on Forms W-2 from employers covering about 153 million workers.
 - ❑ SSA processes these wage reports as an agent of the Internal Revenue Service (IRS).
 - ❑ IRS regulations permit SSA to use the earnings information from these reports to determine eligibility for Social Security benefits and the amount of the benefits.
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Overview (2)

- When SSA receives the Forms W-2 from employers with earnings information for each employee it attempts to match the name and Social Security number on each Form W-2 with the name and Social Security number in its database.
 - If a match occurs, the SSA immediately enters the employee's W-2 earnings into the employee's permanent record of earnings. (This permanent record is what SSA uses to determine eligibility for benefits and the amount of benefits.)
 - If a match does not occur, the updating process is interrupted. SSA conducts a series of electronic edit procedures to correct mistakes. If these procedures do not result in matches, the un-matched wage items are placed in a holding file, called an Earning Suspense File.
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Overview (3)

- In an effort to ensure that employees' earnings are properly credited and to reduce the growing Earning Suspense File, SSA takes steps to obtain corrected information.
 - One of the steps that SSA takes is sending no-match letters to employers.
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The 2007 SSA Letter to Employers

- Estimated that approximately 140,000 letters will be sent by SSA to employers.
 - Currently, these letters are sent to any employer who report 10 or more no-matches with the no-matches representing more than .5% of the W-2s submitted by that employer.
 - Approximately 8 million employees will be affected by the employer no-match letters in 2007.
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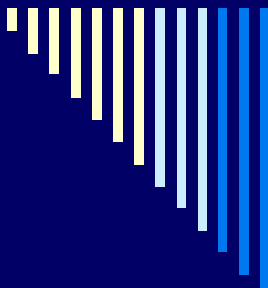
The Employer No-Match Letter and its Components

- The no-match letters has 8 pages and 4 different parts.
 - First part is the actual letter.
 - Second part is the list of the mismatches/no-matches.
 - Third part is entitled “How to Correct Social Security Numbers (SSNs)”.
 - Fourth part is entitled “Tips on Annual Wage Report Filing.”
 - Generic letter can be found at SSA website: www.ssa.gov and search (no-match program). Also, a copy of the generic letter is provided to all participants.
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The Employer No-Match Letter and its Components (2)

- The letter basically advises the employer that some employee names and SSNs that the employer reported on the Forms W-2 for tax year 2006 do not agree with SSA's records.
 - It asks for corrected information so that SSA can credit employees' earnings to their Social Security records.
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Employer No-Match Letter and its Components (3)

- The letter states that “[t]his letter does not imply that you [the employer] or your employee intentionally gave the government wrong information about the employee’s name or SSN.”
 - The letter also specifically cautions that these letters:
 - Do not make any statement about an employee’s immigration status;
 - Are not a basis for taking any adverse action against an employee; and
 - That taking such action could subject the employer to anti-discrimination or labor law sanctions.
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DHS Insert with No-Match Letter

- Along with the no-match letter, employers will be receiving an “insert” from DHS.
- The insert is a 2 page informational letter addressed generically to all employers. It says – “Dear Employer” and explains that the “purpose of the letter is to provide you with additional guidance on how to respond to the enclosed letter from ...SSA in a manner that is consistent with your obligations under United States immigration laws.”
- A copy of the insert is provided to all participants. This letter can be obtained from DHS and SSA websites.



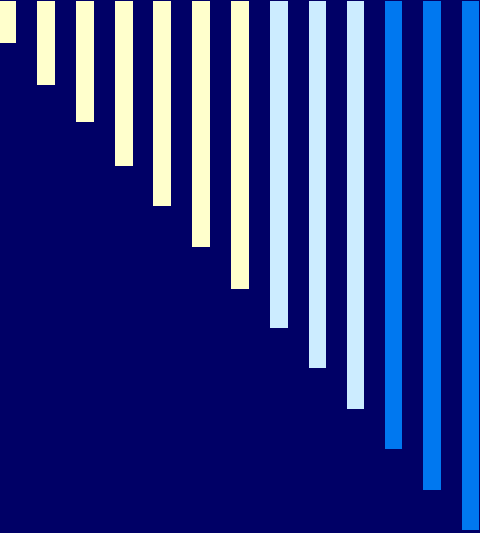
SSA Estimates Numbers of Letters in Various States

- SSA has published on its website, state by state data that shows how many no-match letters will go out in each state.
 - Information can be obtained from SSA website: www.ssa.gov.
 - For instance:
 - California -- 35,474 letters will be sent.
 - North Carolina – 4,705 letters will be sent.
 - Wyoming – 202 letters will be sent.
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SSA Has No Enforcement Authority

- Importantly, because wage report information is tax return information, SSA follows Department of Treasury regulations governing disclosure of this information.
 - Information disclosed to the IRS by SSA is considered tax information protected under section 6103 of the Internal Revenue Code.
 - Thus, SSA cannot share information about mismatched name/SSN combinations on Forms W-2 with other Federal Agencies.
 - DHS will not know (from SSA) which employers get no-match letters.
 - However, ICE during an audit can ask employers to produce no-match letters. Also, ICE can obtain SSA no-match file during a criminal investigation. The letter must be requested within the legal processes by using an ex-parte order, subpoena duces tecum or a grand jury subpoena.
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DHS Final No-Match Letter Rule

Basic Information



What Does the Final Rule Do?

- Significantly changes the nature of a no-match letter.
 - Prior to the rule a no-match letter was seen as a way to notify/inform employees that there is a problem with their earnings statement.
 - Now, it is seen as an enforcement tool.
 - Under the final rule, DHS considers the receipt of a no-match letter as **potential** evidence that the employer has “constructive knowledge” that an employee is not authorized to work. (A finding will depend upon the totality of the circumstances.)
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Two Parts to the Final Rule

- First, the final rule adds two more examples to the current regulation's definition of "knowing" particularly with respect to "constructive knowledge."
 - These are two additional examples of situations where employers may be deemed to have "constructive knowledge" that an employee is not authorized to work.
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Two Additional Examples of Constructive Knowledge

- Written notice from SSA that the combination of name and SSN submitted for an employee does not match SSA's records (SSA No-Match Letter)
 - Written notice from DHS that the immigration status document or employment authorization document, presented or referenced by the employee in completing Form I-9 was assigned to another person, or that there is no agency record that the document was assigned to anyone (DHS No-Match Letter).
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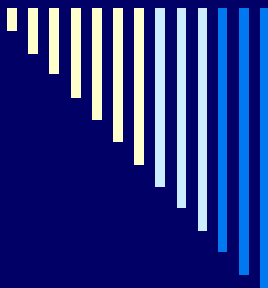
2nd Part to Final Rule -- Reasonable Steps for Employers

- The final rule outlines reasonable steps or “safe-harbor” procedures that an employer should take after receiving a no-match letter to avoid a finding by DHS that it had constructive knowledge that an employee is not authorized to work.
 - Note: Steps outlined below are for the receipt of a SSA no-match letter to an employer.
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1. Employer Checks Records

- ❑ An employer should check his/her records to make sure that the discrepancy did not occur because of an error on his/her part – typo error, transcription error, clerical error.
 - ❑ If there is an error, the employer should correct it, inform the relevant agencies of the correction, and verify that the name and number, as corrected, match the agency's records.
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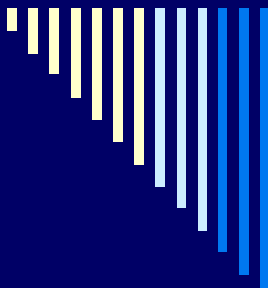
1. Employer Checks Records (2)

- ❑ Employers should make a record of the manner, date, and time of any such verification.
 - ❑ ICE considers that a reasonable employer will take these steps within **30** days of receipt of the no-match letter.
 - ❑ If no error in employer records, employer should proceed to the next step.
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2. Employer Asks Employee to Look at Records

- ❑ If the employer's records are correct, then the employer should **promptly** request that the employee look at the information that the employer has and confirm that the employer's records are correct.
 - ❑ If the employee comes back to the employer and says that the employer's records are not correct, the employer should correct his/her records with the new information.
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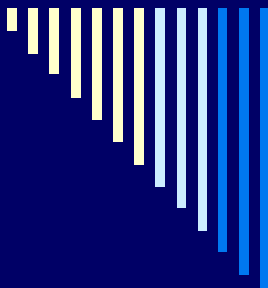
2. Employer Asks Employee to Look at Records (2)

- ❑ Along with correcting the information in his/her records, the employer should inform the relevant agencies of the correction and verify the corrected information with the relevant agency.
 - ❑ Employers should make a record of the manner, date and time of such verification.
 - ❑ If employee states that the employer's records are correct, employer should go to next step.
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3. Employer Asks Employee to Resolve Issue

- If according to the employee, the employer's records are correct, the employer should promptly ask the employee to pursue the matter with the relevant agency – SSA or DHS.
 - Employer must tell the employee of the date he/she received the letter and advise the employee to resolve the discrepancy within 90 days of the employer's receipt of the letter.
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3. Employer Asks Employee to Resolve Issue (2)

- The rule provides that a discrepancy will be considered resolved only if the employer verified with SSA or DHS that the employee's name matches in SSA's records the number assigned to that name, or, with respect to DHS letters, the employee verifies the authorization with DHS that DHS records indicate that the immigration status document or employment authorization document was assigned to that employee.
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4. If No Resolution in 90 Days, Special Verification Procedure

- ❑ If the mismatch has not been resolved within 90 days, the employer should verify the identity and work eligibility of the employee by using a new Form I-9 using a special verification process.
 - ❑ The new Form I-9 must be completed within 3 days after the 90 days has passed.
 - ❑ New Form I-9 retained for the same period of time as the original Form I-9. (Three years after the date of hire, or one year after the date employment ends, whichever is later.)
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Special Verification Procedure

- An employer should complete a new Form I-9 using the same procedure as if the employee were newly hired with three restrictions.
 - Note: With the special verification procedure, no requirement that employers have to verify information with DHS or SSA.
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The Three Restrictions

- ❑ 1. An employer should complete the new Form I-9 within 93 days of receiving the no-match letter.
 - ❑ 2. An employer may not accept any document containing the SSN or alien number that is the subject of the no-match letter, and no receipt of an application for a replacement of such document, may be used to establish employment authorization or identity or both.
 - ❑ 3. No Document without a photograph may be used to establish identity or both identity and employment authorization.
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5. If No Resolution to the Discrepancy

- If the discrepancy referred to in the no-match letter is not resolved, and if the employee's identity and work authorization cannot be verified using the Form I-9 special verification process, then the employer may choose to terminate the employee or face the risk that DHS will find that the employer had "constructive knowledge" that the employee was not authorized to work.
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Steps a Reasonable Employer May Take for a DHS No-Match

- 1. Employer contacts DHS within 30 days to resolve the issue in the letter. Letter itself will give employer guidance information.
 - Employer has 90 days to resolve the issue set forth in the letter.
 - If cannot resolve the issue, the employer may use the special verification procedure outlined in the rule.
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Some Considerations

- Final rule states that whether an employer will be found to have “constructive knowledge” will depend on the totality of the circumstances.
 - Employers who follow the steps outlined will have “safe harbor” even if the worker is later found to be unauthorized. However, DHS makes clear that in the totality of the circumstances, other independent evidence exists to prove that that the employer has constructive knowledge, the employer still may face liability.
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Some Considerations (2)

- ❑ Rule applies to constructive knowledge. It does not preclude a finding that the employer had “actual knowledge” that one or more of its employees was not authorized to work.
 - ❑ Rule acknowledges that there may be other procedures that an employer could follow in response to a no-match that would be considered reasonable by ICE. However, such would depend on the totality of the circumstances.
 - ❑ No mention in the rule that it applies retroactively.
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Some Considerations (3)

- Rule does not require the employer to take any particular action at the end of the process and the employer could choose not to follow the rule as well.
 - Of course, if the employer does not take any action, he/she risks a finding by DHS that he/she had constructive knowledge that an employee was not authorized to work.
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Implementation Of the New Rule

Time Line



Implementation Time Frame

- August 15, 2007, the government published in the Federal Register a final rule that sets forth guidance for employers on how to handle no-match letters from the Department of Homeland Security (DHS) and from the Social Security Administration (SSA).
 - The rule was going to be effective on September 14, 2007. However, a TRO has prevented the implementation of the rule temporarily.
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Temporary Restraining Order Stops Letters From Being Sent

- August 31, 2007, a federal judge issued an order that temporarily blocks DHS from implementing the rule.
 - The order also stops the SSA from beginning to send out no-match letters with the DHS insert to employers.
 - Order comes as a result of a lawsuit filed by the AFL-CIO, the ACLU, NILC and others on August 30th.
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TRO (2)

- A hearing on the groups' request to **permanently bar** the implementation of the DHS rule is scheduled for October 1st before U.S. District Court Judge Charles Breyer.
 - This means that the DHS rule will not go into effect on September 14th and the SSA will not send out the no-match letters until the Court issues a decision following the Oct. 1st hearing.
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Advocates' Strategy

- Immediate goal to get SSA not to send out the letters, or delay them from being sent until questions were answered about the rules implementation.
 - Last week of August and first part of September, advocates from across the country requested meetings with Regional SSA commissioners.
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Advocates' Strategy (2)

- In some cases, SSA refused the meetings stating that SSA headquarters prohibited them. In response, advocates held press conferences and rallies to demand that their voices be heard. In other cases, public relations officer took the letters but would not meet with them.
 - Low Wage Immigrant Worker Coalition sent a letter to SSA on September 1st asking the agency to meet with advocates to reconsider its policy of sending SSA no-match letters to employers.
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Ways to Help Your Communities

- Five ways to help your communities:
 - First, educate community groups and workers about the DHS no-match final rule.
 - Second, ensure that employers are implementing the rule uniformly and treating everyone on the no-match list in the same way.
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Ways to Help Your Communities (2)

- Third, tell employers that they should not be immediately terminating employees over a no-match.
 - DHS inserts warns employers not to fire immediately as there are a number of reasons for a no-match.
 - Employers should not assume that the receipt of a mismatch is a result of wrong doing on the part of the employee.
 - Employers who take adverse action against an employee based on nothing more than a mismatch letter, may, infact, violate the law.
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Ways to Help Your Communities (3)

- Fourth, participate in an action day being planned in some cities across the country – October 12th. (One took place on September 12th.)
 - Fifth, help document impact the final rule has on your communities.
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Other Ways to Help

- Stay informed.
 - Join the SSA no-match list serve to share materials and strategies.
 - Contact Mike Munoz at munoz@nilc.org to join the list serve.
 - Join national calls on no-match issues.
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Questions and Answers

- Websites:
 - CLINIC Website: www.cliniclegal.org
 - National Immigration Law Center: www.nilc.org
(Very effective tool kit currently being revised – keep checking NILC’s website.)

 - Contact Information:
 - Karen A. Herrling at CLINIC
kherrling@cliniclegal.org
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