NATIONAL FOUNDATION FOR AMERICAN POLICY

NFAP POLICY BRIEF » OCTOBER 2019

SSA NO-MATCH LETTERS: PROVIDING CONTEXT FOR HOW EMPLOYERS ASSESS THE MEANING AND SIGNIFICANCE OF SSA NO-MATCH LETTERS

BY AMY MARMER NICE

EXECUTIVE SUMMARY

For decades, there has been a confusing intersection between the Social Security Administration's (hereafter "SSA") so-called "no-match letters"[1] and the obligation of employers to verify the employment authorization of new hires that has caused consternation for the employer community. A thorough examination of this intersection has become pertinent because for Tax Year (hereafter "TY") 2018, the SSA returned in March 2019 to issuing no-match letters. Critically, the relevance of SSA no-match letters from an employer liability perspective is limited by the very nature of such letters and the confidentiality of the underlying W-2 information. Yet, while employers and their advisors cannot ignore no-match letters altogether, an assessment of what meaning to attach to receipt of a no-match letter cannot rely on prior but abandoned rulemaking efforts or presumptions about legal duties.

One of SSA's jobs is to maintain the accuracy of earnings records used to determine benefit amounts, in order to ensure workers ultimately receive social security benefits if they have earned them. The idea behind ensuring such accuracy is simple: if wages reported as earned on a W-2 Wage and Tax Statement are not associated with a Social Security Number (hereafter "SSN") that matches the worker, then the correct worker might not be receiving credit toward future qualification for benefits. While potential enforcement impact related to SSA no-match letters cannot be through SSA – because there are not "any SSA-related consequences for employers' non-compliance" with SSA's no-match letters, and SSA does not take any action if an employer fails to respond,[2] an employer's understanding of SSA no-match letters cannot stop there.

In particular, employers and those that advise them are benefited if they discern (1) the history of what SSA no-match letters actually do, and do not do, along with (2) the details of SSA's mission with regard to accuracy of records, and (3) the legal framework protecting the confidentiality scope of tax-related records. And, those presented with no-match letters should grasp that enforcement concerns framing an employer's response to a no-match letter from SSA include (1) complying with employment eligibility verification obligations under immigration law, and the need to avoid (2) tax, (3) anti-retaliation, and (4) anti-discrimination violations.

[1] SSN (social security number) records that are unmatched to the names or birth dates of wages reportedly earned by the holder of that SSN are commonly referred to as mismatches, and letters issued by the Social Security Administration (SSA) that attempt to correct reported earnings records are called "no-match letters." Such letters for any given Tax Year (TY) are sent out the following calendar year. This is because the W-2 Wage and Tax Statement for a given TY is sent out early the following calendar year. Typically, no-match letters are sent by SSA in March and April of a given calendar year, concerning the prior TY.

[2] See, e.g., June 3, 2019 letter from SSA's Acting Commissioner to Rep. Jim Costa (D-CA), available on the InfoNet of the American Immigration Lawyers Association (AILA Doc. No. 19061204).

This backgrounder summarizes the controlling practices governing SSA's wage-reporting records including when these records can be shared, and the potential interface of SSA's record-keeping with an employer's legal liability generally and immigration-related enforcement specifically. With this knowledge in hand, employers can be better positioned to assess the risks and benefits of potential courses of action they and their attorneys are considering in response to SSA's current no-match letters.

UNDERSTANDING SSA WAGE-REPORTING RECORDS

Consistent with SSA's very specific record-keeping role, centering on accuracy, and also recognizing the relative accuracy of SSA's records but the vastness of its record-keeping responsibility and the weaknesses in such records, it only makes sense that receipt of a no-match letter, standing alone, cannot create liability for an employer.

SSA No-Match Letter History and Content

In addition to multiple records management steps and procedures that SSA has adopted over the last decades to improve the accurate reporting and matching of wages and earners, since TY1978 SSA has sent out various types of no-match letters. At least prior to our current digital age, the no-match letters were a customary component of SSA's efforts to reach its all-important goal to avoid wage reporting unmatched to an SSN.[3]

There are basically two types of no-match letters. One type is the Employer Request Letter currently being sent out for TY2018, or "EDCOR" (educational correspondence), which had not been sent out for more than a decade. The other no-match letter format is the Employee Request for Social Security Information and the Employer Request for Information (sent to the employer when a current address for the employee is unavailable), each of which is referred to as "DECOR" (decentralized correspondence), which was discontinued in August 2012 for budgetary reasons.

DECOR letters had been sent out TY1978 and for various tax years through TY2011 and then formally suspended. EDCOR letters were sent out from TY1993 to TY2005 and reinstated in TY2018. Criteria for which employers received EDCOR letters have varied. For example, it used to be that EDCOR letters were only sent to an employer

[3] Tax withholding payments under the Federal Insurance Contributions Act (FICA) for retirement and other social security benefits that remain unmatched are accepted and received by the government and are separately identified as records in SSA's suspense files in the hope they will later be reinstated to the appropriate worker's account. According to SSA, since TY1936 the Earning Suspense File (ESF) has accumulated a balance of $1.6 trillion. SSA OIG, "Fiscal Year 2018 Inspector General's Statement on the Social Security Administration's Major Management and Performance Challenges" (November 2018, Report number A-02-18-50307) at p. 28. Over the last 15 years, SSA has redoubled its efforts to engage in a number of ongoing records management auditing routines to reinstate earnings to individual earners' accounts, including the development and expansion of digital tools for employers, and for this reason the ESF has noticeably decreased since 2004. See also, SSA OIG, "Status of the Social Security Administration's Earnings Suspense File" (September 2015, Report number A-03-15-50058).

whose unmatched SSNs represented at least 10 percent of the organization's employees and who had more than 10 mismatched records reported to SSA.[4] Receipt of a letter predicated on the prevalence of such errors in an employer's workforce created the possibility of suggesting that the employer had constructive knowledge of a systemic problem if the employer did not have policy and practices in place to respond to a letter relating to at least 10 percent of its workforce. The TY2018 EDCOR letters are being sent out if an employer has a single (one) mismatched record in its W-2 Wage and Tax Statement reporting. This does not obviate the need for an employer to carefully consider how to respond, but likely changes the assessment of an employer's legal counsel concerning the import of the no-match letter standing alone.

Further, another important difference between the current round of EDCOR letters and those in the past is that the previous letters came with an attached list of employee names and SSNs that had been reported by the employer that did not match SSA's records. That is not the case for TY2018. Instead, current EDCOR letters for TY2018 ask employers to go to SSA's Business Services Online portal and create an account so the employer can share information with SSA and then obtain a list of mismatched records. This means, again, that standing alone the no-match letter in its current iteration has limited relevance in contributing to the development of constructive knowledge of the sort that might lead to legal liability.

Moreover, the no-match letter for TY2018 itself emphasizes the limited import of the no-match letter, alone, by stating that the receipt of a no-match letter does not imply there was an intentional provision of incorrect information or permit the employer to take any adverse action with the employee in question.[5]

Beginning in 2018, SSA also started sending out an EDCOR Announcement letter, that touts the various online tools SSA has developed to try to improve the accuracy of the agency's wage-reporting records, including not only the Business Services Online portal but also the Social Security Number Verification Service (SSNVS), online W-2s, and the AccuWage service. This package of digital tools highlights that SSA's role and responsibility is solely to develop, implement, and account for steps that will enhance the accuracy of SSA's records.

---

[4] See, SSA OIG, "Effectiveness of the Social Security Administration's Decentralized Correspondence Process" (July 2002, Report number A-03-01-11034) at p. 2, footnote 4.

[5] The current SSA no-match letter being sent for TY2018 includes the following text on page one:
"**IMPORTANT**: 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. 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 SSN or name does not match our records. Any of those actions could, in fact, violate State or Federal law and subject you to legal consequences."

SSA Accuracy Mission

This focus on accuracy means that SSA is called upon regularly to report on the accuracy of its various records and to identify efforts it can effectively undertake to improve such accuracy. Familiarity with the details of these accuracy challenges is relevant to a thoughtful evaluation with counsel regarding any possible liability growing out of inaccurate SSA records. For example, it appears the last publicly available report focusing solely on detailing SSA's efforts to reinstate unmatched wage reports is the audit report from SSA's Inspector General in July 2002. This report found that only about 10% of unmatched wage records were subsequently reinstated, and that resolving such discrepancies can take as long as one year. The 2002 report focused on the effectiveness of DECOR no-match letters, and found that about one-third of reinstated records were attributable to the DECOR letters (about 3.5% of unmatched records were reinstated through DECOR).

Relatedly, the last publicly available report focusing solely on detailing SSA's efforts to maintain the accuracy of its SSN application records – the Numerical Identification System or so-called "Numident" File at SSA – is the audit report from SSA's Inspector General in October 2012 which updates a Congressional response report from SSA's Inspector General in December 2006.[6] The Numident File at SSA contains the name, date of birth, citizenship status, and, where applicable, date of death of every applicant for an SSN that was issued an SSN.[7] The extent to which Numident records are accurate or inaccurate is important in appreciating whether a no-match letter is particularly indicative of an error or not, or what type of error. To gain a perspective on how the Numident accuracy issues relate to SSA no-match letters, records where the name is inaccurate are problematic. According to the SSA reports, a little less than 1% (.008) of the name fields in the Numident records have errors. This is a small percentage but could be the basis for a large number of unmatched wage reports, even though name discrepancies could be inadvertent.

[6] These SSA reports explain that almost all the errors in Numident records for native-born U.S. citizens are caused by a failure to confirm a citizen's death. In addition, while there are similar errors for non-citizens and naturalized citizens, 70% of all the unverified death fields in the Numident File are for native-born U.S. citizens. Overall, the reports show that about 87% of issued SSNs have gone to native-born U.S. citizens, about 2% to naturalized citizens, and about 11% to non-citizens, and that the error rate in the Numident File for either native or naturalized citizens is about 3% but for non-citizens is about 10% (with about two-thirds of the errors in non-citizen files attributable to fact that a listed foreign-born individual is now a naturalized U.S. citizen).

[7] It is SSA's Numident File that is referenced in an E-Verify query to confirm employment eligibility. Since 1936, SSA has issued 471 million SSNs, each referenced in the Numident File.

Confidentiality of Unmatched SSA Records

One part of assessing an employer's responsive steps after receipt of an SSA no-match letter is being aware of how likely the unmatched wage and SSN information or the existence of a mismatch will be shared with another government agency.[8]

The Internal Revenue Code establishes a general rule of confidentiality with regard to the disclosure of tax return and taxpayer information, codified at 26 USC 1603 (hereafter referred to as "section 1603"). Section 1603 provides that both tax returns and return information are confidential and may not be disclosed by the Internal Revenue Service (IRS) or any state or federal employee, except within certain, specified exceptions. Essentially, section 1603 prohibits the release of any information that can be associated with a particular taxpayer and be used, either directly or indirectly, to help identify a taxpayer. While the IRS has authority to disclose to SSA, for purposes of administering the Social Security Act, W-2 Wage and Tax Statements (and certain other returns and return information), a Form W-2 is considered, under section 6103, a protected information tax return of both the employer who filed it with the IRS and the employee for whom wages are reported on it.

As confirmed in SSA's Program Operations Manual System (POMS), SSA has General (GN) policies that allow the limited sharing of information but only consistent with section 6103 and this specifically does not allow the sharing of SSA no-match information. SSA explains definitively in GN 03313.095 Disclosure to the Department of Homeland Security (DHS) (last updated June 3, 2019) that with regard to information related to wages unmatched to SSNs:

> "We do not disclose information regarding our W-2 suspense file or any information concerning whether a particular employer would have received, did receive, or was qualified to receive, an Educational Correspondence (EDCOR) letter or a Decentralized Correspondence (DECOR) letter identifying employees whose names and SSNs may not match our records."

Any number of government agencies would find it useful to have unfettered access to the Forms W-2 for various enforcement purposes, including targeting employers for investigation or audit relating to their agency enforcement interests. Congress was well-aware of how relevant a review of taxpayer information might be for any number of

[8] For an official and fairly concise resource on the confidentiality protections that might apply to unmatched W-2 Wage and Tax Statements, and a reference verifying the information on section 6103 in this section of the NFAP Backgrounder, see testimony before the House Committee on Ways and Means, Subcommittee on Social Security, "The Social Security Administration's Role in Verifying Employment Eligibility: Background and Present Law Relating to Section 6103 and Employment Verification" (Joint Committee on Taxation, April 12, 2011, Report number JCX-25-11). The testimony was provided in the context of House Ways and Means Committee consideration of the use of SSA records for employment verification through E-Verify, but is equally helpful as a resource on the nature of section 6103 confidentiality generally.

civil or criminal enforcement matters unrelated to tax compliance. When Congress devised the current confidentiality provisions in 1976, the Senate Finance Committee pointed out this obvious interest in tax return information by government agencies. "It has been stated that the IRS probably has more information about more people than any other agency in this country. Consequently, almost every other agency that has a need for information about [a taxpayer], therefore logically seeks it from the IRS."[9] But Congress severely restricted access to tax returns and return information, including information held by SSA.[10]

There are two types of protected information under section 1603. Information transcribed directly from a taxpayer's return and then filed with the IRS, or other information filed with the IRS by or on behalf of a taxpayer is "taxpayer return information." An extraordinarily broad set of data points, including the amount of income; whether a return is or will be subject to audit; the name, address and Taxpayer Identification Number (including SSN, for individuals) of a taxpayer; and any data received, recorded, prepared, or collected by the IRS about a taxpayer is considered "return information."

The former, *taxpayer* return information, is typically only obtainable beyond the statutory exceptions (one of which is tax investigations by the IRS) when it is for nontax criminal matters and then only through a court order. The latter, the *return* information other than the protected taxpayer return information, is usually obtainable through request by the head of a federal agency but only when it is alleged that the return information may constitute evidence of a violation of nontax federal criminal statute. Thus, if DOJ or DHS, in an immigration-related criminal case, sought return information that strikes the name, address and SSN fields, that return information remains protected under section 6103 and would require the approval of the Attorney General or the Secretary of Homeland Security.

Currently, SSA policy at GN 03312.001 Disclosure Without Consent for Law Enforcement Purposes (last updated December 21, 2018) explains when certain information about an already identified individual can be shared by SSA in limited law enforcement situations, consistent with section 6103. SSA policy at GN 03312.080 Valid Law Enforcement Requests (last updated December 21, 2018) lays out what constitutes a valid law enforcement request, including that it must be tied to an already-identified individual and be authorized by a senior official. With

[9] S. Rep. No. 94-938 at 317.
[10] See section 6103(c) (disclosure by taxpayer consent); 6103(d) (disclosure to State tax officials); 6103(e) (disclosure to persons having material interest); 6103(f) (disclosure to committees of Congress); 6103(g) (disclosure to the President and certain other persons); 6103(h) (disclosure to Federal officers and employees for tax administration purposes); 6103(i) disclosure to Federal officer and employees for administration of Federal laws not relating to tax administration); 6103(j) (statistical use); 6103(k) (disclosure of certain returns and return information for tax administration purposes); 6103(l) (disclosure for purposes other than tax administration); 6103(m) (disclosure of taxpayer identity information); 6103(n) (tax administration contractors); and 6103(o) (disclosure of return and return information with respect to certain taxes).

regard to immigration-related enforcement broadly, the SSA policy at GN 03313.095 Disclosure to the Department of Homeland Security (DHS)[11] explains when SSA provides information to either ICE or U.S. Citizenship and Immigration Services (which operates E-Verify) or Customs and Border Protection (last updated June 3, 2019).

Beyond section 6103 protections, there are also Privacy Act considerations that SSA reviews before releasing information from its records. SSA explains at GN 03313.001 Disclosure Without Consent to Federal Agencies and Officials (last updated effective October 26, 2017) the exceptions to the Privacy Act the agency most commonly relies on to release information from its records. For a complete list of Privacy Act exceptions, SSA lays those out at GN 03301.099D Confidentiality and Disclosure, Exhibit 3 (last updated effective December 9, 1998).

Awareness that section 6103 protects the W-2 information[12] and the existence of unmatched wage reports or an SSA no-match letter,[13] means that no enforcement agency will have access to that information for purposes of initiating an investigation or driving the development of audit targets.

[11] SSA explains in GN 03313.095, governing disclosure to DHS, that it is obligated to provide certain information under 8 USC 1360(b) when there are specific requests relating to specific aliens: "The request must also contain enough identifying information, (e.g., SSN, name, date of birth, place of birth, mother's maiden name, and father's name), to help us search for the requested information. If a request does not indicate that the subject of the request is an alien and the information is contained in our records, we may disclose information if our records indicate that the subject of the request was an alien at the time we issued a SSN to that person." 8 USC 1360(b) provides: "(b) Information from other departments and agencies.—Any information in any records kept by any department or agency of the Government as to the identity and location of aliens in the United States shall be made available to the Service upon request made by the Attorney General to the head of any such department or agency." See also 5 USC 552a(b)(7) on the sharing of records between government agencies.

[12] There appears to be one exception from SSA's perspective. SSA indicates in GN 03313.095 (for a hyperlink, see text preceding footnote 11) that while name and address information in wage reports SSA receives is considered confidential tax return information SSA believes it retains discretion to disclose such information to DHS if it is associated with an SSN issued for a non-work purpose. SSA states that "[w]e consider a request for this information to be program-related since it helps us protect the integrity of the SSN issuance program and detect SSN misuse" and "we may disclose the name and address of aliens and employers reporting earnings for aliens to whom we issued SSNs for non-work purposes." (POMS says that such disclosure is only permitted for post-1997 earnings attached to SSNs issued for non-work purposes, due to statutory changes.)

[13] While there is no known Memorandum of Understanding on sharing a list of employers that have registered for SSA's Business Services Online system (BSO), it appears likely that the existence of a BSO registration would not be confidential. This is relevant because under the EDCOR letter format in place for TY2018, no employer will have a list of employees with unmatched SSNs without registering for BSO.

UNDERSTANDING ENFORCEMENT ISSUES RELATED TO SSA WAGE-REPORTING

There are many inadvertent but commonly occurring situations that may generate a no-match letter from SSA, such as:

(1) the worker's name has changed (due to marriage, divorce, naturalization, or other reason);

(2) a typographical or clerical error was made on an IRS Form W-2 or IRS Form W-4, such as misspelling a name or transposing a number in the SSN;

(3) administrative errors made at SSA; and

(4) mistakes in reporting proper culturally-based naming conventions, such as hyphenated or multiple surnames.

Given the ordinariness, and presumed prevalence, of such innocent errors, the difficulty SSA has faced in reinstating wages to the specific account of a worker when wages are initially noted in records unmatched to an SSN in the worker's name, the current SSA focus on online tools for improving accuracy; and the relative ineffectiveness of no-match letters in contributing to this effort (such that they were discontinued), it is somewhat disconcerting that SSA returned to sending letters by the US Postal Service to employers for TY2018.[14] The mere fact that no-match letters are being sent provides an impetus to separately gauge the scope of possible enforcement tied to receipt from SSA of a no-match letter.

To forestall the same discrepancies that give rise to an SSA no-match letter from creating employer liability, a plan of action should reflect an appreciation of four topics:

Employment Eligibility Verification Obligations – ICE

The crux of possible difficulties in planning a response to SSA no-match letters most commonly centers on immigration compliance. There are three obligations under the immigration statute (the INA, or the Immigration and Nationality Act) for all employers in the United States concerning employment eligibility.[15] First, all employers are barred from hiring any individual in the United States without complying with the employment verification system at the time of hire (through completion of Form I-9 and, if voluntarily so choosing to participate, through E-Verify).[16] Second, no employer may hire an individual, even if facially complying with I-9 and E-Verify requirements, knowing

[14] It is not clear if efforts beyond accuracy of SSA wage-reporting records drove the decision-making to return to no-match letters for TY2018. When asked by Congress how SSA decided to reinstate no-match letters and whether DHS or the White house were consulted, SSA recently explained as follows: "Because we process wage reports as an agent of the Internal Revenue Service (IRS), we vetted the revised EDCOR letter with IRS. Consistent with longstanding SSA practice, we engaged in pre-deliberative discussions both internally and externally with relevant stakeholders throughout the executive branch." June 3, 2019 letter from SSA's Acting Commissioner to Rep. Jim Costa (D-CA), available on the InfoNet of the American Immigration Lawyers Association (AILA Doc. No. 19061204).

[15] 8 USC 1324a.

[16] 8 USC 1324a(a)(1)(B).

an individual is not a citizen and not authorized to work.[17] Third, all employers are banned from continuing to employ an individual once an employer knows the employee is not a citizen and is or has become unauthorized to work.[18]

It is about this third employer responsibility where a discussion arises concerning SSA no-match letters. Because SSA no-match letters relate to individuals already hired, and thus do not typically relate to the first or second employment verification obligations, the question is whether and to what extent an SSA no-match letter contributes to or establishes "knowledge" for purposes of a "continuing to employ" violation. Immigration and Customs Enforcement (ICE), a component of DHS, is charged with interior enforcement including worksite audits and investigations to uncover "continuing to employ" violations.

DHS regulations, at 8 CFR 274a.1(k), state that "isolated, sporadic, or accidental acts" cannot be considered in establishing a possible pattern and practice of employer behavior inconsistent with its statutory obligations. Following the pattern and practice rule, the DHS constructive knowledge regulation at 8 CFR 274a.1(l) then establishes the foundation for ICE's potential consideration of other facts and circumstances (but not isolated ones). This regulation provides that:

> (l)(1) The term *knowing* includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. (emphasis in original)

The Immigration and Naturalization Service (INS),[19] attempted to provide clarification on the connection between SSA no-match letters and constructive knowledge, in two General Counsel letters. In one INS General Counsel letter, INS explained that the agency "would not consider notice of this discrepancy from SSA to an employer 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."[20] In another INS General Counsel letter, INS reiterated that receipt of an SSA no-match letter "does not, by itself, put an employer on notice that the employee is not authorized to work" and explained that the employer should not "assume an irregularity in this

[17] 8 USC 1324a(a)(1)(A).
[18] 8 USC 1324a(a)(2).
[19] INS was the predecessor agency to ICE responsible for worksite compliance investigations and audits regarding the employment verification obligation, before DHS was established in March 2003. The constructive knowledge regulation was promulgated by INS following the passage of the Immigration Reform and Control Act in 1986, which amended the INA.
[20] December 23, 1997 letter from INS General Counsel David Martin, available on the InfoNet of the American Immigration Lawyers Association (AILA Doc. No. 98011391).

situation and require new documentation confirming employment eligibility and/or suspend the employee until the situation has been resolved."[21]

The potential relevance of SSA no-match letters in the development of constructive knowledge, dramatically changed under the George W. Bush administration. In August 2007, a final regulation was published by DHS on Safe-Harbor Procedures for Employers Who Receive a No-Match Letter that would have significantly changed an employer's legal obligations upon receiving an SSA no-match letter. Under that rule, an employer who received of a no-match letter and did not re-verify the employee's work authorization could be deemed to have "constructive knowledge" that the employee named in the letter was not authorized to work in the United States. Specifically, the final rule amended the definition of "knowing" in 8 CFR 274a.1(l) by changing the constructive knowledge concept to explicitly include receipt of an SSA no-match letter which the rule redefined as information indicating that an employee was not authorized to work in the United States.[22] A federal district court, however, enjoined that new interpretation and ultimately barred the rule from ever going into effect, in part because of failure of DHS to explain its departure from the INS prior interpretation of the significance of SSA no-match letters and in part because DHS had not properly calculated the very high costs on employers should a new approach to SSA no-match letters be adopted.[23]

Although the DHS rule mandating specific employer actions on a specific timeline in response to SSA no-match letters ***never went into effect and is not in effect today***,[24] the lingering presumptions about what employers should or must do after receiving an SSA no-match letter are in part related to the prior effort by DHS. For example, in 2015, when ICE published Guidance for Employers on Employment Verification, the agency felt it necessary to explain (bottom of page 4 in Guidance) that the 90-day period identified in the old DHS rule was not relevant in

[21] April 12, 1999 letter from INS General Counsel Paul Virtue, available on the InfoNet of the American Immigration Lawyers Association (AILA Doc. No. 01061431).
[22] 72 FR 45611 (Aug. 15, 2007) at 45623-45624.
[23] See, AFL– CIO v. Chertoff, D.E. 21 (N.D. Cal. Aug. 31, 2007) (order granting motion for temporary restraining order and setting schedule for briefing and hearing on preliminary injunction), and AFL–CIO v. Chertoff, 552 F.Supp.2d 999 (N.D. Cal. October 10, 2007) (order granting motion for preliminary injunction). Because of the litigation, SSA stopped issuing EDCOR no-match letters to employers in 2007 for TY2006. The EDCOR letters issued in 2019 for TY2018 are the first such letters to be issued since then.
[24] In response to the August 2007 restraining order and October 2007 injunction, DHS issued a supplemental notice of proposed rulemaking in March 2008 (73 FR 15944, March 26, 2008) to try to cure the defects identified by the court. A supplemental final rule was ultimately published at the end of October 2008 (73 FR 62843, October 28, 2008), just before the 2008 general presidential election, but President Obama put the rule on hold upon his inauguration and later in 2009 proposed the rule be rescinded (74 FR 41801, August 19, 2009). A final regulation rescinding the regulation and the underlying policy was effective November 2009 (published 74 FR 51447, October 7, 2009). The Trump administration has not listed a rule mandating employer actions in response to SSA no-match letters on any Unified Agenda for regulatory action. The Unified Agenda is available through reginfo.gov and identifies any regulatory action the executive branch is working on for publication in a particular year.

determining if or when an employer had developed knowledge that it was "continuing to employ" a non-citizen unauthorized to work.

ICE's 2015 Guidance, issued jointly with DOJ, makes no suggestion or implication that employers have certain compulsory steps to follow after receipt from SSA of a no-match letter. Instead, the 2015 ICE-DOJ Guidance is a useful resource on how employers can conduct internal audits concerning their employment verification compliance. The Guidance does make clear, though, that it could take "up to or more than 120 days" to resolve discrepancies (p.4 in Guidance). Given that SSA testified before Congress saying it typically takes a full year to resolve SSN mismatches, that SSA does not take any action if an employer fails to respond to a no-match letter, and that ICE recognizes it can typically take at least 120 days to resolve discrepancies, it appears that the reference in the current EDCOR letter suggesting an employer response is due to SSA within 60 days of receipt of a no-match letter should not drive employer decisions on the timeline for deciding or implementing next steps following the current round of no-match letters.

Nevertheless, from legacy INS days it has long been understood from the government's perspective that "[a]lthough it is incorrect to assume that an SSA discrepancy necessarily indicates unauthorized aliens, it would be equally incorrect for an employer to assume that in all cases it may safely ignore any possible INA relevance or consequences of SSA discrepancies."[25] Employers need to evaluate the totality of their circumstances when discussing with their advisors possible next steps after an SSA no-match letter to ensure employment verification compliance under the immigration statute, which at a minimum may entail the need to document a full review of their payroll records for errors, consider that the data show a small likelihood of criminal charges for immigration-related employer offenses, and also appreciate that the Trump administration has greatly expanded the initiation of worksite enforcement actions and I-9 inspections but may not have the staffing or other resources to prioritize the completion of such activities.

Potential Tax Violations – IRS

Receipt of an SSA no-match letter does not itself initiate any compliance obligations with the Internal Revenue Service (IRS) such that employers must reach out to the employer's workers.

SSA acts as an agent for the IRS when SSA retains wage-reporting records for purposes of social security benefits but the IRS has its own responsibilities and enforcement concerning the underlying W-2 Wage and Tax Statement, where the taxpayer identification number (TIN) is the SSN for individual employees (payees). It is clear, as

[25] April 12, 1999 letter from INS General Counsel Paul Virtue, available on the InfoNet of the American Immigration Lawyers Association (AILA Doc. No. 01061431).

explained in the IRS Publication on missing and incorrect names and taxpayer identification numbers (IRS Publication 5186, at p. 11), that: "IRS penalty notices relating to mismatched TINs are based and issued exclusively on IRS system information. Mismatches reported under SSA verification systems are not considered IRS notices and do not trigger any further solicitation requirements" where the employer must solicit information from its employee.

It is not clear the extent to which the IRS collects civil penalties related to uncorrected W-2s but in recent years such accuracy penalties with regard to W-2s do not appear to have been pursued. The IRS penalty levels for TY2018 and TY2019 (Revenue Procedure 2018-57, at p. 28) state that penalties for failure to provide correct payee statements are $50 per payee if the W-2 is corrected within 30 days, $100 per payee if corrected by August 1st of the calendar year following the TY, and $270 if left uncorrected or a correction is filed after the August 1 following the TY.

Thus, SSA no-match letters standing alone do not result in an affirmative obligation to seek corrective information from employees with regard to potential IRS penalties. However, should the IRS issue its own mismatch letter, then the IRS reasonable cause regulation at 26 CFR 301.6724-1[26] would control an expected employer response. This regulation provides that the employer must act in a "responsible manner" which in general means:

> 301.6724-1(d)
> "*Responsible manner*—(1) *In general.* Acting in a responsible manner means—
> (i) That the filer exercised reasonable care, which is that standard of care that a reasonably prudent person would use under the circumstances in the course of its business in determining its filing obligations and in handling account information such as account numbers and balances, and
> (ii) That the filer undertook significant steps to avoid or mitigate the failure…"

If such an IRS mismatch notice is received, therefore, then an employer must develop a means for responding, consistent with advice from the employer's legal advisors. In addition to IRS mismatch notification related to W-2s, some large employers are now required to make an annual filing to the IRS of employee names and SSNs under the new reporting requirements for the Affordable Care Act (ACA) to document employee health insurance coverage on Form 1095-C, providing a new source of IRS mismatch notices. The affirmative IRS-driven obligations to contact

[26] The IRS regulation on information reporting (such as that provided on W-2 Wage and Tax Statement or the 1095-C Employer-Provided Health Insurance Offer and Coverage) provides that no penalties for failure to file or to provide correct information shall attach "if the failure is due to reasonable cause and is not due to willful neglect," and thus is called the "reasonable cause" rule.

employees about mismatched SSNs come into play when IRS issues a mismatch notice regarding either Form W-2 or Form 1095-C, among other information reporting IRS forms.[27]

Anti-Retaliation Obligations – DOL and NLRB

Before going to SSA's Business Services Online (BSO) portal and registering in response to the current EDCOR no-match letter,[28] or evaluating whether or on what timeline such registration is a required step, an employer should already have a plan in place as to how it will follow up with employees that might be identified by SSA's BSO system.

An employer may not pick and choose which employees are asked for follow up information or vary how they are asked for clarification based on or related to any worker's or any group of workers' labor or employment activities or claims. An employer who retaliates against employees by singling out workers whose names were flagged by SSA in a no-match letter may be liable, under the anti-retaliation provisions of the relevant federal or state statutes relating to a worker's labor or employment claim, for unlawful retaliation against employees who have engaged in protected activity.

If workers are engaged in a labor union organizing campaign and an employer singles out for adverse treatment union supporters whose SSNs are listed in a no-match letter, that employer may be liable for violating workers' guaranteed rights under Section 7 of the National Labor Relations Act (NLRA).[29] Because Section 7 of the NLRA protects all workers, whether or not they are unionized, who collectively complain to their employer about working conditions, an employer who singles out for adverse or different treatment those workers who have advocated on behalf of their coworkers may also be held liable for retaliating against those workers for exercising rights guaranteed them under the NLRA.

Workers are likewise protected from differentiated treatment under the retaliation provisions of the Fair Labor Standards Act (FLSA)[30] and the Occupational Safety and Health Act (OSH Act)[31] administered, respectively, by the Wage and Hour Division of the U.S. Department of Labor (DOL) and DOL's Occupational Safety and Health

[27] If as part of any IRS information reporting (such as W-2 or 1095-C) an employer leaves the taxpayer identification number for an employee (TIN, which for an employee is an SSN) completely blank or provides an SSN without nine digits or with characters other than numbers, then special rules governing a "missing TIN" control and the IRS reasonable cause regulation specifies that the employer must engage in annual and ongoing solicitations of information with the employee to correct. See 26 CFR 301.6724-1(e).
[28] See above, p. 2. This is a feature of the new SSA no-match letters, which no longer come with a list of employee names and SSNs.
[29] 29 USC 158(a)(3).
[30] 29 USC 215(a)(3).
[31] 29 USC 660(c).

Administration. These same protections against retaliation also apply to corresponding state wage and occupational safety statutes in those states that have equivalent laws.

Anti-Discrimination Obligations – DOJ

Similarly, an employer must ensure that any follow up with employees following an SSA no-match letter avoids actions that could be investigated, charged, or penalized as discriminatory.

An employer who follows different procedures for employees of different national origin, race, color, or ethnicity when such employees' SSNs are identified as a result of an SSA no-match letter may be liable for violating Title VII of the Civil Rights Act of 1964, which is enforced by the Civil Rights Division of the Department of Justice (DOJ).[32] In addition, state and local anti-discrimination laws may be violated if employers vary response procedures to no-match information that appear to be based on differentiating on the basis of a protected class, such as national origin.

The Immigrant and Employee Rights Section (IER)[33] of DOJ's Civil Rights Division could impose civil penalties on an employer whose response to an SSA no-match letter treats employees differently based on their citizenship status or national origin.[34] Likewise, IER can pursue claims that an employer has engaged in "document abuse" if the organization appears to prefer certain documents or information to resolve or address SSA no-match letters.[35]

Both 2010 guidance from DOJ and guidance from DOJ last reposted in 2014 provide a useful resource and make clear, among other things, that an employer who obtains a list of employees with a discrepancy in SSA's wage-reporting records may not simply terminate the employees whose names and SSNs are listed, without attempting to resolve the mismatches or allowing employees to correct the discrepancy. Such employers would face IER investigation and may be liable for unlawful discrimination.

[32] 42 USC 2000d.
[33] Previously known as "OSC," Office of Special Counsel for Immigration-Related Employment Practices, in DOJ's Civil Rights Division.
[34] 8 USC 1324b(a)(1), and see (a)(3) for who is a "protected individual" for purposes of the immigration statute's anti-discrimination protections.
[35] 8 USC 1324b(b)(6).

CONCLUSION

An employer's actions following a no-match letter from SSA become relevant with regard to future potential liability. This backgrounder attempts to refocus attention on practical considerations that can provide context for employer assessment of next steps following receipt from SSA of no-match letters. In discussing with an employer's own legal advisors how to proceed, an employer's understanding of the specifics of SSA wage-reporting and the contours of the various enforcement issues related to such wage-reporting can help minimize disruption.

About the Author

Amy Marmer Nice, a Research Fellow at the National Foundation for American Policy, is an independent Immigration Policy Advisor. Nice was an Attorney Advisor in the Office of the General Counsel at DHS headquarters from September 2015 to December 2016, working on employment-based immigration regulations, and before that was the Executive Director of Immigration Policy at the U.S. Chamber of Commerce from December 2010 to September 2015, where she primarily worked on legislative reforms to business immigration. From October 1989 to December 2010, she practiced immigration law at the Washington, DC firm of Dickstein Shapiro LLP, where she managed the immigration practice beginning in 1996. She is a Phi Beta Kappa, magna cum laude graduate of Tulane University, where she studied Medieval History, and earned her law degree at George Washington University.

About the National Foundation for American Policy

Established in 2003, the National Foundation for American Policy (NFAP) is a 501(c)(3) non-profit, non-partisan public policy research organization based in Arlington, Virginia, focusing on trade, immigration and related issues. Advisory Board members include Columbia University economist Jagdish Bhagwati, Cornell Law School professor Stephen W. Yale-Loehr, Ohio University economist Richard Vedder and former INS Commissioner James Ziglar. Over the past 24 months, NFAP's research has been written about in the *Wall Street Journal*, the *New York Times*, the *Washington Post*, and other major media outlets. The organization's reports can be found at www.nfap.com. Twitter: **@NFAPResearch**