



## Social Security Number No-Match Recommendations

With the rescission of the "no-match" rule by the U.S. Department of Homeland Security (DHS), it might seem employers receiving a Social Security Administration (SSA) no-match letter could ignore its employment-eligibility implications. That isn't the case, however.

Despite the repeal of the rule, which specified "safe-harbor" steps to resolve Social Security number (SSN) discrepancies, DHS still maintains that an employer's failure to respond appropriately to the receipt of a no-match letter can contribute to a finding that the employer has "constructive" knowledge that an employee identified in the letter is not eligible to be employed in the United States.

In rescinding the no-match rule, DHS reaffirmed its position that it may find an employer has constructive knowledge of unauthorized employment based on the "totality of the circumstances" and that an employer's receipt of a no-match letter and how it responds to the letter are two of those circumstances. DHS says it can use an inadequate response to help prove the employer constructively knew the employee in question was not employment eligible.

The repeal included this guidance to employers wanting to avoid that result: "A reasonable employer would be prudent, upon receipt of a no-match letter, to check [its] own records for errors, inform the employee of the no-match letter, and ask the employee to review the information. Employers would be prudent also to allow employees a reasonable period of time to resolve the no-match" with SSA.

The repeal also noted that "DHS focuses criminal and civil enforcement against the most egregious violators: employers who use unauthorized workers in order to gain a competitive advantage or those who exploit the vulnerable, often engaging in human trafficking and smuggling, identity theft, and social security number and document fraud...."

DHS has audited and will continue to audit employers and apply a "constructive knowledge" concept to an employer who received a no-match letter. Under that concept, DHS says an employer's failure to take steps to resolve the discrepancy after getting a no-match letter may impute to the employer constructive knowledge of work ineligibility.

DHS analogizes this situation to that in a 1989 case where a federal appellate court held an employer had constructive knowledge that three of his employees were not work authorized. In that case, a Border Patrol officer told the employer he suspected the employees had used false alien registration cards to gain employment. The employer neither investigated the officer's suspicion nor took appropriate corrective action. The officer then determined the employees were in fact unauthorized aliens. Because the employer had deliberately failed to investigate the officer's suspicion, the court imputed to the employer knowledge of their status.

**Other No-Match Situations:** An employer might learn about an employee's SSN no-match in ways other than getting a letter from SSA. An employer might receive:

- A garnishment notice for someone whose name is not in the employer's payroll database but that also includes an SSN associated with the name of one of its employees.
- A phone call from someone claiming one of its employees is fraudulently using the caller's SSN.
- A letter from a county social services agency or from the Employment Development Department (EDD) because another person filed for unemployment insurance benefits under an employee's SSN.

Given how DHS applies the "constructive knowledge" theory to an employer's receipt of suspicious information about an employee's SSN, an employer facing one of these situations ignores it at its peril.

In DHS's eyes, the receipt by an employer of information that an employee's SSN might not relate to him doesn't mean the employee lacks employment eligibility. Rather, what DHS considers important is how the employer responds to that information.

Should it learn the employee lacks employment eligibility, DHS could assert the employer failed to take reasonable steps to resolve the discrepancy, pointing to that failure as evidence the employer had constructive knowledge the employee lacked employment eligibility. DHS could then claim that by continuing to employ the employee despite having

that knowledge, the employer broke the law.

Therefore, to protect itself from a charge that it had constructive knowledge of an employee's lack of employment eligibility, an employer should take some reasonable action to investigate and resolve the SSN discrepancy.

Given the high stakes, employers should take the following actions:

**A. SSN No-Match Steps to Take:** When faced with an SSN no-match – whether it be a garnishment, third-party notification, or governmental agency claim of SSN misuse – here are some steps to consider taking:

1. Look at the employee's SSN card and compare its information with that in your payroll records. If your records don't match the information on the card, then correct your records and send SSA a Form W-2c.  
But if your records do match the information on the card, go to step 2.  
It is useful to photocopy each new employee's SSN card and attach it to the employee's IRS Form W-4 for future reference. This practice eliminates the necessity to discuss the matter with the employee prematurely.
2. If a third party other than SSA is claiming the SSN belongs to someone other than your employee, call SSA to verify your employee's SSN. When you call SSA, you will need the employee's name, sex, date of birth and SSN. If SSA verifies the employee's SSA, advise the employee that someone else is using his SSN. But if SSA's records don't match the employee's name to the SSN, go to step 3.
3. Discuss the matter with the employee. If the employee admits he is using a fraudulent SSN and cannot give you a real SSN due to his immigration status, discharge the employee.
4. If the employee assures you his SSN is legitimate, tell him to go to SSA and resolve the issue and return to you with information about the resolution. Give the employee a letter notifying him of the discrepancy and your advice to resolve the issue with SSA. See the sample letter on page 4.  
If the employee refuses to follow up with the SSA or does not follow up with the employer as to progress in resolving a discrepancy, the employer should contact an attorney to discuss subsequent action. Discharge based on receipt of a no-match letter might result in a claim of discrimination by the discharged employee.
5. If the employee returns with a new SSN and/or a new name, then call SSA to verify the SSN.

You might consider or might need to discharge the employee if you determine he obtained employment with your company by using fraudulent documents.

**B. Establish a company policy** on SSA no-match letters. On page 3 is a sample policy that includes these elements:

1. The company's procedures for responding to an employee request to change in company records his or her SSN and/or name.
2. The company's procedures upon being notified by SSA of one or more no-matches.
3. The company's procedure for when a court or governmental agency asks for information about a person using the SSN of one of your employees. This usually occurs in garnishment cases.
4. The company's procedures where it receives credible information about an employee's use of another person's SSN. While it isn't required to act on baseless third-party allegations that an employee is using a fraudulent SSN, the company should investigate a credible claim made by an apparently reliable source.

**C. Document** the steps you took to resolve the discrepancy. See sample tracking log on page 4.

**D. Complete Form I-9 for every employee.** Periodically audit Forms I-9 for accuracy and to ensure a Form I-9 is on file for each employee. For each employee, retain Form I-9 for three years after the hire date or one year after the date employment ends, whichever is later.

**E. Purge Outdated Documents:** Employers should set up a document-review schedule to periodically discard documents no longer must be kept. For example, an employer must retain the Form I-9 of each employee as noted in the prior paragraph. After that retention period has ended, an employer should destroy the form. Other documents that can be discarded are SSA no-match letters, EDD unemployment insurance claim forms and garnishment demands.

**F. Establish Form I-9 Handling Procedures:** Employers should have one or two qualified employees trained in Form I-9 compliance. Train employees who are responsible for handling Forms I-9 to maintain consistency.

Have a second person review Forms I-9. This "secondary review" is important to demonstrate the employer's good faith in seeking to comply with the law and will often catch errors early.

For more suggestions on Form I-9 handling procedures, see the following checklists.

### Form I-9 and ICE Inspection Checklists:

Here are two checklists with Form I-9 handling procedures and for preparing for Immigration and Customs Enforcement (ICE) inspections:

#### Form I-9 Checklist:

- Employees who process Forms I-9 are trained before handling the forms and periodically (at least annually) thereafter.
- A single person has overall responsibility to review every completed Form I-9 before the form is filed.
- Where there are multiple work sites, all Forms I-9 are stored at a central location. Forms I-9 are filed separately from other personnel forms.
- A Form I-9 is on file for every employee, including owners (except sole proprietors) and top management.
- Section 1 of Form I-9 is completed before each employee begins working. Section 2 is completed within 3 days after the employee starts work (exception: employment of less than 4 days, section 2 must be completed on the first day).
- All Forms I-9 will:
  - A. Have all of Section 1 filled in (except SSN, if company isn't using E-Verify).
  - B. Have employee's signature and preparer's signature (only when another assisted in completing the Form I-9).
  - C. Not be over-documented in Section 2 by recording more documents than are necessary to complete the Form I-9.
  - D. Be signed by the person who reviewed the employee's employment-eligibility and/or identification documents.
  - E. Be either attached to or photocopied on the back of the Form I-9 "List of Documents."

#### Immigration inspection checklist

- Assign a top-level management person to be the employer's spokesperson.
- Educate supervisors on how to respond when enforcers appear at the workplace.
- Collect documents likely to be inspected into a single location and have them readily available for inspection.
- Develop and educate employees on your "Visitor Policy."
- Implement Form I-9 and Employee Recordkeeping policies & procedures.
- Periodically perform a Form I-9 self-audit.
- Use central hiring procedures to avoid mistakes in completing Form I-9 for new employees.
- Create checks-and-balances procedures.

### Sample Employment Policy

#### EMPLOYEE RECORDS POLICY

An employee must immediately notify the Company when a change occurs in the employee's:

- Address
- Phone number
- Person to notify in emergency
- Marital status
- Number of dependents
- Insurance beneficiary
- Military status
- Name

**Note:** Before any change in an employee's employment data can become effective, documentation of the change must be presented. An employee may not change any employment data for a fraudulent purpose.

**Social Security Number (SSN):** Every employee must have a valid SSN.

**Social Security Fraud:** It is possible but rare that an employee would be assigned a new or different SSN. Where an employee notifies the Company of a change in the employee's SSN, the Company will verify the change with the Social Security Administration (SSA). If the SSA advises the Company that the new SSN is invalid or does not otherwise match the SSA's records, the employee's record will not be changed. Unless the employee provides other credible evidence supporting its legitimacy, the Company will deem the requested change as an act of attempted fraud, and the employee will be discharged.

Further, the Company investigates an employee's SSN if it receives credible evidence from an apparently reliable source that the employee has supplied the Company with an invalid SSN.

**SSN No-Match:** If the SSA advises the Company that an employee's SSN is invalid or does not otherwise match the SSA's records, the Company notifies the employee about the discrepancy and asks the employee to resolve the matter with the SSA.

If a no-match is discovered due to a garnishment ordered by a court or governmental agency, the employee is notified by the Company about the discrepancy and instructed to resolve the matter with the court or governmental agency.

If the discrepancy is resolved, the employee must notify the Company of the resolution. In the case of a garnishment, the Company processes the garnishment under the SSN specified in the garnishment as if it applied to the employee until the conflict has been resolved with the court or governmental agency.

**Sample SSN No-match Tracking Log**

EE SSN	EE Name	SSA Letter - Date Received	EE Record Corrected Y/N?	If Yes, date W-2c mailed to SSA	If No, date EE notified by ltr.	Date EE provides new data	Comments

**Sample Letter to Employee - Re: SSN No-match**

[Date of letter:]

Re: Social Security Number:

Dear [Employee's Name: ]

We have received notification from: [Check appropriate box]

- Social Security Administration
- Internal Revenue Service
- State Franchise Tax Board
- Employment Development Department
- A person claiming to have the same SSN that we have on file for you
- Other: \_\_\_\_\_

that your Social Security number (SSN) shown above may not relate to you.

The entity or person noted above is asking us to: [Check appropriate box]

- Garnish your wages
- Resolve the discrepancy
- Discontinue using the SSN
- Other: \_\_\_\_\_

This letter is our notification to you of this issue.

To resolve this problem, please show me your SSN card to verify that the name and SSN we have on file for you is correct. If the name or SSN we have on file for you is not your name or SSN, then give us your name or SSN so we can correct our records. If the name and SSN we have for you are your true name and SSN, then contact the entity or person noted above to resolve the conflict.

**Please note:** Once you have resolved this apparent discrepancy, you must report to us the resolution. If you provide us with a new name or SSN, we will verify that new information with Social Security Administration (SSA).

It is possible but rare that a person would be assigned a new or different SSN. Where an employee notifies the Company of a change in the employee's SSN, the Company will verify the change with the SSA. If the SSA advises the Company that the new SSN is invalid or does not otherwise match the SSA's records, the employee's record will not be changed. Unless the employee can provide other credible evidence supporting its legitimacy, the Company will deem the requested change as an act of attempted fraud, and the employee will be discharged.

Sincerely,

[Company representative's name: ]

I acknowledge I received this notice.

Employee's Signature: \_\_\_\_\_ Date: \_\_\_\_\_