

# PUBLICATION

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## Horrors: Return of the No-Match Letter

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**The Social Security Administration has resumed sending "no-match" letters to employers of workers whose 2010 W-2 contains information that does not match the name, date of birth, and social security number in the "Numident" database used by SSA to track retirement and disability contributions, benefits, and claims. Employers must not ignore these notices and should develop a careful policy for taking action on them.**

### **Background**

The U.S. Social Security Administration (SSA) is responsible for tracking employee and employer contributions to social security accounts it maintains for each U.S. worker. It uses this information to process claims for retirement and disability claims. When an employer submits a W-2 form reflecting annual wage payments, and the employee information on the W-2 does not match an SSA record for a worker, SSA is unable to credit the worker's social security account. The social security contribution is credited to an Earnings Suspense File which has grown to many billions of dollars as unauthorized workers using fictitious identities receive wage payments.

From 1979 to 2007, SSA sent letters to certain employers notifying them when a number of W-2s had information that did not match with SSA account records. Employers expressed confusion about what to do with "no-match" letters, which stated that they might result from a host of innocent causes and that an employer should not take adverse action against an employer merely on the basis of the letter. But other departments of the Government had referenced failure to act on no-match letters as evidence of "constructive knowledge" that a worker was not authorized and thus as the basis for heightened fines for I-9 violations and for criminal prosecution of employers and their managers and executives.

In 2007 the Department of Homeland Security proposed a regulation allowing it to insert into a no-match letter's envelope a letter from U.S. Immigration and Customs Enforcement advising the employer how to resolve the no-match in order to avoid an inference of constructive knowledge that the referenced workers were unauthorized aliens. Employer and union groups brought suit to block the regulation, and SSA decided to hold no-match letters until the suit was resolved. In 2009 the Obama Administration retracted the proposed regulation, leaving employers with no guidance until 2010, when the Justice Department published advice similar to the proposed ICE regulation (and similar to our advice all along).

The U.S. Internal Revenue Service is authorized to assess penalties on employers for failing to provide correct information on a Form W-2 and for failing to submit corrections. The penalties can be \$100 per W-2. In the past IRS has not been reported to be aggressive in assessing penalties relating to no-match issues.

### **Current Action**

Now SSA has issued an internal instruction to its offices to issue the letters to employers again, but only for 2010 W-2s-- not for the 2007 to 2009 years for which no such letters were sent. All along SSA has been sending no-match letters directly to workers, and occasionally employers have received them when the W-2 used the employer's address as the worker's address.

For 2010 SSA will send a separate no-match letter for each worker with a no-match. In the past SSA sent an employer only one no-match letter, listing all W-2 workers with a matching problem, and SSA only sent the letters to employers with a certain number or proportion of no-matches (the number or ratio varied over the years).

### **Employer Actions**

Employers should prepare to handle SSA no-match letters in keeping with a comprehensive employment verification policy concerning I-9 procedures, E-Verify procedures (if used), and No-Match scenarios (of which SSA no-match letters are only one example). Employers should consult counsel competent in employment and immigration matters to design these policies and procedures.

No-match procedures should ensure that the employer does not ignore the letters, that workers are given appropriate opportunity to resolve innocent problems (arising from transcribing errors, name change, SSA database error, etc.), that SSA and IRS are notified of corrections, that adverse action is taken where identity or authorization issues are not resolved, and that records of the no-match letters and resolution are maintained.

### **Primary Source Information**

- SSA Sample No-match Letter: <https://secure.ssa.gov/apps10/poms.nsf/lnx/0900901050>
- IRS W-2 Instructions: <http://www.irs.gov/pub/irs-pdf/iw2w3.pdf> (see page 7 for Penalties) Baker Donelson Information

### **How We Can Help**

Baker Donelson's Immigration Group and its Labor and Employment Department regularly counsel employers on I-9 compliance. We perform private audits of I-9 documents, prepare compliance programs, and train managers and workers in implementing those programs. We evaluate particular questionable documents and situations. We help employers decide whether and how to create or store I-9 forms electronically, to use Social Security Administration's Number Verification System, or to participate in the Department of Homeland Security's "E-Verify" program. We defend sanctions actions by ICE for paperwork and "knowingly hire" violations of I-9 rules. We work with our strong Litigation Department to bring and defend claims against competitors based on employment of unauthorized aliens. We advise and defend employers and managers in the increasingly common criminal investigations and proceedings relating to employment of aliens. We coordinate our Team's services closely with our firm's well-respected Labor and Employment Law Group and with our firm's White Collar Crime Group. We provide advice and coordinate with U.S. and foreign preparers concerning U.S. taxation of international companies doing business in the U.S., and concerning the U.S. taxation of international workers placed in the U.S. and abroad.