

No-Match Letter

GUIDANCE TO EMPLOYERS



New York Farm Bureau • 159 Wolf Rd., Albany, NY 12205 • 800-342-4143 • www.nyfb.org

New York Farm Bureau (NYFB) continues to advocate, persistently, with our Congressional leaders on the need for immigration reform, through either a comprehensive reform bill or a separate single sector agricultural immigration reform bill. Without immigration reform, our farmers are looking at an uncertain future, where labor supplies will dwindle to the point where farmers will not have enough help to harvest crops or milk cows, as the demographics in NYS show that a domestic workforce is simply not available.

In light of the Senate failure to pass comprehensive immigration reform, and inaction from the House of Representatives, the White House, Department of Commerce and Department of Homeland Security (DHS) announced a set of regulatory and administrative initiatives related to the enforcement and implementation of immigration laws. DHS has issued its final rule that will establish a safe harbor for employers who receive Social Security no-match letters as a result of this initiative. Also, in the future, DHS will reduce the number of documents that employers can accept to verify work eligibility and will raise the civil fines imposed on employers who knowingly hire illegal immigrants.

No-Match Letters

Every year, the Social Security Administration (SSA) informs thousands of employers via a "no-match" letter that certain employees' names and corresponding Social Security numbers provided on Forms W-2 do not match SSA's records.

Through regulation, the Department of Homeland Security (DHS) is reiterating that employers remain accountable for the workers they hire and clarifies the steps employers should take to resolve mismatches identified in letters issued by SSA. The DHS regulations provide guidance that will help employers comply with legal hiring requirements by outlining specific steps they should take under immigration law when they are notified that employees' names or corresponding Social Security numbers provided on Forms W-2 do not match SSA records.

Currently, SSA is not changing its procedures for issuing employer no-match letters. It has been SSA practice (not regulation) to issue no-match letters to employers if they reported more than 10 "no-match" SSNs and names and these represent more than 0.5% of the forms W-2 in the employer's report. SSA guidance on how to correct Social Security records is also unchanged. However, an employer that follows DHS' procedures will have a "safe harbor." This means that the employer will not be considered by DHS to have constructive knowledge that they employed unauthorized workers, unless DHS could prove independently that the employer had actual or other knowledge that the employee in question was unauthorized to work. The safe harbor would be available even if the worker were later determined to be unauthorized, assuming the employer followed the DHS procedures and could prove that it did so.

There are many reasons for a mismatch between employer and SSA records, including transcription errors and name changes due to marriage, that are not reported to SSA. Employers should not assume that the mismatch is a result of any wrong doing on the part of the employee. Moreover, an employer who takes action against an employee based on nothing more substantial than the first receipt of a mismatch letter may, in fact, violate the law.

No-match letters issued by the SSA will be accompanied by a letter from U.S. Immigration and Customs Enforcement (ICE) informing employers on how to respond to the employer no-match letter in a manner consistent with obligations under U.S. immigration laws.

The DHS regulations and the ICE letter describe with specificity what steps employers should take upon receipt of a no-match letter: 1) verifying within 30 days that the mismatch was not the result of a record-keeping error on the employer's part; 2) requesting that the employee confirm the accuracy of employment records; 3) asking the employee to resolve the issue with SSA; 4) if these steps lead to resolution of the problem, follow instructions on the no-match letter itself to correct information with SSA, and retain a record of the verification with SSA; and 5) where the information could not be corrected, within 90 days of receipt of the no match letter, the employer should complete, within three days, a new I-9 form. These procedures, which are also tabled below, should be followed starting immediately due to the fact that when the final rule goes into effect the first 30 days will have elapsed.

| Action | Final Rule |
|--|-------------------|
| Employer receives letter from SSA indicating mismatch of employees name and social security number. | Day 0 |
| Employer checks own records, makes any necessary corrections of errors, and verifies corrections with SSA. | 0-30 Days |
| If necessary, employer notifies employee and asks employee to assist in correction. | 0-90 Days |
| If necessary, employee corrects own records and verifies correction with SSA. | 0-90 Days |
| If necessary, employer performs special I-9 procedure | 90-93 Days |

For the new I-9 form, the employer may accept any of the accepted documents to reestablish its worker's identity and employment eligibility, with one important exception: the employer may not accept any document that contains the Social Security number that instigated the no-match letter. In addition, the employee must present a document with a photograph in order to establish identity or both identity and employment authorization.

Employers that re-verify documents listed in no-match letters according to DHS procedures will have a defense against discrimination allegations based on document abuse provisions of current immigration law. It is critical to follow these steps carefully and consistently for each and every employee referenced in no-match letters that you receive in order to gain the "safe-harbor" protection and relief from discrimination allegations.

Civil Fines

An employer that fails to follow the procedures set forth in DHS' rule will be considered by DHS to have constructive knowledge that it employed unauthorized workers. This will influence DHS' exercise of its prosecutorial discretion in deciding whether it will bring charges against employers that receive no match letters and do not follow up on them. Currently, the civil penalty for knowingly hiring an unauthorized alien is: 1) First offense-not less than \$275 and not exceeding \$2,200, for each unauthorized alien; 2) Second offense-not less than \$2,200 and not exceeding \$5,500, for each unauthorized alien; or 3) More than two offenses-not less than \$3,300 and not exceeding \$11,000, for each unauthorized alien. Additionally, employers that are determined by DHS (if a respondent fails to request a hearing) or by an administrative law judge, to have failed to comply with the employment

verification requirements (completion of I-9 forms within 3 days of the date of hire) shall be subject to a civil penalty in an amount of not less than \$110 and not more than \$1,100 for each individual.

In the future, as a civil counterpart to the Administration's strategy of using criminal investigations to deter illegal employment, DHS plans to raise the civil fines imposed on employers who knowingly hire illegal immigrants by approximately 25 percent. It is the opinion of DHS that efforts to secure the border will fail unless the "magnet" that attracts illegals is turned off and that the fines for relying on illegal workers are so modest that some companies treat them as little more than a cost of doing business. DHS plans to use existing authority to update civil fines for inflation in order to boost fines by about 25 percent, as much as is allowed under current law. DHS has not yet specified when the fine increase will take effect.

Employment Eligibility Documents

In the coming months, the Administration will publish a regulation that will reduce the number of documents that employers can accept to confirm the identity and work eligibility of their employees. Presently, no fewer than 29 categories of documents can be used to establish identity and work eligibility. Employers have little capacity to verify the authenticity of these documents. According to DHS, the sheer quantity of accepted documents is an invitation to fraud. This regulation plans to reduce unlawful employment by weeding out insecure documents now used often for identity fraud.

These are expected changes not yet in effect. NYFB will publish the additional information when it becomes available. The documents identified below remain acceptable to establish identity and employment eligibility on the I-9 form. Please note that the list of acceptable documents is different than the list that appears on the back of the current I-9 form due to intervening changes in law. However, employers that continue to follow the list that appears on the back of the I-9 form will not be sanctioned by the DHS, until such time as DHS issues a new I-9 form and Handbook for Employers.

List A - Documents that Establish Both Identity and Employment Eligibility.

- U.S. Passport (unexpired or expired)
- Unexpired foreign passport that contains a temporary I-551 stamp
- Alien Registration Receipt Card or Permanent Resident Card (INS Form I-551)
- Unexpired Employment Authorization Card that contains a photograph (Form I-766, Form I-688, Form I-688A, Form I-688B)
- For non-immigrants authorized to work for a specific employer: an unexpired foreign passport with an Arrival-Departure Record, Form I-94, bearing an unexpired endorsement of the individual's nonimmigrant status.
- Unexpired foreign passport with a Machine Readable Immigrant Visa (MRIV) and unexpired temporary I-551 stamp (valid until the expiration date set forth on the temporary I-551 stamp).
- Unexpired foreign passport with a MRIV containing temporary I-551 language and endorsed with an unexpired DHS admission stamp (valid for one year from the date of admission).

OR

List B - Documents that Establish Identity

- Driver's license or ID card issued by a state or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, sex, height, eye color, and address
- ID card issued by federal, state or local government agencies or entities provided it contains a photograph or information such as name, date of birth, sex, height, eye color, and address
- School ID card with a photograph
- Voter's registration card
- U.S. Military card or draft record
- Military dependent's ID card
- U.S. Coast Guard Merchant Mariner Card

- Native American tribal document
- Driver's license issued by a Canadian government authority

For persons under age 18 who are unable to present a document listed above:

- School record or report card
- Clinic, doctor, or hospital record
- Day-care or nursery school record.

AND

List C - Documents that Establish Employment Eligibility

- U.S. Social Security card issued by the Social Security Administration (other than a card stating it is not valid for employment or valid only with INS work authorization)
- Certification of Birth Abroad issued by the Department of State (Form FS-545 or Form DS-1350)
- Original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the United States bearing an official seal
- Native American tribal document
- U.S. Citizen ID Card (Form I-197)
- ID Card for use of Resident Citizen in the United States (Form I-179)
- Unexpired employment authorization document issued by the Department of Homeland Security (other than those listed under List A), including (1) a Form I-94 identifying the holder as an asylee (by stating "asylum", "asylee" or appropriate provision of law), or (2) other documentation issued by DHS (or the former Immigration and Naturalization Service (INS)) that identifies the holder as an asylee, lawful permanent resident, refugee (except for the Form I-94 identifying the holder as a refugee, which is considered a receipt only), or other status authorized to work in the United States incident to status.

This regulatory and administrative initiative will make it harder for illegal immigrants to secure jobs and indirectly will have an impact on the labor supply to agriculture in New York State. Farmers do not want to hire illegal workers. The agriculture industry desperately needs both a reformed temporary agricultural labor program and a solution for a year-round work force, including the ability to adjust the status of present skilled agricultural employees who want to work on farms.

Clearly, immigration reform is needed to provide a permanent fix to the problem of illegal immigration or agriculture faces an uncertain future. NYFB encourages its members to continually advocate for immigration reform

If you have any questions concerning these or other labor and immigration issues please contact NYFB at 1-800-342-4143.

The information contained herein is provided for informational purposes only, it is not intended to be, nor should it be considered, a substitute for legal advice rendered by a competent attorney. If you have any questions about the application of the issues raised herein to your particular situation, seek the advice of an attorney. New York Farm Bureau's legal department, 518-431-5628, can refer members to an attorney who specializes in immigration issues.