

# KNOWLEDGE EXCHANGE PARTNER

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## They're Back: The Dreaded SSA No-Match Letters

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Like a blast from 1993, the Social Security Administration (SSA) has triumphantly reprised its No-Match letter initiative (a.k.a. "Employer Correction Request"). When first launched in 1993, the program created widespread confusion, and even panic, among businesses across the country, most notably in agriculture. After a series of lawsuits, the Obama Administration ultimately suspended the program in 2012. As of March 2019, SSA has resumed issuing No-Match letters to businesses throughout the country that have been identified as having at least one W-2 form that contradicts information in SSA records.

**Employers, however, should be cautioned that there are a variety of reasons why information contained in payroll records may not match information found in SSA records, and should not take rash action.** Issuance of such a letter does not necessarily mean that an employee is undocumented or lacks employment authorization. For example, any of the following events could result in a discrepancy: (1) typographical data entry errors by SSA; (2) reporting errors by an employer or employee; (3) identify theft; (4) errors in hyphenated or multiple last names; or (5) name change due to marriage or divorce.

It is clear that employers receiving a No-Match letter must take proper steps to address such requests, but should not assume that issuance of such a letter is evidence of an unauthorized or undocumented employee. Indeed, an employer can be held liable for employment discrimination if pre-mature action is taken. Such rash action could have the same consequences as non-action. SSA has made clear that employers should not take adverse employment action against an employee solely based on the No-Match letter. SSA includes the following statement:

*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.*

**Why is this?** The U.S. Department of Justice Immigrant and Employee Rights Section is the agency charged with enforcing unfair

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employment practices and workplace discrimination. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on a number of factors, including national origin through provisions that prohibit unfair documentary practices on the basis of citizenship, national origin or immigration status. We see this most often in the context of I-9 regulations by restricting employers from soliciting or requesting excessive or unnecessary documents as part of the I-9 verification process. It equally extends to the No-Match letter scenario. If an employer terminates an employee simply because there is a discrepancy in payroll records and in SSA records, this could lead to an allegation of employment discrimination.

It is clear that we are living in an unprecedented culture of enforcement across government agencies. We have seen a shift from employee-focused enforcement actions to employer/workplace enforcement in an effort to eliminate the so-called magnet of our illegal immigration problem. We have seen parallels with the I-9 program as Notices of Inspection/I-9 Audits have skyrocketed to an all-time high. Employers would be well-served to treat SSA No-Match protocols similar to how it addresses I-9 compliance issues.

Information contained in SSA records, including discrepancies, is not automatically shared with other enforcement agencies, including Immigration Customs and Enforcement (ICE). Indeed, federal courts have held that SSA is prohibited from sharing information concerning the names of employers receiving No-Match letters as such information is confidential under tax laws. See *Judicial Watch v. SSA*, 701 F.3d 379 (D.C. Cir. 2012). Despite this prohibition, however, the U.S. Department of Homeland Security (DHS), including ICE, may request information from SSA for the purpose of identifying and locating aliens in the U.S. and enforcing laws. U.S.C. §552(b)(7). The breadth of this statute in enforcing immigration laws creates much risk for employers.

**How should an employer respond?** To be clear, receipt of a No-Match letter does not, by itself, constitute constructive knowledge that a named employee is not authorized to work, or is undocumented. At the same time, however, an employer must take immediate steps to remedy the discrepancy. As part of the I-9 audit process, ICE has traditionally requested documentation regarding compliance with No-Match inquiries. Immigration officials may regard an employer's failure to act on a No-Match letter as evidence of constructive knowledge of unauthorized employment. The employer's action plan should include the following steps:

## I. Initial Receipt of No-Match Letter

- Recognize and train human resources staff that the name/SSN no matches can result because of simple administrative errors.
- Do NOT assume that the no-match implicates an employee's immigration status or work authorization.
- Review payroll records, W-4, Form I-9, Social Security number verification system (SSNVS) record, and any other documents in the employer's file that contains the employee's SSN to ensure that the name and SSN are correctly shown on documents.

## II. Communicating with Employee

If internal review confirms a no-match:

- Provide written notification to the affected employee of the No-Match letter immediately and request that they confirm the name/SSN reflected in the employer's personnel records.
- Advise the employee to contact the SSA to correct and/or update their records.
- Give the employee a reasonable period of time to address a reported no-match. There are no Federal statutes or regulations that define "reasonable period of time" in connection with the resolution of a no-match notice. In other contexts, such as E-Verify, however, SSA has held that 120 days could be considered reasonable for resolving an issue concerning right to work.
- **Be consistent!** Follow the same procedures for all employees regardless of citizenship status or national origin.

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### III. Follow-up Actions

- To demonstrate good-faith compliance, regularly follow-up with affected employee and document efforts in resolving the no-match.
- Review any documents the employee chooses to offer establishing resolution.
- Submit any employer or employee corrections to SSA.
- Do NOT attempt to immediately re-verify employment eligibility through completion of a new I-9 form: this is employment discrimination.
- Do NOT require the employee to produce specific I-9 related documentation to address a no match inquiry.
- Do NOT require the employee to provide a written report of SSA verification.

The return of the No-Match letter is a not-so-subtle reminder that we are operating under a robust worksite enforcement regime. It is critical that employers in all industries make compliance a priority and ensure accurate records for wage reporting and I-9 records. Employers may not be able to avoid issuance of a No-Match letter, but can have procedures in place to address the letter when it does arrive. Now is the time to develop compliance programs and enforcement response procedures, whether it be for I-9 or SSA compliance.



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## 2017 Census of Agriculture

### A snapshot of Northeast Agriculture

The USDA recently released the long awaited 2017 *Census of Agriculture*. The ag census is compiled every five years and gives a detailed look of the current state of agriculture in the United States.

#### Key National Highlights

- The number of farms<sup>1</sup> decreased by three percent, while the average farm size increased by 1.6 percent to 441 acres.
- The average age of farmers increased by 1.2 percent, to 57.5 years, with farm operators over the age of 65 now making up 35 percent of the total.<sup>2</sup> Twenty percent of farm operators were under 45 years of age.
- More than eight percent of farmers were less than 35 years old, an increase of roughly 28,000.
- More farm operators are being counted; the total number of producers increased nearly seven percent, primarily because more farms reported multiple operators.
- Increase in beginning farmers; with more farmers counted, new farmers<sup>3</sup> now represent 27 percent of the overall farm population, a five percent increase.
- Women now make up 36 percent of all farmers, and were most involved in day-to-day decisions, record keeping and/or financial management.
- 12 percent of farmers had military service.

1 For the purposes of the ag census, a "farm" is an operation that normally sells at least \$1,000 worth of product annually.

2 Operations could report up to four operators.

3 "New Farmers" are those operators who have farmed for 10 or fewer years.

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## Northeast Farm Operations

Focusing on farm operations in the Northeast,<sup>4</sup> there was a decline of 3,828 operations and 650,406 fewer acres farmed since the last census in 2012. Nearly all Northeast states showed declines, except New Jersey, which saw an increase of 812 farm operations and 19,071 acres added since 2012. This is primarily due to a significant increase in farm operations of less than 10 acres. It is important to note that the *Census of Agriculture* counts more than full-time commercial farms. Any operation that sells at least \$1,000 worth of product annually is counted, so many of the farms included in the census are part-time enterprises.

Number of Farm Operations					
Farm Credit East states	2017	2012	2007	2002	1997
New York	33,438	35,537	36,352	37,255	38,264
New Jersey	9,883	9,071	10,327	9,924	10,045
Connecticut	5,521	5,977	4,916	4,191	4,905
Rhode Island	1,043	1,243	1,219	858	994
New Hampshire	4,123	4,391	4,166	3,363	3,928
Massachusetts	7,241	7,755	7,691	6,075	7,307
Maine	7,600	8,173	8,136	7,196	7,404
<b>Subtotal</b>	<b>68,849</b>	<b>72,147</b>	<b>72,807</b>	<b>68,862</b>	<b>72,847</b>
<b>Difference from prior census</b>	<b>(3,298)</b>	<b>(660)</b>	<b>3,945</b>	<b>(3,985)</b>	<b>--</b>
Vermont	6,808	7,338	6,984	6,571	7,063
<b>Northeast Total</b>	<b>75,657</b>	<b>79,485</b>	<b>79,791</b>	<b>75,433</b>	<b>79,910</b>
<b>Difference from prior census</b>	<b>(3,828)</b>	<b>(306)</b>	<b>4,358</b>	<b>(4,477)</b>	<b>--</b>

Figure 1: 2017 Census of Agriculture

Although other Northeast states saw a decrease in the total number of farm operations, many of them saw growth in the number of small (less than 10 acre) farms. Operations of this size make up around 19 percent of total farms in the Northeast. The largest sector of farms by size are those that range from 10 to 50 acres, making up 31 percent of total farm operations in the Northeast.

It is also interesting to look at the legal structure of farms. Around 82 percent of farm operations are structured as family and individual ownership,<sup>5</sup> followed by partnerships at 8.5 percent, then corporations, institutional & research, and other ownership structures.

When looking at acres operated by farms, the 2017 census showed fewer acres of farmland than the prior four census reports. Since the 1997 census, the Northeast has collectively lost 1.3 million acres of farmland. This is due to a variety of reasons ranging from development of rural and transitional areas into non-agricultural uses, to land that is no longer actively farmed.<sup>6</sup>

4 The Northeast includes the states of New York, New Jersey, Connecticut, Massachusetts, Rhode Island, New Hampshire, Vermont and Maine.

5 Farm Operations: organization, tax purposes.

6 While broad trends in the ag census over time are highly likely to be accurate, minor differences in numbers between census editions may occur because of changes in methodology and statistical adjustments made to compensate for nonresponses and misclassified farms.

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The average farm size in the Northeast was 151 acres in 2017,<sup>7</sup> very similar to the 152 acres reported in the 2012 census. In total, farms operated on 11.5 million acres across the eight Northeastern states.

Net cash income rose to \$1.9 billion in 2017 from \$1.6 billion in 2012.

Farm Operations – Acres Operated					
Farm Credit East states	2017	2012	2007	2002	1997
New York	6,866,171	7,183,576	7,174,443	7,660,969	7,788,241
New Jersey	734,084	715,057	733,450	805,682	856,909
Connecticut	381,539	436,539	405,616	357,154	406,222
Rhode Island	56,864	69,589	67,819	61,223	65,083
New Hampshire	426,393	474,065	471,911	444,879	463,383
Massachusetts	491,653	523,517	517,879	518,570	577,637
Maine	1,307,613	1,454,104	1,347,566	1,369,768	1,313,066
<b>Subtotal</b>	<b>10,264,317</b>	<b>10,856,447</b>	<b>10,718,984</b>	<b>11,218,245</b>	<b>11,470,541</b>
<b>Difference from prior census</b>	<b>(592,130)</b>	<b>137,463</b>	<b>(499,261)</b>	<b>(252,296)</b>	<b>--</b>
Vermont	1,193,437	1,251,713	1,233,313	1,244,909	1,315,315
<b>Northeast Total</b>	<b>11,457,754</b>	<b>12,108,160</b>	<b>11,952,297</b>	<b>12,463,154</b>	<b>12,785,856</b>
<b>Difference from prior census</b>	<b>(650,406)</b>	<b>155,863</b>	<b>(510,857)</b>	<b>(322,702)</b>	<b>--</b>

Figure 2: 2017 Census of Agriculture

## Dairy

Since the 2012 census, there have been significant changes in the dairy industry throughout the region. Since 2012 the Northeast has 1,221 fewer dairy operations, but increased milk cow inventories by a little over 15,000<sup>8</sup> and milk sales by \$128 million dollars. New York saw the largest increase in milk cow inventory with over 17,500 added.

The 2017 census shows that there were 5,487<sup>9</sup> dairy operations across the Northeast, down from 6,708 in 2012. Again, New York led the way in overall milk sales, with \$2.5 billion, followed by Vermont with \$505 million in sales. In total, the Northeast sold over \$3.4 billion in milk, averaging \$618,202 per dairy operation.<sup>10</sup>

## Women In Agriculture

A major shift in recent years has been the role of women in agriculture. In 2017, there were 53,047 women operators on the region's 75,657 farms.<sup>11</sup> This indicates the significant role that women have in running and managing farms in the Northeast. Of those 53,047 operators, 24,644 were listed as the primary operators of their farm, or about one-third of all farms. New Hampshire had the highest percentage of female primary operators, at 41 percent.

7 Area operated, measured in acres / number of operations

8 Cattle, Cows, Milk-Inventory

9 Milk-Operations with Sales

10 Milk-operations with sales / Milk-Sales, measured in \$

11 Farms could list up to four operators per farm

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## The Next Generation

As the current age of farmers rises, a significant number of farms will transition to the next generation in the coming years. In the Northeast, there are 6,731 farm operations where the principal operator is considered a young operator (less than 35 years of age). A greater number of farms (9,952), had a “young producer” as part of the farm operation, who was not a principal operator, but was part of the farm management team.

	Young Principal Operators	Young Principal Acres	Young Producer Operations	Young Producer Acres
<b>Overall Northeast Total</b>	6,731	1,061,470	9,952	1,883,491
<b>FULL OWNER</b>	3,747	272,705	5,742	470,679
<b>PART OWNER</b>	1,894	701,645	2,982	1,308,996
<b>TENANT</b>	1,090	87,120	1,228	103,816

Figure 3: 2017 Census of Agriculture

## Conclusions

The USDA *Census of Agriculture* is a very important, once-every-five-year snapshot of U.S. farms. It is used by researchers, policy makers and others to glean important insights into what is happening with this critical sector of our economy and society.

This edition of the ag census showed fewer farms and fewer acres in farmland nationwide as well as in the Northeast. The average age of farm operators continues to climb, but so has the number of young and beginning farm operators, a reflection of changes in agriculture as well as broad demographic trends. The increase in number of female producers reported confirms the significant role that women play in agriculture both nationally and locally.

Most states reported greater numbers of very small and large farms, and fewer numbers of farms in the middle. This shift in farm size suggests a rise in the number of part-time and niche producers, as well as the continued consolidation among full-time farms; as some producers decide to exit, their properties are often purchased by neighboring farms that wish to expand.

Finally, net cash farm income increased in the Northeast between 2012 and 2017, indicating growth in productivity as well as profitability of the region’s farms. For more information on the 2017 *Census of Agriculture*, visit [Nass.usda.gov/AgCensus/](http://Nass.usda.gov/AgCensus/).

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