



U.S. Department of Justice

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By E-mail (dfazio@wafla.org)

April 27, 2011

Dan Fazio
Director
Washington Farm Labor Association
975 Carpenter Rd. N.E., Suite 101 D
Lacey, Washington 98516

Dear Mr. Fazio:

This is in response to your e-mail dated March 10, 2011. In your e-mail, you express concern that the name/Social Security number (SSN) no-match guidance issued by the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) contradicts your view of "best practices" in responding to "no-match" notices. In particular, you express concern that discouraging employers from requiring that an employee produce a letter from the SSA puts employers "at risk for a claim of continuing to employ unauthorized workers." In addition, you solicit OSC's views as to the reasonableness of steps you recommend an employer take when an employee provides a new SSN after being advised of a no-match.

As you know, OSC enforces the anti-discrimination provision of the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1324b. OSC cannot provide an advisory opinion on any particular instance of alleged discrimination or on any set of facts involving a particular individual or entity. We can, however, provide some general guidelines regarding employer compliance with the INA's anti-discrimination provision. The INA's anti-discrimination provision prohibits four types of employment-related discrimination: citizenship or immigration status discrimination; national origin discrimination; unfair documentary practices during the employment eligibility verification (Form I-9) process (*i.e.*, "document abuse"); and retaliation for filing a charge, assisting in an investigation, or asserting rights under the anti-discrimination provision.

A "no-match" notice is information received by an employer from one of a wide variety of governmental and non-governmental sources suggesting a possible inconsistency between an employee's name and/or SSN in the employer's records and the records of the reporting entity or the Social Security Administration (SSA). Most "no-match" notices typically received by employers are generated for, and in some cases legally limited to, purposes other than determining work authority under 8 U.S.C. § 1324a(b). OSC's publicly available guidance, issued after consultations with, among others, the SSA and Immigration and Customs Enforcement (ICE) of the U.S. Department of Homeland Security (DHS), seeks to assist

employers in responding to "no-match" notices in a way that treats employees consistently regardless of citizenship status or national origin.

At the outset, we would like to address the first sentence of your "best practices" scenario, in which you state that a "no-match [notice] advises the employer that the name and SSN are impossible or belong to someone else." In the context of no-match letters issued by the SSA, the SSA makes clear that its "no-match" letters only advise the recipient that "a reported name or SSN does not match SSA's records," and that the purpose of the letter "is to obtain corrected information to help SSA identify the individual to whom the earnings belong so that the earnings can be posted to the individual's earnings record." *Handling Inquiries Relating to SSA Letters on No-Match Names and Social Security Numbers (SSNs)* (Sept. 9, 2010), available at <https://secure.ssa.gov/poms.nsf/lnx/0101105027>. Moreover, SSA "no-match" letters contain the following notice:

This letter does not imply that you or your employee intentionally gave the government wrong information about the employee's name or Social Security number. Nor does it make any statement about an employee's immigration status.

Id.; see also *Social Security Administration Retirement, Survivors and Disability Insurance Employer Correction Request*, <http://www.ssa.gov/employer/SSAsampleLetter.pdf>.

Substantially similar language is included in sample notice letters provided by the SSA for use by an employer in advising an employee of a reported no-match. *Sample Letter Employers Can Give to Employees*, www.ssa.gov/employer/sampleltr.doc. The Social Security Number Verification Service (SSNVS) Handbook similarly states that a SSNVS "no-match" "does not make any statement about . . . immigration status," and is "not a basis, in and of itself, to take any adverse action against [an] employee." *Social Security Number Verification Service (SSNVS) Handbook* (Dec. 2008) at 5, http://www.ssa.gov/employer/ssnvs_handbk.htm. No-match notices issued by other entities are also not determinative of immigration status.¹ For that reason, OSC's guidance states: "[R]eports or alerts [from sources other than the SSA] . . . should be treated cautiously, and should not be used as conclusive evidence of employment authorization, as these third party reporting entities have no legal authority to determine an individual's work authority and may not have access to current information contained in SSA's databases." *Frequently Asked Questions About Name/Social Security Number "No-Matches"*, <http://www.justice.gov/crt/about/osc/pdf/publications/SSA/FAQs.pdf>.

In your letter, you also state that when an employee seeks to resolve a "no-match" by presenting a new SSN, "HR best practices would dictate that the employer verify the new Name/SSN combination using SSNVS, or that the employer ask the worker to bring a letter from the SSA confirming that the name and SSN is a match." First, we note that the propriety of using SSNVS depends on the purpose for which it is being utilized. Use of the SSNVS is permissible only for wage reporting purposes. *SSNVS Handbook* at 4. "It is not proper to use SSNVS for non-wage reporting purposes such as identity, credit checks, mortgage applications, etc." and "rely[ing] only on the verification information SSA provides to justify adverse action against a worker, . . . may violate State or Federal law and be subject to legal consequences." *Id.* at 5.

¹ Our discussion of no-match notices in this technical assistance letter does not refer to notices generated in connection with a worksite audit by ICE.

Thus, SSNVS is not intended to be used to verify employment authorization in connection with the I-9 process.

Second, as OSC's employer "No-Match" guidance points out, written SSA verification reports are not made available by every local SSA office. OSC strongly cautions employers against adopting policies and/or practices *requiring* the production of documents that might be impossible to obtain or which are not acceptable to establish work authority under 8 U.S.C. § 1324a(b), particularly when that requirement may create the appearance of document abuse in violation of 8 U.S.C. § 1324b(a)(6) (*i.e.*, demanding the production of more or *different* documents than those identified in the Form I-9 process with the intent to discriminate on the basis of national origin or citizenship status). Of note, OSC's guidance does not state that an employer is prohibited from asking an employee to provide a SSA verification report if available. Rather, OSC's guidance states that an employer cannot *require* the production of, among other possible documents, a SSA verification report.

Finally, with respect to your inquiry regarding the actions an employer should take when an employee provides a new SSN after being advised of a no-match, we are unaware of any publicly available guidance specifically addressing this issue. We caution against developing a policy or practice of treating the presentation of a new SSN as presumptive evidence that an employee is not authorized to work in the absence of any additional information. The presentation of a new Social Security card does not necessarily indicate that an employee is currently not authorized to work. Further, under DHS guidance, employers are not required to be document experts for I-9 purposes but rather, must accept documents that reasonably appear to be genuine and to relate to the person presenting them. See 8 U.S.C. § 1324a(b)(1)(A). For additional guidance on this issue, you may wish to contact ICE. For more information about ICE and additional contact information, you may visit ICE's website at www.ice.gov.

We hope this information is helpful.

Sincerely,



Katherine A. Baldwin
Deputy Special Counsel