



U.S. Department of Justice

Civil Rights Division

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Inter-Agency Request for Technical Assistance

August 21, 2012

Dear:

Thank you for contacting the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC"). This is in response to your email dated July 12, 2012. In your email, you inquire whether Social Security numbers may be required for an "electronic payroll system" even though the employer is aware that Social Security numbers are "not required as part of employment eligibility compliance." From your email, it is not clear whether the "electronic payroll system" utilized is a system that also includes an employment eligibility verification component.

OSC, a section within the Department of Justice's Civil Rights Division, was established by Congress in 1986 to enforce the anti-discrimination provision of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1324b. The INA protects U.S. citizens and work-authorized individuals from employment discrimination based on citizenship or immigration status and national origin with respect to hiring, firing, and recruitment or referral for a fee. It also prohibits unfair documentary practices by employers when verifying the employment eligibility of employees, and retaliation against individuals who exercise their rights under the anti-discrimination provision. OSC cannot provide an advisory opinion on any set of facts involving a particular individual or entity. However, we can provide some general guidelines regarding the anti-discrimination provisions of the INA, 8 U.S.C. § 1324b, and information concerning the employment eligibility verification process.

As you know, U.S. Citizenship and Immigration Services publishes the Form I-9 and accompanying guidance. As a reminder, while Section 1 of the Form I-9 includes a field for an employee's Social Security number, that field is optional unless the employer is enrolled in E-Verify. Even where an employer is enrolled in E-Verify, USCIS guidance provides that if an employee has not yet been issued a Social Security number, the employer must allow the employee (assuming Form I-9 requirements are satisfied) to work and delay running the E-Verify query until the individual receives a Social Security number. See U.S. Citizenship and Immigration Services ("USCIS") *E-Verify User Manual for Employers*, (Form M-775, Rev. 05/01/11), p. 13, available at http://www.uscis.gov/USCIS/Verification/E-Verify/E-Verify_Native_Documents/manual-employer_comp.pdf. Even if an employer uses E-Verify, the employer is prohibited from specifically requesting to see the Social Security card for purposes of verifying the Social Security number provided by the employee in Section 1 of the I-9 Form. For Section 2 of the Form I-9, an employee must be permitted to choose which document(s) he or she wishes to present for employment eligibility verification purposes from the lists of acceptable documents on the Form I-9. An employee may choose to present a document other

than a Social Security card for purposes of Section 2. Under the anti-discrimination provision, document abuse may occur when an employer requests more or different documents than are required to verify employment eligibility, rejects reasonably genuine-looking documents, or specifies certain documents over others with the purpose or intent of discriminating on the basis of citizenship status or national origin.

To the extent an employer is requesting employees' Social Security numbers (and not the actual cards) for purposes other than to verify employment eligibility through the I-9 process, the E-Verify process, or other means, the employer is unlikely to implicate the anti-discrimination provision. However, in order to avoid the appearance of discrimination under the INA, OSC recommends that employers clearly communicate the basis for the request and to the extent possible, separate such requests from the employment eligibility process. Furthermore, employers making such requests should do so consistently irrespective of the citizenship status or national origin of their employees and should develop a process for individuals that have not yet received Social Security numbers. As noted above, some work-authorized employees—including refugees and asylees--may experience a delay in receiving Social Security numbers, despite their legal eligibility to work. Furthermore, in the wage-reporting context, the Internal Revenue Service cautions employers that no federal law prohibits either the employment of, or payment of wages to, a person solely because that person lacks a Social Security account number. See Internal Revenue Service ("IRS"), *Delays in Issuing SSNs to Aliens by the Social Security Administration* (updated 12/02/11), <http://www.irs.gov/businesses/small/international/article/0,,id=129227,00.html>. The IRS also advises that "[i]f the employee has applied for a card but the number is not received in time for filing, enter 'Applied For' in box 'a' on paper Forms W-2 filed with the SSA. (Enter zeros if Form W-2 is filed electronically with the SSA.)" Internal Revenue Service ("IRS"), *General Instructions for Forms W-2 and W-3*, <http://www.irs.gov/instructions/iw2w3/ch01.html> (last visited 08/20/12).

Finally, to the extent an employer is requesting to see the Social Security cards and/or copies of Social Security cards of its employees for purposes unrelated to employment eligibility verification, OSC strongly discourages this practice. Employers that request employees to present Social Security cards for purposes other than employment eligibility verification may create the appearance of violating the anti-discrimination provision. Further, to the extent an electronic payroll system combines various payroll and new hire procedures, including the employment eligibility verification process, the request for a Social Security card may constitute a request for a specific document for employment eligibility verification purposes, potentially implicating the anti-discrimination provision.

We hope this information is helpful. If you have further questions, do not hesitate to contact OSC on the Employer Hotline at 1-800-255-8155 or visit the website at www.usdoj.gov/crt/about/osc.

Sincerely,

/s/

Seema Nanda

Deputy Special Counsel