

## Mismatched Social Security Numbers: An Employer's Dilemma

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Recently, a federal district court judge from the Northern District of California ruled that the government cannot use mismatched Social Security data to root out illegal immigrants from the workforce, declaring that such enforcement actions would do 'irreparable harm to innocent workers and employers.'" Judge Breyer issued a preliminary injunction temporarily preventing the Department of Homeland Security from beginning a program to punish companies that do not clear up discrepancies between their workers' names and Social Security numbers within 90 days after receiving a letter from Social Security advising them of the discrepancy.

What does this mean for employers? What should they do if they are faced with an employee's name that does not match the Social Security Number? Employers have to tread lightly in California in summarily terminating employees because of discrepancies in Social Security numbers. Mismatched Social Security data could be evidence that someone is unauthorized to work, or it could also be caused by a typo or name change. If an Employer takes the position that an employee with a mismatched Social Security number is unauthorized to work and therefore should be terminated, the employer is looking for trouble.

First, the new Homeland Security provisions place a burden on employers to comply with a new 90-day time frame for resolving mismatches. The scope of the rule would have staggering effects on employers, prompting them to develop costly personnel systems and fire workers who may be legally employed, thus exposing them to liability for wrongful termination. The liability exposure for employers summarily terminating employees with mismatched numbers could be staggering.

Under California law all individuals who have applied for employment or who are or who have been employed in the State are entitled to all protections, rights, and remedies available under state laws, except any reinstatement remedy prohibited by federal law, regardless of immigration status. The law further provides that for the purposes of enforcing state employment and civil rights laws, a person's immigration status is irrelevant to the issue of liability. No inquiry is permitted into a person's immigration status except when necessary to comply with federal immigration law.

All employers are required to have an employee execute an INS I-9 Employment Eligibility Verification and give documents verifying his or her legality to work. An employer complies with the verification requirements for document examination if the documents reasonably appear on their face to be genuine. An employer is not required to further investigate the authenticity of documents that meet that criterion. An employer is liable for accepting documents if the employer knows or has reason to know that the documents are false. In summary, if the employer knew or should have known, because of the availability of certain information, that the applicant alien held an unauthorized status and had no right to work, the employer will be held liable.

The new Homeland Security provision basically takes the employer's duty further than just asking for verification to work in the United States, but makes an employer an INS agent by requiring the employer to investigate the validity of documents presented for verification. Will employers begin to target certain ethnic and racial groups and systematically not hire them, because they are known by the employer as a group that receives mismatched social security letters?

Even if a mismatch letter is sent, this does not give the employer the right to terminate. If an employer receives a mismatch letter, the employer should re-verify work authorization by allowing the employee another opportunity to present acceptable documentation and complete a new I-9. If the employee is unable to produce acceptable documentation, then an employer may be faced with termination of the employee's employment to avoid penalties for 'knowingly continuing to employ' an unauthorized worker. However, if the employee presents the same documentation for a new I-9 and maintains the documentation he or she originally provided to verify the first I-9 is valid, an employer is still taking a substantial risk in terminating.

In California, employers have been exposed to large monetary judgments because they use the mismatch letter as an excuse to get rid of employees who are foreign born, or want to take leave, such as pregnancy, after they are employed. Do not think a mismatch letter gives an employer carte blanche to exercise their authority to terminate, especially if the employee is a member of a protective class.

It is time that the federal government adopts comprehensive immigration reform and work in partnership with American businesses to ensure compliance with reasonable measures which do not over burden the employer, especially the small business. As the law exists now, a mismatched social security number and name places an employer in a dilemma as to terminate or retain an employee, and when doing either, is faced with liability.