AMERICAN IMMIGRATION BACKGROUNDER LAWYERS ASSOCIATION

SOCIAL SECURITY AND IMMIGRATION

The Social Security Administration (SSA) has several programs and policies that directly impact our immigrant population. Several of these programs underscore the fact that numerous American businesses depend on foreign workers, many of whom are unable to obtain proper documentation, and these workers are paying taxes and contributing to Social Security. Without comprehensive immigration reform that would enable these workers to regularize their status and obtain proper documentation, the SSA will never be able to achieve important policy objectives such as reducing the earnings suspense fund or correcting its databases and records. Furthermore without this reform, American businesses will be denied the legitimate workers they need, and the undocumented communities that need to be brought out of the shadows in order to separate contributing individuals from those that may be here to do us harm could be driven farther underground.

No-Match Letters: The SSA annually reviews W-2 forms and credits social security earnings to workers. If a name or a Social Security Number (SSN) on a W-2 form does not match SSA records, the Social Security earnings go into a suspense file while the SSA works to resolve discrepancies. In recent years, the SSA has been unable to match employee information with SSA records for 6-7 million workers a year. SSA has deposited over $420 billion in wages in the earnings suspense file as a result of the cumulative effect of these no-matches. The no-match letters are an annual attempt by the agency to reduce the earning suspense file and clean up its database to prepare for the release of its new Internet-based Social Security Number Verification System (which is discussed later in this backgrounder).

Previously, the SSA would send no-match letters to employers when information submitted for at least 10% of their employees did not match SSA records. Until 2000, that system resulted in about 40,000 letters sent annually to employers. In 2001, that number jumped to 110,000 letters, with 1 in 60 employers receiving no-match letters. In 2002, the SSA sent a letter to every employer who had at least one employee whose information did not match the SSA's records. This change in practice resulted in the SSA issuing roughly 900,000 letters, the equivalent of 1 in 8 employers receiving these letters. Approximately 7 million workers were included on these letters.

The sheer volume of no-match letters sent out in 2002, combined with language in the no-match letter indicating that the Internal Revenue Service (IRS) could fine an employer for each incorrectly reported social security number, resulted in panic and uncertainty among both employers and employees. Despite language indicating otherwise, the letters were confused with notification of immigration violations. Even savvy employers were very confused as to how to respond to the letters and at the same time obey the immigrant worker protection laws. Some employers immediately fired individuals appearing on the list. Others gave employees a limited timeframe to correct the inconsistent information. In some cases, employees resigned immediately after being notified of their no-match status. Reports indicate that U.S. employers lost thousands of workers due to the effects of the no-match letter.

In 2003, the SSA significantly reduced the number of no-match letters issued by sending letters only to those employers with more than 10 employees with mismatched information or whose mismatched employees represented ½ of 1% of the W-2 forms filed with SSA. In those two years, the SSA sent out approximately 130,000 letters -- roughly 770,000 less than in 2002. However, even with the change in determining which employers should receive letters, the total number of employees referenced in the 2003 letters did not drop significantly from the numbers reached in 2002.

In 2004, the SSA sent roughly 121,000 employer letters. However, it altered its criteria as to which employers received letters. The SSA sent no-match letters in instances where employers employed 11 to 2,200 staff and 11 or more earnings reports had a mismatch between SSN and the employee name. No-match letters were not sent for employers who employed 10 or fewer staff. For organizations with more than 2,200 employees, the SSA only sent no-match letters if there were reported earnings to SSNs that did not match the employee names for more than 0.5% of employees

The 2004 no-match letter also contained, and improved upon, many of the positive revisions made in 2003. Most importantly, the letter did not include any reference to IRS fines. The SSA also marked as "Important" and drew employer attention to a first-page paragraph explaining that the letter was not a statement about the employee's immigration status. The leading paragraph on the second page advised employers not to take any adverse action against an employee just because the SSN appeared on the no-match list, and that taking adverse action could violate state and federal law and subject the employer to legal consequences. The letter also further clarified that the request for a 60-day response from employers was for the convenience of the agency and was not a mandate. As in previous years, the letter informed the employer that some of the information reported on the Form W-2 did not match the SSA's records, and that the mismatch could have resulted from a typographical error or human mistake.

In addition to the reduction in volume of letters and the content changes to the employer letter, the SSA also sent a no-match letter to each "no-match" employee about two to three weeks before it sent the no-match letter to the employer. If the SSA does not have a valid address listed for a particular employee, the agency will send the letter directly to the employer. Employers should note that even if an employee corrects his or her SSN information before the employer no-match letters are sent, the employer would still receive a letter listing that employee as a no-match. The receipt by the employer of this no-match letter is a function of the process of producing the letters and has nothing to do with the validity of the employee's corrected information.

No-Match Letters and the IRS: Although the SSA does not have any power to enforce its request for corrected information, the SSA is required by law to provide the IRS with information on no-match W-2 forms. The IRS is authorized by regulation to fine employers $50 for each incorrectly reported social security number and is planning to begin enforcing the regulation after it develops a program for imposing penalties.

The IRS has discussed implementing a new program concerning the application of fines, however employers are subject to current regulations that impose penalties if incorrect information is submitted to the IRS. However, these regulations provide waivers from penalties if the employer acts in a responsible manner and if the events of noncompliance are beyond the employer's control. As currently interpreted by an IRS representative, the regulations carve out a safe harbor for employers if less than ½ of 1%, or less than 10, of the W-2 forms issued by a single employer do not match SSA records. In addition, IRS representatives have indicated that the agency will not fine an employer for incorrect information on the W-2 forms if they are based on a duly executed W-4 form and the employer has shown due diligence in trying to obtain the correct information. According to the letter, "[a]n employer may rely on the SSN that an employee provides in response to a solicitation, and the employer may use that SSN in filing a Form W-2 for that employee." Employers may document that the employee provided the SSN to the employer and the employer subsequently relied on that SSN in good faith and used it on the W-2 form. Once the IRS notifies the employer that the employee's SSN is incorrect, the employer may have to document solicitation of the correct SSN for an additional two years.

Once the Social Security Number Verification System (SSNVS) (see below) is fully operational, employers will be able to verify an employee's social security number via the Internet. The IRS is not requiring that employers use this system, but it will be considered within the context of due diligence. An IRS representative has indicated that discontinued use of the system could be a factor in determining that the employer has not satisfied the threshold of due diligence. It is unclear how these safe harbors will change once the IRS develops its new plan.

Basic Pilot Program: The Basic Pilot Program is an Internet-based system that enables employers to verify that an employee's social security number is correct. The program had originally operated in six states (California, Texas, Florida, New York, Illinois, and Nebraska). On December 20, 2004, USCIS expanded the voluntary program to all 50 states. Prior to this expansion, the Secretary of Homeland Security submitted to Congress a report which identified and evaluated many of the problems with the pilot program. The report also described the actions the Secretary is taking to resolve outstanding problems. Such problems include the failure to provide timely and accurate data due, in part, to inaccurate and outdated DHS data bases.

Information Sharing with the DHS: According to SSA and IRS representatives, neither agency is currently sharing detailed information with the Department of Homeland Security (DHS). The only information that the SSA shares with the DHS is information relevant to investigations between the two agencies and an annual review, required by law, of earnings reported for Social Security numbers that were assigned for purposes other than employment. The SSA is considering a program whereby it would share more information with the DHS and possibly grant the DHS authority to issue social security numbers (much like a hospital's authority to issue a social security card to newborn infants). The IRS indicates that it does not share any information on no-match letters with any agency, but the new IRS program currently under development would include meetings with the DHS.

SSA Verification of Foreign Nationals' Documentation with DHS: On September 1, 2002, the SSA implemented a nationwide policy change in the processing of SSN applications submitted by all foreign nationals. The change requires the SSA to verify a foreign national's immigration documents and status with the DHS's Systematic Alien Verification for Entitlements (SAVE) information service and database before processing an application for an SSN or a replacement card. Under the policy of total verification, the SSA now requires all foreign nationals, regardless of how long they have been in the country, to have their DHS documentation verified by SAVE before their SSN applications are processed. A more rigorous check is required for foreign nationals who were either born in, or most recently resided in, Iran, Iraq, Sudan or Libya.