U.S. Department of Justice
Civil Rights Division

Office of Special Counsel for Immigration Related Unfair Employment Practices - NYA
950 Pennsylvania Avenue, NW
Washington, DC 20530

By E-mail

JUL 01 2011

Melissa Dearing
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Dear Ms. Dearing,

Thank you for contacting the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC"). This message is in response to your e-mail dated May 13, 2011, in which you ask about OSC's position regarding what action an employer should take if an employee is not able to resolve a Social Security Number ("SSN") no-match within a reasonable period of time. You also ask when an employer should terminate such an employee.

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.

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. As you note in your email, OSC's guidance indicates:

> There are no Federal statutes or regulations in effect that define a 'reasonable period of time' in connection with the resolution of a no-match notice. As a practical matter, a 'reasonable period of time' depends on the totality of the circumstances. Of note, in the E-Verify context SSA has the ability to put a tentative nonconfirmation into continuance for up to 120 days. This recognizes

that it can sometimes take that long to resolve a discrepancy in SSA's database.

OSC is unaware of any publicly available guidance specifically addressing the question of whether to terminate an employee who is unable to resolve a no-match within a reasonable period of time. However, under federal law, an employer has only violated 8 U.S.C. § 1324a(a) if that employer knows (or has constructive knowledge) that the employee is not authorized to work. Mere suspicion or conjecture is not knowledge. *See, e.g., Collins Foods International, Inc v. INS*, 948 F.2d 549 (9th Cir. 1991). For additional guidance on this issue, you may wish to contact ICE. For contact information, visit ICE's website at www.ice.gov.

As stated above, OSC cannot comment on whether an employer should terminate an employee who is unable to resolve the no-match within the specified time period. To the extent, however, that an employer has such a policy, OSC would advise the employer to treat all employees consistently, regardless of citizenship status or national origin.

We hope this information is helpful to you.

Best regards,

Seema Nanda
Acting Deputy Special Counsel