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

March 3, 2010

Ann Allott, Esq.
Allott Immigration Law Firm
2305 East Arapahoe Road
Suite 100
Centennial, Colorado 80122

Dear Ms. Allott,

This letter is in response to your letter of October 26, 2009, seeking guidance on how an employer should, consistent with the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. §1324b, respond to a notification by the City and County of Denver, Colorado ("Denver") that some employees have provided Social Security numbers that do not match the Social Security Administration's records. Your letter states that one of your clients was informed by Denver that its certified payroll contained mismatched Social Security numbers. According to your letter, Denver also stated that in its view, because of the mismatched Social Security numbers, the payroll was not a correct payroll — as allegedly required by local government contract — and that therefore the employer was not in compliance with the contract. The local government contract requires "true and correct" payroll records, but it does not include any specification relating to treatment of workers.

The Office of Special Counsel for Immigration-Related Unfair Employment Practices ("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. However, we can provide some general guidelines regarding employer compliance with the INA's anti-discrimination provision. The anti-discrimination provision prohibits discrimination on the basis of national origin, citizenship status or immigration status, document abuse during the employment eligibility verification process, and retaliation.

Notices of a Social Security number ("SSN") no-match can come from many sources including the Social Security Administration ("SSA"), other federal or state agencies, commercial businesses that conduct employee background checks, third-party identity theft inquiries, and healthcare providers providing services to an employee under an employer-provided health plan. The Social Security Administration ("SSA") issues no-match letters to employers reporting an apparent error in either the employer's records or the SSA records, and seeks the employer's and, if necessary, the employee's assistance in conforming those records. *See* Social Security Administration, "Overview of Social Security Employer No-Match Letters Process," *available at* http://www.socialsecurity.gov/legislation/nomatch2.htm. These letters specifically caution employers against taking any adverse employment action against a referenced employee based solely on receipt of the letter, and explicitly state that the letter makes no statement about the referenced employee's employment authorization.

In many instances, it is unclear whether an entity reporting a no-match has relied on SSA records or other sources of information in determining that there is a no-match. In addition, there are many reasons for a "no-match," many of which have nothing to do with an individuals's immigration status or work authorization, including but not limited to: (1) an unreported name change due to marriage,

divorce or naturalization; (2) input errors by SSA verifiers; (3) reporting errors by an employer or employee; (4) identity theft; (5) errors in reporting proper culturally based hyphenated or multiple surnames; and (6) fraud. Because of this, an employer should not assume that an employee referenced in a no-match notice is not work authorized. Accordingly, the mere receipt of a "no-match" notice does not, standing alone, constitute "constructive knowledge" on the part of an employer that the referenced employee is not work authorized. *See* Immigration and Customs Enforcement, "ICE Insert," *available at* http://www.ssa.gov/employer/ICEinsert.pdf ("There are many reasons for a mismatch between employer and SSA records, including transcription errors and name changes due to marriage that are not reported to SSA. Employers should not assume that the mismatch is the result of any wrongdoing on the part of the employee. Moreover, an employer who takes action against an employee based on nothing more substantial than a mismatch letter may, in fact, violate the law.").

Thus, an employer should not use the "no-match" notice by itself as the reason for taking any adverse employment action against the referenced employee or as a basis alone for reverifying the employment eligibility of an employee. An employer should: recognize that SSN no-matches can result because of simple administrative errors; check the information in the no-match notice against personnel records; ask the employee to confirm his or her name and SSN reflected in the personnel records; advise the employee to contact SSA to correct and/or update SSA records; and give the employee a reasonable period of time to address a reported no-match with the local SSA office.[1] Furthermore, an employer should be mindful of treating all employees for whom it receives a no-match notice the same regardless of citizenship status or national origin, and an employer should not require an employee to produce specific documents to address the no-match. To do otherwise may violate the anti-discrimination provision of the INA.

I hope this information is helpful to you. Should you have any further questions, please contact OSC's employer hotline at (800) 255-7688.

Sincerely,

Katherine A. Baldwin
Deputy Special Counsel

[1]Under the electronic employment eligibility verification program administered by the U.S. Department of Homeland Security, E-Verify, if an employee receives a tentative nonconfirmation generated by a mismatch of information in SSA's records, SSA may place a case in continuance for up to 120 days to ensure adequate time for a worker to obtain needed documentation or information and for SSA to update its records. Although involving a different context, the 120-day E-Verify period recognizes the often time-consuming nature of resolving an SSA record mismatch.