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

Via electronic mail to: dfazio@wsfb.com

MAR 25 2010

Mr. Dan Fazio
Director of Employment Services
Washington Farm Bureau
975 Carpenter Road, North East
Lacey, Washington 98516

Dear Mr. Fazio,

This is in response to your e-mail of February 16, 2010. You ask the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC") to provide guidance for employers who have been notified by a state agency that an employee's Social Security Number (SSN) does not belong to that employee.

You write that your state unemployment agency advised an employer in writing that it would no longer accept a number the employer reported to be the SSN for one of its employees, and would fine the employer if it continued to include that number in its reports to the agency. In addition, a representative of the agency verbally told the employer to immediately terminate the employee. You pose the following questions: (1) Whether an agency can tell an employer that it will not accept a number it reported; (2) whether an employer may legally terminate an employee based on such a notification by a state agency, or whether it must further investigate and give the employee the opportunity to dispute the state agency's notice; and (3) what number an employer should use to report wages for the employee during an investigation.

Although OSC cannot give you an advisory opinion or legal advice on any set of facts involving a particular individual or company, it may provide some general guidelines regarding compliance with the anti-discrimination provision of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1324b, which OSC enforces. The anti-discrimination provision prohibits four types of unlawful conduct by employers: (1) citizenship or immigration status discrimination; (2) national origin discrimination; (3) unfair documentary practices during the employment eligibility verification (DHS Form I-9) process ("document abuse"); and (4) retaliation for filing a charge or asserting rights under the anti-discrimination provision.

An employer should not terminate or take other adverse action against an employee solely based on a report of a SSN or name discrepancy even if the report suggests the SSN reported appears to belong to another individual. There are many reasons for Social Security name and number mismatches that are not related to a person's employment eligibility, including simple administrative errors. Thus, an employer should not assume that such a mismatch notice by itself conveys information regarding the employee's immigration status. 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 notreported 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.").

Employers should take steps to assist the employee in resolving the discrepancy. After checking information in the discrepancy report against its personnel files to ensure that the reporter correctly submitted the information, an employer should ask the employee to confirm his or her name and SSN as reflected in the employer's personnel records. If there are no recording errors in the personnel records, the employer should advise the employee to contact SSA to correct or update SSA records, and give the employee a reasonable period of time for doing so[1]. The employer should follow the same procedures for all employees regardless of actual or perceived citizenship status or national origin.

Whether the state agency may refuse a number reported by an employer, and what number the employer should use while investigating a discrepancy, are questions outside of OSC's jurisdiction that could be directed to the appropriate State official.

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[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.

Thank you again for your inquiry. If you have any questions or need additional information regarding immigration-related unfair employment practices, please contact OSC at 1-800-255-8155 or at our website www.justice.gov/crt/osc.

Sincerely,

Katherine A. Baldwin
Deputy Special Counsel