



“Gender No-Match” Letters Issued by the Social Security Administration

Issue

The issuance of “gender no-match” letters by the Social Security Administration (“SSA”) to employers who use Social Security number (“SSN”) verification services results in the denial of employment opportunities to transgender people.

Short Answer

SSA should remove requests for gender information from all of its SSN verification services.

Background

SSA encourages employers to verify Social Security numbers when processing W-2 forms as part of SSA’s duty to maintain wage reports under the Social Security Act. When using SSA’s Social Security Number Verification Service (“SSNVS”) on the internet, the automated telephone employee verification service (“TNEV”), or the consent- and fee-based Social Security number verification service (“CBSV”), employers are requested, but not required, to provide information regarding an employee’s gender. When using the telephone- or paper-based Employee Verification Service (“EVS”), the employer is required to provide gender information. Under current practice, SSA sends employers a “no-match” letter when an employee’s reported gender does not match the gender marker in his or her Social Security record.

Employers receiving a “gender no-match” letter will likely confront the employee about the discrepancy and require that the discrepancy be resolved before continuing with employment. Because SSA presently requires proof of sex reassignment surgery in order to change a person’s gender marker, many transgender job applicants and employees will not be able to remedy that discrepancy. Many transgender people choose not to undergo surgeries, others may not be financially or medically able to do so, and still others may be in a place in the treatment of gender identity disorder that precedes any surgery. As a result, a “gender no-match” letter may not only lead to invasive questions regarding medical information, but when the discrepancy is not resolved, an employer may also terminate the employment of a transgender employee.¹

Gender is not necessary to verify an employee’s eligibility to work in the United States. No employer is required to submit information about an employee’s gender to the Department of Homeland Security (“DHS”) or to the Internal Revenue Service (“IRS”); in fact, I-9 and W-2 forms do not contain gender information. Given that gender information is only requested, but not required, in several SSN verification services, gender information is clearly not necessary to identify a particular individual for wage report submission purposes.² In addition, clerical errors on the part of

¹ Under a proposed additional regulation published on March 26, 2008 by the Bureau of Immigrations and Customs Enforcement (ICE) and the Department of Homeland Security (DHS), DHS would consider the receipt of a no-match letter as constructive knowledge that an employee may be an alien not authorized to work in the United States. Nothing in the proposed rule prohibits employers from using a gender no-match letter to discriminate against an employee.

² In addition, SSNVS states that including a date of birth and/or middle name of the employee is optional as well.



employers and SSA in the input of redundant information will also lead to the issuance of improper “gender no-match” letters.

Recommendation

The Office of the Commissioner of Social Security should cease requiring or requesting gender information in the Social Security number verification process.

Authority

There is no statutory or regulatory requirement for SSA to collect gender information in fulfilling its duty to maintain records of wage amounts employers pay to individuals under the Social Security Act.³ As the agent of the Internal Revenue Service, SSA ensures that employees’ names and SSNs match SSA records prior to submitting W-2 forms. Pursuant to this agreement, SSA adopted SSN verification systems for employers, but Department of Treasury regulations do not limit SSA in requesting additional information in these systems, such as gender. In fulfilling its duty to maintain records of wage amounts under the Social Security Act, it is thus within the sole discretion of SSA to require or to request gender information in its verification systems. As the body responsible in SSA for the “development of policy, administrative and program direction, [and] program interpretation and evaluation,” the Office of the Commissioner of Social Security has the authority to issue a policy discontinuing the collection of gender information in its SSN verification systems.⁴ More specifically, the Commissioner of Social Security has the “full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this title, which are necessary or appropriate to carry out such provisions.”⁵

³ 42 U.S.C. § 405(c)(2)(A).

⁴ See SOCIAL SECURITY ADMIN., SSA ORGANIZATION MANUAL, ch. SA, Office of the Commissioner, <http://www.ssa.gov/org/orgoc.htm>.

⁵ 42 U.S.C. § 405(a).