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Duff on Hospitality Law

Does Your Employee Have a New Social Security Number? How to Comply with Form I-9 Requirements

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Our post today provides important steps to take when employers are faced with an employee with a new SSN or Employment Authorization Document. Thank you! - Greg

How would you respond if a valued, long-time employee notified you that she has a new social security number (SSN) and/or an Employment Authorization Document (EAD) that includes different information about her than in your current records? This happens for hotel and restaurant employees more often than you may realize. Being ready to act quickly, and legally, can be important for you, the employee, labor relations (if in a collective bargaining situation) and your business.

The first question that many employers want to ask is, "Why did your number change?" The employee may voluntarily provide that information without you asking. But do you want or need to know, and can you believe whatever explanation is provided? The safer course of action is to proceed with a protocol that you can apply uniformly in all situations.

What could be the reason for assignment of a "new" social security number?

There are few situations in which the Social Security Administration (SSA) will change someone's legitimate SSN, including witness protection, domestic violence issues, the correction of an SSA error in which it assigned the same number to multiple individuals, or because of identity theft. But otherwise, the most common reason to report a changed SSN to an employer is because the person has only recently become legally authorized to work and the number previously used was not legitimate.

President Obama's Executive Actions in mid-2012 and again in late 2014 have made it possible for certain people who came to the U.S. without documentation as children, or for certain undocumented parents of U.S. citizens or Lawful Permanent Residents, to be issued time-limited EADs, which have allowed them to be issued legitimate SSNs. Those eligible for consideration under these programs, called Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), are the

most likely to present themselves to you. (As we go to "press," Congress is already taking aim at eliminating both DACA and DAPA. We will have more to say about the effects of the President's 2014 Executive Action regarding employment-based immigration in a future blog entry.)

Long-term hotel and restaurant employees may appear to be more affected by DACA and DAPA than in many other industries. This may be because these individuals have had little opportunity or motive to move from job to job, even in the highly mobile service industry, because of concern that Form I-9 procedures could result in a new employer's discovery of the lack of official documentation or employment authorization. For many affected by DACA and DAPA, job security has been more important than mobility.

Should I discipline the employee? Am I required to discipline the employee?

What if you become aware of the fact that the SSN you have previously associated with this employee was not that person's legally assigned SSN? This would certainly be the case for a DACA or DAPA set of facts. This could be considered falsification of business records or a violation of a company's "honesty in the business" policies.

As a business, you have a couple of choices, based your policy/ies, collective bargaining agreement (if the employee is represented by a union), and/or history of action in similar circumstances. You must be sure that, whatever you do, it does not result in disparate treatment involving any legally or contractually protected status. Make sure that proper protocols are followed for any investigation or action taken. If the employee is represented by a union, proper protocols should include reviewing the discipline-related articles of the collective bargaining agreement to ensure compliance, and providing representation for the employee if requested and required.

Assuming it is determined that the employee had purposely provided false information, taking disciplinary up to and including dismissal may be appropriate, considering other cases with that employer, the employer's policy regarding honesty in the business, collective bargaining agreements, and status in any protected class.

Many employers confronted with DACA or DAPA cases are unwilling to dismiss a valued worker in this situation. Taking disciplinary action, or taking no disciplinary action, is not mandated by the government. However, you should be sure that whatever choice is made, it is not illegally discriminatory or in violation of a collective bargaining agreement.

How do I comply with Form I-9 Requirements?

The underlying basis of the presentation of a new SSN, or an EAD (which is likely to be accompanied by reference to a new SSN) may be of no real interest to you. Assuming you decide to continue her employment, your focus should be on what to do with the *new*

information, which involves the Employment Eligibility Verification form; the Form I-9.

Assuming she was hired after November 6, 1986, when the Form I-9 came into existence, and the employer has a Form I-9 for her, you need to fully verify her employment authorization. This *may* allow an opportunity to run this new information through E-Verify if you are registered.

The government has prepared a helpful resource document related to DACA cases, but which is also applicable to DAPA cases and cases in which you have been advised that a new SSN has been issued. You will see that the focus is clearly on the objective information presented, not the mystery behind it.

Your focus is on having a properly completed Form I-9 on file.

If the information presented presents a *change* to any of the information in Section 1 of the previously completed Form I-9, such as name, date of birth, attestation, or SSN (which is not always required in Section 1), she and you should complete a new Form I-9, using the *original* date of hire, and attaching it to the previously completed Form I-9. This applies in either situation, in which only an SSN change has been reported or an EAD has been presented. Of course, as a part of this process, you must examine and record information from the original document(s) presented to complete Section 2 and, if your policy is to always copy documents presented, to do so. Employers who participate in E-Verify should verify the new Form I-9 information through E-Verify.

If the information presented requires *no change* to *any* information in Section 1 of the previously completed Form I-9, such as if no SSN had been noted and no attestation change is required, you may complete Section 3 of the previously completed Form I-9 if the version used for the previous verification is still valid for use as of the current date. If Section 3 of the previously completed Form I-9 has already been completed, or if the previously completed Form I-9 is not currently valid for use, you should complete Section 3 of a new Form I-9, being sure to write the employee's name at the top of Section 2. Attach any newly completed Form I-9 to the previously completed Form I-9. This situation does not require or authorize a new E-Verify check.

In all cases, be sure to examine the *original* documentation. You must certify that you have done so, and that the documentation appears to be genuine and relates to the employee presenting it.

The employee may choose which documents to present, either List A, or List B and List C. In only very limited circumstances may you legally suggest to the employee what documentation to present for Form I-9 purposes. Rather, provide the employee with the List of Acceptable Documents included with the Form I-9 and let the employee choose what to present to you. An employee who has a "new" SSN may choose to present an EAD as a List A document and is not necessarily required to present an SSN card as a List C document.

- In all cases, be sure to record the document title, document number, and its expiration date (if any).
- In all cases, be sure to sign and date the Form I-9 in the appropriate space.
- Remember to reverify the employee's documentation by the date the validity period of a List A document expires, except for passports or Lawful Permanent Resident cards. Never reverify List B documents.

We also suggest that you consider preparing a memo to the file, also to be clipped to the Form I-9, explaining what happened and when, signing and dating that. This will allow an auditor to consider this, potentially years from now when none of the parties may be available to explain it, to understand exactly why this action took place.

Forms I-9 and related attachments must be retained for at least three years after the date of hire or one year after the date the individual's employment is terminated, whichever is later.

What to do?

It is important to recognize that an employee's presentation of the kind of information referenced here is a very serious matter in that employee's life. Emotions can be high for that employee, co-workers, representatives, and yes, even you. Like anything you do in your job, planning for your response to a situation like this, and responding in a manner that can be seen as fair and reasonable can go a long way toward maintaining good employee relations and legal compliance.

If you have any questions about I-9 compliance, please contact Greg Duff.

Tags: DACA, DAPA, Employment Authorization Document, Form I-9, Social Security Number