

# Applicant who used fake SSN owed \$1.4 million from employer

Employees who present false Social Security numbers (SSNs) can wreak havoc with your payroll operations. Nevertheless, a federal trial court ruled that an employer violated Title VII when it denied a job based solely on a false SSN. The court also ruled that the unsuccessful applicant could recover \$1.4 million in court-related fees. (*Guerrero v. California Department of Corrections and Rehabilitation*, No. C 13-05671 WHA, N.D., Calif., 2016)

**Oh, what a tangled web we weave when false SSNs we do conceive.** A job applicant who was Latino was brought into the country from Mexico by his parents when he was 11. When he was 15, he made up an SSN, which enabled him to work. He continued to use this SSN for 12 years. After becoming a citizen in 2011 he applied for a legitimate SSN and cleared up the discrepancies resulting from his made-up SSN.

He applied to become a prison guard and was placed on an eligibility list after passing written and physical examinations. When he was asked whether he had ever used an SSN other than his own he answered Yes and provided an explanation. He was denied a job based solely on the answer to this question.

After a six-day nonjury trial, a federal trial court ruled that the employer violated Title VII by discriminating against him based on his previous use of that false SSN. *Court:* The employer's policy of denying employment based solely on the prior use of a false SSN has a disparate impact on Latino job applicants. In a later ruling, the court recommended that the applicant recover a total of \$1,403,566.60 in attorneys' fees and other court-related costs from the employer.

**Crash course in Title VII.** Payroll professionals are often told to never put anyone on the payroll who doesn't present a valid SSN. And for good reason: Hefty tax penalties will apply if you file a W-2 that contains a false SSN. But this policy—so sensible from a payroll perspective—may violate Title VII, which prohibits you from discriminating against employees or job applicants based on their national origin.

Under the Equal Employment Opportunity Commission's guidelines, a policy or practice of screening out new hires or job candidates who lack SSNs violates Title VII if it disproportionately screens out work-authorized individuals of a certain national origin, such as newly arrived immigrants or new lawful permanent residents. In other words, your actions have a *disparate impact* on employees based on their national origin.

*Hitch:* There are defenses to disparate impact claims, but it doesn't appear that impending tax penalties are among them.

**Win the battle over SSNs.** Violating Title VII is serious business, but your concern is tax penalties. You'll know whether an employee's name and SSN don't match after using the Social Security Administration's [Social Security Number Verification Service](#).

The mismatch could be completely innocent (e.g., an employee got married or divorced and didn't update her Social Security Card), or not. In either case, you can protect yourself from tax penalties by showing that you had reasonable cause to file an incorrect W-2 by taking the following steps:

- If you receive a notice from the IRS, compare your payroll records to the notice. If there's a discrepancy, contact the employee to explain why the number is incorrect, ask him/her to clear up the discrepancy with the SSA and document this.
- Request that the employee complete a new W-4 with the correct SSN; document this, too.
- If you receive another IRS notice, request that the employee again complete a W-4.

These solicitations must be made by Dec. 31 of the year you receive the notices. The IRS stresses that it's your solicitation process that's important, not employees' response to your efforts.

**TRUTH AND CONSEQUENCES:** If, after you've completed this solicitation process, employees still insist that their SSNs are correct, you're off the hook for tax penalties. And if employees can't clear up the discrepancies with the Social Security Administration after a reasonable amount of time, you may want to terminate them, but let them know the consequences beforehand.