EMPLOYEES WITHOUT SOCIAL SECURITY NUMBERS

Although almost all employers can go years without seeing this situation, and most employers never encounter it at all, every once in a while, an employer might run across an applicant or a new hire who claims not to have a social security number, or else refuses to disclose it. Now, the situation could be as simple as that of a person who is newly arrived in this country and does not yet have a social security number, in which case the employer can give the applicant, if hired, or the new hire the basic information on how to apply to the Social Security Administration for a number (see http://www.ssa.gov/ssnumber/), and proceed with the I-9 process as usual (see "I-9 Requirements"). However, the situation is more complex if the applicant / new hire claims not to have a social security number, or refuses to disclose it, because of a religious or other form of conscientious objection.

It is certainly legal to hire someone who is authorized to work in this country, but who does not have a social security number or who chooses not to disclose it. In such a case, as noted in the article "Verification of Social Security Numbers", the employer has the right to require the employee to complete an affidavit such as a "Form P-1" ("Reasonable Cause Affidavit by Payor For Not Obtaining Payee's Identifying Number" (a privately-developed form findable with an Internet search engine)) or similar document that the employer will need to excuse its failure to obtain a social security number for IRS (whether such an affidavit is sufficient to excuse non-disclosure of the SSN on a new hire report is an open question, at least in the situation of religious objectors - see below). Employers do not face any particular legal issues for discharging an employee who refuses to complete such a form, other than perhaps an unemployment claim, the outcome of which would depend upon whether the employer could prove that refusal to complete the employee portion of the form amounted to work-related misconduct and that the employee either knew or should have known they could be fired for such a reason.

The complicated issue is whether the employer can legally refuse to hire a conscientious SSN objector or discharge a new hire who is in that category, based solely upon that fact. That issue, in turn, depends upon a number of factors, including the reason for the conscientious objection and the number of employees in the company (the religious discrimination laws do not apply to employers with fewer than 15 employees). Conscientious objectors fall into two main categories: those with religious objections, and those without. The simpler of the two situations is that of someone who objects to having a social security number on general principles not involving religious conviction. There is no law or legal doctrine in Texas that affords any kind of job protection for such an individual. In contrast, the situation of a person who objects to having a social security number for religious reasons involves complex legal issues, and the rest of this article will focus on that situation.

Reasons for Requesting a Social Security Number Top of Page

Many employment-related laws call for new hires and other employees to furnish a social security number to the employer, and SSNs are often requested in a number of other situations that affect the workplace - following is a list of the most common situations in which SSNs will be requested:

- Job applications (for the purpose of enabling background checks)
- Background check consent forms
- W-4 (information for tax withholding)
- I-9 (verification of employment authorization)
- New hire report (reporting of new hires to the state)
- Professional and other occupational license applications and renewals
- Permits needed by the employee or the company for the job
- Driver's license application
- Some benefit applications and sign-up forms

The situations in which the employer feels the greatest need to get the social security number include the W-4, the I-9, and the new hire report. Here are the legal issues of which employers should be aware for each of those forms:

W-4 and W-2 Forms Top of Page

As noted in the article "Verification of Social Security Numbers", employers do not have to supply the employee's SSN on the W-4 form. However, employers may face a monetary penalty from the IRS for failing to include the employee's full and correct name and SSN on W-2s and other wage reports. To apply for a waiver of the penalty if the employer decides to keep the employee, employers should have the employee who claims not to have an SSN (or declines to give it) complete their portion of an affidavit to that effect, such as the previously-described "Form P-1" (see "Verification of Social Security Numbers").

Section 4 of IRS Publication 15 (http://www.irs.gov/pub/irs-pdf/p15.pdf (PDF)) contains the following information relevant to the SSN issue:

> **4. Employee's Social Security Number (SSN)**
>
> You are required to get each employee's name and SSN and to enter them on Form W-2. This requirement also applies to resident and non-resident alien employees. You should ask your employee to show you his or her social security card. The employee may show the card if it is available. You may, but are not required to, photocopy the social security card if the employee provides it. If you do not provide the correct employee name and SSN on Form W-2, you may owe a penalty unless you have reasonable cause. See Publication 1586, Reasonable Cause Regulations and Requirements for Missing and Incorrect Name/TINs. ...
>
> **Applying for a social security number.** If you file Form W-2 on paper and your employee applied for an SSN, but does not have one when you must file Form W-2, enter "Applied For" on the form. If you are filing electronically, enter all zeros (000-00-0000) in the social security number field. ...
>
> **Correctly record the employee's name and SSN.** Record the name and number of each employee as they are shown on the employee's social security card. ...
>
> **IRS individual taxpayer identification numbers (ITINs) for aliens.** Do not accept an ITIN in place of an SSN for employee identification or for work. An ITIN is only available to resident and non-resident aliens who are not eligible for U.S. employment and need identification for other tax purposes. You can identify an ITIN because it is a 9-digit number, beginning with the number "9", with either a "7" or "8" as the fourth digit, and is formatted like an SSN (for example, 9NN-7N-NNNN). CAUTION: An individual with an ITIN who later becomes eligible to work in the United States must obtain an SSN. ...

I-9 Form Top of Page

Although there is a space in section 1 of the I-9 form for the employee's SSN, there is no requirement on an employer that it get that space filled in. Here is what the U.S. Citizenship and Immigration Services bureau (USCIS) of the U.S. Department of Homeland Security says about that in its current instructions for employers for the I-9 form:

> NOTE: An employee is not required to include his or her social security number in Section 1 of the Form I-9, nor can the employee be required to do so by the employer. This information block is optional. However, there is one exception: when the employee is hired by an employer participating in the voluntary automated employment eligibility confirmation pilot program. Therefore, an employer cannot require an employee to include his or her social security number unless the employer is participating in the voluntary automated employment eligibility confirmation pilot program.
>
> The failure of an employee to include a social security number in section 1 of the Form I-9 does not subject an employer to civil money penalties. Such an omission is neither a substantive, technical, or procedural failure to comply with the Form I-9 requirements.
>
> Source: USCIS, Employer Information Bulletin 102, October 7, 2005
> http://www.uscis.gov/files/article/EIB102.pdf (PDF)

In addition, although a social security card is listed as one of the items in List C on page 3 of the Form I-9 that an employee can show to prove employment authorization, it is only one of several such documents. USCIS cautions that conditioning the I-9 process on showing of a social security card can possibly subject an employer to a charge of "document abuse", which amounts to a form of employment discrimination. Thus, an employer should not insist on seeing a social security card in connection with the I-9 employment verification process.

New Hire Report Top of Page

The issue is trickiest when it comes to the new hire report that employers must submit to the state new hire directory within the first twenty (20) days after hire. The federal statute (42 U.S.C. § 653a(b)(1)(A)) and the regulation adopted by the Texas Attorney General's office (1 T.A.C. § 55.303) both specify that the employer must include the SSN as one of six data elements. Interestingly, both provisions also note that the reporting should be done with a copy of the W-4 form or its equivalent. If, as noted above, the SSN may not be required when completing the W-4, can the new hire reporting statute nonetheless insert such a requirement? Another question is what weight should be given to a person's religious belief that having a social security number is wrong? Those questions are not definitively answered by any materials currently available from either state or federal government agencies (see "Lack of Clear Administrative Guidance" below for details).

Religious Freedom Issues Top of Page

Following a decision by the U.S. Supreme Court in the case of *Employment Division v. Smith*, 494 U.S. 872 (1990), Congress passed a law in 1993 known as the Religious Freedom Restoration Act (42 U.S.C. 2000bb). Its purpose was to reverse the Supreme Court's holding in *Smith* that facially-neutral legal requirements and restrictions were permissible as long as they applied equally to all, regardless of religious faith or lack thereof. The RFRA specifically provided that the legal standard for restrictions on a person's exercise of religious faith should be restored to the pre-Smith holdings in *Sherbert v. Verner* (374 U.S. 398 (1963)) and *Wisconsin v. Yoder* (406 U.S. 205 (1972)), both of which held that the government must prove two things to defend a requirement or restriction that substantially burdens a person's sincerely-held religious belief: 1) that the government action is in furtherance of a compelling state interest; and 2) that the action is the least-restrictive means of enforcing that interest. Thus, the RFRA addressed the balancing test that must occur before Congress or a state may infringe upon a person's free exercise of religious faith.

There is a real potential for a conflict between the two federal statutes in question, 42 U.S.C. § 2000bb (the RFRA) and 42 U.S.C. § 653a(b)(1)(A) (the "New Hire Reporting Law" requiring employers to report an employee's SSN to a designated state agency). No U.S. court has yet directly addressed a situation involving the interplay between the two statutes. Thus, one must speculate on what the outcome might be. The RFRA predates the new hire reporting law; which law came last is sometimes taken into account in conflict of law situations, but the effect is not always the same. As a general rule, though, the most recent law is given precedence, all other factors being equal, since a court usually presumes that the lawmakers were aware of their prior enactment and would have included a saving provision in the latter statute if they had intended for the previous statute to be undisturbed. However, there is likely no need to get into that kind of analysis, since the new hire law is extremely specific in nature, and the RFRA does not attempt to address PRWORA's subject matter, but instead affords a general backdrop for constitutional analysis of federal and state statutes and regulations. Although the Supreme Court ruled in *Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), that the RFRA was unconstitutional as applied to states and local governments, the Ninth Circuit in *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826 (9th Cir. 1999), ruled that the RFRA is constitutional as applied to the federal government.

The RFRA makes it clear that a government action that infringes on a person's religious liberty interest must pass certain tests if it is to be considered constitutional. Here is the statute in question:

> § 2000bb. Congressional findings and declaration of purposes
>
> (a) Findings
> The Congress finds that
> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
> (3) governments should not substantially burden religious exercise without compelling justification;
> (4) in *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.
> (b) Purposes
> The purposes of this chapter are
> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

The statute summarizes what used to be the prevailing case law in cases involving infringements of religious liberty. Basically, in order to justify such an infringement, the government must show a compelling interest in doing so. Only a compelling government interest (in the case law, the government interest is equated with "public interest", i.e., the interest of the people at large) can justify going against a fundamental right guaranteed under the Constitution. The burden of proving such an interest has always been on the government. These principles certainly come to light in the two court cases cited in the RFRA provision in question, relevant selections from which appear below:

> *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (an unemployment insurance case): "We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '(o)nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation,' *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 323, 89 L.Ed. 430. ... For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights" (*ibid* at 407).
>
> *Wisconsin v. Yoder*, 406 U.S. 205, 235 (a compulsory school attendance case): "... courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable education requirements. ... and it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish" (*ibid* at 236).

However, in the case of *U.S. v. Lee*, 455 U.S. 252, 102 S.Ct. 1051 (1982), the U.S. Supreme Court ruled that the exemption from SSN taxes that applies to self-employed individuals with religious objections to participation in the social security system (26 U.S.C. § 1402(g)) does not apply to employers or employees with similar religious objections.

An argument that the new hire reporting statute is not a statute that would have to pass muster under the RFRA, if push ever came to shove for a religious objector to SSNs, would be unlikely. The real question is, would the government's purpose in enacting the SSN reporting requirement be compelling enough to meet the standards under *Verner* and *Yoder*? Most

commentators on the new hire reporting requirement recognize two main purposes for the law: 1) to better enable the federal and state governments to track across state lines non-custodial parents who for one reason or another fail to satisfy their court-ordered child support obligations; and 2) to enable state and federal agencies to detect, discourage, and deal with benefit fraud under various government programs. Now, as important as the second purpose is, it is doubtful that it would be enough to pass the compelling interest test as explained in RFRA and in the *Verner* and *Yoder* cases. However, the public interest behind that first purpose is much more compelling, and has been used as a rationale for many other enactments on a state and federal level. It is why, for example, that in the order of priority for garnishments and wage attachments, child support has a greater priority than anything except for a bankruptcy court garnishment (even there, the bankruptcy trustee must give child support garnishments priority over almost everything else when disbursing funds to creditors of the estate) or a prior IRS tax lien. For guidance on how compelling the child support interest is in relation to an infringement of religious liberty, a court would look to, among other things, the intent and findings of Congress when it passed the new hire reporting statute.

The only provision in PRWORA (http://wdr.doleta.gov/readroom/legislation/pdf/104-193.pdf (PDF)) dealing directly with a Congressional finding on the child support issue seems to be in Section 101 of Title I, in which the following finding appears:

> (4) In 1992, only 54 percent of single-parent families with children had a child support order established and, of that 54 percent, only about one-half received the full amount due. Of the cases enforced through the public child support enforcement system, only 18 percent of the caseload has a collection.

The statute does not list child support as a "compelling government interest", although it characterizes the goal of ensuring the financial self-reliance of alien immigrants as such. It characterizes the goal of reducing child pregnancy and out-of-wedlock births as a "very important government interest", which might not satisfy the tests in the RFRA.

Court Decisions on Religious Freedom and Child Support Top of Page

An essential task here is to analyze the case law regarding free exercise and compelling state interest issues. The cases that deal with this subject seem to focus on four main issues:

1. whether the plaintiff or defendant has a sincerely-held religious belief;
2. whether the government action imposes a substantial burden on the free exercise of that belief;
3. whether the government action is in furtherance of a compelling state interest; and
4. whether the action is the least-restrictive means of enforcing that interest.

The threshold questions are the first two, but once those have been established by the plaintiff or defendant, the second two questions must be answered in the affirmative by the government in order for the government action to be enforceable.

The case that turns up time after time in other free-exercise child support cases is *Hunt v. Hunt*, 162 Vt. 423, 648 A.2d 843 (Vermont 1994), in which the Vermont Supreme Court held that the state has a compelling interest in enforcing child support obligations, and hence affirmed the child support order even though it produced a burden on the father's free exercise of his religious beliefs, but vacated the contempt order against the father because the state failed to prove that contempt was the least-restrictive means of enforcing the obligation.

Other cases that recognize a compelling state interest in enforcing child support obligations include *Murphy v. Murphy*, 574 N.W.2d 77, 80 (Minn.App. 1998); *Walton v. Walton*, 789 S.W.2d 64, 67 (Mo.App. 1990); *Berry v. Berry*, 769 P.2d 786, 787 (Or.App. 1989); *In re Marriage of Crockarell*, 631 N.W.2d 829, 835 (Minn.App. 2001); and *Rooney v. Rooney*, 669 N.W.2d 362, 370 (Minn.App. 2003). There were others as well, but they did not particularly address religious freedom issues.

The Texas Attorney General's office, which enforces the new hire reporting laws and has a major division devoted to enforcing child support obligations, takes the position that child support is a compelling state interest (see Op. Tex. Att'y Gen. No. DM-348 (1996)). This author has not found any Texas cases directly addressing the sort of issues one finds in the *Hunt* case.

Regarding the SSN requirement in the new hire reporting law, based upon the case law and other indications such as the high priority given to child support withholding orders in wage garnishment situations, it seems likely that a court would find that there is a compelling state interest behind the law. The real battle, in this author's view, would be over whether the government could meet its burden of showing that the SSN requirement is the least-restrictive means of enforcing that interest. Much would depend upon whether the government could document its opinion, as might be the case with studies showing that the SSN is the most universal identifier and that forcing the government to use some other means of identifying and "tagging" support-delinquent parents would be too great a burden on the public. Such an argument failed in two cases dealing with state requirements that Amish horse-drawn carts had to display an orange, triangular slow-moving vehicle plaque on the back of each cart on the road. The courts in both cases ruled that the state had failed to offer any studies establishing that the Amish alternative of a white reflective stripe across the back would have left the automobile-driving public less safe. Thus, the states failed the least-restrictive means test in that situation.

How the least-restrictive test would work out with the SSN requirement is unknown. The author is unaware of any case directly on point here.

Lack of Clear Administrative Guidance Top of Page

This area of the law is so relatively new that there is a dearth of authoritative government rulings, opinion letters, and other forms of official guidance. All of the agency handbooks for employers regarding the new hire laws are still at the "here's what the law says" stage, and all of the references point back to the same untested statutes. "Untested" in this context means no published court opinions directly on point, especially at the appeals court level. What seems to be the most direct agency guidance is on the Web site of the U.S. Department of Health and Human Services, in the National Directory of New Hires section, in the FAQ section for employers - here is the link: http://faq.acf.hhs.gov/cgi-bin/employers.cfg/php/enduser/popup_adp.php?p_sid=-bSPJami&p_lva=&p_li=&p_faqid=831&p_created=1062108728&p_sp=cF9zcmNoPTEmcF9zb3J0X2J5PWRmbHQmcF9ncmlkc29ydD0mcF9yb3dfY250PTcxJnBfcHJvZHM9JnBfY2F0cz0

Here is the question and HHS's answer:

> Question: May an employer submit a new hire report without using an employee's Social Security number?
>
> Answer: No. The Social Security number (SSN) is a required data element in the new hire report. Including a SSN in a new hire report is important for a number of reasons. Before state new hire records are submitted to the National Directory of New Hires (NDNH), the Social Security Administration (SSA) verifies the name and SSN combination provided to the State Directory of New Hires with the SSA master file of correct SSNs. If the combination submitted does not correspond to SSA's file, the new hire report is not entered into the NDNH.
>
> Correct SSN data is (sic) also important because new hire records are used for crossmatching with outstanding child support cases and with unemployment insurance claims. These crossmatches are performed using the SSN as a key field. Therefore, it is critical that you use only a valid SSN. Do not use an Individual Taxpayer Identification Number or Resident Alien ("green card") number in place of the SSN.

Of course, that answer does not get the analysis very far, since it merely makes the obvious observation that the new hire report form has a "required field" for the SSN, which in turn is based upon the basic statute (42 U.S.C. 653a). Following is HHS's answer to the author's request for clarification of the interaction between the RFRA and the SSN requirement in the new hire reporting law:

> Response (FPLS) - 06/24/2008 03:16 PM
>
> No, we have not undertaken a study regarding how PRWORA and the RFRA interface. 42 U.S.C 653a requires that employers report newly-hired employees' names, addresses, and Social Security numbers. If the employee has a Social Security number, it should be reported; if the employee does not have a Social Security number, we will attempt to locate the person without it.

We regret that we do not have additional information on this topic. For information regarding the new hire reporting laws, please visit the Policy section of our website, at: http://www.acf.hhs.gov/programs/cse/.

Thus, it would appear that there is no particular penalty under the federal new hire reporting law if the report does not include an employee's SSN for the reason that the employer does not have it. If a report comes in without such a number, the new hire office will simply go ahead with its mission, which is to keep track of the employee at the new job.

Under Texas law, new hires must be reported to the Attorney General's New Hire Reporting office - the applicable regulation is 1 T.A.C. § 55.303, which includes the SSN as one of six required data elements (thus echoing the federal law). The latest guidance from the Texas office, quoting HHS directive PIQ-99-05 (issued July 14, 1999), is that failure to provide an SSN is permitted if the employee or applicant submits an affidavit stating that the individual does not have a Social Security number [author's note: no official form exists for such an affidavit]. Of course, that flexibility does not apply to someone who has a number, but refuses to reveal it.

Refusal to Hire Due to Lack of SSN Top of Page

As to the question of whether an employer may legally refuse to hire an applicant due to failure or refusal to furnish a social security number, courts from around the country generally support an employer's right to refuse to hire an applicant for such a reason. In *Seaworth v. Pearson*, 203 F.3d 1056 (8th Cir. 2000), *cert. denied*, 531 U.S. 895, 121 S.Ct. 226 (2000), the Eighth Circuit Court of Appeals held that the IRS requirement that an employer furnish an employee's correct name and SSN with payroll tax documents is sufficient neutral justification for refusal to hire, even if the refusal infringes on an applicant's religious beliefs, and that an employer is not obligated to seek a waiver from the IRS in order to get past that requirement (thus, even though an employer may file an affidavit of reasonable cause for failing to furnish the SSN, it is not bound by any law to do so). The *Seaworth* court cited other court decisions along the same line: *E.E.O.C. v. Allendale Nursing Centre*, 996 F.Supp. 712, 717 (W.D. Mich.1998) ("requirement that employee obtain SSN is requirement imposed by law, not employment requirement"); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 830-31 (9th Cir. 1999) ("employer not liable for not hiring person who refused for religious reasons to provide his SSN, because accommodating applicant's religious beliefs would cause employer to violate federal law, which constituted 'undue hardship'"); and *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67, 107 S.Ct. 367 (1986) ("accommodation causes undue hardship whenever it results in more than *de minimis* cost to employer") (*ibid*). The *Sutton* case further noted that in the absence of proof of some kind of collusion with the government, there is no valid RFRA claim against a private sector employer that is simply complying with the law (*Sutton*, *supra* at 836-842). A similar decision came in the case of *Weber v. Leaseway Dedicated Logistics, Inc.*, 5 F.Supp.2d 1219 (D.Kan.1998), *aff'd in an unpublished opinion*, 166 F.3d 1223 (10th Cir. 1999), which held that a trucking company did not have to hire an applicant for a commercial driver position who refused on religious grounds to submit his SSN; according to the court, the SSN was required by both IRS and DOT regulations, and it would have been an undue hardship on the employer to hire the applicant and risk both IRS and DOT penalties. Finally, in *Baltgalvis v. Newport News Shipbuilding Inc.*, 132 F.Supp.2d 414 (E.D. Va. 2001), *aff'd in an unpublished opinion*, 15 Fed. Appx. 172 (4th Cir. 2001), the court, agreeing with the decisions cited above, ruled that the employer did not violate religious discrimination laws by acting on the basis of IRS requirements regarding the SSN, and that it would have been an undue hardship on the employer to require the company to either seek a waiver from the IRS or use an identifying number other than the SSN.

In an opinion letter dated June 14, 2003, the EEOC agreed with the above court decisions and indicated there would be no problem under Title VII with an employer insisting that an employee give a valid SSN in connection with employment (see http://www.eeoc.gov/eeoc/foia/letters/2003/titlevii_religion_ssn.html).

Conclusion Top of Page

While it may be possible for an employer to hire an employee without a social security number and seek a waiver from IRS regulations requiring its use on various payroll tax-related forms, it is by no means clear that other laws, such as new hire reporting statutes and DOT regulations, allow such waivers. On the other hand, it seems very clear that courts around the country will support an employer's decision that it will not hire an employee who fails to give a social security number for use in complying with various government regulations, even if the failure to give the SSN is due to the employee's sincerely-held religious belief.

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