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**SOCIAL SECURITY NO-MATCH AND EMPLOYER SANCTIONS: STATES SHOULD NOT  
DUPLICATE AN ERROR-PRONE PROCESS**

States across the country, frustrated by Congress' failure to pass comprehensive immigration reform, have taken immigration into their own hands. Some have turned to ill-conceived immigration "enforcement only" approaches. These raise serious questions, from the Constitutional to the practical. States should reject them and instead should adopt proposals that would protect all workers against the actions of unscrupulous employers.

Legislators in one state have proposed laws that force employers to take disciplinary action against workers when they receive information from the Social Security Administration (SSA) about those workers' mis-matched Social Security Numbers (SSNs). These bills provide for a private right of action by a person whose social security number has been used by another. They provide that such a person may bring an action against an employer, if the employer either did not "verify" the employee's identity prior to employment, or received information from the SSA indicating an SSN error, but did not "make a reasonable effort to resolve the discrepancy." Some provide both for an action against the person who misused the number and any person who supplied or aided in the obtaining of false documents, as well as the employer. These bills miss the mark by grafting an unworkable federal immigration system into a state system, interfere with the federal government's authority in the area of employer sanctions, and risk state entanglement in pending federal litigation.

**What is a Social Security no-match letter?** SSA's mission is to pay benefits to disabled and retired workers. It maintains earnings information on workers for the purpose of determining eligibility for Social Security benefits for which the worker and dependents may qualify. Its "Earnings Suspense File" contains more than 255 million mismatched earnings records totaling approximately \$519.6, and is growing at the rate of 8 million to 11 million records per year. Cite?

One strategy employed by SSA to reduce the amount of money in its Earning's Suspense File, is to issue "no match" letters, which it calls "educational correspondence," to employers who submit IRS Form W-2s containing name and/or SSN information that does not agree with SSA's records.

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Social Security sends out letters directly to employees each year, to the address listed on their W-2 form. About two weeks later, it sends out letters to employers.

**Why do no-matches occur?** There are many reasons why a particular person's name or number might show up in the list of unmatched names or numbers with the SSA. Common errors resulting in a no-match include incorrect name or SSN; misspelled names; using nicknames or shortened names, using titles before or after the name; hyphenated names and name changes. Approximately 70% of mismatched records pertain to U.S. citizens.

**Verification not required by federal law.** Federal law, the Immigration Reform and Control Act (IRCA) makes it unlawful for an employer to "knowingly" employ an "unauthorized alien." IRCA sets up a process by which employers must request certain documents from workers within three days of their hire, and keep a record of the data that was submitted. Federal law does not require an employer to "verify" immigration status through, for example, a federal database.

**Databases for verification are fraught with error.** SSA estimates that its database contains 17.9 million discrepancies which could affect the results of a verification check by employers.<sup>1</sup> Mandating the use of the SSA system will embroil many U.S. citizens in a records-correction nightmare.

**SSA verification system not for immigration enforcement.** SSA's system was never intended as an immigration enforcement tool. SSA's Social Security Number Verification Service (SSNVS) Handbook cautions employers that:

- Any employer that uses the failure of the information to match SSA records to take inappropriate adverse action against a worker may violate State or Federal law.
- The information you receive from SSNVS does not make any statement regarding a worker's immigration status.<sup>2</sup>

**No-Match letters ineffective as a determination of immigration status.** The employer no-match letters are not a particularly effective way of correcting the problem of the Earnings

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<sup>1</sup> Office of Inspector General, Social Security Administration, *Accuracy of the SSA's Numident File*, Report A-08-06-26100 (December 2006), at <http://www.socialsecurity.gov/oig/ADOBEPDF/auditxt/A-08-06-26100.htm>

<sup>2</sup> See, [http://www.ssa.gov/employer/ssnvs\\_handbk.htm#fails](http://www.ssa.gov/employer/ssnvs_handbk.htm#fails)



Suspense Fund – Social Security’s Office of Inspector General found in 2002 that the letters account for only about 2% of corrections, as opposed to other means, including the letters directed to employees.

**State no-match proposals risk entanglement in federal litigation.** In summer 2006, DHS proposed a new rule, which was set to become final on September 14, 2007. The rule would have provided that employers would have to take certain steps to avoid liability for hiring unauthorized workers, should they receive a no-match letter from SSA. However, the rule was blocked by a federal court. On October 10, 2007, the U.S. District Court for the Northern District of California issued a preliminary injunction in *AFL-CIO, et al. v. Chertoff, et al.* (N.D. Cal. Case No. 07-CV-4472 CRB).

The state liability proposals implement a similar system to that enjoined by the federal court, except that they propose attaching civil liability to the employers’ action. The proposals would therefore transform a social security system into a legal standard of liability for employers, something that the federal court has prevented even the federal government from doing.

**States should not create a standard of liability from a federal policy that has been halted by a federal court.** The SSA provisions in these state proposals appear to be an attempt for the state to graft its own standards for liability on a federal standard which has been enjoined by a federal court. SSA itself has repeatedly cautioned employers that its database and its notifications should not be used to take disciplinary action against employees, yet the bills would force employers to do so.

**Harsh employer sanctions won’t solve our immigration crisis and will contribute to an economic crisis.** States that have passed anti-immigrant bills, like Arizona and Oklahoma, are seeing immigrant families abandon their state and their economy. Labor commissioners and economists have expressed concern about the damage that such exodus might cause to states’ economies, because studies show that immigrants represent a sum contribution to states’ economies. More importantly, immigration enforcement-only strategies do nothing to bring the some 8 million undocumented immigrants working in our country out of the shadows. All in all, legislation in this area subjects states and cities to grave risks.

**Immigration is Constitutionally a matter of federal law.** Immigration is a subject wholly regulated by federal law. States that add their own provisions risk, at the least, entanglement with

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that system. State may also find that their provisions run afoul of the federal system, especially where they impose separate, state-level employer sanctions.

**Real problem, real solution.** The real problem for state treasuries, immigrant and non-immigrant workers are employers who pay workers “off the books,” fail to provide workers’ compensation or pay their fare share of payroll taxes, fail to offer workers a lawful wage and a safe place to work, and weak labor and employment enforcement regimes in many states. The solution is real labor standards, coupled with vigorous enforcement of those rules – a new kind of “employer sanction” against low-road employers who abuse all workers. NELP’s paper on models for enforcement, called “From Anti-Immigrant to Pro-Worker,” <http://www.nelp.org/docUploads/FromAnti-ImmigranttoPro-workerFinal.pdf>, offers some alternatives.

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