

DEAR LITTLER: DOES AN EMPLOYER HAVE TO REPORT DISCREPANCIES IDENTIFIED IN OLD I-9 FORMS?

By: Jorge R. Lopez

Dear Littler: A former employee recently reapplied for an open position at our company. In reviewing the new-hire paperwork, we noticed that her social security number did not match the one we had on file previously. Her new information checks out fine, but we are wondering if we have any reporting or disclosure requirements, to the extent that perhaps her information in her old I-9 was inaccurate?

-Harried HR Manager in Texas

Dear Harried HR Manager,

As you know, all employees (including rehires) are required to complete Form I-9, no later than their first day of employment, to demonstrate their identity and eligibility to work in the United States. Your scenario raises the question of how to handle the possibility that your applicant for rehire made an error—intentional or otherwise—in her original paperwork. Given the new administration’s ongoing focus on immigration issues, you are smart to consider your duties in this situation proactively. In fact, now might be a good time to revisit your company’s employment eligibility verification procedures generally and remedy any glitches in systems or paperwork.

For today, however, the short answer to your question is “no.” As long as your applicant’s paperwork is complete, and her current documentation appears genuine in your opinion, you are not obligated to report any prior discrepancy. For a bit of explanation, let’s briefly review an employer’s I-9 duties, particularly in the case of a rehire.¹

Employers must have new hires fill out an I-9 when they start work. Within three business days of their start date (not including the day they start work), new employees are obligated to provide original, unexpired documentation to support their I-9 responses. Employees may choose what type of documentation to provide from lists of the acceptable options, and the employer cannot demand either particular or additional documents if the document meets the I-9 requirement. Thus, for example, if a new hire presents a valid driver’s license and a certified birth certificate, an employer cannot also ask the employee for a social security card.

When presented with the I-9 and documentation, the employer must examine the materials in the presence of the new employee. This step gives the employer the opportunity to confirm that the

¹ Additional details are available from the U.S. Citizenship and Immigration Services (USCIS) website, including: (1) a copy of the current Form I-9 (https://www.uscis.gov/system/files_force/files/form/i-9.pdf?download=1); (2) instructions for completing Form I-9 (<https://www.uscis.gov/i-9>); and (3) a Handbook for Employers (<https://www.uscis.gov/sites/default/files/files/form/m-274.pdf>). USCIS also has posted frequently asked questions, which can be found at <https://www.uscis.gov/i-9-central/questions-and-answers>.

documentation appears to be legitimate and to relate to the new employee. If the materials appear reasonably genuine on their face, and relate to the individual, the employer must accept them. If an employee fails to deliver satisfactory documentation within three days, the employer may discharge the individual.

That being said, an employer is not expected to be a document expert. If the picture on a driver's license does not resemble the individual who presented it, an employer may reject the documentation and ask for another acceptable document. By way of another example, if the name on a document does not match the name given on the I-9, an employer can still accept the materials if there is a reasonable and supported explanation for the discrepancy, preferably with corroborating information. As long as an employer reviews the materials, reasonably believes they are genuine, and concludes that they relate to the employee, it can rely on that documentation.

Similar principles apply in the context of a rehire. If the rehire occurs within three years of the execution date of the worker's original I-9, an employer could use that same form and complete Section 3, which concerns re-verifications and rehires.² In the situation you describe, however, the change in social security number necessitates completion of a new form, along with retention of the original form.³ Again, when completing the new I-9, if the employer reasonably finds that the supporting documentation appears authentic and relates to the rehire applicant, it must accept those materials.

Of course, some employers in your situation may suspect that the rehire candidate worked under a false identity in the past. According to USCIS guidance, if the employee is currently authorized to work, an employer is not obligated to terminate the employment or to report its concerns about the employee's prior conduct. An employer should consider any pertinent company policies, state laws, or other factors—but the discrepancy in social security numbers on the individual's two forms neither prevents an employer from rehiring the employee, nor triggers any disclosure requirement.⁴

Employers in such a situation must also bear in mind that the law prohibits discrimination on the basis of an employee's actual or perceived citizenship, immigration status, or national origin.⁵ Simply put, as long as an individual is authorized to work in the United States, employers cannot discriminate against them because they look or sound "foreign." Types of unlawful discrimination include, for example: demanding that employees provide additional documentation where not required, rejecting valid documents that should be accepted, and refusing to hire work-eligible U.S. citizens, asylees, or refugees. Retaliation is also illegal, and larger employers may be subject to Title VII and other anti-discrimination laws. On the whole, employers must balance their duties to avoid knowingly employing unauthorized aliens and to avoid unfair immigration-related employment practices.

Private employers that participate in the E-Verify program are bound by nearly identical rules.⁶ E-Verify is an electronic program employers may use to submit new-hire information to the Department of Homeland Security (DHS) and the Social Security Administration (SSA). The program attempts to match each employee's information, taken from an I-9, with data held by the DHS and the SSA to confirm the employee's identity and work eligibility. While E-Verify is currently voluntary under federal law, many employers must participate

² If the employee has been gone more than three years from the date of the original I-9, a new form must be completed.

³ Specifically, an employer should complete Section 3 of the original form and retain it along with the new, updated I-9.

⁴ The same approach generally applies if an existing employee has a legal name change or otherwise wishes to straighten out his or her employment records. See, e.g., *USCIS, Handbook for Employers: Guidance for Completing I-9*, at 23–24 (M-274, Rev. 4/30/13), available at <https://www.uscis.gov/sites/default/files/files/form/m-274.pdf>. Employers may then re-verify the employee's eligibility with the updated, accurate information.

⁵ These anti-discrimination provisions, found in the Immigration and Nationality Act, apply to employers with four or more employees. See, e.g., *USCIS, Handbook for Employers: Guidance for Completing I-9*, at 31–35.

⁶ Employers that participate in the E-Verify program must obtain the employee's social security number, which otherwise is voluntary. E-Verify employers also must make copies of certain types of documents that may be submitted by employees (i.e., passports). Employers not enrolled in E-Verify are not required to make copies of any I-9 supporting documentation. Employers that choose to make copies must still complete Form I-9 and may not use the copies for any other purpose.

under state law. To date, approximately 15 states require public contractors or employers to participate in E-Verify, and about eight states apply this requirement to private employers. Moreover, Congress is currently considering a bill that would mandate E-Verify for employers nationwide.

In any event, *Harried HR Manager*, you may proceed to rehire this former employee, if you wish. Because you have verified her identity and her current eligibility to work, you have complied with your federal obligations as a private employer.