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An Analysis of Recent Developments & Trends

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Proposed Legislation Would Require California Employers to Verify Employee's Social Security Numbers And Penalize Those Who Don't

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Summary: Proposed legislation in California would require employers to verify employee's social security numbers through the Social Security Administration and file a report each year with the California Franchise Tax Board. The bill also offers a tax credit for correctly reported social security numbers and a penalty for not reporting false or fraudulent social security numbers.

On February 21, 2007, Assemblyman Chuck DeVore (Republican, 70th District) introduced the Employment Verification Act of 2007. This bill:

1. requires employers to verify each new employee's social security number with the Social Security Administration (SSA) and to provide annual reports to the Franchise Tax Board (FTB) showing the name and social security number of each employee;
2. provides a tax credit of \$100 to an employer for each newly hired employee for whom a valid social security number has been provided to the FTB; and
3. imposes on an employer a fine of \$1,000 for each employee for whom the employer has not provided a valid social security number.

The legislation adds new sections to the Revenue and Taxation Code to accomplish these goals. The credit would apply against the personal income tax or corporate income tax as appropriate, and may be carried forward indefinitely to the extent the credit exceeds the tax due in any given year.

The preamble to the legislation correctly states that "existing law requires employers to obtain the social security number of each employee and to use that number on various reports to the state and federal government." For example, California Unemployment Insurance Code section 1088.5 requires all employers to "report the hiring of any employee who works in this state and to whom the employer anticipates paying wages" to the Employment Development Department (EDD). The report must contain "the name, address, and social security number of the employees." This

information is supplied quarterly to the EDD on a DE 3D or DE 6 and annually on the DE 7 reports. In addition, California requires the reporting of all new hires, including their name and social security number, to the EDD within 20 days of hire on a DE 34.

It is unclear what will be accomplished by requiring employers to make yet another report to the FTB of exactly the same information that they are already reporting to the EDD, particularly given that the EDD and FTB are authorized to share information. The legislation fails to state what the FTB will actually do with the information. To the extent that it represents a "carrot and stick" approach to reporting social security numbers, the numerous other state laws that already compel this disclosure without credits or penalties appear sufficient to meet that goal.

There are several other problems with this proposed bill. Specifically, it does nothing to ensure that employers receive true and correct social security numbers from employees in the first place. Federal tax law does not actually require that employees provide their social security card; only a social security number. (See, e.g., IRC section 3402(f)(2)(a); Treasury Regulations 31.3402(f)(2)-1(d); 31.6011(b)-2(b)(iv).)

If an employee provides a social security number and name that checks out against the SSA's Social Security Number Verification Service (SSNVS), even though such name and social security are "false" because they do not actually belong to the employee that submitted them, the employer may be liable for a \$1,000 penalty under this legislation.

In addition, under federal tax law, a person may start working if he or she has applied for a social security number. In fact, the SSA's official position is that the

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failure of name and social security number to match in the SSNVS does not necessarily mean that the person does not have a valid social security number or is not authorized to work, and nor should an employer terminate an employee merely because of a mismatch.

Also, the bill may conflict with California employment laws that would prevent discrimination against workers as a result of failure to provide a valid social security number.

Thus, the bill does little to ensure that employers receive true and correct social security information from employees. Further, to the extent that the legislation is actually a disguised attempt to regulate immigration, it may be preempted by federal law.

In addition to its other flaws, the legislation is presumably subject to scrutiny because of its potential impact on the general fund. California added 251,400 nonfarm payroll jobs in 2006.¹ Under the proposed legislation California employers would have potentially received \$25.14 million in tax credits. While the credit is relatively *de minimis* in nature for all but the largest employers, it is unlikely to do much to offset the burdens of administration of yet another reporting obligation. Lastly, it is not clear what benefit, if any, the state derives from receipt of social security numbers it will already possess in most cases.

This legislation stands in contrast to the Georgia Security and Immigration Compliance Act, signed into law last year and effective beginning July 1, 2007. Under the Georgia law all public employers, as well as contractors and subcontractors who enter into a contract with a public employer, are required to register with a federal work authorization program to verify the legal status of all new hires. The bill prohibits employers from claiming as a deductible business expense for state income tax pur-

poses wages paid to an individual of \$600 or more per year unless the individual is an authorized employee. Employers are also required to withhold state income tax at the rate of 6% on compensation paid to an individual whose income is reported on a IRS Form 1099 if the individual: (1) failed to provide a taxpayer identification number; (2) failed to provide a correct taxpayer identification number; or (3) provided an IRS-issued taxpayer identification number for nonresident aliens.

In contrast to the Georgia statute, A.B. 689, on its face, will do little to curb the underlying problems of misreported social security numbers while adding additional reporting obligations of the same information that is already reported to another state agency. The legislation also potentially punishes employers for activity over which they have little control, while providing at best a modest benefit to employers and little or no benefit to the State.

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¹ EDD, California Labor Market Review, January 2007, at p. 5.