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Employers historically have viewed termination as the safest course of action when an employee presents a new, valid Social Security number after having used a fraudulent one at the time of hire, but a new anti-retaliation law in California complicates that decision, Littler Mendelson attorneys Jorge R. Lopez, K. Kayvan Iradjpanah, Suzanne M. Potter-Padilla and Christopher E. Cobey write in this BNA Insights article.

The authors examine a variety of scenarios California employers might encounter and discuss whether or not they could be subject to liability under the new law if they terminate an employee in such an instance.

New Law Complicates Terminations of Workers with Fraudulent Social Security Numbers in California




By Jorge R. Lopez, K. Kayvan Iradjpanah, Suzanne M. Potter-Padilla and Christopher E. Cobey

On October 5, 2013, California Governor Jerry Brown signed Assembly Bill 263 into law, creating various anti-retaliation protections for undocumented workers (7 WIR 784, 10/28/13).

The law broadly prohibits employers from engaging in retaliation or other unfair immigration-related practices against any individual who exercises his or her rights under the California Labor Code, or related local ordinances. Among other things, the law, which took effect Jan. 1, 2014, prohibits employers from taking an adverse employment action against an employee who updates or attempts to update his or her personal information.

The passage of this new law significantly complicates terminations of employees who come forward with a new and valid Social Security number or identity. While federal immigration law does not prohibit terminations for an employee's prior dishonesty, the new California legislation calls into question the practice of terminating employees who falsified their Social Security number or identity at the time of hire, and later come forward to correct their personal information with their employer.

As discussed below, employers should review their existing policies and consider addressing Social Security number falsification issues on a case-by-case basis

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in California while precedent under the new law develops in California courts.

Overview of the Law. Under the newly codified Labor Code section 1024.6, employers are expressly prohibited from terminating employees who attempt to update their personal information on file with their employers:

> An employer may not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against an employee because the employee updates or attempts to update his or her personal information, unless the changes are directly related to the skill set, qualifications, or knowledge required for the job.

Although the legislature did not define ''personal information,'' references to that term in other California statutes suggest that the legislature intended that term to include an individual's name, Social Security number, and other personal information that undocumented workers may commonly remedy after hire.

This particular provision, among the others passed by A.B. 263, seeks to provide protection against retaliation for immigrant workers, whom California lawmakers identified as the ''most vulnerable segment of the workforce population in both the United States and California.''[1]

What the Law Means for Employers. Prior to the enactment of this law, employers in California—and elsewhere in the United States—considered that the safest course of action under federal immigration law was to terminate an employee who clearly supplied a false Social Security number at the time of hire, even if he or she later produced a valid one. In light of the new law, terminations in these scenarios could prove to be much more problematic for employers in California.

Meanwhile, there may be an argument that the new California statute is preempted by federal immigration law. Immigration law has generally been considered a federal prerogative that falls outside the scope of state legislation. Accordingly, there may be a legitimate argument that the California legislature has exceeded its authority in passing this legislation.

However, until the statute is litigated and interpreted by courts, employers have little in the way of guidance with respect to the new law. Employers should proceed with a great deal of caution when evaluating terminations of undocumented, and previously undocumented, workers.

The following are among the more common scenarios seen by employers with respect to the use of fraudulent Social Security numbers in the workplace and recommended courses of action to take. Although these scenarios presume the likely outcomes if an employer's decision to terminate is challenged in court or scrutinized by an administrative agency, California employers are best advised to address these issues on a case-by-case basis, applying any policies or practices consistently, and engaging legal counsel when the company is unsure of how to proceed.

Scenario One: Employers Should Not Terminate Employees Who Provide New, Valid Social Security Numbers

Employers should no longer terminate an employee who first provides a false Social Security number, but then provides a new, valid Social Security number, without evaluating the potential consequences under state law.

This scenario would likely arise when an employee comes forward with a new Social Security number and voluntarily discloses to his or her employer that the original number provided was fraudulent.

The employee's termination in this context—based on the employer's discovery of the employee's dishonesty—would likely violate the new California law.

While the practice of terminating an employee for his or her prior dishonesty probably does not run afoul of federal immigration laws, until there is some clarification by the courts on this new statute, California employers are best advised to reevaluate any practice of terminating an employee who provides a new, but valid, Social Security number.

Scenario Two: Employers May Terminate Employees Who Provide New Social Security Numbers That Are Fraudulent

Where an employee submits a false Social Security number at the time of hire, and later offers a second, also false, Social Security number, there continues to be a strong basis for employers to terminate the employee, provided the employer gives proper notice to the employee and a reasonable opportunity to remedy the deficient Social Security number.

The new California law notwithstanding, federal law continues to prohibit the employment of undocumented workers, and employers are subject to penalties for knowingly hiring or employing individuals who are unauthorized to work in the United States.

Under these circumstances, employers need to continue to exercise caution in verifying new Social Security numbers in accordance with federal immigration law.

Policies and practices used in these situations should be uniformly applied to all employees who come forward with such information so as to minimize the potential for national origin discrimination claims. Employers must also ensure their inquiries for verification of newly provided Social Security numbers comply with California Labor Code Section 1019, which makes it an ''unfair immigration-related practice'' to request ''more

[1] See the April 22, 2013, Assembly Committee on Judiciary report; June 25, 2013, Senate Committee on Labor and Industrial Relations report (available at http://leginfo.legislature.ca.gov).

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or different documents than are required under'' federal immigration law.

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Scenario Three: Terminations of Employees Who Repeatedly Lie About the Validity of a Previously Furnished Social Security Number Are Not Likely to Run Afoul of the California Statute

Assume an employee provides his or her employer with a new Social Security number, yet continues to misrepresent the validity of the original number provided at the time of hire.

In these circumstances, the employer is likely to have a strong argument for termination, provided the company conducts a thorough investigation into the validity of the original Social Security number, and gives the employee a reasonable opportunity to correct the deficiency once it is brought to the employee's attention.

Here, the termination decision is more likely to be upheld if challenged because there is an established pattern of dishonesty from the employee.

The employee's repeated avowals of the validity of the false Social Security number would also bolster the employer's position that the ''update'' of the Social Security number had nothing to do with the discharge; rather, the termination was premised on the employee's pattern of false statements.

Scenario Four: Employers Who Learn From a Third Party of a Fraudulent Social Security Number May Likely Terminate Without Violating the California Law

In some cases, an employer may learn from a third party (such as through a Social Security Administration no-match letter, third-party payroll administrator, or third-party benefits administrator) that the Social Security number provided by an employee is not accurate.

Once the employer conducts an investigation confirming the number's invalidity, and provides sufficient notice to the employee and an opportunity to remedy, the company has a strong argument that the new California provision does not preclude termination, because there has been no attempt by the employee to update his or her Social Security number—the triggering event under the statute.

Scenario Five: Terminations Governed by Collective Bargaining Agreements

Collective bargaining agreements often require that there be ''just cause'' to terminate a bargaining unit employee. Many unionized employers require honesty from their employees and consistently terminate employees who falsify their employment applications, regardless of the nature of the falsification.

However, labor arbitrators have not taken a consistent position on whether the falsification of an employment application by inclusion of a false Social Security number, by itself, should result in immediate discharge.

Unionized employers have had greater success in having arbitrators uphold terminations where the employee engages in a pattern of dishonesty beyond the original Social Security number falsification. However, arbitrators have upheld terminations even when they have determined that the original falsification, by itself, is insufficient to constitute ''just cause.''

The impact of A.B. 263 on grievance arbitrations arising under collective bargaining agreements is uncertain. Labor unions may use the newly codified Labor Code section 1024.6 at arbitrations even though the ultimate issue is whether the ''just cause'' provision of the collective bargaining agreement—not the Labor Code—has been violated.

Arbitrators who are inclined to look beyond the four corners of the contract to statutory law may be susceptible to such arguments by unions.

Scenario Six: Whether Honesty Constitutes a Qualification of the Job Is an Open Legal Question

As noted above, the recently enacted California statute provides an exception whereby the company may terminate an employee who updates or attempts to update his or her personal information, if the changes ''are directly related to the skill set, qualifications, or knowledge required for the job.''

While employers may be tempted to argue that honesty is related to the ''skill set, qualifications, or knowledge'' required for the job, there is no case law yet interpreting this exception to the statute. Both the Labor Code and the bill fail to define or offer guidance on the meaning of ''skill set, qualifications, or knowledge.''

Specifically, it is unclear whether the scope of this provision is limited to job-specific qualifications (e.g., work history, job-specific skills) or, alternatively, includes the employee's authorization to work in the United States, and the validity of his or her Social Security number. Even if work authorization fell within the ambit of the qualifications exception, the touchstone is whether the changes to a Social Security number are ''directly related'' to the ''qualifications . . . required for the job.''

Further, there is an argument that allowing employers to rely on ''honesty'' as a job qualification in support of terminations upends the very purpose of the California statute—to allow undocumented workers to come forward with lawful work authorization without fear of reprisal or retaliation.

An employer may point to language in its employment application advising of termination if an employee provides false information at the time of hire, or may argue that honesty is a job prerequisite because employees are entrusted to work independently or in sensitive areas. However, there is no certainty yet on how California courts might rule on such arguments.

Until this theory is tested by the courts, employers should exercise caution in terminating employees in reliance on this exception and take an approach, within the company's risk tolerance parameters, that evaluates whether prior honesty with regard to the employee's own personal information is truly related to the skill set, qualifications, or knowledge required of the position.