



August 15, 2006

Director,
Regulatory Management Division
U.S. Citizenship and Immigration Services
Department of Homeland Security
111 Massachusetts Avenue, NW, 2nd Floor
Washington, DC 29529

Re: Docket No. ICEB-2006-0004

The National Center for Transgender Equality (NCTE) respectfully submits these comments on the rule proposed by the Department of Homeland Security (DHS) regarding safe-harbor procedures for employers who receive a no-match letter.

The system of no-match letters and the timelines proposed for the system will cause unnecessary harm outside a realm of reasonableness in an equitable society for transgender people.

Background

The existing Social Security Administration (SSA) policies are difficult for transgender people and have caused adverse employment actions. The newly proposed DHS rules will make it worse.

“Transgender” is an umbrella term encompassing: pre-operative, post-operative, and non-operative transsexual people; cross-dressers; feminine men and masculine women; and, more generally, anyone whose gender identity or expression differs from conventional expectations of masculinity or femininity.¹ For the purposes of these comments, we use “transgender” to refer to people who transition from being a man to a woman, or vice versa, with or without surgery or other medical modification. A transsexual person is an individual who is born one sex but who has the psychological identity of the other sex and who lives his or her life as the other sex. Some transsexual people undergo medical treatment to alter their bodies to match their psychological identification.

While no complete census of transsexual people in the United States currently exists, reasonable estimates range as high as 0.5% (one half of one percent) of the population.²

Currently, SSA sends a gender no-match letter to an employer when an employee’s gender data submitted to the agency does not match SSA records. Under existing procedures, when verifying an employee’s Social Security number via telephone, an employer must provide the employee’s gender. When employers send employees’ W-2 data to the SSA electronically, they are permitted to include gender on an optional basis. Only when gender is included (either mandatorily over the phone or optionally in an electronic submission), does the SSA compare an employee’s gender to that listed in its records.

Discussion

The new safe-harbor procedures proposed by the Department of Homeland Security will cause transgender people a myriad of problems and exacerbate an already serious medical privacy invasion of many employees’ medical privacy. In order for the employee verification system to be efficient and equitable;

- 1) Gender must be completely removed (even as an optional field) from the information used to verify employees;

¹ Transgender Law and Policy Institute, (www.transgenderlaw.org.)

² Lynn Conway, University of Michigan, Ann Arbor, MI, (<http://ai.eecs.umich.edu/people/conway/TS/TSprevalence.html>)

- 2) An extension of timeline needs to be instituted for persons who have a legal name change;
- 3) The proposed process for providing updated information about an employee with mismatched information is poorly worded and could lead to confusion; and
- 4) The anti-discrimination aspects of the proposed procedure need to be strengthened to protect transgender people from adverse employment action.

1. Gender no-match letters are an invasion of private and privileged medical information.

NCTE acknowledges the importance of confirming that the Social Security number an employee is using is one that belongs to the employee and authorizes the employee to work. Avoiding fraud and ensuring that every person receives the Social Security funds deposited into their account are important features of this program. These comments do not challenge this aspect of the practice.

However, comparing records of a person's gender is both unnecessary and is a dangerous invasion of medical privacy. The practice is unnecessary because no employer is currently *required* to submit information to the SSA about the gender of individual employees. Some large employers submit this information on an optional basis when electronically submitting their W-2 data to the SSA electronically. Only then does the SSA confirm an employee's gender. If confirming gender was thought to be necessary, every employee's gender would need to be confirmed. Since employees do not disclose their gender to their employer in an official federal form (neither sex nor gender are fields on the W-2 or I-9), the gender sent by the employers is often the result of an employer's guess or assumption about an employee's gender. Gender no-match letters thus raise serious concerns about compliance with federal medical privacy laws and constitutional guarantees of privacy.

Before a change can be made to a person's gender marker in their SSA account, they must provide proof that they have had surgery as a part of their transition. Therefore any employer who receives a gender no-match letter for a transgender employee will learn the employee's surgical status. The disclosure of such status reveals privileged medical information. Employers and the SSA should not exchange private medical information of this nature.

Furthermore, not every transgender employee discloses their transgender status to their employer. If an employer receives a gender no-match letter, the transgender employee is left with no option but to disclose their status. Such disclosure has often led to on-the-job discrimination, including termination. It also forces an employee to disclose their transgender status, which is often a medical condition that an employee should be able to disclose or not depending on their own choice.

For these reasons, federal policy should be unified so that no employer reports the gender of any employee to the SSA or DHS. Comparing records of a person's gender is not necessary to determine citizenship or work-eligibility status; this is confirmed by the fact that gender information is not routinely solicited, as previously noted.

Solution: NCTE suggests that the governmental bodies that receive information from employers not accept or process information about the employee's gender.

2. The time limits impose a heavy and unfair burden on transgender people.

The proposed rules outline a strict 60-day period in which all mismatched information must be rectified by the employer, employee and SSA/DHS. In December 2005, the SSA began to require proof of a court effectuated name change (including names changed through marriage and adoption) before an individual employee's SSA records would be updated. This policy applies even in states that continue to recognize common law name changes. However, in many of those states employees can get state issued identification in their new name, even without court recognition of that change. For these employees, the proposed time limit is insufficient to go to court and effectuate a change.

For any person, transgender or otherwise, who makes a voluntary and legal name change, the process is tedious out of necessity and can take a long time. Even if the legal process of name change doesn't require the full 60-day time period, an individual needs to make the changes with a number of different organizations, and SSA is only one of them. If not allowed enough time to effect a name change on all

relevant government and employment documentation, a person could have a legal name that is different from the one that SSA has on record and could have trouble securing or maintaining employment.

In order to reduce the amount of harm and privacy invasion, individual employees must be allowed sufficient time for legal name change on all relevant documentation. We have spoken with attorneys in California and Texas who handle name changes for transgender clients, and they believe that in California, as much as 90 days would be required and in Texas, as much as 120 days.

Solution: NCTE suggests that DHS extend the time period for rectification of information by employer, employee and SSA/DHS. If at all possible, SSA/DHS should allow a flexible time frame for people who are making or who have made a legal name change to get all the necessary documentation changes made. At the very least, DHS should allow a time period of 90-120 days.

3. Proposed process for providing updated information about an employee with mismatched information is poorly worded and could lead to confusion.

The language in the existing proposal regarding rectifying mismatches is unclear. This language, in particular, will lead to confusion, “(2) No document containing the SSN or alien number that is the subject of the no-match letter, and no receipt for an application for a replacement of such a document, may be used to establish employment authorization or identity or both³.”

Clearly, what the Department intends with this language is that any employee whose initial SSA number is submitted incorrectly must provide their employer and/or the SSA with a new, accurate number. Resubmitting the same number, when the submitted number *and not other information* is what created the mismatch, is not allowed.

As written, the current language could be interpreted to require all employees with mismatched information to submit a different number even if the problem was in regards to their name or gender. Persons with a changed name or gender are still the same person and have the same SSN.

Solution: The rule should be written clearly to define for whom and under what circumstances the original SSN cannot be used again. NCTE also suggests that accommodations be expressly written into the no-match letter procedures allowing for differences in identification requirements and timelines for rectification for people who have gone through legal name changes.

4. The anti-discrimination aspects of the proposed procedure need to be strengthened to protect transgender people from adverse employment action.

NCTE applauds the protection afforded to persons with a foreign appearance or accent and appreciates that employers cannot require additional documentation from people because of these characteristics. Despite these protections, though, transgender people are still at a significant risk for being mistreated based on their appearance and the possible divergence between their current appearance and the picture on their identification documents.

Employers should be proscribed from requiring additional or special documentation from employees simply because of gender non-conformity or appearance of being transgender.

Solution: NCTE suggests that explicit protection for persons whose name or appearance is gender non-conforming be included in the proposed rule. This could be done by simply expanding the language regarding foreign appearance or accent⁴.

Conclusion: NCTE believes that these new timelines will impose a large burden on the transgender community that is completely unjustifiable. It is our position that *at a minimum* gender should be removed, even as an optional field, from any compulsory verification of employees and should not be transmitted to or

³ Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 34281 at 34283 (proposed June 14, 2006) (to be codified at 8 C.F.R. pt. 274a).

⁴ Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 34281 at 34285 (proposed June 14, 2006) (to be codified at 8 C.F.R. pt. 274a).

accepted by the DHS/SSA. Without these changes, this rule and the timelines proposed will put transgender employees at greater risk of adverse employment actions or bias simply because they are transgender or do not conform to narrow societal standards of gender.

Respectfully submitted,

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