

Memorandum

To: Helene Robertson, Director
Office of International Student and Scholar Services

From: Peg O'Donnell
Assistant General Counsel

Date: Dec. 6, 2002

Re: Social Security Numbers and other miscellaneous legal issues regarding hiring

This is in response to your request for legal advice on issues that may arise due to the delay by the federal government in issuing social security numbers for foreign nationals. I will answer your questions in the order asked:

What is CUA's institutional obligation with respect to prompt payment of people who are working for the University?

DC Wage and Hour law requires that an interval of not more than 10 working days may elapse between the end of the pay period covered and the regular payday designated by the employer, unless a different period of time is specified by a collective bargaining agreement.¹

¹ § 32-1302. When **wages must be paid**; exceptions

Every employer shall pay all wages earned to his employees at least twice during each calendar month, on regular paydays designated in advance by the employer; provided, however, that an interval of not more than 10 working days may elapse between the end of the pay period covered and the regular payday designated by the employer, except where a different period is specified in a collective agreement between an employer and a bona fide labor organization; provided further, that where, by contract or custom, an employer has paid wages at least once each calendar month, he may lawfully continue to do so. Wages shall be paid on designated paydays in lawful money of the United States, or checks on banks payable upon

Under tax law, when is the social security number absolutely required?

An employee who is in employment for wages which are subject to taxes under the Federal Insurance Contributions Act (FICA) or which are subject to the withholding of income tax from wages must apply for a social security number by filing Form SS-5. If the employee does not have a social security number at the time employment commences, the application shall be filed on or before the seventh day after the first day of employment. ² An account number will be assigned to the employee by the Social Security Administration *in due course*. (Language from the regulation)

If the employee already has the card, he/she shall show it to the employer upon commencement of hire. If the employee has a number, but cannot locate the card, the employee shall advise the employer of the number of the card, and how the name is shown on the card. If the employee has applied for a card and has the receipt for application of the card, the receipt shall be shown to the employer. If an employee does not yet have a social security card, and has not yet applied for one, the employee shall furnish to the employer a statement in writing, signed by the employee, setting forth the following on Form SS-5:

- date of the statement
- the employee's full name
- present address
- date and place of birth
- father's full name
- mother's full name before marriage
- employee's sex
- a statement as to whether the employee has previously filed an application on Form SS-5 and, if so, the date and place of such filing.

Giving this information to the employer does not relieve the employee of the obligation to make an application for a social security number. The employer can facilitate this process by supplying the necessary forms.

The institution has certain obligations as well. Once the employee gives the account number to the employer, the employer must enter the account number and name, exactly as shown on the card, in the employer's records, returns, statements for employees, and claims to the extent required by the applicable forms, regulations and instructions. If the employee does not show the employer the card, the employer should request the employee to do so. If the employee has not yet applied for an account number, the employer has an obligation to let the employee know of the requirement to do so. If the employee gives the employer the account number, or a receipt for application, this information shall be entered into the records. In the latter instance, the employer records

demand by the bank upon which drawn.

² 26 CFR § 31.6011(b)-2

the name and address of the employee as shown on the receipt, the expiration date of the receipt, and the issuing office's address.

If the account number is unknown when the return is filed as required for any period in connection with reporting of wages, the above collected information (contained on the application for a card) shall be entered upon the return. If the information was given to the employer on Form SS-5 or in a statement, a copy of this Form or statement shall be attached to the return. If the employee did not provide any of the above, the employer shall obtain and provide as much of the information referenced above as can be obtained, with an explanation of why it was not secured from the employee.

The regulations³ also suggest (this is not mandatory) that employers inform prospective employees of the requirement to apply for a social security card.

Is it permissible to write pending in the SSN box on the form I-9 and then update when the number is actually received?

Yes, this is permissible. As can be seen from the question above, there is no legal requirement that an employee have an SSN at the time they commence work. The employee must simply apply for an SSN within seven days of employment. As the I-9 must be completed within three working days of hire⁴, it is clear that the SSN cannot be a requirement for completion of the form. This was confirmed with Kay Bernstein (410-965-7912) of the Social Security headquarters in Boston. The INS has also proposed modifying the Form I-9 to make it clear that recording of the employee's social security number if Section 1 is voluntary.⁵

Does the Office of General Counsel see any legal problems with the recommendation by the Office of International Students and Scholars that the University should not wait for an employee to obtain an SSN prior to activating employees in the Human Resources system?

As can be seen from the answers above, there is no legal impediment to immediately activating employees in the Human Resources system once they commence employment. If anything, failure to do so could violate both federal and state law. The applicable state law is the wage and hour law quoted above. As the class of employees currently experiencing delays in obtaining social security numbers are foreign employees required to undergo extensive background checks, delaying employment until an SSN could be obtained would put the university at risk for violating federal anti-discrimination laws on the basis of national origin.

This is not to say there will not be practical problems that arise for various departments (e.g. payroll) when procurement of an SSN is delayed. Our office is available to assist in resolution of these issues.

³ Id.

⁴ 8 CFR 274a.2

⁵ 60 Fed. Reg. 32472 (June 22, 1995)

