

## NEW RULES PROTECTING EMPLOYEE SOCIAL SECURITY NUMBERS IN EMPLOYER RECORDS

In 2006, Puerto Rico joined the growing number of states that have passed legislation protecting employee and other individuals' social security numbers ("SSN") in employer/business records. Of the three laws that were enacted last year, the principal statute directed to all employers is Commonwealth Law No. 207 of September 27, 2006.

In order to protect employees from identity theft, the Law No. 207 limits and regulates the employer's use, dissemination and protection of its employees' social security numbers; as well as requiring employers to file certification of compliance with the Puerto Rico Department of Labor and Human Resources ("PRDOL"). The Law also grants the PRDOL authority to adopt regulations directed at ensuring compliance with the Law's prohibitions and restrictions; and imposing penalties on employers who fail to comply with the new requirements and procedures. On October 5, 2007, the PRDOL issued Regulation 7413 to implement Law No. 207.

Generally, Regulation 7413 (the "Regulation") imposes affirmative obligations on all employers doing business in Puerto Rico when handling their employees' social security numbers. Pursuant to the Regulation, all employers must now take reasonable measures to avoid access of the SSN by those company officials, employees and third parties who do not have a business need for such access. Further, additional precautions will be required so that those persons with a "need-to-know" the employee's SSN, can access the numbers only for a legitimate or necessary purpose related to the conduct of the business. Additionally, all employers must ensure that appropriate safeguards are put into place to preclude unauthorized access to SSN numbers and to protect the confidentiality of this information.

The Regulation also requires that all employers file a certification with the PRDOL, on or before **April 2, 2008** (six months from issuance of the Regulation), confirming that all of the appropriate measures explained below have been implemented to comply with Law No. 207 and the Regulation. Employers who are unable to set up the necessary precautions by said date, must certify and represent to the PRDOL that all necessary measures and precautions will be put into place on or before **October 5, 2008** (one year from the issuance of the Regulation) and provide a specific work plan to achieve compliance.

Under the Law and Regulation, and as early as April 2, 2008, employers must comply with the following usage and dissemination rules:

1. No employer may show, display or in any other way disseminate an employee's SSN in: (a) an ID Card; (b) any place visible to the general public (bulletin boards, accessible computer screens, etc.); (c) documents of general circulation (see definition below); or (d) in personnel directories or similar lists that are or may be available to individuals without a need to know the employee's SSN or who do not have the required authority to access said information. The Regulation defines "document of general or routine circulation" as "any type of document whether on paper or digital which contains information related to persons and things." Thus, the Regulation encompasses all business forms (HR and others) containing or requiring disclosure of the SSN.

2. Further, the Regulation provides that an employer may require the disclosure of an applicant or employee's SSN only when requesting the number is mandated by a government agency. Although this provision of the Regulation is

confusing, the Law No. 207 sheds some additional light and establishes that the social security number may be requested or disclosed by the employer when allowed by federal law and regulations, such as, employee identity verification (I-9 forms), tax withholdings, hiring and payroll purposes, *provided the employer adopts adequate safeguards to maintain the confidentiality of the social security number.*

3. When the SSN is requested in a form, application or any other document, the Regulation requires the employer indicate whether the disclosure of this information in that particular document is voluntary or mandatory. If the SSN of an applicant will not be used in considering him/her for employment, it is recommended that employers refrain from requesting such information in the application form.

4. As to the disclosure of the social security number, the Regulation states that the employer will not divulge an employee's SSN except when: (1) the law permits it; or (2) when the employee consents to the disclosure (in writing); and (3) when an outside entity acts as the employer's contractor or agent and has adequate security measures to prevent its being divulged. In the latter case, which was apparently incorporated to cover contractors such as external payroll services, the Regulation provides that the employer must maintain a list of the entities approved to manage this type of information.

5. The Regulation also provides that employment applicants and employees may voluntarily surrender the protections provided by the Law and Regulation *in writing*. However, the law provides a cause of action under Puerto Rico's Anti-Retaliation Law (Law No. 115 of December 5, 1990) against employers that require said waiver as a condition of employment, or who in any way retaliate against employees for refusing to waive up this protection.

6. When disclosure of a document containing a SSN is required or must be made public for purposes that do not require disclosure of the number, the Regulation requires the employer edit

the document so the number is partially or totally illegible. Any document modified in compliance with the Regulation will not be considered altered as to its content.

7. As to transmission through electronic means, the Regulation requires the SSN number be transmitted only when the employer has in place mechanisms that guarantee the confidentiality of the information. Thus, this imposes considerable restrictions on employers that require employment candidates and employees to use or transmit their SSN over the Internet or any computer system or network. If an employer requires employees to enter their SSN to access the Internet, to register time, or for any other reason, these practices should be modified. Further, all preventive measures must be taken to ensure that all information systems are secure and that all transmissions including SSN be encrypted.

8. Likewise, the Regulation requires that when documents (paper or electronic) containing SSN are to be discarded or destroyed, it must be done in a secure manner. The establishment of protocols to ensure the proper disposal of this information is recommended.

9. Although not specifically covered or even mentioned in the Regulation, all employers must also keep in mind Regulation 7376, issued by the Secretary of Consumers Affairs (or "DACO," its Spanish acronym) on June 26, 2007, which requires all business entities that maintain "personal information" of its employees to notify its owners *and* the DACO, of any security breach, if personal information was or is reasonably believed to have been accessed by an unauthorized person. The term "personal information" includes the employee's social security number. The DACO Regulation also specifies the manner in which the notification is to be performed.

10. Two (2) other recently enacted local laws also contain restrictions and protections concerning the inquiry, use, protection and disclosure of an individual's social security number, but apply only to (1) the Commonwealth of Puerto Rico governmental agencies, public corporations,

municipalities, government branches, and (2) private sector employees who provide services to such government entities or are otherwise government contractors. These are Law No. 243 of November 10, 2006 and Law No. 187 of September 1, 2006. Both laws should be reviewed when preparing protocols and/or establishing measures for compliance.

As to penalties, the Regulation provides protection under Puerto Rico's Anti-Retaliation Law to employees and applicants that provide testimony or information to the PRDOL regarding any violations of the Law and its Regulation. The Anti-Retaliation Law allows employees to recover all damages suffered as the result of protected retaliation, including back pay, emotional distress and reinstatement. The Law also provides an automatic double damages penalty for any proven damages, plus litigation costs and attorney's fees.

Further, the Regulation establishes step fines for violations of the Regulation that range from \$500.00 to \$5,000.00, depending on the amount of employees affected. If the employer incurs in a subsequent independent and separate violation, the fine to be imposed will be 150% of the original fines. The Regulation does not clarify whether fines will be imposed *per violation* (i.e. improper transmission, breach of security resulting in improper publication of social security numbers), or *per employee* affected (or improperly disclosed social security number). The Regulation allows condoning penalties imposed on small businesses (those with 15 employees or less) when the employer demonstrates that it can correct the situation that caused the violation, within the timeframe established by the PRDOL, with the funds that would otherwise be used to pay the fine.

Finally, the Regulation establishes an administrative process through the PRDOL's Bureau of Labor Standards to ensure compliance, entertain complaints, and to impose the fines provided in the Regulation.

It is recommended that all employers review and/or implement protocols, policies, forms, and practices to limit the disclosure of social security

numbers. ○ 'NEILL & BORGES is available to assist you in complying with these new obligations.

*Note: Because of the general nature of this Labor Newsletter, nothing herein should be considered as legal advice or a legal opinion. For further information, please contact our labor and employment lawyers.*

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