

Working Without a SSN

Here's a series of letters between an individual asking for help in securing work without using a Social Security Number (SSN), his Congressman, and the Treasury Department.

6 October 1996

Representative Martin Frost
Rayburn House OFC BLD #2459
House of Representatives
Washington, D.C. 20515-0003

Dear Sir,

Last May I left full time employment to seek a part time job for the purposes of continuing my education. I sent Out applications and resumes to over fifty prospective employers. I am still unemployed a year and a half later because of a misunderstanding of State and Federal laws. I was contacted about employment last month by four different companies. I have done some research which I have shared with those companies. They will not accept any of my information, but require a formal letter from a governmental representative. I am having a problem getting this information from any of our governmental agencies. As of today, I have sent in several "certified return receipt requests" which have gone unanswered. Monday, 16 September

1996 I called several government agencies, talked to the several people, and posed the same question to each of them. None of them had an answer and suggested I write this letter to you.

The question I would like your help with is : *What are the instructions that an employer would follow in hiring a person who is otherwise qualified for employment, but does not have or use a Social Security Number (or related TIN, EIN or ITIN)?*

The *reason* for the absence of a Social Security Number is not the issue because the law provides for exceptions. However, according to a lawyer at the EEOC, the law is unclear on the employer's responsibility of implementing those exceptions. My reason is founded on *Revelations 13:16-18** and has not been a problem with employers. Employers do not engage in persecution for religious beliefs directly, but do so inadvertently because of what they see as a Federal requirement for employment. The IRS has been in business for years and this should not be a complicated question for them and it is not per the Lawyer I talked to at the Internal Revenue office, but again he would not send me a formal letter to satisfy

a prospective employer.

I would appreciate a timely response.

Sincerely,

Vance Lee, Meurer

* "He also forced everyone, small and great, rich and poor, free and slave, to receive a mark on his right hand or on his forehead, so that no one could buy or sell unless he had the mark, which is the name of the beast or the number of his name." *Rev. 13: 16-189.*

Congressman Frost's reply:

January 2, 1997

Dear Mr. Meurer:

Enclosed please find a copy of the letter I received from the U.S. Department of Treasury in response to my inquiry on your behalf. I believe you will find this letter self-explanatory.

I always appreciate the opportunity to serve the constituents of the 24th Congressional District and hope you will call on me again whenever I may be of further service.

Sincerely,

Martin Frost

Member of Congress

The IRS letter of explanation follows. The italicized comments within the letter are my emphasis. The footnotes are my comments on the government's letter.

Note that my comments on this letter express a number of unsubstantiated conclusions that are hopefully interesting, but only personal speculation. Further, this is only a letter, not a statute, regulation, or court case. As such, it's "official" value is, at best, limited. It's entirely possible that the letter's author is sometimes writing casually; therefore it's inadvisable to read too much into the letter's specific language.

On the other hand, the letter is written by an "Assistant Chief Counsel (Income Tax & Accounting)" of the Office of Chief Counsel of the IRS. Further, since the author is a prominent IRS attorney writing an official reply to a U.S. Congressman, we can reasonably assume his letter was carefully constructed to be legally reliable (or intentionally evasive). Therefore, this letter may provide enough legal substance to justify interest, perhaps even cautious confidence in my comments.

Dec. 24, 1996

Department of The Treasury
Internal Revenue Service
Washington D.C. 20224

Office of Chief Counsel

Dear Mr. Frost:

This is in response to your letter, dated October 25, 1996, referring to this office for consideration the inquiry of your Constituent, Mr. Vance Lee Meurer. Mr. Meurer requests instructions for an employer to follow when hiring a person who does not have and will not use a social security number, or any other identifying number, because of his or her religious beliefs.

Mr. Meurer's question involves the liability for penalties of an *employer* who does not provide an employee's taxpayer identification number (TIN) when required. The following provisions of the law and regulations provide guidance as to an employer's obligations for providing the Service and an employee with the employee's TIN in connection with tax administration.¹

Section 6109(a) of the Internal Revenue Code provides in part that any person required to make a return, statement, or other document with respect to another person shall request from such other person, and shall include in any such return, statement, or other document, such identifying number as may be prescribed for securing proper identification of such other person.

Section 6721(a) of the Code provides as a general rule that any person failing to include all of the required information on a return shall pay a *penalty* of \$50 for each uncorrected return with respect to which the failure occurs; with the total penalty not exceeding \$250,000 during the calendar year.²

Section 6722(a) of the Code provides, in part, that any person failing to include all of the information required to be shown on a payee statement shall pay a penalty of \$50 for each statement with respect to which such a failure occurs; with the total penalty not exceeding \$100,000 during the calendar year.³

Sections 6721(e) and 6722(c), in part, set forth greater penalties for intentionally failing to include required information on a return or

¹ Note that penalties for not using a SSN apparently apply primarily to the *employer*, not the employee. Also, note that the IRS seems to prefer using the terms "employee's TIN" and "TIN" (*Taxpayer* Identification Number) instead of "Social Security Number" (SSN). In fact, in this letter, the IRS refers to the SSN only four times, but the TIN twenty-four times. This reluctance to refer to the SSN (the subject of both Mr. Meurer's and Congressman Frost's letters) strikes me as curious because it implies there might be a "dual-nature" in our SSNs that somehow includes or implies the TIN. Are we tied to the income tax (as most constitutionalists suspect) because we have SSN? Or are tied to the tax because the SSN somehow implies or is converted into a *Taxpayer* Identification Number (TIN)? This speculation implies that the SSN may not be the malignant nexus to the income tax or "mark of the beast" that many people believe. Perhaps the SSN is a relatively benign "precursor" until it somehow metastasizes into the truly dangerous TIN. Whether I am a "taxpayer" may be debatable if the only supporting evidence is my SSN; but if I have or appear to use a "Taxpayer Identification Number" (TIN), who can avoid the presumption that I am a "taxpayer"?

² In theory, each employee without a SSN might simply offer to pay his employer the \$50 penalty that might be assessed for filing any documents with the IRS which do not include the employee's SSN/TIN.

³ What is a "payee statement"? If it's a single, end-of-year document filed with the IRS, sounds like the employee might be able to simply reimburse the boss another \$50 penalty for not using a SSN/TIN. However, if a "payee statement" was issued more frequently - say, once a week like a paycheck (is a paycheck a "payee statement"?), the penalty could be prohibitive.

payee statement.

Section 6724(a) of the Code provides that no penalty shall be imposed for any failure if it is shown that the failure is due to reasonable cause and not to willful neglect.⁴

As a general rule, the question of whether a taxpayer has reasonable cause for failing to comply with specific requirements of the Code is in the first instance a question of fact which must be resolved on the basis of all the facts and circumstances surrounding each particular case. *Commissioner v Lane-Wells Co.*, 321 U.S. 219 (1944).⁵

Section 301.6724-1(a) of the Regulations on Administration and Procedure provides for a waiver of the penalty if the filer [employer] establishes significant mitigation factors for the failure or that the failure arose from events beyond the filer's control. The filer must also establish that he or she acted in a responsible manner before and after the failure occurred.⁶

Section 301.6724-1(c)(1)(v) of the regulations includes in the definition of "events beyond the filer's control" certain actions of the payee [employee] or other person with necessary information.

Section 301.6724-1(c)(6)(i) of the regulations includes in "actions of the payee" the *failure of the payee to provide* the filer with necessary information to comply with information reporting requirements.⁷

Section 301.6724-1(e) of the regulations provides special rules for acting in a responsible manner in the case of missing TINs. A filer seeking a waiver for reasonable cause will have acted responsibly if the failure to provide a TIN on an information return resulted from a *payee's failure to provide* the filer with the *information*. However, this provision applies only if the filer makes an initial solicitation, and if required, additional annual solicitations.⁸

⁴ "Willful" is a crime, "reasonable" is OK. In other words, if the employer can offer a reasonable explanation for why the TIN was not provided, no penalty accrues. Mr. Meurer's reliance on the Biblical prohibition against "marks" etc. is presumably "reasonable" and therefore no \$50 penalties should attach. But maybe the employee doesn't have to explain a thing. Maybe the entire legal obligation is on the back of the employer, especially the *corporate* employer since he's chartered by government and therefore subject to government rules.

⁵ This "general rule" is potentially dangerous since it allows virtually endless harassment if the IRS decides to "resolve" the "question of fact" concerning use of the SSN "on the basis of all the facts and circumstances surrounding each particular case". Sounds like a universal fishing license for IRS agents seeking information ("*all the facts*").

⁶ Could employers establish a formal "Company Policy On Hiring Individuals Without SSNs" that would stand up to government scrutiny just like a company Policy on Sexual Harassment or Affirmative Action? If such a document/ policy were devised and proven reliable, it could be propagated to every company in the USA. This might even benefit the employers in that it would open up a fairly large and probably talented labor pool of folks who refuse to use SSNs.

⁷ Fascinating. If the employee simply doesn't provide the "necessary information" (SSN?), the employer is off the hook.

⁸ In other words, as long as the employer asks for the SSN/TIN when the employee is first hired, and then again before the end of each calendar year, the employer's duties have been satisfied. And if each time, the employee answers, "Sorry, I don't have one" or "Sorry, I don't want to tell you", everything's still OK. More importantly, "the failure to provide a TIN" implies that the obligation to supply a TIN rests with the *employer*. That means that if there is a "conversion" of the SSN into a TIN, it takes place in the employer's office – not in Washington. Given government's reputation for tricking folks into assuming obligations that can't be imposed under the Constitution, the idea that the *employer* (not the government) somehow converts the SSN into a TIN makes some sense. Imagine that I get a job and give my employer my SSN; my employer then enters my SSN on some document that he sends to Washington that in fact asks for my TIN (somebody – perhaps a CPA or tax accountant — told the employer to just enter the SSN on the line that says TIN since "they mean the same thing"). Government gets the document in which my employer inadvertently identified me as a "Taxpayer" and simply accepts the information as true. Then government employees can truthfully say *they* did not mandate or designate me as a "taxpayer"; they simply relied on the information provided by my employer – presumably with my full knowledge and agreement. Suppose I sue the government to release me from my "taxpayer" status; it might not work unless I challenge the fact that I have been given (unbeknownst to me) a TIN. Further, the proper party to sue may be my *employer* — who may have falsely ID'd me as a "taxpayer" when he submitted my SSN as a TIN. In any case, so long as I fail to refute any statement of implication that I have a TIN, I'm presumed to be a "taxpayer" and the IRS can probably compel me to pay income taxes.

Section 301.6724-1(e)(1)(i) of the regulations provides that the filer must make an initial solicitation for the payee's TIN when the relationship between filer and payee begins.⁹

Section 301.6724-1(e)(1)(ii) of the [Code of Federal] regulations provides that the filer must undertake an annual *solicitation* if a TIN is not received as a result of an initial solicitation. The first annual solicitation must be made on or before December 31 of the year in which the relationship began or January 31 of the following year if the relationship began in December.

Section 301.6724-1(e)(1)(iii) of the regulations provides that if the filer does not receive a TIN as a result of the first annual solicitation, the filer must undertake a second annual solicitation. This solicitation must be made after the expiration of the annual solicitation period and on or before December 31 of the year immediately succeeding the calendar year in which the relationship began.¹⁰

Section 301.6724-1(e)(1)(v) of the regulations provides that the initial and first annual solicitations relate to the failures on returns filed for the year in which the relationship begins. The second annual solicitation relates to failures on returns filed for the year immediately following the year in which the relationship begins and for succeeding calendar years.¹¹

Section 301.6724-1(e)(2) of the regulations provides that the manner of making solicitations may be by mail or by telephone.

Section 301.6724-1(e)(2)(i) of the [Code of Federal] regulations provides that mail solicitations must include—

(A) a letter informing the payee that he or she must provide his or her TIN and that he or she is subject to a \$50.00 penalty imposed by the IRS under section 6723 if he or she fails to provide the TIN;¹²

(B) a Form W-9 or an acceptable substitute form on which the payee *can* include his or her TIN;¹³ and

(C) a return envelope for the payee to mail Form W-9 to the filer.

Section 301.6724-1(e)(2)(ii) of the regulations provides that a telephone solicitation must be reasonably designed and carried out in a manner conducive to obtaining a TIN. The filer must—

(A) complete a call to each person with a missing TIN;

(B) request the TIN of the payee;

(C) inform the payee that he or she will be subject to a \$50.00 penalty under section 6723 if he or she fails to furnish his or her TIN;

(D) maintain contemporaneous records showing that the solicitation was properly made; and

(E) provide contemporaneous records to the IRS upon request.

Section 301.6724-1(m) of the regulations provides that when seeking an administrative determination (after a penalty has been assessed), a filer must submit a written statement to the district director or the director of the service center where the returns are required to be filed. The statement must—¹⁴

(A) state the specific provision under which the waiver is being requested;

(B) set forth all the facts alleged as the basis for reasonable cause;

(C) contain the signature of the person required to file the return; and

⁹ Again, the employer is obligated to ask for an employee's TIN – which is not necessarily a SSN. But what happens if the employee unknowingly provides a SSN instead? I wouldn't be surprised if, in the sense that 5 pounds of potatoes and 5 pounds of beef both use the number "5" but identify two entirely different commodities, the SSN and the TIN can be identical numbers which nevertheless refer to two entirely different legal entities and obligations. I'll bet most employers don't even know they're asking for a TIN instead of a SSN, or if they know, don't realize the two "numbers" create hugely different legal consequences for their "employees".

¹⁰ Note that there is no obligation to "get" a TIN from the employee, only to *ask* when hiring and then ask again, every year, so long as the employee is still employed. Also, it appears that there may not be any clear obligation for the employee to "have" a TIN. But judging from this Department of Treasury document, the TIN seems to tie us to the IRS, while the SSN's nexus is less obvious.

¹¹ The employer's got to *ask* for your TIN when he hires you and again at the end of the first calendar year (twice in the first years). Afterwards, he must ask only once at the end of each calendar year.

¹² But if you don't have a TIN, you can't very well provide one, can you?

¹³ Ah ha! Does the IRS counsel suggest that the "payee" (employee) "can" (voluntarily?) designate himself as a "Taxpayer"?

¹⁴ Note that the "filer" is the *employer*, not employee.

(D) contain a declaration that it is made under penalties of perjury.

Thus, to summarize the foregoing: An employer who files with the Service certain information returns, with respect to an employee, must include the required identifying number under section 6109 of the Code. In the case of an individual, the identifying number is the individual's SSN. If an employer fails to include an employee's TIN on the information return and payee statement, the employer is subject to penalties under sections 6721 and 6722 of the Code.¹⁵

The regulations under section 6724 establish criteria for determining whether an employer has reasonable cause for failing to include an employee's TIN on a return, document, or information statement. The employer must solicit a new employee's TIN when that employee begins working for the employer. If the initial request fails, the employer must solicit the employee's TIN on or before December 31 of the employee's first year of employment, or by January 31 if employment began in December. If the second request fails, the employer must request the employee's TIN on or before December 31 of the employee's second year of employment. The employer's annual solicitations, by mail or by telephone, must inform the employee that he or she is subject to a \$50.00 penalty, and must maintain records of the various requests for the employee's TIN. An employer complying with these requirements will likely satisfy the reasonable cause standard of section 6724 of the Code. Generally, no more than two annual solicitations are required in order for an employer to establish reasonable cause.

Thus, the cited Code and regulations sections do not establish a blanket exemption from penalties for an employer who has not provided the employee's TIN because the employee has failed to obtain or furnish an SSN. Rather, these sections provide a method whereby an employer can establish, subject to verification by the Service, that the failure to provide an employee's TIN is due to reasonable cause and not to willful neglect. Further, compliance with the solicitation provisions of section 301.6724-1 of the regulations will not preclude the Service from contacting the employer every time a return, statement, or other document is filed that lacks a required TIN. In light of this, the employer must maintain documentation of its efforts to secure a TIN from any employee failing to provide the employer with his or her SSN for the duration of that employee's employment.¹⁶

We hope this information will be helpful to you in replying to your constituent.

Sincerely yours,
Rudolf M. Planert
Assistant Chief Counsel
(Income Tax & Accounting)
Chief, Branch 4

For the most **accurate information**
on the so-called "income" tax
and the 16th Amendment, see:

<http://www.ottoskinner.com>

or write to otto@ottoskinner.com

Don't be fooled by those who claim that the
16th Amendment authorized a direct tax.

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¹⁵ Why is the *individual's* "identifying number" declared to be the SSN, but the employer is required to provide the *employee's* TIN? (Curiously, the index on "Taxpayer ID numbers" does not tell how to get one.) Something sneaky may be happening here. The letter's next paragraph offers a clue: "The employer must solicit a new employee's TIN when the employee begins working for the employer." If there is a conversion from SSN to TIN, it apparently occurs when the individual *begins working for the corporation* and thereby becomes an "employee".

¹⁶ In other words, the *administrative* hassles that might ensue should an employer fail to provide an employee's TIN may make the threatened \$50 penalty look trivial. I.e., although the IRS probably lacks the resources to harass more than a small percentage of employers, by threatening to harass (a few) employers with endless "paper terrorist" requests for missing TINs, virtually all employers are intimidated into an employment policy of simply not hiring any individual who's too "uppity" to provide a SSN. Even though the "SSN-less" job applicant may be perfectly legal, why risk all that administrative hassle (plus the possibility triggering an *audit*) by employing folks outside the IRS's "recommendations"?