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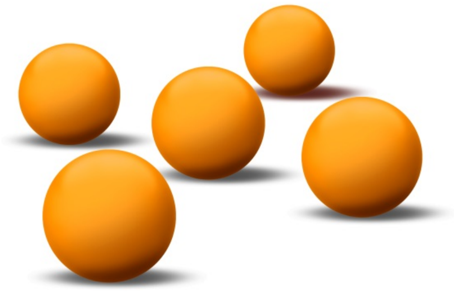

Hold that Friend Request: Legal Traps in a Post-Facebook Work Environment

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Many well-meaning managers engage with employees on social media websites, and doing so provides a host of benefits: stronger relationships between employees and management; a sense of collegiality; instant updates on employees' life changes. However, accessing employees' social media pages could expose the employer to legal liability. Employers, and their management teams, would be wise to consider how knowledge gleaned from employees' social media accounts could shape future litigation.

Social Media Exposes Us to Unprecedented Amounts of Information and Access

The extent of social media use today is unprecedented. According to the Pew Research Center's Social Networking Fact Sheet, as of January 2014, 74% of adults use social networking sites. The workplace is no different. A 2013 Proskauer study, Social Media in the Workplace Around the World 3.0, revealed that approximately 90% of companies use social media for business purposes. Moreover, 70% of employers reported taking disciplinary action against employees for misuse of social media. Not surprisingly, as many as 80% of employers now have social media policies, and more than half of businesses reported that they had updated their social media policies in the last year. Employers who have yet to update social media policies would be wise to do so, and it is important to keep the following considerations in mind when making changes.

What You Need to Know About Social Media Information and the Law

According to another 2013 survey, Social Media Statistics for 2013, 25% of Facebook users do not bother with privacy settings. So, employers are almost guaranteed to learn potentially protected information about employees simply by becoming a Facebook friend. While some of that knowledge may be to an employer's benefit, much of it can present legal traps, including discrimination claims, retaliation claims, or claims under the National Labor Relations Act. For instance, if an employer declines to hire someone after having looked at the individual's Facebook page, which likely contains a birthdate and a picture demonstrating race and/or sex, an employer may have opened itself up to an age, race, or sex discrimination claim.

In particular, the National Labor Relations Board, the government agency responsible for enforcing the National Labor Relations Act, has been very active on the social media front. While the Labor Board and the Act it enforces have long been associated with unionized workforces, the Board has been vigorously pursuing complaints by employees in non-unionized workplaces as well. Section 7 of the NLRA gives employees the right to choose to engage in union activities and "protected concerted activity." "Protected concerted activity" is activity involving two or more employees with the purpose of effecting changes in "terms and conditions of employment." So, as long as two or more employees are involved in activity that purports to affect their terms and conditions of employment (such as discussions of wages and benefits with other employees), that activity is protected. The Labor Board has been clear that this protection of "concerted activity" extends to social media activity.

For example, on March 31, 2015, the Board upheld a decision by an Administrative Law Judge that an employee's uncouth Facebook posts constituted protected activity for which he could not be discharged. In this case, the employer terminated the employee for posting a Facebook message calling his supervisor a "nasty mother f----r" and stating "f--k his mother and his entire f-----g family!!!!" The employee's post continued "What a LOSER!!!! Vote YES for the UNION!!!!!!!" The Board agreed with the ALJ that the employee's termination violated the National Labor Relations Act because the employee's behavior was the culmination of months of concertedly protesting disrespectful treatment by managers. The Board further noted that the employee's conduct did not interfere with the employer's work or customer relations, and managers and employees constantly used vulgar language in the workplace. This case teaches us that even negative comments may be protected by the NLRA, and employers must exercise great caution in making any disciplinary decisions based on an employee's social media activity.

Of course, given the foregoing, employers might consider giving up employee social media interaction altogether. Yet using social media can help employers find out important non-protected information about applicants and employees as well. For example, it would be helpful to know that the person who claimed to have worked for twelve years at his prior place of employment lists on Facebook that he held three jobs in the past two years.

With this in mind, several steps can help protect employers from potential liability. First, consider any state laws governing employee privacy. While Alabama statutes do not address privacy of employees' social media accounts, many states, such as Colorado and Oregon, forbid employers from requiring applicants or employees to disclose their social media passwords or make their social media accounts accessible. Second, create a protocol for social media so that management knows the boundaries of social media use. Third, consider having a non-decision maker perform the search and report only non-protected information. In other words, have someone not making the employment decision look at an applicant or employee's social media profile and screen out any information that might indicate the person's age, race, national origin, or other protected characteristics.

Fourth, if you do screen or monitor applicants or employees' social media accounts, do so uniformly. There may be a harassment claim lurking for the employer who looks at female applicants' Facebook pages before deciding whether to hire them, but not male applicants' pages. Finally, the Labor Board's recent decisions counsel that employers should closely examine any discipline resulting from Facebook or social media activity. While social media is a rapidly evolving landscape, these simple steps could provide employers with valuable protection.

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