

New scrutiny may change the way employers access social media

According to some reports, 45% of employers use social networking sites such as Facebook to screen job applicants, 35% say they have rejected applicants because of online information they discovered, such as inappropriate pictures, references to substance abuse and bad-mouthing former employers.

The incentives for an employer to check social media are clear: It's fast, free and easy. Social networking sites contain a potential treasure trove of information about an applicant's character.

Before you plunge into cyberspace in search of information on applicants (or current employees), understand the legal implications. Employers' efforts to access employees' and applicants' private social media websites have recently been subject to increased scrutiny by New York and federal legislators.

Lawmakers see danger ahead

In April, New York State Sen. Liz Krueger (D-Manhattan) introduced legislation that would prohibit employers from requiring employees or job applicants to disclose login names, passwords or other means for accessing personal Internet accounts or services. That includes private social media account login names and personal email account passwords.

The legislation would prohibit employers from discharging, disciplining or otherwise penalizing an employee or failing to hire an applicant for refusing to provide access information. It would give the New York Attorney General authority to enjoin employers from committing such practices.

Employers could be subject to a \$300 fine for a first offense, going up to \$500 for each subsequent offense.

The New York bill follows the lead of other states. Maryland recently became the first state to prohibit employers from requiring that employees or applicants disclose social

media user names and passwords.

On the federal front, U.S. Sens. Charles Schumer (D-New York) and Richard Blumenthal (D-Connecticut) recently sent open letters to the EEOC and the U.S. Department of Justice urging them to investigate employers' practice of requiring applicants to provide Facebook and email passwords as a condition for job interviews.

Too much information

Even without login information or passwords, employers can learn a lot about applicants and employees. Use caution when doing so.

You may learn things about applicants that you cannot legally use to

Legislation in New York would prohibit employers from requiring disclosure of login names and passwords.

make hiring decisions, even though the information is publicly available. For example, employers all know that it is illegal to make a hiring decision based on an individual's race, religion, disability, sexual orientation or other protected characteristic. In New York, employers cannot ask applicants for those types of information.

But it is nearly impossible to visit a job applicant's Facebook page without discovering those types of information. In addition to the general information that may appear in an individual's Facebook profile—marital status, religion and age, for example—a profile picture may reveal his or her ethnicity and, if not already disclosed in the profile, the individual's sex.

In addition, most Facebook users post pictures of their family and friends on their pages, which may reveal a lot about their personal lives.

This too can present an employer with information it may not want to have.

For example, an employer might find pictures of a job applicant's baby shower on her Facebook page. Of course, an employer cannot legally refuse to hire the applicant because she is pregnant, but once it has the information it has increased the risk of having to defend such a claim.

Another problem: Social media sites can be misleading. Online profiles often contain inaccurate information and information that may be easily taken out of context or misunderstood. An individual may have little control over the information appearing on his or her "wall" or message board.

Organized labor concerns

In addition to containing information about an applicant's membership in classifications protected under the equal employment opportunity laws, an individual's union activity or affiliation may also be readily discoverable.

In addition to general "union organizing" pages, many unions have Facebook pages. In using social media screening, an employer might discover that a particular job applicant "likes" a union that has been attempting to organize the company at which the applicant has applied.

It would be unlawful for an employer to discriminate against an applicant based on such union activity or affiliation.

What should employers do?

For now, make sure you pay attention to legislative efforts to curb employer use of social media to screen job applicants or check up on employees. You may also want to have your attorney review your current social media policies as they relate to hiring and discipline.

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