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LABOR/EMPLOYMENT

Labor: The legal implications of social networks in the workplace

Employers need to be honest and fair when developing social media policies or checking out future hires.

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The revolution that is social media is not only causing major reverberations in the workplace, it is increasing corporate exposure to employment-related claims. While more and more employers are using information gathered on social media sites to assist in making employment decisions, they need to understand the legal implications of relying on such information. Emerging legal risks include potential violation of federal and state employment discrimination statutes and unfair labor practice claims arising from an employer's response to protected concerted activity occurring on a social media site.

Potential violations of anti-discrimination statutes occur when an employer discovers information about a job applicant by viewing social networking sites that it might not otherwise have learned until a physical interview, if even then. While a job application, or even an interview, may not involve the disclosure of information about an individual's race, religion, marital status, sexual orientation or disability, such information may be readily apparent on an individual's Facebook page.

Although discovery of such potentially sensitive information is not unlawful, an individual's status in one or more of these categories cannot be used as a basis for employment decisions. By exposing hiring staff to personal information about job applicants via online searches they have conducted, an employer may find it more difficult to explain the legitimate basis for its hiring decision and establish that no inappropriate considerations influenced the hiring decision. Of course, the first line of defense to any claim of discriminatory hiring is a good equal employment opportunity policy, which every employer should have, distribute to its staff and regularly update.

Of perhaps greatest concern to employers, the National Labor Relations Board (NLRB) has recently turned its enforcement efforts toward the world of social media. First, the NLRB examined situations involving employee discipline stemming from the employee's use of online sites. The main issues in these cases are whether the employee's online activity represents "concerted activity" and whether it is protected activity relating to the terms and conditions of employment. Next, the NLRB examined employers' social media policies to determine whether the policies are overbroad. Specifically, the NLRB examined whether the policies are so vague that they have the effect of chilling in the exercise of employees' rights.

Employers should never use false information or false aliases to attempt to access social networking sites to collect information about applicants or current employees. A number of common law causes of action are implicated when an employer pretends to be someone they are not to gain access to an applicant or employee's private social networking site.

In addition, several federal statutes, such as the Federal Computer Fraud and Abuse Act and the Stored Communications Act, prohibit accessing a computer or network without authorization and create criminal and civil liability for violations. As in so many areas, the primary rule for employers searching social networking sites for information about prospective or current employees is to be honest.

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