The Expanding Law on Employee Use of Social Media

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Employee use of social media, such as Facebook, Twitter, MySpace and other internet social sites, whether at the workplace and during work time or off-duty, can be a minefield for both employees and employers.

Employers should exercise caution about gathering information about employees through their social media sites. Initially, employers should never mandate or request password information from a potential employee, because courts have found this to be a clear invasion of privacy. At the hiring phase, employers should be careful when gathering information about potential employees from social media, because that practice may subject them to legal risks. An employer may discover information such as a potential employee's religious beliefs or medical history, which the employer would not have known otherwise, which can put an employer at risk for a claim of discrimination if ultimately the potential candidate is not hired, pursuant to state laws, such as the New Jersey Law Against Discrimination and federal law, such as Title VII of the Civil Rights Act. Once an employee begins work, an employer's risks continue if the employer accesses or has the capability to access an employee's social media websites. The same risk of a discrimination lawsuit applies if an employer discovers information about an employee's protected status and the employee has been subject to discipline and/or termination, because the employee can claim that the employer's actions were motivated by knowledge of his/her protected status and discriminatory animus. An employer's knowledge of an employee's off-duty conduct through such sites may also subject an employer to an invasion of privacy claim, as well as discrimination and retaliation claims. Moreover, recent rulings of the National Labor Relations Board have also determined that postings on social media websites can constitute "concerted activities" for the purposes of collective bargaining under Section 7 of the National Labor Relations Act, if an employee is found to have engaged in a discussion of the terms and conditions of his or her employment. An employer may be subject to an "unfair labor practice" charge under the National Labor Relations Act if it attempts to regulate this activity or discipline an employee for his or her postings which are considered "concerted activity."

Employees also need to be wary of posting information on social media websites, because doing so can subject them to legitimate legal claims and possibly disciplinary action by employers. An employee should never post the confidential and proprietary information or trade secrets of the employer on any website, which likely will be held as violating common law and/or any non-disclosure agreement that the employee has signed (which are commonplace). Employees should also be aware that much of the personal information or discussions that they post on social media websites will not be considered confidential or private pursuant to the law. In particular, any information open for the general public to view on the public pages of an employee's social media sites will not be considered confidential. Even the information posted on the employee's private part of his or her social media site, such as on Facebook, where only "friends" can view certain pages, may be subject to employer access, if a court finds that legally relevant information exists on the employee's public page, entitling the employer to review the employee's "private" pages in order to determine if relevant information exists there also. In addition, employees must be cautious that "friends" do not provide their website postings to an employer, because the employer will not be found to have violated the employee's privacy unless the employer forced the disclosure of these pages. Finally, employees must be wary of posting derogatory comments that do not concern the "terms and conditions" of employment, because those postings may not be considered "concerted activity," and thus an employer can discipline or terminate the employee for such postings.

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