EMPLOYMENT LAW- SOCIAL MEDIA ISSUES IN THE WORKPLACE

By: Joette S. Doran

It is clear that social media use is on the rise. On October 4, 2012, Facebook announced that has 1 billion monthly users which doubles the 500 million users it had in July 2010. Given this activity and the potential for employer and employee consequences from such usage, social media issues have become an area of importance and concern for legislators and state and federal administrative agencies and courts.

Illinois was the second state after Maryland to pass legislation that prohibits employers from requesting employee passwords to social media sites from potential and current employees. See Right to Privacy in the Workplace Act, 820 ILCS 55/10. Signed on August 1, 2012, the law takes effect on January 1, 2013 and provides in part: "It shall be unlawful for any employer to request or require any employee or prospective employee to provide any password or other related account information in order to gain access to the employee's or prospective employee's account or profile on a social networking website or to demand access in any manner to an employee's or prospective employee's account or profile on a social networking website." The law applies to Illinois employers of all sizes, is enforced by the Illinois Department of Labor and provides a private right of action for individuals to bring suit against the employer in state court.

While this law prohibits accessing private accounts subject to password protection, even if the employee or job applicant has a public account, an employer will likely be privy to information that is not job-related which could provide the individual with a basis for a legal claim based on protected class status or protected activity. By accessing photos or postings, social media sites may reveal an individual's protected attributes such as race, religion, national origin, age, disability, pregnancy, genetic information, sexual orientation, marital status and other protected characteristics protected under state and federal laws. As such, viewing employee or applicant personal information on social media sites may trigger protections under state and federal anti-discrimination laws such as Title VII, the Age Discrimination in Employment and The Americans with Disabilities Act. Moreover, reliance on such information in making an employment decision could give rise to a claim under the Right to Privacy in the Workplace Act, 820 ILCS 55/1, which prohibits the refusal to hire, terminate employment, or otherwise disadvantage any person because he or she uses alcohol and/or tobacco away from the job site on non-working time.

In addition to the state and anti-discrimination, employers need to be careful not to violate the federal Stored Communications Act, 18 U.S.C. § 2701 et seq., (the "SCA"). The SCA regulates when an electronic communication service provider may disclose the contents of or other information about a customer's emails and other electronic communications to private parties. Under SCA, an offense is committed by anyone who: "(1) intentionally accesses without authorization a facility through which an electronic communication service is provided;" or "(2) intentionally exceeds an authorization to access that facility; and thereby obtains...[an] electronic communication while it is in electronic storage in such system." 18 U.S.C. §

2701(a)(1)-(2). However, the SCA does not apply to an "electronic communication [that] is readily accessible to the general public." 18 U.S.C. § 2511(2)(g).

In *Maremont v. Susan Fredman Design Group, Ltd*., Case No. 10 C 7811 (N.D. Ill. Dec. 7, 2011), U.S. District Court for the Northern District of Illinois ruled an employer may be liable under the SCA where the employer posted entries on an employee's personal Facebook page and posted Tweets on her personal Twitter account to promote its business without her authorization. The Court denied the Defendants Motion for Summary Judgment regarding the SCA ruling that there are disputed issues of material fact whether the Defendants exceed their authority in obtaining access to the plaintiff's personal Twitter and Facebook accounts. In *Pietrylo v. Hillstone Restaurant* Group, (06-5754) (July 28, 2008) the District Court of New Jersey applied the SCA to an employer who accessed a cite using an employee's MySpace login. The Court denied the Defendant's Motion for Summary Judgment ruling that a jury could reasonably infer from the plaintiff's testimony that she felt pressured to give the information so the employee's purported "authorization" was coerced or provided under pressure.

Employers should be informed that viewing social media sources for information can create potential claims from job applicants and employees. Once social media information becomes known to an employer either legally or illegally, an applicant or employee may allege that the employer relied on protected class status or activity when making the employment decision. Moreover, if an employer uses an employee's social media account without permission regardless of whether these accounts have promoted or discussed with the employer in the past, the employer may be liable for unauthorized access.

Next month I will discuss considerations for drafting a social media policy.

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