Social Media: **Changing** the Face of **Employment Law**

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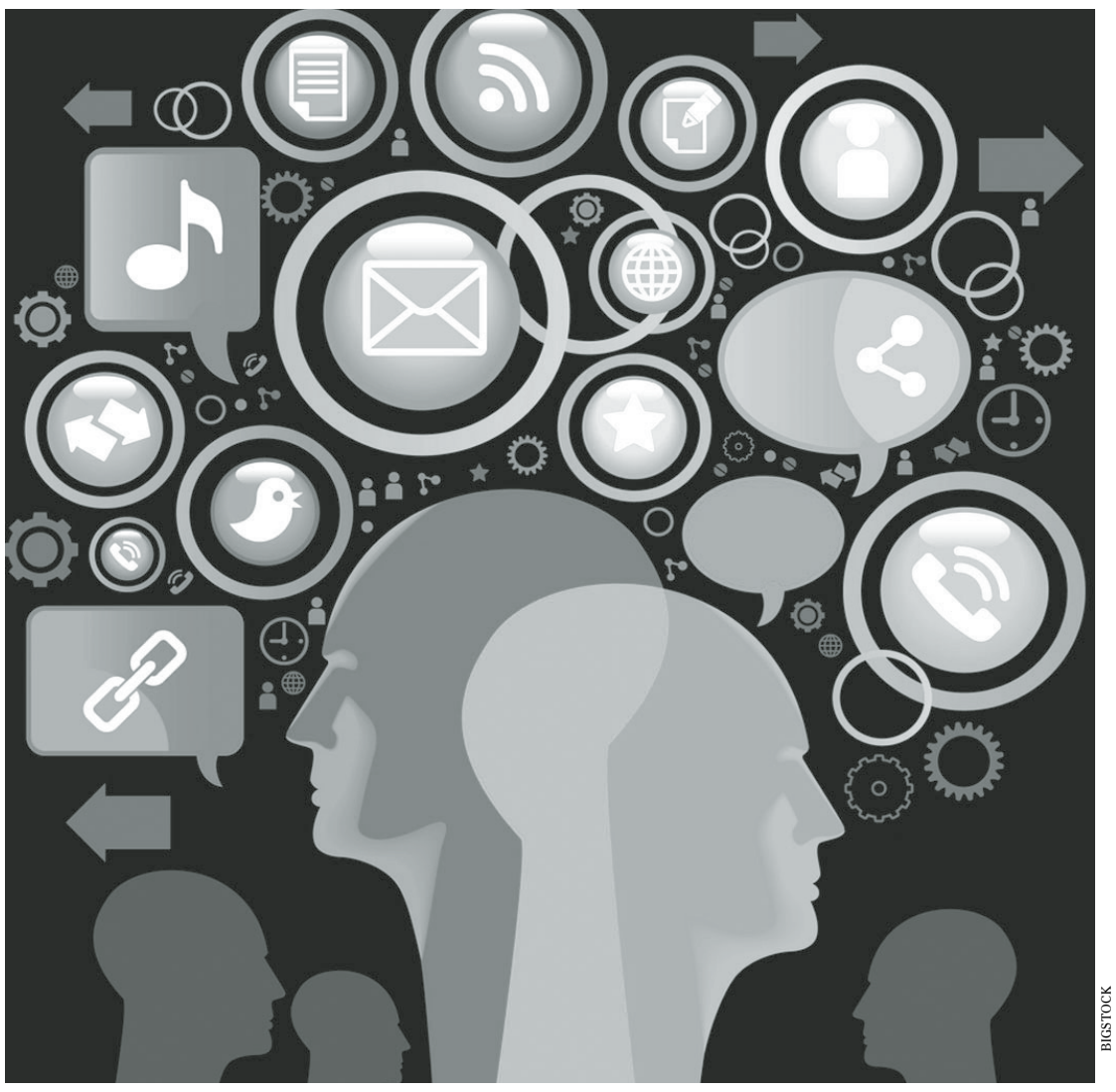

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Before social media changed the world, employers hired employees based on a one-page resume, some perfunctory references and an interview. After the employee was hired, most of the scuttlebutt around the office was shared in chatter at the water cooler, usually out of the earshot of a supervisor and thus, no harm no foul.

With the advent of social media, every aspect of a person's life in and out of the workplace is fair game for employers and anyone else who cares to look. Management can find out what employees think about the company, as can everyone else, including the customers the employer hopes to service. The power of communication through the use of social media is unmistakable and unstoppable. But with great power comes great responsibility—for employees and their employers.

Legal issues involving the use (and misuse) of social media are now coming before the courts for resolution. Management as well as employees need to know what they can and cannot do to avoid finding themselves embroiled in litigation or terminated from their jobs with little recourse. These issues include whether an employer can use information found on a job applicant's social media sites in considering whether to hire that candidate; whether an employer can force an employee or job applicant to provide passwords to access his/her Facebook page; whether an employee or prospective employee has any privacy rights in connection with information he/she posts on the web; whether an employee is protected when he/she posts something on social media that an employer finds unacceptable; and whether the employer can be liable for its employees' postings.

Pre-Hiring

Questions about religion, political affiliation and marital status are known to be off limits during the interview of a candidate for employment. Employers do not even want to receive a picture of a candidate for employment as it could lead to claims that the candidate's age or race played a role in the employment decision. Yet, with a world of information at the employer's fingertips at the touch of a key, some employers feel it would almost be an abdication of responsibility not to study a candidate's online presence before making the hiring decision.

Recognizing that users' postings—public and private—provide potentially useful information in assessing applicants for employment, a new name has been given to the practice: "cyber screening." According to Career Builders, 65 percent of employers surveyed said they research candidates to see if the job seeker presents themselves professionally. Fifty-one percent want to know if the candidate is a good fit for the company culture, and another 45 percent want to learn more about his/her qualifications. A third (34 percent) of employers who scan social media profiles said they have found content that has caused them not to hire the candidate and about half of those employers said they did not offer a job candidate the position because of provocative or inappropriate photos and information posted on his/her profile.[1]

Two issues are raised by "cyber screening." The first is will employers subject themselves to liability by simply gathering information such as a person's race or marital status from the candidate's public profile? The simple answer is: Possibly. If the employer actually has a written policy that it will engage in cyber screening, the risk increases that a candidate will assert a claim that he/she did not get the job because the employer took into account that candidate's race, marital status, et al. As such, an employer might be better off not instituting a formal policy.

Taking it to another level, another issue has become a topic of great debate. Specifically, some employers are not satisfied with merely viewing the public portion of a candidate's online profile. There are many instances where employers have demanded that a candidate produce passwords so it can access the private portion of the candidate's social media site. The ACLU and privacy advocates lobbied hard for legislative protections that would limit the use of private social media in hiring and prohibit employers from requiring applicants and employees to provide usernames and passwords to their social media sites. Bills were introduced in many state legislative bodies, and, on Oct. 1, 2012, Maryland's "User Name and Password Privacy and Exclusions Act" became law, making Maryland the first state to enact such legislation. The Maryland statute prohibits all employers doing business in the state from requesting or requiring that an employee or job applicant disclose any username, password or other means of accessing an electronic communications personal account or service, including a social media account. In the ensuing 16 months, Arkansas, California, Colorado, Illinois, Michigan, Nevada, New Jersey, New Mexico, Oregon, Utah and Washington passed legislation prohibiting employers from requiring prospective and current employees to disclose a username or password to a social media account. Several more, including New York state, introduced such legislation in 2013, and many are expected to be signed into law in 2014.[2]

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The legislation introduced in the New York State Legislature would prohibit an employer or educational institution from requesting or requiring an employee, applicant or student to disclose any username, password or other means for accessing a personal account through specified electronic communications devices.

Recently, New Jersey became the twelfth state to enact social media password protection legislation, which became effective Dec. 1, 2013.[3] The law prohibits an employer from retaliating or discriminating against any job applicant or current employee for any of the following conduct: (1) refusing to comply with an employer's request for login information for a personal media account; (2) reporting a violation of the law to New Jersey's Commissioner of Labor and Work Force Development; (3) testifying, assisting, or participating in an investigation concerning a violation of the law; (4) otherwise opposing a violation of the law.

The recently enacted and pending state laws have distinct commonality with respect to the prohibitions against requesting disclosure of usernames and passwords, but they vary materially in other respects. Some, for example, exempt law enforcement agencies that screen applicants for law enforcement positions. New Mexico's law protects only job applicants, not current employees. Some provide a private right of action in the event of violation, some do not. And, enforcement procedures and penalties for non-compliance vary widely. As new state laws are added to the already complex fabric of state legislation, national and multi-state employers must adopt hiring policies that comply with dozens of divergent statutes and adjust them as pending bills are voted upon and become law. This rather daunting challenge, together with the risks inherent in basing employment decisions on information gleaned from the Internet, may well cause employers to rethink their reliance on social media searches as a hiring tool—at least until the passage of federal legislation that may bring a level of consistency and symmetry to the law. Currently, the Social Networking Online Protection Act, introduced by Congressman Eliot Engel, is pending in the House of Representatives. It would prohibit employers from (1) requiring or requesting that an employee or applicant for employment provide a username, password, or any other means for accessing a private email account or personal account on a social networking website; and (2) discharging, disciplining, discriminating against, denying employment or promotion to, or threatening to take any such action against any employee or applicant who refuses to provide such information, files a complaint or institutes a proceeding under the Act, or testifies in any such proceeding. The act would provide for civil penalties and injunctive relief in the event of violation.[4]

Post-Employment Dangers Lurk

The difficulties inherent in navigating the world of social media do not end after the candidate becomes an employee. Post-hiring questions abound such as: Can an employer punish an employee for online postings? Can an employee disparage the company on social media? One of the growing bodies of law as it pertains to an employee's online postings, whether on Facebook, Twitter or blogs, deals with the question of whether the on-line speech is "protected concerted activity" under the National Labor Relations Act (NLRA).[5] In 2011, the NLRB issued the first decision after a full hearing regarding employee social media use and NLRA rights. In *Hispanics United of Buffalo*,[6] the Board ordered reinstatement of five employees who were found to have been unlawfully discharged for their use of social media to discuss the terms and conditions of their employment.

In 2012, the NLRB's Acting General Counsel released two memos detailing the results of investigations in dozens of social media cases. The memos underscored two main points: (1) employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees;[7] and (2) an employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees. Demonstrating that the use of social media will only expand in the workplace, on May 7, 2013 the Office of the General Counsel of the NLRB issued an "Advice Memorandum" in connection with a pending matter in which it concluded that the employee who, together with nine other current and former employees of the employer, engaged in a Facebook group message to organize a social event.[8] At some point during the group's e-conversation, the employee expressed her disdain toward a supervisor who had tried to speak to her. She said that she told this supervisor to "back the freak off" and had other choice words for her employer. The General Counsel concluded that the employee was not engaged in concerted activity when she posted her comments on Facebook. However, it also concluded that the employer violated §8(a)(1) of the NLRA by forbidding the employee to access Facebook at work or post similar online commentary at any time during the workday. Furthermore, the General Counsel recommended that the Regional Office use the above case "as a vehicle to argue that [the decision] in *The Guard Publishing Company d/b/a The Register-Guard*, should be overturned.[9] In *Guard Publishing*, the NLRB held that employees have no statutory right to use the employer's email system for §7 purposes. That decision has been extended to the use of employer's electronic equipment in general. According to the General Counsel, the reversal of *Guard* » Page 13

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NLRB

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framework set forth in the NLRB's reports on social media policies, the Board has continued to scrutinize employer social media policies and has struck down such policies where they explicitly restrict (or could potentially restrict) an employee's §7 activities. For example, in *Dish Network*,[6] the NLRB adopted an Administrative Law Judge's (ALJ) decision in which the ALJ, consistent with the Board's reasoning in the social media reports, found that the employer's social media policy was unlawful because it violated an employee's §7 rights. Specifically, the ALJ found that the employer's social media policy, which prohibited employees from making "disparaging or defamatory comments about DISH Network," was unlawful because such restrictions on negative commentary about an employer tend to chill an employee's §7 rights. Likewise, the ALJ found that the employer's policy of banning employees from engaging in negative electronic discussions during "Company time" was also presumptively invalid because it failed to clearly convey that union solicitation can still occur during breaks and other nonworking hours at the company.

Similarly, in *Butler Medical Transport*,[7] an ALJ found an employer's social media policy to be unlawful. In particular, the ALJ analyzed the employer's social media policy which, among other things, instructed employees to "refrain from using social networking [sites] which could discredit Butler Medical … ."[8] In reviewing this policy, the ALJ found that the policy was unlawful under the NLRA because employees could reasonably construe the policy to prohibit §7 activity. Specifically, the ALJ found that "[t]he rule on its face is broad enough to prohibit posting and distribution of papers regarding wages, hours and other working conditions [and] [i]t can reasonably be read to apply to non-work time and non-work areas."[9]

As exemplified by these recent decisions, the Board is continuing to review employer social media policies and is more than willing to strike down such policies as unlawful if there is any potential restriction of employees' §7 rights.

Adverse Employment Actions

With respect to employer use of social media to make employment related decisions, the NLRB's decisions in *Karl Knauz Motors*,[10] and *Hispanics United of Buffalo*,[11] detail how the Board will analyze social media-related terminations in the future.

In *Karl Knauz Motors*, an ALJ held that certain Facebook postings by an employee did not constitute protected, concerted activity under §7 and, therefore, the employee's termination was not unlawful.[12] In reaching this decision, the ALJ reviewed the Facebook posts at issue, which included criticism of events held by the employer and making fun of a car accident which occurred on the employer's related property. The ALJ found that since the employer terminated the employee for the comments made about the car accident, the termination was lawful. Specifically, the ALJ found that making fun of a car accident which occurred on a related property had "no connection to any of the employees' terms and conditions of employment" and, therefore, the posts were not protected under §7 of the NLRA.[13]

In *Hispanics United*, the NLRB ordered the employer to reinstate five workers that it previously terminated based on comments the workers posted on their respective Facebook pages. In reaching this decision, the NLRB delineated the standard that it will use when determining whether social media posts constitute protected, concerted activity under §7. The NLRB looked to past precedent, specifically, its two *Meyers Industries*[14] decisions from the 1980s. In these decisions, the Board held that an employee termination violates the NLRA if the following four elements are established: (1) the activity engaged in by the employee was "concerted" within the meaning of §7; (2) the employer knew of the concerted nature of the employee's activity; (3) the concerted activity was protected by the NLRA; and (4) the discipline or discharge was motivated by the employee's protected, concerted activity. In determining whether the activity was "concerted" activity, the NLRB again looked to the *Meyers Industries* decisions, which defined concerted activity as that which is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself"[15] and includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."[16] Applying these definitions, the NLRB found that the Facebook posts were protected, concerted activity because one of the terminated employees specifically solicited comments from her fellow co-workers about perceived complaints from another co-worker. The Board interpreted this solicitation as the employees taking a first step toward group action to defend themselves against accusations that they reasonably believed a co-worker was going to make to management.

With *Karl Knauz Motors* and *Hispanics United* as guidance, the Board has continued to issue orders finding employer workplace decisions premised upon an employee's social media postings to be unlawful. For instance, in *Butler Medical*, the ALJ found that the employer's termination of an employee based upon postings he made on Facebook to be unlawful.[17] In the postings at issue, the employee discussed issues at work, including the condition of the employer's vehicles, and he also suggested that a former coworker contact an attorney about his recent termination from the company. This Facebook conversation was delivered to the employer and the employee was terminated.

The ALJ found that the termination violated the NLRA because the Facebook posting constituted protected, concerted activity.

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Indeed, the ALJ found that since the employee at issue was advising a former coworker to contact an attorney regarding his belief that he was terminated for complaining about the condition of the employer's vehicles, and since the condition of the employer's vehicles was a matter of mutual concern among employees, the employees were making common cause regarding a matter of concern to most employees. Therefore, the Facebook posting was protected, concerted activity and the termination of the employee was unlawful.

Likewise, in *Design Technology Group*,[18] the NLRB found that a termination premised upon a Facebook posting was unlawful because the employees' Facebook conversation was protected, concerted activity. In this matter, the employer terminated a number of employees who took to Facebook to complain about the conduct of a supervisor, the safety of the neighborhood they worked in, and the concerns they had about working late. One employee also mentioned that he could bring in a California labor law book to determine if the employer was violating California law. The Board found these complaints to be protected, concerted activity under §7 because the complaints related to the terms and conditions of employment and, therefore, the termination of the employees was improper.

Best Practices

In light of these recent NLRB decisions, the NLRB has signaled that (i) the Board will continue to review social media policies with a critical eye and will not hesitate to strike down policies as unlawful, and (ii) the Board will continue to take an expansive view regarding whether postings on social media will be considered protected, concerted activity. Given the NLRB's current position, employers are well advised to take certain steps to ensure that their social media policies pass muster, while continuing to protect themselves in situations where an employee has posted unfavorable comments about the employer on social media.

First, given the NLRB's stated position on social media policies, and its provision of a sample policy for employers, employers should review their current social media policy and compare it against the NLRB's sample policy, to ensure that it does not infringe on an employee's §7 rights and that the policy would pass NLRB scrutiny if challenged.

Second, given the NLRB's recent decisions regarding social media-related terminations, employers must be extra cautious when taking adverse action against an employee for postings the employee made on a social media website. This means that employers, before terminating an employee for social media posts, should closely review and investigate the posts at issue to determine if they are indeed related to the employees' terms and conditions of employment. If the social media posts are related to the terms and conditions of employment, terminating the employee for these posts would run afoul of the NLRA.

Finally, if a situation arises where the decision is made to terminate an employee for reasons unrelated to social media postings, but the employee has made social media postings related to the terms and conditions of employment, the employer should make it clear that the termination is not related to the negative social media postings. This can be accomplished by clearly delineating, in a termination letter or otherwise, the reasons for the termination.

In conclusion, given the NLRB's stated intent to continue its focus on social media issues, employers must take care to ensure that their social media policies and practices do not infringe on employee §7 rights.

1. See Abigail Rubenstein, "NLRB Chairman Lays Out Approach to Social Media Cases," Law360 (Jan. 21, 2014, 8:34 PM), http://www.law360.com/employment/articles/502701?nl_pk=28762f1d-ec1c-43a0-b672-eac751481d71.
2. See NLRB, Office of the Gen. Counsel, Report of Acting General Counsel Concerning Social Media Cases (May 30, 2012) (hereinafter NLRB Report), available at http://mynlrb.nlrb.gov/link/document.aspx/09031d4580a375cd.
3. Section 8(a)(1) of the NLRA makes it an "unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7."
4. See NLRB Report at 3.
5. Id. at 22-24.
6. 359 N.L.R.B. 108 (2013).
7. *Butler Med. Transp.*, 05-CA-097810, JD-58-13 (Sept. 4, 2013).
8. Id. at 7.
9. Id.
10. 358 N.L.R.B. 164 (2012).
11. 359 N.L.R.B. 37 (2012).
12. On Sept. 28, 2012, the NLRB affirmed the ALJ's findings with respect to the employee terminations.
13. *Karl Knauz Motors*, 358 N.L.R.B. at *11.
14. *Meyers Indus.*, 268 NLRB 493 (1983) (*Meyers Industries I*) and Meyers Indus., 281 NLRB 882 (1986) (*Meyers Industries II*).
15. *Hispanics United*, 359 N.L.R.B. at *2 (quoting *Meyers* Industries I, 268 NLRB at 497).
16. *Hispanics United*, 359 N.L.R.B. at *2 (quoting *Meyers Industries II*, 281 NLRB at 887).
17. *Butler Med. Transp.*, 05-CA-097810, JD-58-13 (Sept. 4, 2013).
18. 359 N.L.R.B. 96 (2013).

Face

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Publishing would certainly expand the ability of employees to organize and engage in union related activity. In the event that *Register Guard* was overturned, any blanket prohibition of instant messaging with friends and surfing the Internet during working hours would be deemed unlawful as overly broad.

As for public employees, their social media speech is protected by the First Amendment. The Fourth Circuit decided a case in September 2013 that should serve as a warning to public employers who take adverse actions against employees based on their use of social media. In *Bland v. B.J. Roberts*, two employees of the then-elected sheriff, who was in a re-election campaign, engaged in activity on Facebook that cost them their jobs and spurred a lawsuit.[10] The acts consisted of one employee "Liking" the opposing candidate's campaign page on Facebook and the second employee signing onto the same opposing candidate's campaign Facebook page and posting an entry on the page indicating [his] support for his campaign.

The district court granted summary judgment in favor of the employer, concluding that one employee's "merely 'Liking' a Facebook page is insufficient speech to merit constitutional protection" and that the second employee did not sufficiently allege that he engaged in speech because the record did not sufficiently describe what statement he had made on the Facebook page. The Fourth Circuit reversed, holding that, inter alia, "Liking" the campaign page constituted pure speech as well as symbolic expression stating "it is the Internet equivalent of displaying a political sign in one's front yard, which the Supreme Court has held is substantive speech."[11] As for the second employee, the court ruled that a posting on a campaign's Facebook page indicating support for the candidate constituted speech within the meaning of the First Amendment. For the same reasons as applied to the first employee's speech, the court found that the second's speech "was made in his capacity as a private citizen on a matter of public concern."[12]

Under New York Law, both public and private employees are protected by New York State Labor Law 201-d, which provides, in pertinent part:

> [It] shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of … (c) an individual's legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property.[13]

While there appear to be no reported cases, yet, associating this section with social media, spending time on Facebook is, for many, a type of "recreational" activity that should be covered under the statute.

Even if the employer does not take action against an employee for social media postings, it may still find itself in violation of the law if it simply monitors the employee's social media presence. In one New Jersey case, *Pietrylo v. Hillstone Restaurant Group*,[14] the court found sufficient evidence supporting a finding that employees' managers violated the U.S. Stored Communications Act and the N.J. Wiretapping and Electronic Surveillance Control Act by knowingly accessing a chat-group on a social networking website without authorization.

Conclusion

There is little doubt that statutes and common law will have to adjust to the social media revolution. This was done before when businesses first communicated by mail, then fax and then email, allowing, at times, bad things to be communicated with the click of a key. Lawmakers, courts and businesses will adapt again to our rapidly changing communication environment.

1. Jacquelyn Smith, "How Social Media can Help (Or Hurt) You in Your Job Search," http://www.forbes.com/sites/jacquelynsmith/2013/04/16/how-social-media-can-help-or-hurt-your-job-search/.
2. Assembly Bill No. A00443-B; Senate Bill No. S02434-B.
3. New Jersey Password Protection Law Act 2878.
4. H.R. 537: Social Networking Online Protection Act.
5. Section 7 National Labor Relations Act.
6. *Hispanics United of Buffalo and Carlos Ortiz*, Case 03-CA-027872 (Dec. 14, 2012).
7. *Design Technology Group d/b/a Bettie Page Clothing*, 359 NLRB No. 96 (April 19, 2013) (the NLRB held that an employer unlawfully terminated employees who complained to management about working late hours in an unsafe neighborhood and who later continued their protest on Facebook. The Facebook postings were protected because they "were complaints among employees about the conduct of their supervisor as it related to their terms and conditions of employment and about management's refusal to address the employees' concerns."
8. Price Edwards & Company, Case 17-CA-92794.
9. *The Guard Publishing Company d/b/a The Register-Guard*, 351 NLRB No. 70 (Dec. 16, 2007).
10. *Bland v. Roberts*, 730 F.3d 368, 36 IER Cases 1045, 41 Media L. Rep. 2445 (4th Cir. (Va.) Sept. 18, 2013) (No. 12-1671), as amended (Sept. 23, 2013).
11. Id. at 386.
12. Id. at 389.
13. McKinney's Labor Law §201-d.
14. *Pietrylo v. Hillstone Restaurant Group*, 2009 WL 3128420 (D.N.J. Sept. 25, 2009).

Recruiting

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Federal Fair Credit Reporting Act.

Uniform Application of the Social Media Policy. If an employer chooses to screen applicants using social media, it should not do so selectively with some applicants and not others. It would be prudent for an employer to apply the same general protocols when checking social media for all applicants. Such consistency in application will help avoid discrimination claims based on applicants claiming that they were subject to more stringent requirements/checks than applicants of a different race or protected category.

On a related note, an employer should document its efforts to search an applicant's social media and retain copies of all documentation reviewed and considered in connection with the application process. Such documentation will be useful in establishing that the employer applied its policies in a consistent and non-discriminatory manner.

Flip Side: Turning a Blind Eye

Some employers, understandably, may opt to forgo using social media in the hiring process rather than risk a potential claim of discrimination. But this approach is not necessarily without risk. In New York, an employer may be liable to a person injured by an employee who the employer knew, or should have known, had a propensity to engage in the conduct which caused the injury. *Bouchard v. New York Archdiocese*, 719 F. Supp. 2d 255 (S.D.N.Y. 2010). A cause of action for negligent hiring or retention may be established if the employer had knowledge of facts that would lead a reasonably prudent person to investigate that prospective employee. *Richardson v. City of New York*, 2006 WL 3771115 (S.D.N.Y. Dec. 21, 2006).

The law does not require an employer to implement any specific background checks, or even require employers to conduct a criminal background check, except for certain positions where the employee deals with the public or vulnerable populations such as teachers and health care professionals. However, adopting the "hear no evil, see no evil" approach will not always serve to protect an employer from a negligent hiring or retention claim. An employer may, without taking any affirmative action or initiative to investigate, be told by a colleague, friend or other staff member about negative information posted on the Internet or social media site about a prospective applicant or existing employee. Take the extreme example: An employer is told that an applicant or employee purportedly posted that he or she was terminated from their prior employment after coming to work with a gun. In such instances, when the information conveyed to the employer is more than just unflattering, but may reveal a propensity on the part of the applicant or employee to cause harm or injury in the workplace, an employer may not be able to turn a blind eye and should consider conducting an appropriate level of investigation based on the reported information and circumstances.

Conclusion

Social media can be a valuable resource and an effective tool to recruit and screen applicants. However, employers should be wary about randomly checking the social media background of job applicants without first implementing policies and procedures to minimize the potential risk of discrimination or privacy claims by applicants who are denied employment.