

LABOR & EMPLOYMENT ALERT

FACEBOOK WARNS EMPLOYERS: ACCESSING EMPLOYEE ACCOUNTS MAY SPUR LEGAL ACTION

As social media websites become increasingly prevalent, questions regarding accessibility and privacy are on the rise. Given the flurry of requests by employers to obtain the passwords of prospective and current employees, last week, Facebook announced that it is taking a stand in order to protect the privacy of its users. The Company has made clear its intent to toughen its position on privacy and security. In addition, several members of the U.S. Congress have requested that federal agencies investigate whether demands by employers for access to applicants' social media accounts violate federal law, and they plan to introduce legislation that would ban companies from requiring current and prospective employees to provide access to their Facebook (and other social media) accounts as a condition of employment. Lawmakers in several states are also in the process of preparing similar legislation. What should employers do in the interim? Our advice: proceed carefully.

FACEBOOK'S POSITION

On March 23, 2012, Erin Egan, Chief Privacy Officer of Facebook, issued a statement on the Company's blog vowing to fight against a rising trend among employers to require prospective (and current) employees to provide access to their Facebook accounts. In the March 23, 2012 blog, Egan commented "we've seen a distressing increase in reports of employers or others seeking to gain inappropriate access to people's Facebook profiles or private information. This practice undermines the privacy expectations and the security of both the user and the user's friends. It also potentially exposes the employer who seeks this access to unanticipated legal liability." Egan further stated that the "most alarming of these practices is the reported incidents of employers asking prospective or actual employees to reveal their passwords," and commented that such requests violate Facebook's "Statement of Rights and Responsibilities" which prohibits individuals from soliciting login information for someone else's account and from sharing passwords with others.

Initially, Egan promised legal action against employers who request account passwords from potential employees, stating that Facebook will "take action to protect the privacy and security of our users, whether by engaging policymakers or, where appropriate, by initiating legal action, including shutting down applications that abuse their privileges." However, several days later, in a clarifying message sent to reporters, Facebook relaxed its stance slightly stating "[w]e don't think employers should be asking prospective employees to provide their passwords because we don't think it's the right the thing to do. While we do not have any immediate plans to take legal action against any specific employers, we look forward to engaging with policy makers and other stakeholders, to help better safeguard the privacy of our users."

PROPOSED LEGISLATION AND OTHER GOVERNMENTAL ACTIVITY

On March 25, 2012, U.S. Senators Richard Blumenthal (D-CT) and Charles E. Schumer (D-NY) issued letters to the Equal Employment Opportunity Commission ("EEOC") and the Department of Justice ("DOJ") calling on them to investigate the legality of the growing practice of employers

demanding that job applicants provide their user names and passwords for social networking and email websites, such as Facebook, to gain access to personal information like private photos, email messages, and biographical data. Sens. Blumenthal and Schumer expressed significant concern that this practice represents a serious intrusion into personal privacy that could set a dangerous precedent for personal privacy and online privacy, affect the ability of individuals to get jobs, and expose employers to legal liability, including discrimination claims.

In their letter to the EEOC, Sens. Blumenthal and Schumer expressed concerns that by requiring applicants to provide their social networking login information, employers will have access to private, protected information that may be impermissible to consider when making hiring decisions and may be used to unlawfully discriminate against otherwise qualified applicants. Sens. Blumenthal and Schumer recognized that comprehensive background checks for individuals are sometimes needed when seeking employment in certain fields, but noted that requiring prospective employees turn over Facebook and other social media login and password information could provide employers with information they are not legally permitted to ask about during the interview process, such as the applicants' health, religion, age, marital status, pregnancy status, and other protected categories.

In their letter to the DOJ, Sens. Blumenthal and Schumer urged the DOJ to investigate and issue a legal opinion as to whether an employer violates federal law when they request and use the passwords to prospective employees' social networking accounts. More specifically, the Senators asked the DOJ to investigate whether such actions "violate the Stored Communication Act ['SCA'] or the Computer Fraud and Abuse Act ['CFAA']." The SCA prohibits intentional access to electronic information without authorization or intentionally exceeding authorization to access electronic information, and the CFAA prohibits intentional access to a computer without authorization to obtain information. According to Sens. Blumenthal and Schumer "[r]equiring applicants to provide login credentials to secure social media websites and then using those credentials to access private information stored on those sites may be unduly coercive and therefore constitute unauthorized access under both SCA and the CFAA." The letter also notes that two federal courts have determined that supervisors may be subject to civil liability under the SCA when requesting employee login information and passwords and using such credentials to access otherwise private information.

Rep. Patrick McHenry (R-N.C.), with input from Rep. Ed Perlmutter (D-Colo.), is currently drafting legislation that would ban employers from requesting that employees disclose their Facebook passwords. Ryan Minto, a spokesman for Rep. McHenry, said that "[r]equiring an individual to provide access to their personal social media account is an invasion of privacy, plain and simple."

On March 27, 2012, Rep. Perlmutter proposed an amendment to the FCC Reform Act which would have clarified that the Act does not limit the FCC's power to adopt rules banning employers from asking for passwords to Facebook or other social media sites. In doing so, Rep. Perlmutter commented "[p]eople have an expectation of privacy when using social media like Facebook and Twitter. . . No American should have to provide their confidential personal passwords as a condition of employment."

The House of Representatives voted down Rep. Perlmutter's proposal amidst concerns that the last-minute amendment would give the FCC too much power to regulate online privacy; however, additional proposed legislation is forthcoming and may meet with better success.

At the state level, lawmakers in California, Illinois, Maryland and New Jersey have either introduced or promised to introduce legislation that would prohibit employers from requiring current or prospective employees to provide their social media login credentials to employers in connection with the hiring and/or employment process.

On a related note, last week a National Labor Relations Board (“NLRB”) administrative law judge ruled that a company’s social media policy prohibiting employees from discussing work-related legal matters without permission from the company violated federal law, but the company’s prohibition on posting photos of employees in company uniforms on social networking websites did not violate the law. Employers are being warned that Section 7 of the National Labor Relations Act (“NLRA”), which provides that all employees have the right to form or join a union and to engage in “other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” is likely to be increasingly applied to protect employees in the context of social media. In this regard, demanding access to employees’ Facebook or other social media accounts may not directly violate the NLRA, but it could be viewed as threatening or restricting employees’ right to engage in protected, concerted activities.

RECOMMENDED GUIDELINES FOR EMPLOYERS

How should employers proceed in the midst of this activity? Generally, it is not recommended that employers require that applicants or employees provide their login credentials to Facebook or other social media sites. This is because an employer’s knowledge of the protected characteristics of an applicant or current employee, which often are revealed on social media webpages, could be used against the employer in the event of an adverse employment decision. However, there are certain circumstances where it may be appropriate for employers to request login credentials from applicants and employees. For example, an employer may determine that it needs the information to investigate an internal complaint that an employee is using Facebook or other social media sites to harass another employee. An employer also may determine that it has a legitimate business reason for reviewing an applicant’s Facebook or other social media page when hiring for positions that involve highly sensitive security issues. In such situations, it is prudent for employers to protect themselves against potential legal liability by:

- Implementing a written procedure specifying the situations in which login and password information will be required, for what purpose it will be used, who will have access to it, and steps that will be taken to ensure that the information remains confidential, to the extent possible, and will be provided to others only on a “need to know” basis;
- Obtaining written consent from the employee or prospective employees and detailing, in writing, the consequences for refusal to consent;
- Ensuring adherence to the requirements of the Fair Credit Reporting Act if the employer plans to use a third party to conduct the review;
- Ensuring that decision-makers do not review information upon which the employer cannot legally rely (such as birthdates, etc.) in making an employment decision when reviewing applicants’ Facebook or other social media pages; and
- Training those involved in the process regarding proper procedures.

Our Labor and Employment team stands ready to assist your company with these ongoing changes in the social media arena. Please contact us.

This Labor & Employment Alert provides a general summary of regulation updates and is not intended to be, and should not be relied upon as, legal advice.