

LEGAL
SMARTS

Should Employers Coerce Social Media Passwords from Job Applicants and Current Employees?



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Requiring job applicants and current employees to fork over their social media passwords to a prospective or existing employer seems to be the rage. However, an employer should determine, in advance, whether adopting such a practice would be beneficial or serve as a gateway to employment litigation.

Some employers believe that by accessing the social media sites of job applicants and current employees, they will be able to learn information about the character of such applicants and employees. Proponents of this practice also assert that, with respect to current employees, searching social media sites is a proper way to investigate employment-related threats, or whether such employees have misused confidential company information or trade secrets. On the other hand, critics claim that giving prospective and existing employers access to private social media sites constitutes an invasion of privacy. Critics also claim that job applicants and current employees should never be forced to divulge private information in order to obtain or keep a job.

Several states are considering legislation prohibiting employers from asking current or prospective employees for their usernames and/or passwords to privately maintained password-protected social media sites, such as Facebook. Maryland recently became the first state to pass this type of legislation. Similar bills have been introduced into the legislatures of California, Illinois, Michigan, Minnesota, New York and Washington.

Are there legal risks in having a blanket policy requiring the disclosure of social media passwords of job applicants and current employees? Aside from allegations that it invades privacy, such a policy may lead to claims of discrimination based on race,

national origin, age and religion. Accessing an individual's password-protected social media site may also give rise to "knowledge" of an individual's status as a member of a protected group. Hence, any adverse action, such as an applicant not receiving a job or a current employee being disciplined, may give rise to a claim of discrimination.

In addition to the types of discrimination claims referenced above, seeking social media passwords may also lead to claims that the employer has violated the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act. That's because a disability or a genetic illness might be referenced on a password-protected social media site.

Employers may also unintentionally violate the National Labor Relations Act through the practice of seeking social media passwords. This situation would not just apply to union employers. Applicants with an arguably pro-union view might also claim that any adverse action taken against them was premised upon their affiliation to organized labor.

So when should an employer ask job applicants and current employees to disclose their social media passwords? Because job applicants have not been hired, demanding access to their social media sites can be problematic and should be avoided. With respect to current employees, after seeking competent legal counsel, employers might consider requesting social media passwords for the limited purpose of investigating threats or allegations that an employee has disclosed confidential company information or trade secrets. With these considerations in mind, employers should take the path of least resistance and not insist on obtaining social media passwords from job applicants and current employees. **AT**