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North Carolina Law Life

Stop at the Intersection of Job Application and Facebook Login

By: Donna Ray Berkelhammer. *Monday, March 26th, 2012*

At the intersection of social media and law today is **whether** employers can or should ask job candidates for their **Facebook** login information as part of the interview process or force candidates or employees to "Friend" someone at the company.

Several recent **situations** are raising this issue:

- The **Maryland Department of Corrections** used to ask applicants for password information. After a complaint by the Maryland Chapter of the **American Civil Liberties Union**, it now asks applicants to log in themselves during the interview so the interviewer can look over their shoulders to monitor social media use.

- **UNC** employs an outside social media monitoring service called Varsity Monitor to **watch** what its athletes are saying online. This partly stems from the recent **NCAA** sanctions for violations in the football program. The NCAA **alleged** that adequate and consistent monitoring of Tarheel athletes' social media use would have revealed potential amateurism violations.

- This **North Carolina** police department job **application** explicitly asks for usernames and passwords for social media accounts. **Bozeman, Montana** has been doing this for a **while**.

- In **Spotsylvania** Virginia, law enforcement employees are **forced** to log onto social media accounts and scroll through while interviewers watch.

Can they? Currently, this is not forbidden in North Carolina , although the **EEOC** among other regulators are considering legislation to forbid it. The EEOC has been monitoring the "the snowballing problem" of potentially discriminatory hiring practices based on Internet searches and social media use by candidates. The **EEOC** is expected to issue regulations as part of the implementation of GINA (the federal Genetic Information and Nondiscrimination Act).

Should they? Absolutely not.

Why not? Let us count the ways:

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1. This probably violates the candidate's use agreement with the social media site (Facebook is strongly behind this position). It irritates applicants. Even if it's legal, many will resent it, and they may not turn out to be loyal or enduring employees.

2. You will probably find out information that is protected and that you are forbidden by law from considering in making the hiring decision, like the person's age; health conditions; race; national origin; sexual orientation; or marriage, family or pregnancy status, race, etc. In North Carolina, for example, you cannot refuse to hire someone because they smoke.

3. One you have seen this information it is impossible to (check your favorite idiom): ___ unring the bell, ___close the door after the horse left or ___ put the genie back in the bottle.

4. You could be in the expensive and distracting position of explaining to the EEOC or a plaintiff's attorney that you really didn't use improper facts in not hiring that particular candidate. The EEOC is cracking down on workplace racial discrimination through a program known as **E-RACE**, which gives heightened scrutiny to actions that have a disproportionate effect within minority populations.

5. A candidate or employee might claim she was coerced into revealing her password, in possible violation of the federal **Stored Communications Act** or state equivalents.

6. It could violate state privacy laws protecting intrusion into seclusion. North Carolina recognizes this tort, although to our knowledge, there are no court cases interpreting whether requiring social media login information violates privacy in this way.

7. This practice is seen as so viscerally repugnant that two democratic Senators, **Chuck Schumer** of New York and **Richard Blumenthal** of Connecticut are **asking** Attorney General Eric Holder, the Department of Justice and the EEOC to investigate whether this violated federal law.

What can you do instead:

1. Have a social media policy that governs the company's use of social media and the employee's use. This needs to be carefully crafted to avoid forbidding "concerted activity," which is protected by the **National Labor Relations Act** (NLRA), even if your company is not unionized.

2. Outsource background checks. There are many rules surrounding acquisition and use of credit histories and criminal background checks. If your company doesn't comply with the multitude of rules, especially if you do not hire the candidate based on the background checks, you could face federal liability for not following the rules

3. Have clear company policies and procedures outlining the hiring process. Do not deviate from it.

4. If you simply must electronically research a candidate, try to do it post-offer. Have very specific criteria that a third party, not the decision-maker, will look at, so there is as much proof as possible that no bias was transmitted up the decision-making person.

Tags: **American Civil Liberties Union**, **EEOC**, **employment**, **Equal Employment Opportunity Commission**, **Facebook**, **NCAA**, **North Carolina**, **Richard Blumenthal**, **social media**, **Spotsylvania County Virginia**, **Stored Communications Act**, **UNC**, **University of North Carolina**