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COLE SCHOTZ
COLE, SCHOTZ, MEISEL, FORMAN & LEONARD, P.A.

Employers - Are You Aware of the Potential Pitfalls in Using the Internet and Social Networking Sites?

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As most employers are aware, the use of social networking sites such as Google, Facebook, LinkedIn and Twitter is on the rise as both employees and employers utilize these sites for business and personal purposes. Employers must be aware of the pitfalls associated with using social networking sites, however, to avoid potentially expensive and time-consuming litigation. The following highlights the most common risk areas associated with social networking sites.

Using Social Networking Sites to "Google" Applicants

While many hiring managers "Google" applicants to uncover useful information, they overlook the potential legal problems that arise when an employer learns personal information about an applicant that it would be prohibited from obtaining through traditional sources pursuant to applicable state and federal law. For instance, while the law prohibits an employer from asking an applicant his/her age, sexual orientation, religion, national origin, etc. during a conventional application/interview process, the employer may unwittingly learn this information simply by doing a quick "Google" search. Once an employer has such information, it may face discrimination claims from applicants who are not hired and contend that the company's decision was based on some illicit factor. Similarly, applicants may allege discrimination where the employer only conducts Google searches on some applicants (for example, minorities), and not others, or holds certain groups to a higher standard than others

when viewing and considering information on social media sites. In using such sites, employers must also comply with the federal Fair Credit Reporting Act and related state laws.

To reduce risk in this area, employers are well-advised to prepare and distribute a comprehensive Internet background search policy and train supervisors in this area. In addition, employers may have a third-party or "screened" employee conduct any Internet background checks and send only information relevant to the employment search to the company's hiring decisionmakers.

Providing LinkedIn Recommendations

The provision of LinkedIn recommendations is another area in which employers may potentially run into trouble. Unfortunately, employers may only realize the danger of a LinkedIn recommendation in a subsequent employment discrimination lawsuit. For instance, an employee who is terminated for performance reasons and claims his/her discharge is discriminatory may argue that his/her performance was not substandard, and may point to a LinkedIn recommendation provided by his/her supervisor as proof that he/she was performing satisfactorily.

Review of Employees' Private Emails and Chat Rooms

Another area in which employers are overreaching is in their review of employees' private emails and/or review of employees' posts in private chat rooms. In two recent cases, courts have favored employees' privacy rights in their Web-based email accounts and private chat rooms, and held that employers violated these rights by their unauthorized review of such emails/posts. In Stengart vs. Loving Care Agency, 408 N.J. Super. 54 (App. Div. 2009), about which we recently posted, New Jersey's Appellate Division held that Loving Care violated the attorney-client privilege by viewing private Web-based emails between Stengart and her attorney even though the emails were drafted on the Company's computer and Loving Care's email policy made clear, at least in some areas, that Stengart had no privacy interest in such emails. The New Jersey Supreme Court is currently reviewing this case.

In Pietrylo v. Hillstone Restaurant Group, 2008 WL 6085437 (D.N.J. 2008), a Newark jury held that the employer, Houston's Restaurant, violated the federal Stored Communications Act and the New Jersey Wiretapping and Electronic Surveillance Control Act, by secretly monitoring employees' postings on a private password-protected Internet chat room. The Court affirmed the jury's finding.

Accordingly, these cases make clear that an employer's review of an employee's private communications is not unlimited and employers must be very cautious about reviewing private emails. To reduce risk in this area, employers should clearly address employees' expectations as to the privacy of their use of Company-provided technology and properly draft and communicate email, Internet, blogging and social media policies. Finally, employers should use great caution and consult counsel before entering an employee's password-protected site or email account.

Cole, Schotz, Meisel, Forman & Leonard, P.A.

Court Plaza North
25 Main Street
Hackensack, NJ 07601
Phone:
(201) 489-3000

900 Third Avenue
16th Floor
New York, NY 10022
Phone:
(212) 752-8000

500 Delaware Avenue
Suite 1410
Wilmington, DE 19801
Phone:
(302) 652-3131

300 East Lombard Street Suite 2000
Baltimore, MD 21202
Phone:
(410) 230-0660