EPSTEIN BECKER GREEN | TAKE 5 VIEWS YOU CAN USE

LABOR AND EMPLOYMENT

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1. Employers' Request for Facebook Access Comes Under Attack

In recent weeks, a number of federal and state legislators have issued strong statements against employers that demand access to job applicants' Facebook accounts before making a hiring decision. Decrying the practice as both a gross violation of privacy and a potential violation of various laws, the legislators have promised to draft new statutory protections to prohibit employers from requiring current or prospective employees to provide or disclose any usernames, passwords, or other means of accessing a personal online account (including a Facebook account). Two U.S. Senators have also requested that the U.S. Department of Justice launch an investigation into employers that seek this information to determine whether such action violates the Stored Communication Act and/or the Computer Fraud and Abuse Act, and have urged the Equal Employment Opportunity Commission ("EEOC") to determine whether employers that access and view employee Facebook or other social media accounts violate anti-discrimination laws prohibiting hiring decisions on the basis of certain protected characteristics. At the state level, the Maryland Legislature passed a bill prohibiting employers from requesting social media site passwords from prospective or current employees. Legislators in California, Illinois, New Jersey, New York, and Washington have either proposed, or are contemplating, similar legislation.

Amid all of this controversy, why are employers still asking job applicants to hand over usernames and passwords to social media sites? Employers believe that they will learn information about an applicant's character that will allow them to make an educated hiring decision. Indeed, many of the applicants or employees who have been asked for this information involve government positions in law enforcement and education, employment areas where employers and the public expect employees to exhibit good character.

While there may be some benefit to requesting and using this information, the risks may be significant. It is likely that the applicant's social media account will reveal knowledge that an employer should not have about an applicant and which may reveal his/her protected status. For example, an employer may view a status update revealing the individual's religion, recovery from surgery, or struggles with a chronic disease. Or an employer may access an account containing information on an individual's age, sexual orientation, national origin, or marital status. If an applicant is not selected for the position, then he or she may claim that the hiring decision was unlawfully based on the posted information. Employers need to weigh any perceived benefit of viewing an applicant's or employee's social media account against the potentially significant costs of discrimination claims, allegations of privacy violations, and general ill-will toward the employer. For more detail and analysis on this recent wave of legislative action, please see the recent Epstein Becker Green *Act Now Advisory* entitled "Under Attack: Employer Access to Social Media Accounts of Employees and Applicants."

2. EEOC Releases Publications on the Rights of Disabled Veterans Returning to the Civilian Workforce

The EEOC recently released two revised publications addressing the rights of disabled military veterans in an effort to aid such veterans who are transitioning into or reentering the civilian workforce. The EEOC's "Guide for Wounded Veterans" provides information on accommodations and other protections for veterans with service-related disabilities. The "Guide for Employers" discusses how employers can prevent disability-based discrimination claims and comply with protections for disabled veterans under the Americans with Disabilities Act ("ADA") and the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Additionally, the "Guide for Employers" also provides instructions for employers responding to requests for accommodations and identifying reasonable accommodations to aid an employee or applicant.

In both publications, the EEOC describes the types of accommodations that employers may be required to provide to disabled veteran applicants or employees. The accommodations listed include:

- providing written materials in accessible formats, such as large print, Braille, or computer disk
- providing modified equipment or devices, such as one-handed keyboards or other assistive technology giving permission to work from home
- allowing leave for treatment, recuperation, or training related to the disability
- granting modified or part-time work schedules
- providing "job coaches" to assist with learning or remembering job tasks

The EEOC also reminds employers that USERRA goes beyond the ADA to require *all* employers to assist *all* returning veterans, including nondisabled veterans, by making reasonable efforts to provide job training in addition to accommodations.

The EEOC estimates that three million veterans have returned from military service over the past decade, and another one million will return over the next five years. Given that approximately 25 percent of these veterans report having a service-related disability, employers should be familiar with their obligations to disabled and nondisabled military veterans.

3. EEOC Publishes Rule Amending ADEA Regulations

On March 30, 2012, the EEOC published a final rule amending the Age Discrimination in Employment Act ("ADEA") regulations regarding disparate impact claims and the affirmative defense of "reasonable factors other than age" ("RFOA"). The EEOC's final rule, 29 C.F.R. § 1625.7, incorporates the holdings of two U.S. Supreme Court decisions under the ADEA and clarifies that the ADEA prohibits policies and practices that have the effect of disproportionately harming individuals 40 years of age or older, unless the employer can show that the policy or practice is based on a reasonable factor other than age. Under the revised regulation, the employer "must show that the employment practice was both reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer." The revised regulation takes effect on April 29, 2012.

For more detail and analysis on the revised regulation, please see the new Epstein Becker Green *Act Now Advisory* entitled "EEOC's Amended ADEA Regulation Raises the Bar for Employers' RFOA Defense."

4. Employers' Use of Unpaid Interns Comes Under Attack

In recent weeks, employers' use of unpaid interns has come under attack. In March 2012, a former intern of the "Charlie Rose" show filed a class action lawsuit in the New York Supreme Court on behalf of herself and others. See *Lucy Bickerton v. Charles Rose and Charlie Rose, Inc.,* Index No. 650780/2012. The lawsuit alleges that the company violated New York State wage laws by not paying interns wages and overtime for the work that they performed. The former intern alleged that she regularly worked at least 25 hours per week without pay while on the "Charlie Rose" staff in 2007. Her job responsibilities included performing daily background research, assembling press packets, escorting the show's guests through the studio, breaking down the interview set after daily filming, and cleaning up the green room.

New York employers should therefore assess whether their use of unpaid interns is appropriate by reviewing New York's 11-factor test discussed in the Epstein Becker Green *Act Now Advisory* entitled "New York State Department of Labor Issues Opinion Letter on Internships." Employers in other states should review the U.S. Department of Labor's six-factor test, which is discussed in a post entitled "The (Sort Of) Hired Help: Wage and Hour Implications of Hiring Unpaid Interns" on Epstein Becker Green's Wage & Hour Defense Blog.

5. Title VII's Protections Extend to Provision of Severance Benefits to Former Employees

The U.S. Court of Appeals for the Fourth Circuit recently held in *Gerner v. County of Chesterfield*, No.11-1218 (4th Cir. March 16, 2012), that Title VII of the Civil Rights Act of 1964 ("Title VII") protects former employees from discriminatory employment actions and also prohibits the discrimination in severance offers, even where such offers are voluntary and non-contractual. In *Gener*, the plaintiff began working for the county in 1983 and, by 1997, she was the Director of Human Resources Management. After 25 years of employment, the county informed Gerner that her position was being eliminated and offered her three months' pay and health benefits in exchange for a voluntary resignation and waiver of claims. Gerner rejected the offer and was terminated. Gerner rejected the offer and was terminated. Gerner alleged that the county did not offer her the same "sweetheart"

severance packages that it offered her male counterparts. The district court granted the county's motion to dismiss, holding that the offer of a less favorable severance package was not an adverse employment action as a matter of law because the offer of severance benefits was not a "contractual entitlement" and was made after Gerner had been terminated.

The Fourth Circuit reversed the district court and issued two holdings. First, an employment benefit does not have to be a contractual right in order for its denial to provide a basis for a Title VII claim. Rather, the viability of such a claim turns on whether the benefit is "part and parcel of the employment relationship." Second, Title VII protects both current *and* former employees from discriminatory adverse employment actions. This decision reminds employers that they must ensure that voluntary, discretionary severance offers are provided in a consistent, nondiscriminatory manner.

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