WOMBLE CARLYLE
INNOVATORS AT LAW®

Client Alert

May 2011

EEOC REGULATIONS SPOTLIGHT SOCIAL MEDIA

Does your human resources staff dig into MySpace, snagging pictures of applicants at bong parties and finding admissions of employees stealing boxes of copy paper? Does your manager learn about the latest office pregnancy or skiing accident on Facebook? Is social media an official information source for your company?

If so, the EEOC is aiming to regulate your company's use of social networking sites, especially as it relates to health data.

The EEOC commentary comes in the form of new anti-discrimination regulations and some interpretive guidance by the EEOC's top lawyer. For several years the EEOC has cautioned of what one official has called "the snowballing problem" of potentially discriminatory hiring practices in the Internet era. Use of social media in particular creates further issues, as an employer may become aware of an individual's protected characteristics such as marital status, sexual orientation, religious affiliation, or political activities.

The EEOC's concerns are evidenced in long-awaited regulations implementing GINA (the federal Genetic Information and Nondiscrimination Act). The EEOC recognizes that advances in technology have made it possible for employers to obtain vast and varied information about employees and potential hires, including family medical history and medical conditions. This access creates significant compliance issues, as GINA not only prohibits employers from discriminating against employees and job applicants but also prohibits employers from acquiring employees' genetic information.

Addressing this issue, the EEOC decided that the sharing of information over Facebook, Twitter, and other social networking sites is analogous to discussing such matters around the water cooler – with management in earshot. This scenario falls within the "inadvertent acquisition" exception to GINA's prohibition on the employer's acquisition and possession of employees' genetic information.

Even if the acquisition of genetic information on social networking sites is not purposeful, employers must still address the significance of having obtained that information – which may be uncovered in the course of a routine background check of a potential hire. In a recent interview, P. David Lopez, general counsel for the EEOC was asked "What are the big, cutting-edge discrimination issues facing the EEOC?" Mr. Lopez responded "We're going through difficult economic times right now. It's important to identify discriminatory hiring practices and policies that are excluding people unlawfully from the workplace." Questioned further, he was asked "With so much information available online about virtually everyone, how much checking should an employer do before making a hiring decision?" He answered "I think they need to be very cautious doing online background checks." He further advised that "The employer should examine how it recruits and hires new people. Once you start digging, it's not always passive." *The Houston Chronicle,* April 8, 2011.

The take-away? Employers should implement clear procedures for social media use in screening job applicants and avoid rogue searching. An employer in the possession of information about applicants' or employees' protected characteristics may face the challenge of establishing that employment decisions were made without regard for that information. A structured process with a division of duties between human resource professionals trained in the use of social media screening and managers making employment decisions offers one means of risk reduction. Such a division permits relevant information to reach decision-makers without unnecessary "inadvertently acquired" material obtained from social media sites.

Should you have any questions about the contents of this alert, please contact Mary Windham, Ted Claypoole or Stephanie Shaw or any of Womble Carlyle's Privacy and Data Protection or Labor & Employment lawyers.