

Employment Law

MONTHLY

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October 2012

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Employees' Social Networking Sites: What Can An Employer Obtain?

By Okechi C. Ogbuokiri, Esq.

Many states, including New Jersey, have been considering legislation that serves to prohibit employers from requiring prospective employees to disclose their social media identities and passwords as a condition of employment. If enacted, such legislation would create a private cause of action for prospective, current and former employees who are either (1) required to divulge their usernames and passwords to an employer or (2) are asked whether they have an account on any social networking site ("SNS"). The legislation would make it unlawful for an employer to require an individual, as a condition of employment, to waive his or her rights pursuant to the law.

The New Jersey variation on the proposed legislation contains an anti-retaliation provision, wherein an employer cannot retaliate or discriminate against an individual who exercises his or her rights under the law. Pursuant to this legislation, employees whose rights are violated would have a year from the date of the alleged violation to file suit against their employer. This legislation not only enables employees to recover injunctive relief, compensatory and consequential damages, and attorney's fees, but an employer will be assessed a civil penalty for any violation of the law. For the first violation, the New Jersey Commissioner of Labor can subject an employer to a fine up to \$1,000; for any subsequent violation an employer will be assessed a \$2,500 fine.

In theory, such legislation protects an employee's privacy on SNS, however, in practice is the protection provided short lived for employees who ultimately file suit, in a different context, against his or her employer? In a leading case regarding discovery issues and SNS, a federal court has held:

SNS content is not shielded from discovery simply because it is "locked" or "private." Although privacy concerns may be germane to the question of whether requested discovery is burdensome or oppressive and whether it has been sought for a proper purpose in the litigation, a person's expectation and intent that her communications be maintained as private is not a legitimate basis for shielding those communications from discovery.

EEOC v. Simply Storage Mgmt., 270 F.R.D. 430, 434 (S.D. Ind. 2010). It seems that an employee's personal information published on SNS is only protected up until the point of litigation.

Limited Access to Information on SNS

Depending on the claims an employee asserts against his or her employer, social media posts and information can be discoverable. For example, social media communications regarding a plaintiff's mental state is discoverable when a plaintiff asserts an emotional distress claim against a defendant company. However, even when access is obtained, a court may grant access to a limited scope of information that relates to the allegations asserted in an employee's complaint. Unfortunately, recent case law does not set forth definitive boundaries for the scope of an employer's access to such information.

In *Mailhoit v. Home Depot U.S.A., Inc.*, 2012 U.S. Dist. LEXIS 131095 (C.D. Cal. Sept. 7, 2012), the defendant employer filed a motion to compel responses to its Request for Production of Documents from the plaintiff in a discrimination suit. *Id.* at *1. The defendant company requested access to: (1) any SNS profiles, postings, and messages from the time in which the plaintiff was first allegedly discriminated against through the present that related to the plaintiff's emotional or mental state; (2) third-party communications to the plaintiff that discuss her emotional or mental state; (3) communications on SNS between the plaintiff and current or former employees of the defendant company; and (4) any pictures taken during the relevant time period that the plaintiff posted or that she was "tagged" in, on SNS. *Id.* at *2-3. A California federal district court noted that SNS content is "neither privileged nor protected by any right of privacy," and, in turn, any information relevant to a party's claim or defense is accessible to the other party. *Id.* *6-8. However, in this case the district court held that the defendant's first, second and fourth discovery requests were vague and overbroad. *Id.* at *7, 10-11. The court opined that the requests did not allow a reasonable person to determine which documents should ultimately be disclosed. *Id.* The court reasoned that the defendant's discovery requests 1 and 2 failed because the term "emotion" was too broad. *Id.* at *11-13. The court noted that this term could potentially encompass emotions that were not relevant to the emotional distress the plaintiff alleged that she suffered due to the discrimination to which she was subjected during her employment relationship with the defendant. *Id.* In addition, the court ruled that every picture that the plaintiff posted on SNS over a seven-year period was an overbroad request, and the defendant failed to state how every picture was relevant to lead to admissible evidence in the suit. *Id.* at *13-14.

In contrast to the aforementioned case, in *Simply Storage*, an Indiana federal district court ruled that the plaintiff was required to comply with the same requests set forth in the *Mailhoit* defendant's Motion to Compel. 270 F.R.D. at 434. The court noted that all aspects of social media communications were not necessarily relevant to a claim or defense. However, the *Simply Storage* court opined that it was reasonable to expect "severe emotional or mental injury to manifest itself in some SNS content." *Id.* at 435. The court noted that this content could lead to evidence of other stressors that could have caused the plaintiff's alleged emotional distress. *Id.* The plaintiff argued that the discovery requests should be limited to documents that directly reference the matters alleged in the case; however, the court ruled that this limitation was too restrictive. *Id.* The court ultimately held that all the verbal communications and pictures were relevant to the plaintiff's emotional or mental state during the specified period of the alleged sexual harassment. The court noted that the challenge with this issue was defining the scope of disclosure of an employee's content on SNS. *Id.* As such, it is not surprising that these courts' conclusions diverged.

Bottom Line

Proposed legislation may restrict an employer's access to an employee's personal content on SNS. However, this law does not effectively restrict access to such content indefinitely. During litigation, however, wherein this content relates to the claims and defenses of the parties, it is clear that social media communications are discoverable. The challenging aspect of this issue is determining the scope of an employer's access to social media communications. Given the current lack of clarity from courts on this issue, we advise employers to limit their requests for employees' social media content to information that is relevant to their case. Requesting access to an employee's entire account in the context of litigation is likely to be prohibited.

Legislative Update

Governor Christie recently signed A2647 into law, which requires New Jersey employers, with 50 or more employees, to notify their employees of their right to be free of gender inequity or bias in compensation, benefits or other terms or conditions of employment. Employers must post the notification in an area accessible to all employees and each employee must receive a written copy of the notice. Employers must issue such notice annually, and at the time a new employee is hired, he or she should receive the written notification. This law will take effect on November 20, 2012.

The Porzio Employment Law Monthly is a summary of recent developments in employment law. It provides employers with an overview of the various legal issues confronting them as well as practical tips for ensuring compliance with the law and sound business practices. This newsletter, however, should not be relied upon for legal advice in any particular matter.