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Practice Area Links

Avoiding Social Networking Land Mines For Employers

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This week, Facebook is responding to another round of questions regarding a recent privacy breach, resulting in an inquiry by several members of Congress. That Congress has become involved highlights the fact that Facebook and other social media sites are much more than fun networking tools.

As social media becomes part of the fabric of our society, both state and federal regulators increasingly are scrutinizing its use and abuse, including in the employment arena. As a result, there are several “land mines” for employers in the cyber-communication world, which may be avoided through careful planning and implementation of social media policies.

Land Mine No. 1: Deceptive Trade Practices. Employers may be surprised to learn that the use of social networking sites by their employees, even off-duty, may subject them to scrutiny by the Federal Trade Commission (“FTC”). The FTC recently issued revised *Guides Concerning the Use of Endorsement Testimonials in Advertising*. The revised guidelines note that social media and Internet postings by employees regarding their employers can constitute improper public testimonials in advertising. If employees fail to disclose their employment relationship, their postings may be deemed a deceptive or unfair trade practice.

Land Mine No. 2: Background Checks. Employers are increasingly relying on sites like LinkedIn and Twitter to check the backgrounds of applicants. By doing so, employers may obtain more information than they bargained for, including information that is not appropriate to consider in the application process, such as an applicant’s membership in a protected class (i.e., age, sexual orientation, religion, pregnancy status, etc.).

Land Mine No. 3: The Friendly Supervisor. For current employees, employers may have legitimate reasons for reviewing employees’ social media postings, such as monitoring employee disparagement of the company or public disclosures of confidential business information. This ostensibly justified snooping, however, can create problems. Some employers resort to guerilla tactics that raise serious privacy concerns, including accessing social networking pages through misrepresentations or “fake friending.” On the other hand, supervisors who openly “friend” subordinates may fare no better because the subordinates may claim they felt “coerced” to accept the request. These cyber-friendships typically involve the exchange of personal information, including membership in political or other organizations, medical condition information, knowledge of discriminatory remarks, etc. A supervisor’s awareness of such personal information can trigger the company’s duty to take action, or can trigger harassment, discrimination, retaliation and wrongful discharge claims from the subordinate. An added wrinkle is the concern that taking action against groups of employees who discuss the company on social networking sites may expose the employer to

claims under the National Labor Relations Act for retaliation for engaging in protected concerted activities.

Land Mine No. 4: References Through Social Media. Given the potential liability for negligent references on the one hand, or defamation on the other hand, many companies have implemented a “no reference” policy. Typically, such a policy provides that only the former employee’s title and dates of employment will be provided to prospective employers. Social media sites such as LinkedIn create an avenue to undermine these policies. Supervisors may also undermine these policies by “tweeting” about subordinates’ achievements or failures.

Avoiding the Land Mines. The key to avoiding these and other social media land mines is: (1) a well thought out, written social media policy developed by a group or committee that evaluates the company’s needs, employees’ rights and liability issues, and the realistic social media use of its employees; (2) training of managers and subordinates regarding the policy; and (3) consistent adherence to the written policy.

Because of the many potential legal issues in this area, employers should consult with experienced employment counsel to assist them in the development of social media policies.

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