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Sharing Passwords With @MyBoss

By Tabatha George (New Orleans)

Maryland has become the first state in the country to ban companies from asking employees and applicants for their social media passwords. The bill, which makes the practice entirely illegal, easily passed both houses of the legislature and is awaiting signature by Gov. Martin O'Malley. It will become effective October 1, 2012. Similar bills are being discussed in other states, including California, Illinois, New Jersey, New York, and Washington. In addition, U.S. Senators Charles Schumer (D-NY) and Richard Blumenthal (D-CT) have announced that they will seek investigations of the practice from the Justice Department and the U.S. Equal Employment Opportunity Commission (EEOC).

Asking For Passwords Is Risky

Though it has received media and political attention, the practice of asking for employee passwords appears to be rare. Examples in news reports cite applicants for municipal jobs such as positions with police departments, where employee vetting is necessarily more stringent. No large, private company has been accused of the practice.

Still, Facebook Chief Privacy Officer Erin Egan reported in March that the site had experienced "a distressing increase in reports of employers or others seeking to gain inappropriate access to people's Facebook profiles or private information." Egan decried the practice because it was not the "right thing to do."

Most employers instinctively shy away from requesting personal passwords, with good reason. As an initial matter, it could create bad press and ill will for the company. As mentioned above, several states are in the process of creating laws to ban the practice and so such a policy, while lawful now, may soon become illegal. Furthermore, it is likely the EEOC will issue guidance that disfavors it. In addition, such policies may violate the federal Stored Communications Act, at least to the extent that a court would consider requiring employees to provide their passwords involuntarily. Finally, password sharing violates the terms of service of Facebook and other social media sites.

Online Searches Are Less Risky

While asking for passwords is rare and risky, the practice of searching for employees on the Internet is commonplace. In fact, a Microsoft-sponsored survey from late 2009 found that 75% of managers were *required* to research candidates online before hiring.

In many ways, searching for applicants and employees online makes sense. A company should know if an employee has held something out to the public that would reflect poorly on its business. Online conduct can be indicative of poor judgment. In the extreme, a search could reveal that an applicant has committed a crime that makes his or her presence a danger to other employees. In that case, the failure to perform an online search could (theoretically) constitute negligent hiring.

But any use of online searches to vet or monitor employees is also risky. The biggest issue with online monitoring is that you could become aware of an employee's protected characteristic, subjecting your company

to liability under Title VII. It is illegal under federal law for employers to ask candidates about their nationality, religion, age, race, sex, or disability during the interview process. Many states add still more protected categories.

While some of these characteristics will be apparent, others will not. To the extent that you are unaware of a protected characteristic, you cannot discriminate based on it. But as soon as the company runs an online search and discovers that an employee practices a certain religion or has a disability, it has opened itself to charges of discrimination under Title VII.

Moreover, the practice of online monitoring could suggest a company knew of a protected trait even where it didn't. Imagine, for example, that a company that requests employee passwords or regularly searches social media websites terminates an employee. The company is unaware that she is pregnant, but she has announced the news with a sonogram picture on Facebook. The act of online monitoring has put the company at risk for a claim of wrongful termination that will be harder to disprove.

The Bottom Line

In light of these issues, newly-improved privacy options on social media sites are actually beneficial for employers. The fact is that employers are *allowed* to gather job-related information about applicants and employees. Beyond that, access to additional information creates liability.

Where information is readily available, an employer could face liability for ignoring it (such as negligence claims) or accessing it (such as discrimination claims). It is likely that your best course is to maintain a policy against online monitoring and hire a third-party firm to run background checks (in compliance with state laws) to avoid negligent hiring claims. If you decide to monitor candidates or employees online, it's advisable to limit such searches to information readily available to the public at large.

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A "Love Or Hate" Employment Relationship – How Do Your Employees Feel?

By C.R. Wright (Atlanta)

It comes as no surprise that an unhappy employee is more likely to file a complaint or lawsuit. We often tell managers and supervisors that employees file complaints when they "get their feelings hurt." Sometimes this is because the employee thinks no one is listening, or it may be that the employee does not feel respected. Whatever the underlying reason may be, it's as true now as it ever was that a little bit of employee relations goes a long way toward preventing employee complaints and legal actions.

Even if your managers technically comply with all legal requirements, employees who are not properly managed and motivated may become unhappy. An unhappy employee is less productive and more likely to cause problems at work. So it is worth asking the question: "What makes employees happy at work?"

Gallup To The Rescue

Gallup conducts an annual Work and Education poll to survey employees about how they feel about various aspects of their work. In 2005, this Gallup poll found that most workers were positive about their jobs. About one-third of workers surveyed said they actually loved their work, while less than 10% of workers said they disliked or hated their work.

Employees giving positive response cited that they liked what they were doing and liked their co-workers. Wages were far down the list of things that made people like or love their work. This confirms what we have known for many years: People go to work to make money, but they like or dislike their work for reasons other than the money.

In the 2011 Gallup Work and Education Poll, the greatest increases in dissatisfaction as compared to the 2008 poll were in the areas of health insurance benefits, chances for promotion, on-the-job stress and job security. Employees again expressed a high degree of satisfaction in the area of liking their co-workers.

The Top Ten "Most-Hated" Jobs

A 2011 CNBC report on a survey by CareerBliss listed the top ten "most-hated" jobs. Note that these are not the workers people most hate to deal with, like traffic cop or aggressive salesperson, but instead these are jobs people hate to do.

The reasons cited by employees who hate their work include lack of direction, lack of opportunities for advancement, hostility from peers and lack of respect. And the list of these most-hated jobs include primarily white-collar or management positions:

1. Director of Information Technology
2. Director of Sales and Marketing
3. Product Manager
4. Senior Web Developer
5. Technical Specialist
6. Electronics Technician
7. Law Clerk
8. Technical Support Analyst
9. CNC Machinist (a machine that operates a lathe or mill)
10. Marketing Manager

Putting Love And Hate Together

It's clear that when employees like what they do and like who they work with (including their supervisor), they are happy at work. It is also clear that when employees are treated with disrespect or lack direction, they are unhappy at work.

So we will say again what we have said for many years: to succeed effectively at employee relations and minimize the risk of employee complaints and lawsuits, management must "EMPOWER" employees by:

Engaging – encouraging employees to express opinions and ideas;

Mentoring – developing, motivating and fostering harmony;

Praising – giving positive reinforcement;

Observing – listening to what employees have to say;

Walking Around – making yourself available to employees naturally without appearing to be a threat;

Empathizing – understanding each employee's perspective; and

Respecting – treating employees in a professional and courteous manner.

None of these suggestions costs an employer any significant amount of money; yet all pay enormous dividends in employee morale.

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If You Give A Mouse A Cookie

Disparate-Impact Claims Under The ADEA And The RFOA Defense

By Matthew Korn (Columbia)

On April 30, 2012, an EEOC Final Rule took effect regarding disparate-impact claims under the Age Discrimination in Employment Act (ADEA), and the defense of "reasonable factors other than age" (RFOA).[1] Ostensibly proposed to address issues related to the Supreme Court's decisions in *Smith v. City of Jackson* and *Meacham v. Knolls Atomic Power Laboratory*, the Final Rule incorporates the EEOC's interpretation of the RFOA defense, despite the concerns of several commenters.

Unsatisfied with the cookie it received from the Supreme Court, the EEOC's Final Rule provides the agency with its glass of milk. Proactive employers should consider the Final Rule when implementing policies that may have an adverse impact based on age.

What's In Play

In *City of Jackson*, the Supreme Court decided that potential plaintiffs may bring disparate-impact claims under the ADEA. Disparate-impact claims are based on a facially-neutral policy (such as a reduction-in-force) that has an adverse impact on employees over 40. The employer's motivation is not relevant, unlike the traditional disparate-*treatment* framework where an employee must prove that the employer intended to discriminate. This means that an employer with the best intentions could face liability under the ADEA.

In *Meacham*, the Supreme Court held that an employer has the burden of proving the RFOA defense. To successfully defend a disparate impact age discrimination suit, an employer must demonstrate that it relied upon a "reasonable factor other than age" to guide its policy or practice. The Supreme Court did not provide a list of potential considerations that employers must follow in order to prove the defense; instead, employers were permitted to present their own RFOA defense. The Final Rule contains a list of considerations that you should bear in mind when implementing a policy that may have an adverse impact based on age.

In its comments on the Final Rule, the EEOC included a list of "considerations that are *manifestly relevant* to determining whether an employer demonstrates the RFOA defense." It's not difficult to read between the lines and realize that the EEOC will likely attempt to hold employers accountable if they fail to follow the enumerated considerations.

To best protect your company against disparate impact claims under the ADEA and to preserve the RFOA defense, you should keep the following actions in mind before implementing any policy or practice that may have an impact on workers over 40.

Articulate a "stated business purpose"

When determining whether a policy may have an adverse impact based on age, determine whether the factor upon which you rely supports your stated business purpose. For instance, an employer may decide to raise salaries for less experienced workers at a slightly higher percentage than more experienced workers to attract and retain talent in a competitive market. Such policy may have an adverse impact on older workers (who fall into the more experienced category), but the level of experience is directly related to the employer's stated business purpose, and may therefore support the RFOA defense.

Provide supervisors and managers adequate training

Before implementing a policy, you should consider offering some level of training to your supervisors and managers who may be using the policy. The level of training will necessarily depend on the policy or practice. For instance, if you are planning to use certain hiring criteria, such as technology skills, you could provide a list of specific skills or programs that your employees should be familiar with and which your supervisors and managers are trained to inquire about. Other policies may require more extensive training or guidance.

Try to quantify subjective criteria

The EEOC has made it very clear that it believes subjective assessment may allow age bias, either deliberate or unconscious, to taint the process. An employee or potential employee's flexibility, willingness to learn, and technological skills were identified as areas of particular concern.

Your company likely values such qualities in its employees, and you need not abandon evaluations based on these traits. Instead, you should limit the subjectivity of the assessment by requiring your supervisors and managers to provide specific, objective examples when completing their evaluations. For example, rather than stating that an employee is "flexible," supervisors and managers should be trained to provide specific examples of the employee's flexibility, such as instances where the employee stayed late to complete a project.

Assess and ameliorate the adverse impact on older workers

Many employers are already familiar with adverse-impact assessments, and currently monitor their policies' potential impact based on race, ethnicity, and gender. If you are not already looking at impact based on age, you should begin incorporating this into your regular assessment. There are basic disparate-impact calculators available online and more sophisticated analyses are also available. Conducting such analyses with the assistance of legal counsel may provide some level of confidentiality for the analytical process.

Once you have determined whether your policy has an adverse impact on older workers, consider the extent of the harm. If the effects of your policy are especially harsh (e.g., resulting in termination) or affect a large number of employees, you should consider whether the policy is in your company's best interest. In other words, conduct a cost-benefit analysis to determine whether the policy as drafted provides sufficient benefits to justify the risk of legal exposure.

If you find that your policy has an adverse impact, you should evaluate whether there are any steps you could take to reduce the harm caused to older workers. Under the RFOA standard, you need not find the least

[1] Recent legislative activity has been undertaken to stop the EEOC from enforcing the Final Rule, but it will likely be several weeks before the outcome of this effort is determined.

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Taking Aim At Workplace Violence

By Ted Boehm (Atlanta)

A recent shooting death in Long Beach, California, has placed the issue of workplace violence back on employers' radar-screens. On February 16, a federal immigration agent was shot and killed by a coworker while at the workplace. The shooting occurred after a counseling session escalated into a physical confrontation and then turned deadly. In addition to the fatality, another agent was shot and wounded.

The Scope Of The Problem

Such incidents are an employer's worst nightmare, and recent data suggests that workplace violence occurs more frequently than might be expected. A recent survey from AlliedBarton Security Services entitled "Violence in the American Workplace" revealed that 52% of Americans who work outside their home have "witnessed, heard about, or have experienced a violent event or an event that can lead to violence at their workplace." The survey also linked the likelihood of workplace violence to low employee morale.

Employers should give these findings particular attention given the current economic climate in this country. With the nation's unemployment picture showing only modest improvement, and with job security continuing to be a concern for many, employee morale may be shaky at many workplaces.

Employers need to regularly gauge the morale of their workforce and be vigilant in monitoring situations that could develop into physical confrontations. Properly educating your employees about handling workplace disputes is critical. You should also maintain and enforce tough anti-violence policies so that employees are on notice that violent behavior will not be tolerated.

State Laws That Don't Help

One movement that may be complicating employers' efforts to reduce lethal workplace violence is legislation at the state level. At least 13 states have now passed laws that allow employees to keep firearms in their vehicles while at work. These so-called "bring your gun to work" laws were enacted in response to the restrictions that many private employers have against allowing guns to be stored in workplace parking lots. Of course employers established these rules to decrease the likelihood of workplace shootings. According to the most recent data from the Bureau of Labor Statistics (2009), there were 420 fatalities as a result of workplace shootings.

Another state may soon join the list of states with "parking lot gun laws." Proposed legislation in the Tennessee General Assembly would allow employees to store their firearms in vehicles parked at work and would apply to both private businesses and public institutions. The measure, supported by the National Rifle Association, would also cover any firearm owner, not just those with state-issued handgun permits.

But some lawmakers have expressed concerns about the breadth of the proposed legislation and have suggested that a 2008 Georgia law is a better model. Georgia's gun law excludes parking lots that are fenced or have gates. Georgia also allows employers to prohibit employees from bringing weapons onto company property if they have been subject to disciplinary action.

Defending Against The Problem

Employers must consistently monitor the workplace to prevent any violent episodes. Depending on the state in which the employer operates, a prohibition against firearms on company property may not be possible. But you can minimize your risk with education, proactive monitoring, and consistent enforcement of anti-violence policies.

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discriminatory option, but you can reduce your potential exposure by demonstrating that you considered and adopted a less discriminatory alternative.

Look At *All* The Factors

The EEOC included a provision in its Rule that "[n]o specific consideration or combination of considerations need be present for a differentiation to be based on reasonable factors other than age. Nor does the presence of one of these considerations automatically establish the defense." But based on the EEOC's recent plan to greatly increase the number of disparate impact cases it enforces over the next five years, coupled with its current systemic discrimination focus on class-type cases, you should attempt to incorporate as many of the above considerations into your decisions as possible.

The EEOC certainly got a cookie from the Supreme Court and decided to pour itself a tall glass of milk to wash it down. Except this isn't a children's story, and real employers can face serious liability if they are unable to prove the RFOA defense during a disparate impact suit.

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