

## EMPLOYMENT & *Immigration Law*

### Employee Social Media Accounts: What Employers Can and Can't Do

An up-to-date practical guide

By Rachel Manne

Social media usage is no longer a new trend. Many Americans have multiple social media accounts, such as Facebook or LinkedIn, some of which are publicly accessible, others that are password-protected. When it comes to mixing social media and employment, however, there is a new trend—one that cautions *employers* on how much they can access their employees', and prospective employees', personal social media accounts and how they can utilize information from such accounts. Consider that New Jersey has become the 12th state to pass a social media password-protection law, which took effect on Dec. 1. Under the new law, employers are generally prohibited from accessing current and prospective employees' social media usernames and passwords. On top of this state law, the National Labor Relations Board (NLRB) continues to pay close attention to social media issues, producing guidance that also cautions employers to be careful not to violate federal law in the

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social media context.

With this trend in mind, employers may be left grappling with: (a) what they are permitted to do with respect to these personal social media accounts; (b) what they are prohibited from doing; and (c) how, if information is lawfully obtained from such accounts, they can use the information in making employment decisions. Below is some up-to-date practical guidance for New Jersey employers, regarding their current and prospective employees' social media accounts. With such guidance, New Jersey employers should minimize the risk of inadvertently violating any of the applicable laws.

#### What N.J. Employers Cannot Do

- *Do not request personal social media account usernames and passwords.* Under the new state law, New Jersey employers cannot "require or request a current or prospective employee to provide or disclose any username or password, or in any way provide the employer access to a personal account through an electronic communications device." A "personal account" refers to "an account, service or profile on a social networking website that is used by a current or prospective employee for personal communications unrelated to any business purposes of the employer." This prohibition covers

both *directly* asking the current or prospective employee for a username or password, and *indirectly* obtaining access to a personal account (e.g., through another employee who may know this information).

- *Do not retaliate or discriminate against an employee for refusing to provide social media account information.* Under the new state law, New Jersey employers cannot retaliate or discriminate against a current or prospective employee if the individual has "refused to provide or disclose any user name or password, or in any way provide access to, a personal account through an electronic communications device." Employers may also not retaliate or discriminate against a current or prospective employee for reporting an alleged violation of the new law to the New Jersey Commissioner of Labor and Workforce Development, for testifying, assisting or participating in any investigation, proceeding or action concerning a violation for the new law or for otherwise opposing a violation of the new law.

- *Do not use "protected characteristic" information that is publicly available to make employment decisions.* While the new state law does not prevent employers from "viewing, accessing, or utilizing information about a current or prospective employee that can be obtained in the public domain," New Jersey employers cannot use any information about the employees' or job applicants' protected characteristics to make employment decisions. This means that if an employer learns information from a social media

website that it would not otherwise have known about a job applicant, such as a physical or mental disability, sexual orientation or religion, an employer must not use such information in the hiring process. If a candidate is not hired, and challenges the decision, the employer may have to demonstrate that the protected characteristic did not play a factor in its decision. It may be very difficult to prove that it did not use the material in the discriminatory manner alleged.

- *Do not promulgate policies that interfere with an employee's protected National Labor Relations Act (NLRA) rights.* While written social media policies are strongly recommended (see below), employers cannot draft such policies that in any way restrict an employee's protected activity rights under Section 7 of the NLRA (i.e., the right of employees to comment on terms and conditions of employment and/or to act concertedly in doing so). On May 30, 2012, the NLRB issued an advice memorandum that was directed at overbroad employer social media policies. The memorandum signals that policies will be considered overly broad if the terms and restrictions are vague enough to allow an employee to infer that the policy, in any way, restricts his or her rights under Section 7 of the NLRA. For example, an employer cannot discipline an employee for posting concerns about his or her pay on a social media account, nor can it prevent discussions among employees via social media on such a topic. While the NLRA published a "sample" social media policy with its May 2012 memorandum that it deemed 100 percent acceptable, businesses should seek assistance from an employment attorney to help draft their social media policies, especially since the issues and concerns in this area are evolving rapidly.

#### **What N.J. Employers Can Do**

- *Ask for social media account information for business purposes.* New Jersey's new law sets forth an important exception to its general prohibition against asking employees for social media usernames and passwords: New Jersey employers can ask for and obtain current or prospective employees' usernames and passwords for accounts that are used for business pur-

poses of the employer. This may arise, for example, where the employee is a marketing professional whose job it is to use his or her social media account for the company's marketing purposes.

- *Ask for social media account information for certain investigations.* Under the new state law, New Jersey employers can request username and password information if it is needed to conduct certain investigations. Those investigations must be "for the purpose of ensuring compliance with applicable laws, regulatory requirements, or prohibitions against work-related employee misconduct based on the receipt of specific information about an activity on a personal account by an employee," or "of an employee's actions based on the receipt of specific information about the unauthorized transfer of an employer's proprietary information, confidential information or financial data to a personal account by an employee." This is an important exception, since employers have a duty to investigate claims of discrimination and harassment, which could be occurring on an employee or manager's social media account. If an employer has any doubts about whether the investigation it is conducting falls under this provision of the new law, employers should seek counsel before taking further action.

- *Train key employees on new laws.* New Jersey employers can—and should—train their human resources professionals and managers on the current laws. It is easy for such employees to inadvertently violate relevant laws without such training.

- *Establish clear and specific social media policies that do not violate Section 7 of the NLRA.* Separate and apart from the new law, New Jersey employers can—and should—establish written social media policies that contain specific and definitive terms. These policies are important so employees who have personal social media accounts understand the limits to their social media usage and the expectations of their employer. While social media policies may vary, the following important points should be included:

- (1) The company expects loyalty from all employees.

- (2) In general, employees are not authorized to post on behalf of the company and that they are required to obtain

authorization in advance to make official postings. When making unofficial postings, employees should state that they are speaking on behalf of themselves and not the company.

- (3) Employees are prohibited from disclosing any confidential or proprietary information of the company or using the company's logo or trademark without permission.

- (4) Employees are prohibited from making harassing, discriminatory or otherwise disparaging comments in the workplace or on their personal social media accounts.

- (5) Employees may not post on a personal blog or web page or participate in a personal social networking site during work time unless the employee's position expressly requires such activity.

- (6) In order to ensure compliance with the NLRA, it is prudent to add a line to the policy that says: "This policy is intended to conform with the relevant provisions of the National Labor Relations Act."

- *Establish specific hiring practices and procedures for social media screening.* To avoid any potential discrimination in hiring claims, employers can—and should—establish specific hiring practices for social media screening, whereby a neutral employee or an independent third party, with no hiring authority, is appointed to conduct publicly available social media searches and filter out any improper information (i.e., protected characteristics) for the hiring manager to review. In addition, employers can establish a record-keeping process that ensures hiring actions are documented and retained in accordance with EEOC requirements. Further, if an employer is going to use these sites, it should do so consistently, being sure not to "Google" some applicants and not others, or some groups of applicants more than others. Failure to do so may give rise to claims of discrimination.

In conclusion, while these "dos" and "don'ts" serve as a guide for employers who may be having a difficult time staying on top of all the evolving laws, employers should not hesitate to contact an employment attorney to discuss the potential consequences of any proposed action. Doing so early on could prevent unwanted litigation or civil fines. ■