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Virtual world's real effects at work

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With the ever-expanding popularity of social media and online employer review sites, the virtual world directly impacts the work environment — for both employers and employees.

A treasure trove of information — do you look inside?

Now that nearly all applicants maintain some social media presence, employers easily can conduct background research, and in doing so, learn information about the applicant's age, religion or race — information that the employer would have no other reason to know.

Before conducting such an investigation, an employer should first confirm there is no law prohibiting or limiting social media review. (For example, the Fair Credit Reporting Act applies to consumer reports compiled by a consumer reporting agency).

Then, to minimize risk, an employer could:

- designate an individual without authority to make a hiring decision as the person authorized to conduct social media searches and create a summary of relevant findings without any mention of an applicant's protected characteristics;
- reinforce to both individual(s) conducting the search and those making the hiring decision that protected characteristics should not be considered when deciding whether to make a job offer; and
- document the reasons for all hiring decisions.

Will you accept my friend request?

Much like the challenges posed by using information obtained through social media in hiring, employers whose managers follow

or friend employees on social media create additional ways of getting more personal information about the employee. If the employee is later terminated or disciplined, he could claim the employment decision was made based on this kind of information learned through social media.

If an employer does not take action for a known policy infraction apparent on social media, that too could create potential issues. And, if a supervisor only accepts invitations from certain subordinate employees, this could breed sentiments of alleged discrimination or even just favoritism.

When considering whether to take disciplinary action based on information obtained on social media, employers should:

- analyze whether the posting is protected (for example, is the employee complaining about treatment or safety?);
- determine if the posting is so outrageous and/or disparaging that it loses any potential protection; and
- take disciplinary action that is consistent with past practices of the company.

Managers should be reminded that if they have information about a complaint or issue at work learned through social media, they need to report it to the designated individual or individuals, just as if they had witnessed “IRL.”

And all employees should be aware that people are watching. Just recently, Yale University announced that a dean had left her position following her posting on Yelp Elite regarding patrons of a movie theater. A student-run newspaper reported on the post. (See Hayley Miller: “Yale Dean Who Called People ‘White Trash’ and ‘Low Class’ on Yelp Leaves Position, at huffingtonpost.com/entry/yale-dean-june-chu-yelp-resigns_us_594a547ee4b0177d0b8ab4a0.)

But he criticized me publicly?

An increasing number of employees are now online talking about work, including complaining about mistreatment or just about managers in general. If an employer takes action against that employee, this too could lead to potential claims.

For example, the U.S. Equal Employment Opportunity Commission recently filed a complaint against an employer on behalf of a transgender employee who posted a negative review on an employer review site and was subsequently fired. (EEOC v. IXL Learning, Inc., Case No. 17-2979, N.D. Cal. filed May 24, 2017). And, even if no adverse action is taken, does such a posting require action by the employer? How do you address an anonymous complaint?

Online anonymous complaints should be evaluated and addressed in the same way as any other anonymous complaint, such as a complaint made to an employee hotline. If the employer does not have such a procedure, consider using a response post to encourage the complaining party to come forward.

Can't I just have a policy forbidding all this?

Employers can regulate social media by implementing policies, but need to be aware of the National Labor Relations Act, which generally protects employees' collective discussions about wages, hours and conditions of employment. This includes discussions on social media and can apply to nonunion and union employers alike.

Under the previous administration, the National Labor Relations Board had taken a particular interest in social media claims.

Employers who disciplined an employee in response to posting critical comments were found to violate employees' NLRA rights.

Recent case law is beginning to distinguish employer review sites (such as Vault or Indeed) from traditional social media sites (such as Facebook) where users “talk” with each other. (See IXL Learning, Inc., Case No. 20-CA-153625, 2016 NLRB LEXIS 306, Apr. 28, 2016). A post may not be protected concerted activity if it was not a group discussion like a post on Facebook.

Employers should review their policies — and how they are implemented — to be in line with this evolving trend.

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