

Employers Requesting Facebook Access May Face Federal Consequences

Article By:

Labor & Employment Practice

Add the United States Senate to the growing list of legislative bodies considering new laws that would ban employers from requiring job applicants to turn over their Facebook usernames and passwords as part of the background investigation process. As the number of stories of applicants rejected or **employees being “Facebook-fired”** has grown, savvy social media users have adapted by increasing their privacy settings to the point where approximately 3 out of 4 Facebook pages hide information from public view.

Deprived of the treasure trove of information contained on a job applicant's Facebook page, some employers have started asking for access to job applicants' social networking accounts as part of the interview process. The requests have taken a number of forms, from requiring disclosure of passwords, to “friending” HR or the hiring manager, to requiring a live log-in during the interview. While privacy advocates have analogized such requests to requiring employees to turn over their house keys, this overlooks the fact that passwords can be changed, or managers “de-friended” after the interview. Nevertheless, it is undeniable that some privacy issues are implicated by employers who search social media accounts that are not otherwise publicly available.

Even without the proposed federal legislation expressly banning this kind of pre-hire screening, adopting such a hiring policy is risky. The federal Stored Communications Act prohibits the access of electronic communications — which would include Facebook postings — without the user's authorization. That authorization must be freely given and not coerced. At least one case, **Pietrylo v. Hillstone Restaurant Group**, has ruled that a management request for login information and passwords to otherwise private employee social media accounts can be coercive and **violative of the Stored Communications Act**. In addition, there are risks to learning information about a candidate the hiring manager may later prefer not to have known (such as age, race, disability, religion, or genetic information).

We will be closely watching Congress and state legislatures as they work on legislation addressing these issues.

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