

PUBLICATION

Your Mother Was Right - You Can't Force People To Like You

April 16, 2012

Most job seekers know to keep their Facebook page set to private, so that only their close acquaintances can review their photos and personal information. A series of anecdotal reports suggests that certain employers have begun asking job applicants for their social media user name and password. These accounts, in turn, have led Senators Richard Blumenthal (D-CT) and Charles Schumer (D-NY) to ask the U.S. Department of Justice (DOJ) and the U.S. Equal Employment Opportunity Commission (EEOC) to launch investigations into this practice. At the same time, the State of Maryland has passed a law banning such inquiries, and bills to prohibit this practice are currently pending in California, Illinois, Minnesota, New Jersey and Washington.

Of course, such inquiries – to the extent they occur – are already fraught with peril. Coercive inquiries for password-protected social media sites arguably violate the Stored Communication Act (SCA) and the Computer Fraud and Abuse Act (CFAA). The SCA prohibits intentional access to electronic information without authorization or intentionally exceeding that authorization, while the CFAA prohibits intentional access to a computer without authorization to obtain information. In two recent cases, where supervisors requested current employees to provide their login credentials and then accessed private information with those credentials, courts denied the employers' motions to dismiss.

Accessing private information on applicants' or employees' social media accounts may also violate the Genetic Information Nondiscrimination Act (GINA), and provides employers with access to information they have long sought to avoid when considering someone for employment, including details about an applicant's religion, health status, race, age and national origin.

For its part, Facebook has also spoken out on against the practice, stating: "If you are a Facebook user, you should never have to share your password, let anyone access your account, or do anything that might jeopardize the security of your account or violate the privacy of your friends. We have worked really hard at Facebook to give you the tools to control who sees your information."

The lesson for employers is simple: Don't ask applicants or current employees for their social media account information. If you have questions about the best way to use (or not use) social media in the workplace, please reach out to any of our nearly 70 Labor & Employment attorneys located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee; and Houston, Texas.