

PUBLICATION

Social Media: Friend or Foe?

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Social media can be a powerful tool for employers when facing litigation, but it can also expose employers to liability when used to make employment decisions, especially when it comes to hiring new employees. For example, several states have passed laws prohibiting employers from requesting either applicants or current employees to provide social media account information, such as account names and passwords.

When using social media during the application process, employers run the risk of running afoul of Title VII and the ADEA, because social media profiles contain protected information such as a candidate's age or race. For instance, in Illinois an applicant sued an employer for age discrimination alleging that the employer knew of his age through his LinkedIn profile. It is important to note that the applicant's LinkedIn profile only contained his college graduation year, and not his date of birth. Nevertheless, the Illinois court noted, "[t]his is enough to place [the employer] on notice that [the applicant] is subject to the protection of the laws against age discrimination." The court found that the applicant's allegation was enough to state a claim for age discrimination at the pleading stage.

On the other hand, social media has proven helpful to employers in the context of employment litigation. Employers' discovery requests to access a plaintiff-employee's social media account has become increasingly common, as they can uncover key evidence such as an employee's apparent state of mind during the alleged misconduct. It can also provide employers with powerful impeachment evidence. Courts are still in the process of determining the extent of an employer's right to discovery of such social media information.

Employers' use of social media, in either making employment decisions or during litigation, has recently caught the attention of the U.S. Equal Employment Opportunities Commission (EEOC). During an open session this past month, Commissioner Constance Barker stated that the EEOC's priority regarding social media activity and employment should be to ensure that employers do not use it as a method to screen applicants. However, the EEOC commissioners also declared that they are not planning on promulgating any guidance on social media issues in the near future. Regarding concerns about the use of social media in litigation, Commissioner Barker warned against the EEOC expanding its authority beyond the laws they are responsible for enforcing. Indeed, the courts, and not the EEOC, are responsible for outlining the scope of discovery in civil lawsuits.

Employers must keep in mind that the use of social media in the employment setting is still being explored by the courts. For now, it appears that social media is a "friend" of employers when it comes to defending cases, but can be a foe when used to make hiring decisions.