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Social Networking Sites and Discovery – A Double-Edged Sword

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The advent over the past decade of a plethora of social networking sites such as Facebook, MySpace and Twitter has resulted in a potential treasure-trove of discovery for employers defending lawsuits and charges filed by employees. Communications on these websites can often reveal important personal information about employees – including information that may undermine or entirely refute claims. For example, an employee's posts on a social networking site could reveal that her claims of sexual harassment are actually derived from a consensual relationship with a coworker. The information contained on these websites can also be useful in other contexts. It could reveal that an employee has a substance abuse problem, that the employee is defaming the employer or divulging trade secrets, or even that a potential employee has a history of violent behavior.

Given this potential source of invaluable information, employers often rush to access the social networking accounts of current and potential employees, even seeking to review portions of those accounts that the individuals have designated as private. A recent federal court decision from California, *Crispin v. Christian Audiger, Inc.*, gives employers a reason for pause. Stated simply, the *Crispin* Court held that the portions of an employee's social networking sites designated as private are secure information under the federal Stored Communications Act (the SCA). Thus, employers may run afoul of federal law by obtaining access without permission to information on their employees' social networking sites to which the employees have selected to limit access – regardless of the number of individuals to whom they have provided access. The Crispin decision also calls into question whether an employer can obtain information from the private social networking accounts of employees even through the use of legal process such as a subpoena.

The *Crispin* decision may not be the last word on social networking discovery, however. In another recent federal court decision, *Equal Employment Opportunity Commission v. Simply Storage Management LLC*, the court held that the "locked" and "private" portions of the social networking accounts of two individuals claiming to have suffered severe emotional distress due to alleged sexual harassment were relevant to their claims. The court found that posts, profiles, photographs, and videos relating to the plaintiffs' mental states were discoverable, and ordered that they be disclosed.

In light of these decisions, Employers have several options to obtain and maintain access to the social networking accounts of their employees. Employers may access employees' public postings on social networking sites. If an employee's privacy settings allow the general public access to the employee's social networking information, the SCA does not restrict access. In addition, the SCA does not apply where the employee consents to disclosure. So, private employers may consider adopting a non-disparagement policy requiring employees to authorize access to their social networking sites. It remains uncertain, however, whether this requirement would constitute valid, as opposed to coerced, consent. Finally, in litigation, an employer can request the plaintiff's written consent or through discovery documents relating to plaintiff's relevant social networking site posts. If the plaintiff refuses, courts may order the plaintiff to provide consent.

For electronic discovery guidance and litigation assistance, do not hesitate to contact your Baker Donelson attorney or any of our nearly 70 Labor & Employment attorneys, located in *Birmingham, Alabama*; *Atlanta, Georgia*; *Baton Rouge*, *Mandeville* and *New Orleans, Louisiana*; *Jackson, Mississippi*; and *Chattanooga*, *Johnson City*, *Knoxville*, *Memphis* and *Nashville, Tennessee*.

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