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Can You Request Your Employees' Social Media Passwords? Employers Beware!

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The boom of social media has made it clear to employers that their employees' social media posts can dramatically impact their businesses. There are countless examples of social media faux pas by employees from a Taco Bell employee posting a picture of himself licking a stack of tacos to teachers posting insulting comments about their students. As a result, many employers have begun asking employees or prospective employees to provide them with their usernames and passwords to their social media accounts so that the employers can inspect their accounts. In the last several months, numerous states have passed legislation banning this practice due to privacy concerns.

In April 2012, Maryland became the first state to pass legislation banning employers from asking employees and prospective employees for their social media passwords. Maryland's bill also prohibits employers from taking, or threatening to take, disciplinary action against employees or prospective employees who refuse to disclose their passwords. The Maryland bill was spawned after an interviewer requested a Division of Corrections officer's Facebook account information during an interview after the officer returned from a leave of absence following the death of his mother. After receiving the password, the interviewer logged into the officer's account and reviewed the officer's activity during the interview.

Over the last year, concern about employers seeking social media account information has gained momentum in other states. According to the National Conference of State Legislatures, six states, California, Delaware, Illinois, Maryland, Michigan, and New Jersey, passed similar laws in 2012. Nine states have followed suit in 2013, including Arkansas, Colorado, Illinois, Nevada, New Mexico, Oregon, Utah, Vermont, and Washington. Legislation is being introduced or is pending in at least 36 states. In the Southeast, Florida, Georgia, Mississippi, and North Carolina have all introduced legislation.

Some states are creating private rights of action, allowing employees to sue if their social media passwords are improperly requested. For example, Florida's bill provides employees two years to file a civil lawsuit in the county where the offense occurred. The employee may use the lawsuit to seek an injunction or obtain monetary damages in the amount of \$500.00 per violation or actual damages.

Most of these laws do not prohibit employers from viewing publically available social media information, i.e. information that is not password protected. Additionally, employers are not prohibited from viewing social media information that has been voluntarily shared by the employee or another employee. Prior to engaging in any of these activities, however, an employer should check its state's law.

So, what are the implications for employers? Obviously, these laws will make it more complicated to vet prospective employees to the extent you request social media accounts and passwords as a part of your screening process. These laws also could potentially hamper workplace investigations into misconduct, violence, or sexual harassment. Social media sites often contain critical information for these investigations.

What should you do now? First, employers should check their state's law and determine what obligations it imposes and what conduct may not be prohibited. Second, employers should review and revise, if necessary, their internal policies to ensure they are not running afoul of the law and subjecting themselves to civil liability.

Third, employers should keep up to date on this topic because new state or federal legislation could be just around the corner.