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## Social media can be an employer's friend or its foe

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Social media offers an expanding array of opportunities for companies to engage with potential job applicants and employees. Companies seeking to leverage the benefits of social media for recruiting, advertising, brand promotion and employee engagement must also be mindful of the legal constraints and risks surrounding the use of social media for human resources purposes like recruiting or investigations of workplace misconduct.

Employers face particular challenges if they wish to access the personal social media accounts of job applicants or employees. More than a dozen states have already passed laws limiting employer access to personal social media accounts of applicants or employees, and lawmakers in many other states, as well as the federal government, are considering similar legislation. These laws impose varying restrictions; most frequently they prevent an employer from asking an applicant or employee to provide log-in credentials for a social media account. There are other express restrictions such as prohibiting a company from requiring an employee or applicant to "friend" or otherwise add a company representative to the account's contacts list, change their privacy settings (or otherwise grant access), or even merely to "divulge any personal social media." These laws also protect employees and applicants from retaliation by the employer—such as firing or disciplining an employee, or refusing to hire the applicant—for failing to comply with a prohibited request. However, compliance with these laws can interfere with and restrict an employer's ability to engage in standard management practices like hiring or investigating complaints of workplace misconduct.

### Workplace Investigations

Although state social media laws share the common goal of protecting employee and applicant privacy, their scope and terms vary widely, particularly in the context of workplace investigations. One of the most challenging areas under state social media laws involves an employer's ability to inspect or gain access to employees' personal social media in connection with workplace investigations. An employer may wish to access an employee's social media account, for example, if an employee complains of harassment or threats made by another employee on social media or if the employer receives a report that an employee is posting proprietary or confidential information or otherwise violating company policy. Some of the state social

media laws provide at least limited exceptions for workplace investigations, while others do not:

- Some social media laws (such as in Illinois and Nevada) do not provide any express exception for workplace investigations that might require access to an employee's personal social media accounts. This suggests that an employer's investigation of potential misconduct or legal violations may not justify requesting or requiring an employee to disclose his or her social media login credentials.

- Some social media laws provide an exception for workplace investigations, but only for investigations of specific types of legal violations. For example, the Colorado and Maryland social media laws only provide an exception for investigating violations of securities laws or potential misappropriation of proprietary information.

- Some social media laws extend the exception for workplace investigations beyond investigations of legal violations to investigations of alleged misconduct. These states include California, Oregon and Washington. In general, these laws allow an employer to ask an employee to divulge content from a personal social media account, but still do not allow the employer to request the employee's login credentials. In contrast, Arkansas permits an employer to request any employee's social media login credentials to investigate workplace misconduct.

These differences show the lack of a uniform approach among these state social media laws. Multi-state employers may need to juggle compliance with different laws by state. A California-based employer conducting a workplace investigation in Illinois will need to understand the Illinois restrictions on seeking access to employees' personal social media accounts in connection with that investigation, for instance.

### Social Media Account Access

Beyond these state social media laws, federal and state laws can also present challenges to employers seeking access to personal social media accounts for other legitimate purposes like candidate selection, promotion or termination, as these laws prohibit employers from considering legally-protected characteristics (such as race, age, religion, pregnancy or medical condition, family medical history, marital status, or sexual orientation) or legally protected activity (such as political or labor union activity) in making employment-related decisions. Accordingly, it is standard practice for employers to refrain making such inquiries of applicants or employees.

Yet an employer might easily glean such information from an applicant's or employee's social media pages—and may increase its exposure to discrimination or retaliation claims if it later takes adverse action against the individual. Employers should carefully consider the use of social media in their human resources process and employers using social media for human resources purposes should implement safeguards to reduce these risks. An employer should first consider whether social media should be used for actual candidate selection, or just targeted recruiting. An employer might consider using a third-party recruiter to screen this information and pass along only details that the employer is legally permitted to consider in employment decisions.

Informal social media "friending" relationships can also raise compliance challenges for managers and employers. In some cases, a manager who stumbles across certain information through social media (such as an employee's family medical history) is required to refrain from using or disclosing that information. In other cases, however, a manager who stumbles across potentially discriminatory or harassing postings among employees may be legally required to report the matter for investigation and remediation. Additionally, a manager's own personal postings on issues of race, gender, religion, politics and other sensitive topics might also be used in support of a discrimination claim. To address the compliance challenges presented by friending relationships, employers and employees benefit from social media guidelines and training, although such guidelines and training must take into account restrictions arising under the National Labor Relations Act and similar laws.

### Best Practices

It can be challenging for employers to navigate the multiple layers of laws protecting personal social media activity of applicants and employees, but the following best practices can help:

**Review hiring practices for compliance with social media laws:** Employers should ensure that all employees involved in the hiring process are aware of the restrictions imposed by these state social media laws. For example, recruiters and hiring managers should refrain from inquiring about an applicant's personal social media pages or requesting access to such pages. While these state social media laws do not prohibit employers from accessing publicly available personal social media sites, employers will also want to evaluate whether this practice is advisable, given the risk of

stumbling across legally protected information that cannot be used in employment decisions.

**Implement social media guidelines:** Employers should implement social media guidelines to mitigate potential risks posed by employee social media postings, being mindful of restrictions arising under the National Labor Relations Act and other federal and state laws. Employers also should ensure that their social media guidelines do not run afoul of these state social media laws.

**Educate and train personnel:** Personnel involved in internal investigations, such as human resources and internal audit personnel, need to be aware of the growing restrictions on employer access to employee personal social media accounts. Prior to seeking access to an employee's personal social media account, or content from such an account, the internal investigators should check any applicable restrictions. In general, given the general trends in these laws, employers should avoid requesting login credentials to employees' personal social media accounts, even in the investigation context, unless they have first consulted legal counsel.

While social media offers new ways to engage with applicants and employees, employers are subject to special restrictions on their accessing and use of information obtained through personal social media accounts and adherence to these restrictions can create a challenging landscape for employers to navigate. A successful social media strategy will take into account these restrictions, as well as the expectations of applicants and employees.

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