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LEGISLATION

Social media legislation is back

by Molly DiBianca

Long-term readers of Delaware Employment Law Letter will recall that in June 2012, we wrote about the Workplace Privacy Act, then being proposed by the Delaware General Assembly (see "Delaware proposes Facebook privacy law" on pg. 1 of that issue). Employers were successful in defeating the Act before it passed into law. Unfortunately, the General Assembly is now considering a new social media privacy law.

As of the publication of this article, the law — House Bill (HB) 109 — has been passed by the House and is currently before the Senate. Here's what employers need to know about the risks and possible pitfalls of this piece of legislation.

What does the law do?

The stated purpose of HB 109 is to protect individuals' privacy in their personal social media accounts. Generally speaking, HB 109 would prohibit an employer from requiring or requesting that an employee or applicant give it access to her

personal social media accounts — either by giving up her passwords or by logging in and letting the employer take a look (also known as "shoulder surfing").

As we all know, however, with any law, the devil is in the details. And there are — not surprisingly — a few devilish details. For example, HB 109 prohibits an employer from asking an employee (or applicant) to disclose "a username . . . for the purpose of enabling the employer to access personal social media." As written, that would mean that an employer could not ask a candidate what his Twitter handle is. Twitter is, generally speaking, a publicly available site.

So an applicant could have a public Twitter account where he tweets racist or sexist speech or talks about how he likes to steal money from his current employer, but the prospective employer wouldn't be able to ask about it? Huh? I suppose we'd just have to wait until discovery in a lawsuit before we could ask for that (public information)? This appears highly problematic for an employer attempting to comply with its statutorily mandated duty to protect employees from harassment and discrimination.

Why should we care?

While HB 109 is undoubtedly well-intended — it was drafted by the Office of the Attorney General — it has unintended consequences that put employers at risk.

As we have previously reported, a 2013 study by the Society for Human Resource Management (SHRM) indicated that approximately 20 percent of employers use social media to research job applicants. This makes sense. It's a publicly available source of information that shows you what an employee does when he's relaxed and thinks no one is watching. And as the use of social media becomes more common among employers, there are risks to avoiding it. An employer that fails to check publicly accessible social media accounts and then hires an individual who has a public record of discriminatory or violent posts could be on the hook for a negligent hiring claim if the employee later engages in similar behavior in the workplace.

These are real concerns that Delaware employers and the General Assembly should consider. Most individuals can agree that job applicants shouldn't be screened out on the basis of normal out-of-work activity, but employers should be permitted access to information — such as discriminatory, violent, or drug-related commentary — that has an impact on their liability.

Bottom line

The newest attempt at protecting employees' social media privacy is a vast improvement on the 2012 bill. However, it still leaves much to be desired. Employers that are concerned about the statute are encouraged to reach out to their representatives in the General Assembly or work through affinity organizations such as the Delaware Chamber of Commerce to share their thoughts. As always, we will continue to monitor the bill's progress and report back.

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