State Developments

Why Can't We Be “Friends”? Because The Oregon Legislature Says So

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Riding a wave of national news stories about employers forcing applicants or employees to turn over social media passwords as a condition of employment, the Oregon legislature recently passed House Bill 2654. Governor Kitzhaber signed the bill into law, and once it takes effect on January 1, 2014, Oregon employers will generally be prohibited from compelling access to the social media accounts of their employees and applicants.

What Does the Law Prohibit?

Under the new law, it will be illegal to:

- require or request an applicant or employee to provide access to a social media account;
- require or request an applicant or employee to provide his or her username and password (or other means of authentication) to a social media account;
- compel an applicant or employee to add the employer to the list of the employee’s contacts (e.g., to compel an employee to “friend” the employer on Facebook);
- penalize or threaten to penalize an employee or applicant for refusing to do any of the above.

What Is “Social Media” Under the Law?

Under the new law, “social media” includes the usual suspects, such as Facebook and Twitter, but is broadly defined to include any “electronic medium that allows users to create, share and view user-generated content, including, but not limited to, uploading or downloading videos, still photographs, blogs, video blogs, podcasts, instant messages, electronic mail or Internet website profiles or locations.” This broad scope of the law covers all manner of electronic media whose content can be restricted via privacy settings or passwords. As the growth of new applications for sharing content continues, so too will the scope of this law.

What Does the Law Allow?

In response to the business community’s concerns that the law would unnecessarily restrict the ability to perform workplace investigations, the legislature carved out an exception. When a business is conducting an investigation to ensure legal compliance or to look into alleged unlawful misconduct, and the employer receives
"Specific information about activity of the employee on a personal online account or service" the business may require an employee to share the social media content (but still may not demand usernames and passwords).

For example, if an employer received a report that an employee on medical leave claiming to be physically incapacitated was posting Facebook pictures of herself drinking and dancing (true story), the employer could lawfully require an employee to share those posts (but not the employee’s username and password).

Likewise, nothing in the law prohibits an employer from accessing publicly available information. For example, if the employee mentioned above posted her pictures without making them private, her employer could lawfully review the content.

The law also allows an employer to require an employee to disclose the username and password to any social media account provided by or on behalf of the employer. As the number of legal disputes about the ownership of social media accounts used by employees continues to grow, the new law makes it even more important for Oregon employers to clearly identify when a social media account should be considered company property. Failure to do so could delay, or even prohibit, access to an account used for the employer’s business.

Finally, the law does not make it unlawful to inadvertently obtain an employee’s social media username and password, such as might happen through electronic monitoring. But use of that information to access a social media account is strictly prohibited.

Penalties

Unlike social media laws in other states, Oregon’s new law does not impose minimum statutory penalties. Instead, the law will become part of Oregon Revised Statutes (ORS) Chapter 659A, which addresses most unlawful employment practices. However, the remedies available for violations of ORS 659A vary and it is unclear which remedial section will apply to the new law. This is quite important, as some violations of sections of ORS 659A have fairly limited remedies, while others allow for the recovery of economic, noneconomic, and punitive damages.

In apparent recognition of the fact that employers sometimes become the targets of lawsuits after incidents of workplace violence, or instances where an employee injures a third party, the law expressly provides that employers cannot be held liable for negligent hiring merely because they did not demand prohibited social media usernames and passwords of employees or applicants. In other words, if an employee happened to post something to Facebook about committing an act of violence—but the employer did not know because it complied with this new law—it cannot be held liable for negligence. While that makes good sense, this exception may not protect an employer that receives a complaint about such a posting in advance of the violence, but does not investigate and seek access to the content of the post.

How Should Employers Respond to This New Law?

Oregon employers would be well served to review their existing social media policies, and to ensure that human resources personnel, supervisors, and anyone else involved in hiring decisions or the investigation of workplace complaints understands the new law. As the amount of relevant information on social media continues to grow, employers will understandably want to consider it in making employment decision—but must operate within the confines of this new law.