To Employers: If You Ask For Facebook Usernames And Passwords, Proceed At Your Own Risk!

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I recently read an article by CNN reporter Doug Gross about employers asking prospective and/or current employees for Facebook passwords. If you decide to do so, then proceed atyour own risk.

Unfortunately, it often takes years for statutory and case law to catch up with changes in technology. However, it remains a privacy issue and asking an employee for a password may not be lawful. While there may not be an answer to this problem now, there is no doubt that it will be litigated. If you chose to request this information from prospective or current employees, you may make headlines...as a party in a state or federal lawsuit.

This requirement by employers is fraught with negative consequences. For example, it may expose an employer to claims for discrimination. By viewing an employee's Facebook profile, you may discover that your current or prospective employee is a member of a protected class. That fact may put an employer on notice of the employee's membership in a protected class that the employer may not have otherwise known. That, coupled with an adverse employment action such as a suspension, termination or even less severe discipline, may expose employers to discrimination lawsuits or claims with the New Jersey Division on Civil Rights and/or EEOC.

Yet another potential consequence of requesting Facebook passwords is claims by employees that the employer made changes to the employee profile. In certain circumstances, the passwords may get into the wrong hands such as a vengeful HR manager. This may expose employers to claims of defamation and a host of other potential claims. By way of another example, the information contained in the employee Facebook profile may include medical information or illnesses of an employee for which an employer may need to provide a reasonable accommodation under the Law Against Discrimination or Americans With Disabilities Act. Even more interesting is the potential disclosures by the employee of conduct by the employer which is perceived to be fraudulent or a violation of public policy. This may

result in whistleblower claims by an employee against the employer.

The only time this practice may be worthwhile is for employer Facebook pages when the employee is responsible for accessing and using the Facebook profile for the benefit of the business. In those circumstances, the employer likely has a right to the password and access to the profile.

The negative consequences of requesting Facebook passwords from employees far outweighs any positive results. Although some of these negative consequences may present themselves even when an employer searches for and views an employee Facebook profile, it is far less invasive and less likely to result in litigation than by requesting passwords. Besides, you are often likely to get whatever information you may seek just by searching for and viewing the employee Facebook profile. This may still open up employers to potential claims, but far less invasive and less likely to result in increased scrutiny. So employers: stay away from Facebook passwords.