Legal Updates

Court Decisions Regarding Investigations

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Employers are learning the hard way that gaining access to private employee information during workplace investigations can lead to lawsuits, liability and headaches. Two recent jury verdicts (one of which resulted in an award of $1.8 million in damages to the employee involved) counsel in favor of caution and prudence when undertaking employment investigations that involve employee use of social media or access to an employee's personal information.

Investigate Allegations of Employee Misuse of Social Networking Sites Cautiously. Study after study has confirmed that employees are accessing social media sites at work. Even employers who block access to such sites face risks from employee use of those sites from their personal computers. Investigating claims that involve employee use of these sites can, however, be tricky. In a recent case, Pietrylo v. Hillstone Restaurant Group (D.N.J. 2009), two former Houston's Restaurant servers were fired after management reviewed a private, password-protected, invitation-only group the servers had created on MySpace.com called the "Spec-Tator." Posts on the site included sexual remarks about management and customers, and references to violence and illegal drug use. Management gained access to the site by asking for the logon credentials of an employee who had been invited to join.

After they were fired, the two employees sued Houston's parent, Hillstone Restaurant Group, for violations of the Stored Communications Act ("SCA") and for invasion of privacy. The two employees argued that Hillstone violated the SCA, which prohibits unauthorized access to stored communications, by coercing an employee into giving the company her logon credentials—a novel and untested theory. The court denied Hillstone's request for summary judgment, and a jury found that Hillstone had not only violated the SCA and the privacy rights of the two discharged employees, but that it had acted maliciously, thus entitling the plaintiffs to punitive damages.

Don't Obtain Employee Personal Information Through Pretexting. Many states and the federal government have legislated against a practice known as "pretexting," whereby a person uses fraudulent means to obtain personal information belonging to someone else. A Chicago jury recently returned a verdict of $1.8 million against a company that obtained private information about one of the company's former employees in just that manner.

In 2005, North American Corporation, already involved in a lawsuit over a pay dispute with a former employee, hired a private detective agency to investigate allegations that the employee, who was under a noncompetition agreement, was planning to take a large and recently acquired account to a competing business. North American's CEO directed his VP of Operations to oversee the investigation and to provide the agency with personal information about the employee including her date of birth, social security number and phone numbers. The detective agency used that information to pose as the employee and obtain her personal cell phone records in order to cull from the phone records contacts between the employee and competing firms. The former employee learned of North American's efforts, subpoenaed the investigation records from the agency and promptly amended her complaint to add a claim for invasion of privacy—a claim on which she prevailed and was awarded $1.8 million in damages, including punitive damages.

Both of these recent cases involve jury verdicts, rather than appellate decisions, and therefore they have no precedential value. They do, however, highlight the need for employers to proceed cautiously in this area and to develop clear guidelines and policies that take into account the current state of technology. As technology evolves, there will certainly be room for more errors. Indeed, the contours of the law regarding employee use and employer monitoring of social media are evolving day-to-day. Keeping abreast of these changes will help your organization avoid these kinds of lurking landmines.