

POLITICIANS BALK AT EMPLOYERS SEEKING SOCIAL MEDIA PASSWORDS

Sooner or later, it was bound to happen. The Associated Press (AP) recently reported that some employers have been asking job applicants to give up their passwords to Facebook and other social media accounts so they can check for discrepancies in how the applicants present themselves and evidence of bad judgment or even illegal activities. Employers have a legitimate need to carefully vet applicants, but there are many legal concerns.

Even though later news reports indicated that few employers actually request passwords, there's been a big backlash. Several states are mulling legislation to forbid employers from asking for passwords, two U.S. senators have asked for investigations, and the American Civil Liberties Union (ACLU) has opposed the practice.

To place the controversy in context, asking for passwords is just the latest and perhaps most intrusive method employers could use to screen candidates using the internet.

The Range of Online Screening

Many employers google job candidates for publicly available information. They may also see what, if anything, the candidates show the public on social media sites like Facebook or LinkedIn.

Then there's "shoulder surfing," asking the job candidates to log onto a social media site while the employer looks over the candidate's shoulder. Other employers ask candidates to "friend" them on Facebook to gain access to their information. Still others use third-party vendors or software apps to pull public information on candidates from the Internet. None of those practices involves requesting, or otherwise obtaining the candidate's password.

Requests for passwords are more prevalent in public agencies, especially in law enforcement, the AP reported, as well as in highly regulated enterprises and for jobs requiring a good deal of contact with the public. Some employers believe they have a

duty to watch what employees such as stockbrokers do online to prevent conflicts of interest.

Many Potential Pitfalls

Even if a candidate agrees to disclose a password, legal issues abound. Perhaps the biggest is that an employer may learn about the job candidate's religion, national origin, age, disability or other protected health information, pregnancy, or sexual orientation (protected in some states and cities). The candidate's Facebook conversations may be protected concerted activity under the National Labor Relations Act (NLRA). In fact, the National Labor Relations Board (NLRB) has issued guidance to employers on use of social media.

continued on Page 2

INSIDE ...

**Financial Insight
From the CEO
Contractual Risk Tools**

continued from Cover Page

Legal commentators have raised the issue of coercion when an employer asks for a password, along with privacy concerns. Much online chatter deals with what people do outside the workplace, and some states' laws (including the North Dakota Human Rights Act) limit what actions employers can take based on employees' off-the-job conduct.

Legal issues aside, employers face the risk that the very job candidates they want the most will refuse to work for them if they request password information.

Lawmakers Seek Answers, Craft Remedies

In an effort to clarify some of the legal issues, U.S. Senators Charles Schumer (D-New York) and Richard Blumenthal (D-Connecticut) have asked the U.S. Department of Justice (DOJ) to investigate whether asking for passwords violates federal anti-hacking laws and a separate statute that bars intentional access to electronic information without authorization or in excess of authorization. Facebook itself has protested the practice of asking for passwords. Schumer and Blumenthal also asked the Equal Employment Opportunity Commission (EEOC) to issue an opinion on whether requesting passwords and accessing social media information may be used to illegally discriminate against applicants.

A measure to forbid employers from conditioning current or future employment on providing passwords failed in the U.S. House of Representatives by a vote of 236-185. Blumenthal said he will introduce legislation to protect employees and applicants.

So far, legislation to limit or bar password requests is pending in California, Illinois, Maryland, Massachusetts, Michigan, Minnesota, and New Jersey. The proposals largely forbid employers from asking applicants or employees for passwords, and some forbid penalizing those who complain about the practice or refuse to give out passwords. Some cover e-mail as well as social media passwords. The Illinois legislation would allow employers to ask for user names so they could check out public information.

Considerations

In this uncertain legal climate, you must act with care. Consider how to gain accurate information and address legitimate business concerns short of asking for passwords. Employers concerned about employees bad-mouthing the company online can investigate the possibility of non-disparagement agreements. You also can conduct old-school reference checks. If you do choose to examine publicly available online information, remember that it can be unreliable or even false. Be critical, and double-check what is discovered.

You also should be consistent in screening job applicants using online tools and keep records of the basis for employment decisions. Attorneys have suggested having someone other than the decision-maker filter out any protected-class information that might be publicly available online. You shouldn't attempt to circumvent the privacy settings applicants have set up on their social media sites. These cautions apply to online checks of employees as well.

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RISK SERVICES

Contractual Risk Management Tools and Their Specific Uses: Waivers, Hold Harmless and Indemnity Agreements, and Additional Insured Status

Waivers aren't worth the paper they are written on! Hold harmless agreements won't hold up in court! We hear these statements from our members. This is distressing as we at NDIRF believe each of these risk management tools has their proper use. A hammer works well for driving nails. It does not work well for driving screws.

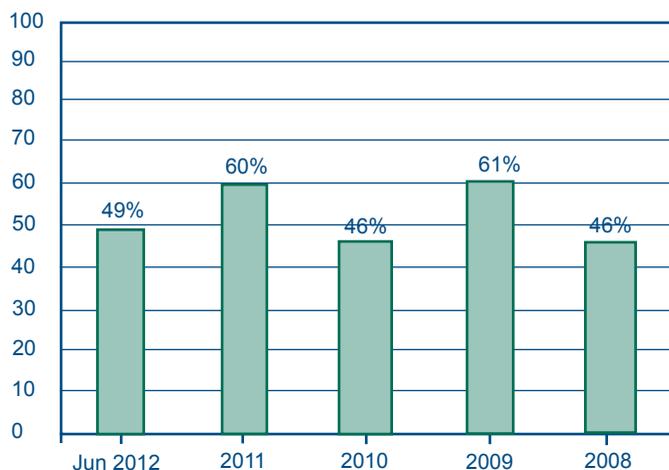
A waiver is voluntary relinquishment of a right. Hold (save) harmless agreements are promises to protect and defend another party. An indemnity agreement guarantees payment of the losses of another. Hold (save) harmless and indemnity agreements can be viewed as meaning essentially the same thing in accordance with North Dakota Supreme Court decisions. *See Bridston v. Dover Corp., 352 N.W.2nd 194 (N.D. 1984)*. Additional insured status is another instrument to ensure contractual hold harmless and indemnity provisions can be fulfilled. Depending on the precise wording of these agreements, they can be very valuable as a risk management tool or nothing more than paper and ink.

Waivers can be used in any situation to reduce exposure to a claim or lawsuit. They are used to waive a right make a liability claim. Typically a waiver of liability is required to take part in athletic competitions. Check the back of a ticket for a Minnesota Twin's game. Is there a waiver for injury as a spectator? A waiver can be used for participants in any activity or event. Participants can include competitors, vendors, promoters, and even spectators.

continued on Page 4

FINANCIAL INSIGHTS

LOSS RATIO



The loss ratio is calculated by dividing incurred losses, including loss adjustment expenses, by earned premium. A ratio greater than 100% means incurred losses exceed premium income. The higher ratios in 2009 and 2011 are the result of the large number of winter weather-related losses in those years. ■

FROM THE CEO

As I write, we are working on the umpteenth consecutive day of low to mid-90's temperatures in July – and not the soothing dry-heat kind – so it's a bit difficult to imagine the fall statewide association annual conference season. It is, however, not that far away and I'd like to put in a pitch for your attendance at these events.

The NDIRF has, for many years, felt that member officials and employees stand to gain useful information – some of it the kind of knowledge that helps reduce liability and property risk – by participating in an annual conference of the political subdivision association applicable to your entity (and regional meetings of this kind, as well). Accordingly, NDIRF provides various incentives, particularly for new officials/attendees, to encourage taking that first step. Most of the time, once someone has experienced the value of training sessions like these and the opportunities they make available for idea-generating conversations with colleagues from around the state, that's all the "push" needed to ensure a desire to return in following years for more of the same.

I encourage those of you who already know the benefits to be gained by your organization through your involvement in the annual conference experience to do a little good-natured arm twisting of your colleagues who haven't – it will be a win/win for all if you are successful. ■

RISK SERVICES

continued from Page 3

Hold harmless agreements, indemnity agreements, and additional insured status, specifying limit of liability requirements, are used between contracting parties to transfer “liability”. Used properly, these agreements are an excellent risk management tool. Used sloppily they can lead to litigation and headaches.

Be certain of exactly what liability is intended to be transferred. Be clear in the wording of the extent of the liability being transferred. Indemnity agreements will not be interpreted to indemnify a party against the consequences of their own negligence unless that intent is very clearly stated.

It is very important to review all contracts closely. We have found contracts that include the hold harmless and indemnification wording in sections other than those titled “indemnity” or “additional insured”. Don’t overlook the importance of transferring your liability or the acceptance of the liability of another party. The difference could be the potential savings of or loss of millions of dollars.

Vendors, Service Providers and Contractors

Should you ever hold a vendor, service provider, contractor or any other party harmless and/or indemnify them? The short answer is NO! The long answer is NO! Why would you have confidence in any other party that does not have confidence in their abilities to provide a quality product or service? If these parties try to transfer their risk of liability they obviously have little to no confidence in their ability to provide a quality product or service. Don’t have confidence in those that have no confidence in their work or product.

Individuals in your organization that have the authority to sign contracts or agreements should be well versed in identifying hold harmless and indemnity clauses and have those removed prior to signature. We seriously suggest all agreements be reviewed by legal counsel to ensure that your entity is not accepting the liabilities of another party. If you have questions on this information, please contact Ross Warner at ross.warner@ndirf.com or local phone 224-1988 and WATS 1-800-421-1988. ■

Mark Your CALENDAR

Sept

6: NDIRF Board of Directors Meeting
NDIRF offices, Bismarck

20-22:

ND League of Cities
Annual Conference,
Alerus Center, Grand Forks

Oct

7-10: ND Association of Counties
Annual Conference & Expo
Ramkota Inn, Bismarck

26-27:

ND School Board Association
Annual Convention,
Ramkota Inn, Bismarck

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