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The Young and the Restless: Gen Y'ers in the Workplace! Are You Prepared?†

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I.
Introduction

Gen Y'ers – those born (roughly) in the 1980s and 1990s and variously also referred to as Millenials, Gen Next, and the Echo Boomers – will make up approximately thirty-six percent of the U.S. workforce by 2014.[1] By 2020, it is estimated that Gen Y'ers will comprise nearly half of working Americans[2] and possibly seventy-five percent by 2025.[3] These workers, who are the most highly educated generation yet, are not just holding entry-level and blue collar jobs but are quickly moving into the professional ranks.

Gen Y'ers come to the workplace with drastically different expectations and values than the generations before them, including the now-aging Baby Boomers – in part due to having grown up in a world of helicopter parenting and 24/7 access to technology. Gen

† Submitted by the authors on behalf of the FDCC Employment Practices and Workplace Liability section.

[1] Jessica Brack, Maximizing Millenials in the Workplace 2 (2012), *available at* http://www.kenan-flagler.unc.edu/executive-development/custom-programs/~/media/DF1C11C056874DDA8097271A1ED48662.ashx.

[2] *Id*.

[3] Business and Professional Women's Foundation, Gen Y Women in the Workplace 1 (April 2011), *available at* http://www.bpwfoundation.org/documents/uploads/YC_SummaryReport_Final.pdf; *see also* Dan Schwabel, *The Beginning of the End of the 9-to-5 Workday?*, BusinessTime (Dec. 21, 2011), http://business.time.com/2011/12/21/the-beginning-of-the-end-of-the-9-to-5-workday/.

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Y'ers tend to be confident and self-centered. They are tech-savvy multi-taskers who value schedule flexibility over salary. In fact, a recent survey found that forty-one percent of Gen Y-ers said they would take a pay cut if it meant more flexibility on the job.[4] They prefer to work collaboratively on team-based projects. And, this generation of individuals who "have been constantly coached, praised and encouraged for participation- rather than for accomplishments"[5] (*i.e.*, the "everyone gets a trophy" syndrome) crave immediate and constant positive feedback on their progress at work.[6]

For this generation, the Internet is an integral part of their lives, and a Gen Y'er is likely to appear on at least one social networking site containing embarrassing material (from an employer's perspective). It is interesting to note that more than half of Gen Y'ers say they will not accept jobs where they cannot access social media at work.[7] About thirty percent believe it is acceptable to share opinions about their work on social media – compared to about fifteen percent for Baby Boomers.[8] And when evaluating a job offer, almost half of

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[4] Mom Corps, 2012 Labor Day Survey (2012/2013), *available at* http://momcorps.com/Libraries/News_PDFs/Mom-Corps-2012-Labor-Day-Survey-infographic.sflb.ashx; *see also* Schwabel,*supra* note 3.

[5] Adrienne Fox, *Mixing It Up*, 56.5 HR Magazine 22 (May 1, 2011), *available at* http://www.shrm.org/publications/hrmagazine/editorialcontent/2011/0511/pages/0511fox.aspx.

[6] *Id.*

[7] Cisco, 2011 Cisco Connected World Technology Report 59 (2011), *available at* http://www.cisco.com/en/US/solutions/ns341/ns525/ns537/ns705/ns1120/2011-CCWTR-Chapter-3-All-Finding.pdf.

[8] Kelly, When Worlds Collide: The Rise of Social Media for Professional and Personal Use 12 (June 2012), *available at* http://www.kellyocg.com/uploadedFiles/Content/Knowledge/Kelly_Global_Workforce_Index_Content/When%20Worlds%20Collide%20-%20The%20Rise%20of%20Social%20Media%20for%20Professional%20and%20Personal%20Use.pdf.

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Gen Y'ers say they would prioritize access to social media,[9] and they value the ability to work remotely over a higher salary.[10]

It is well-known that Millenials eschew suits for jeans, even at work. And then there's the ink, and maybe a nose ring or other piercing. A 2010 Pew survey showed that nearly four in ten have at least one tattoo (contrast that with fifteen percent of Baby Boomers).[11] According to a 2006 Pew survey, fifty-four percent of Gen Y'ers have a tattoo, dyed hair that is a non-traditional color, or a body piercing other than on their ear lobe.[12]

Gen Y'ers also hold a different view of corporate management than the older generations. Unlike their predecessors, Millenials don't view their managers as content experts. That's because this generation knows where to find multiple versions of the information they need to do their jobs. As a result, their managers are viewed more as coaches and mentors.[13]

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[9] Cisco, *supra* note 7, at 62.

[10] *Id.* at 65.

[11] Pew Research Ctr., Millenials: Portrait of Generation Next 57 (2010), *available at* http://pewsocialtrends.org/files/2010/10/millennials-confident-connected-open-to-change.pdf.

[12] Pew Research Ctr., How Young People View Their Lives, Futures, and Politics: A Portrait of "Generation Next" 23 (2007), *available at* http://people-press.org/reports/pdf/300.pdf.

[13] Brack, *supra* note 1, at 4.

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Not surprisingly, the workplace juxtaposition of Gen Y'ers and older generations can result in tensions. In a recent survey, seventy-two percent of respondents indicated that intergenerational conflict is an issue in their workplaces.[14] Forty-seven percent of younger workers complained that older managers were resistant to change and tended to micromanage.[15] About thirty-three percent of older workers griped that younger workers' informality, need for supervision, and lack of respect for authority were problematic.[16] Furthermore, thirty-eight percent of older workers in the survey raised concerns about younger employees "inappropriate use or excessive reliance on technology."[17] Thirty-one percent of younger workers responded that their managers had an "aversion to technology."[18]

Underlying these facts and figures is the need for employers to recognize the challenges – and benefits – of the evolving workforce, including employment law concerns involving dress codes, age bias, and social media issues that can arise from intergenerational conflicts. This article explores these challenges in depth. Part II examines how Millenials are forcing changes in the traditional workplace dress and grooming codes – and the legal limits on what employers can do to set limits on employee appearance. Part III takes a close look at age discrimination and harassment in employment – a common problem in today's workplace where Gen Y'ers are working side-by-side with older employees. Finally, Part IV discusses the legal implications of growing social media use and employer restrictions on social media in the workplace.

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[14] Society for Human Resource Management, Intergenerational Conflict in the Workplace SHRM Poll 3 (April 29, 2011), *available at* http://www.shrm.org/Research/SurveyFindings/Articles/Pages/IntergenerationalConflictintheWorkplace.aspx.

[15] *Id.* at 12.

[16] *Id.* at 9.

[17] *Id.*

[18] *Id.* at 12.

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II.
Wing Tips to Flip Flops: The Evolving Workplace Dress Code[19]

Mark Zuckerberg, founder and CEO of Facebook, made recent headlines when he chose to wear pajamas to a meeting with potential investors. Shortly after that, he "dressed up" in a hooded sweatshirt and sneakers to make his Facebook IPO pitch.[20] Is Zuckerberg an eccentric? Or is his choice of clothing an indicator of attitudes towards traditional corporate attire?

In many corporate offices, suits and ties have already been replaced by "business casual" attire. Some offices eschew formality altogether and allow their employees to wear jeans, t-shirts, and flip flops to work. Casual Fridays are par for the course. This more laid-back approach to employee dress, coupled with the increased popularity of piercings, tattoos, colorful hair dye, and diverse cultural dress, can create difficult issues for employers, whose desire to allow individual expression among employees is tempered by the need to present appropriate-looking employees to clients and to the public.

A. *Aloha Fridays*

"Casual Fridays" have been linked back to Hawaii in the 1960's. In an attempt to sell more shirts, the Hawaiian garment industry came up with the idea that businesses should allow employees to wear Hawaiian shirts on Fridays. By the early 1990's Aloha Fridays started to catch on in the mainland when more casual dress became acceptable on the last workday of the week. In 1992, Levi's launched a campaign to promote its Dockers brand as

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[19] Angela Brandt is the author of Part II.

[20] Mark Milian, *Zuckerberg's Hoodie a 'Mark of Immaturity,' Analyst Says*, Bloomberg (May 8, 2012 6:01 PM), http://go.bloomberg.com/tech-deals/2012-05-08-zuckerbergs-hoodie-a-mark-of-immaturity-analyst-says-2/.

appropriate for the office. A brochure titled, "A Guide to Casual Businesswear" was sent to 25,000 human resource managers around the country. Since that time, khakis have become the unofficial uniform of many office workers.[21]

B. *Tattoos and Piercings*

In recent years, tattoos and piercings have become more prevalent and more widely accepted. A recent Pew Research poll found that nearly forty percent of 18- to 40-year-old adults have a tattoo or a non-earlobe piercing.[22] However, there remains a certain stigma associated with tattoos and piercings. In a survey conducted by Careerbuilders, three out of four managers said they believe visible tattoos are unprofessional.[23] The prevalence of visible tattoos, body piercings, and other forms of body modification has caused some companies to adopt policies that either prohibit or place restrictions on tattoos and piercings. And it is generally recognized that employers are free to set reasonable dress codes and grooming standards that are justified by the business environment and applied in a non-discriminatory manner. There is no federal law that explicitly provides protection from employment discrimination to individuals with tattoos and piercings. Employers have wide latitude to regulate employee appearance and workplace dress. But that latitude must be exercised in conformity with Title VII, which prohibits employment discrimination based on race, color, religion, sex, or national origin.

C. *Title VII*

Religion is the most common area where dress code policies come into conflict with Title VII. Under Title VII, an employer must reasonably accommodate an employee's sincerely held religious beliefs even when those beliefs conflict with a condition of employment (such as a dress code) unless the accommodation would create an undue hardship for the employer. The Equal Employment Opportunity Commission (EEOC) may take enforcement action against an employer who discriminates with respect to any aspect of employment, including hiring, firing, pay, job assignments, promotions, training, and fringe benefits.

Courts apply a three-part burden-shifting framework to evaluate claims brought under Title VII.[24] First, the court determines whether the policy is discriminatory on its face or whether it has a discriminatory effect. Next, if discrimination is shown, then the employer must provide a legitimate, non-discriminatory reason for its policy. If the employer succeeds,

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[21] Krissy Clark, *Dress code: The history of 'business casual'*, Marketplace.org (Aug. 17, 2012), http://www.marketplace.org/topics/business/workplace-culture/dress-code-history-business-casual.

[22] Ed Sealover, *Generations Clash Over Tattoos, Body Piercings in the Workplace*, Denver Business Journal (Dec. 6, 2009, 10:00 PM), http://www.bizjournals.com/denver/stories/2009/12/07/story3.html?page=all.

[23] Regina Robo, *Body Art in the Workplace*, Salary.com, http://www.salary.com/body-art-in-the-workplace (last visited July 21, 2013).

[24] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973).

then the burden shifts back to the plaintiff to prove that the employer's stated reason for the policy is a pretext for discrimination.[25] The employee might show that the dress code policies were enforced inconsistently, or that religious or racial differences were not tolerated in the workplace.

If an employee's physical appearance conflicts with the public image the employer wishes to convey to the public, some courts have found that accommodating the employee's physical appearance would impose an undue hardship on the employer. For example, the United States Court of Appeals for the First Circuit held that Costco did not violate Title VII by terminating an employee whose facial piercing violated the "no facial jewelry" provision of the company's dress code.[26] The employee claimed that Costco failed to offer a reasonable accommodation of her religious practice as a member of the Church of Body Modification.[27] The court held that it would pose an undue hardship to require Costco to grant an exemption because it would adversely affect the employer's "public image," given Costco's determination that facial piercing detracts from the "neat, clean and professional image" that it aims to cultivate.[28]

The EEOC, however, has taken the position that

> [w]hile there may be circumstances in which allowing a particular exception to an employer's dress and grooming policy would pose an undue hardship, an employer's reliance on the broad rubric of "image" to deny a requested religious accommodation may in a given case be tantamount to reliance on customer religious bias (so-called "customer preference") in violation of Title VII.[29]

However, an employer's desire to present a family-friendly atmosphere will not always suffice as a business justification. In Washington state, the EEOC sued Red Robin restaurants for firing a server who had refused to cover tattoos on his wrists that he claimed represented his devotion to Ra, the Egyptian sun god.[30] Red Robin argued that its policy forbidding visible tattoos was essential to its family-friendly image.[31] The court disagreed, finding that Red Robin failed to demonstrate that allowing an employee to have visible religious tattoos

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[25] *Id.*

[26] Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 132 (1st Cir. 2004).

[27] *Id.* at 128.

[28] *Id.* at 136.

[29] EEOC Compliance Manual, (CCH) ¶ 8340, at 6841-42 (Aug. 2008), *available at* http://www.eeoc.gov/policy/docs/religion.html#_ftnref184.

[30] EEOC v. Red Robin Gourmet Burgers, Inc., No. C04-1291, 2005 WL 2090677, at *1 (W.D. Wash. Aug. 29, 2005).

[31] *Id.* at *5.

was inconsistent with its goals, and instructing Red Robin to provide further evidence to demonstrate undue hardship.[32]

D. *Other Grooming Issues*

Facial-hair policies are appropriate where there is a legitimate business reason.[33] Courts have upheld requirements that employees be clean-shaven, though employers must reasonably accommodate employees whose religious beliefs require certain hairstyles or facial hair – such as Rastafarian dreadlocks or Sikh uncut hair and beard.[34]

Body odor and personal hygiene are sensitive topics. Though body odor is not itself protected under the Americans with Disabilities Act,[35] the subject employee may have a medical condition as the underlying cause of hygiene problems. Certain medical conditions may be protected under the ADA. Here, again, the employer must reasonably accommodate the employee if that accommodation does not cause undue hardship for the employer.

E. *Best Practices*

Employers can avoid problems with employee dress and grooming by adhering to a few basic guidelines:

- **Have a policy.** If employers are to expect appropriately outfitted workers, they must give these workers guidance. A policy also enables the employer to enforce its preferred dress code and grooming policies. Employers with clearly written appearance policies who consistently apply those policies will likely not run afoul of Title VII.
- **Be reasonable.** Restrictive policies may reduce a company's ability to attract and retain talent. Depending on the job responsibilities, some departments could have less restrictive dress code requirements. Perhaps the more difficult question is whether the existing dress code is necessary or outdated. Is dress code and appearance important enough to the business to require conformity by the Zuckerberg generation or is there a broader benefit to loosening (or forgoing altogether) the proverbial tie?

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[32] *Id.*

[33] *See* Hussein v. The Waldorf Astoria, 134 F. Supp. 2d 591 (S.D.N.Y. 2001).

[34] *See* Brown v. F.L. Roberts & Co., Inc., 896 N.E.2d 1279 (Mass. 2008).

[35] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (2006 & Supp. V 2011)); *see* Georgy v. O'Neill, No. 00-CV-0660, 2002 WL 449723 (E.D.N.Y. 2002).

- **Be clear, when possible.** Appropriateness is in the eye of the beholder, so vague policies are subject to different interpretations. If visible tattoos and visible non-earlobe piercings are prohibited, the policy needs to clearly state the prohibition. On the other hand, the policy cannot possibly spell out every scenario and should allow room for managers and supervisors to address situations where dress or grooming falls outside of the accepted company practice.
- **Be consistent.** Discipline resulting from dress code violations must be consistent. The easiest way for an employee to get into trouble with their dress code policy is to be selective in its enforcement. However, in certain instances an employer may need to make a reasonable accommodation if it would not cause undue hardship.

III.
Avoidance of Age Harassment In The Workplace: Younger Supervisors, Older Subordinates[36]

Most supervisors and managers are highly mindful of legal prohibitions against harassment on the basis of race, gender, ethnicity, disability, and religion, but they are not always as careful as they might be with regard to how they treat workers older than they. Whether it is a younger manager and an older subordinate, or the other way around, employers need to be aware of the potential liability for age-based harassment in the workplace, and take steps to avoid liability while maintaining a workplace environment that is conducive to getting the most out of their workforce, young and old.

1. *Statutory Authority*

In 1967, Congress enacted the Age Discrimination in Employment Act[37] (ADEA) which provides in pertinent part that:

> It shall be unlawful for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.[38]

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[36] Eric A. Schneider is the author of Part III.

[37] 29 U.S.C. §§ 621-634 (2006).

[38] 29 U.S.C. § 623(a) (2006).

2. *Case Authority*

Crawford v. Medina General Hospital,[39] features a helpful discussion as to age-based harassment being actionable under ADEA even though the term "harassment" does not appear within ADEA as it does under certain state laws[40] (although in *Crawford*, the court did not find that the conduct in question amounted to unlawful harassment). The Sixth Circuit's view in *Crawford* that ADEA prohibits age-based harassment is shared only by the Fifth Circuit.[41] On the basis that a hostile work environment affects a "term, condition, or privilege" of employment within the meaning of Title VII,[42] the court in *Crawford* set forth the prima facie criteria:

(1) the employee is 40 years or older;

(2) the employee was subjected to harassment, either through words or actions, based on age;

(3) the harassment had the effect of unreasonably interfering with the employee's work performance and creating an objectively intimidating, hostile, or offensive work environment; and

(4) there exists some basis for liability on the part of the employer.[43]

Mary Ann Crawford was fifty-seven years old and had worked at the hospital for twenty-nine years when she sued her employer and certain co-workers for violation of ADEA claiming that the defendants had discriminated against her by creating a hostile work environment. With regard to when an environment is sufficiently hostile so as to become actionable, the court stated that while "the environment must in fact be objectively hostile, it is not necessary that the plaintiff be committed to a psychiatric institution in order to have a legal complaint."[44] The court quoted the Supreme Court's decision in *Harris v. Forklift System, Inc.*:

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[39] 96 F.3d 830 (6th Cir. 2003).

[40] *See*, *e.g.*, Cal. Gov't Code § 12940(j) (West 2011).

[41] Dediol v. Best Chevrolet, Inc., 655 F.3d 435, 445 (5th Cir. 2011); *cf.* Burns v. AAF-McQuay, Inc., 166 F.3d 292, 294 (4th Cir. 1999); EEOC v. Massey Yardley Chrysler Plymouth, Inc., 117 F.3d 1244 (11th Cir. 1997); Rivera-Rodriguez v. Frito Lay Snacks Caribbean, a Division of Pepsico, Puerto Rico, Inc., 265 F.3d 15, 24 (1st Cir. 2001).

[42] *See* Ellison v. Brady, 924 F.2d 872, 876 (9th Cir. 1991).

[43] *Crawford*, 96 F.3d at 834-835.

[44] *Id.* at 835.

> [We] can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all of the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or the mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.[45]

The court upheld the summary judgment granted by the district court in favor of the hospital employer. The court found that the only two comments that were "objectively indicative of age-based animus" were that Crawford's supervisor said that she did not think "women over 55 should be working," and "old people should be seen and not heard."[46] Without more it did not amount to a hostile working environment within the meaning of ADEA.

Also instructive is a more recent California Supreme Court case, *Reid v. Google, Inc.,*[47] where the court held that the jury would have to determine whether the alleged conduct constituted unlawful discrimination. Brian Reid joined Google as director of operations and director of engineering when he was fifty-two years old. At the time that he filed suit (for wrongful termination), Reid had worked for Google for less than two years, unlike Crawford's twenty-nine year career. Like Crawford though, he alleged derogatory, ageist comments on the part of his co-workers, including that

- his opinions and ideas were obsolete and too old to matter;
- he was slow, fuzzy, sluggish, and lethargic;
- he did not display a sense of urgency and lacked energy;
- he was an old man/old guy;
- his knowledge was ancient;
- he was an old fuddy-duddy; and
- his CD jewel case office placard should be an LP instead of a CD.[48]

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[45] *Id.* (quoting *Harris,* 510 U.S 17, 20 (1993) (internal quotation marks omitted)).

[46] As to the first comment, the supervisor denied having made it stating instead that she did not care when anyone else wanted to retire, but that she herself would like to retire by the time she reached fifty-five. *Id.* at 835. The court made mention of that although presumably it would have to had accepted the plaintiff's version of the events as true for purposes of summary judgment.

[47] 235 P.3d 988 (Cal. 2010).

[48] *Id.* at 1004.

During the course of his short career with Google, Reid was removed from his position of director of operations and relieved of his responsibilities as director of engineering although he was able to retain that title. He was given responsibilities relative to an in-house graduate degree program and an undergraduate college recruitment program, but he was given no staff or budget to support the programs. Soon after, he was told that the engineering department no longer had a place for him, that the graduate degree program was being eliminated, and that he was being terminated because of job elimination and poor performance. Reid, though, maintained that he was given no reason for his termination other than the lack of a cultural fit.

It is not clear from the opinion whether Reid's complaint included a cause of action for harassment, but it is evident that he was claiming that the ageist comments were indicative of a company mindset adverse to older workers.

The trial court granted Google's summary judgment, but the Court of Appeal reversed. The California Supreme Court affirmed the Court of Appeal decision.

Google had argued that the statements referenced above were irrelevant because they were made by non-decision makers, they were ambiguous, and they were unrelated to the adverse employment decision.

The court addressed the Stray Remarks Doctrine noting that the term "stray remarks" first appeared in a concurring opinion by Supreme Court Justice O'Connor.[49] Justice O'Connor said that stray remarks, statements by non-decision makers, or statements by decision makers unrelated to the decisional process itself, do not constitute direct evidence of decision makers' substantial negative reliance on an illegitimate criterion in reaching their decision. They could however be probative of discrimination.[50]

Ultimately the court determined that the age-related comments could not be discounted as stray remarks because to do so would be to permit the court to do what it is otherwise prohibited from doing on a summary judgment, *i.e.,* weighing the evidence rather than allowing the jury to do so. While mere stray remarks with nothing more are insufficient to establish age discrimination, when combined with other evidence of pretext, such as Reid's claim that he was told that his termination stemmed from him not being a good fit, the remarks were sufficient to defeat summary judgment.[51]

3. *Best Practices*

As Gen Y'ers rise in the ranks, employers must take steps to avoid actionable harassment among older and younger co-workers, or a younger supervisor and an older subordinate. With respect to the hiring process:

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[49] *Id.* (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 276 (1989)).

[50] *Id.*

[51] *Id.* at 1008.

- First and foremost, focus on whether the candidate can perform the job effectively;
- Consider the candidate, and not the candidate's birthdate;
- Do not ask the candidate if he/she would be uncomfortable working under a younger supervisor;
- Do not consider why this candidate is looking for a job usually filled by much younger people;
- Recognize the value of experience in terms of maturity, job knowledge, problem solving, and reduced needs or training.

With respect to managing older workers:

- Older workers may be less willing to respect their supervisors on the basis of position alone. Such respect will be earned through effective management of personnel;
- Along the same lines, the younger supervisor will not engender respect by employing a "because I said so" approach;
- Overcome biases in appraising older workers—evaluate the job performance;
- Provide additional training where needed even though the employee would seem to have sufficient experience to know the job.

It also, of course, stands to reason that employers should incorporate the prohibition of age-based comments in their overall anti-harassment training. Employees who grasp that gender, race, and other ethnic comments are taboo, need to understand that age-related dialogue can both violate the law and give rise to unnecessary discord. To ask another worker "How old *are* you?" is inherently counterproductive, regardless of whether the inquiring employee is older or younger than his or her colleague. Similar comments or questions that can result in disharmony – and possible liability – include:

1. "Considering this is your first job, you probably wouldn't understand."
2. "When I was your age…"
3. To an older worker: "Do you know how to use e-mail?"
4. To a younger worker: "Are you the new intern?"
5. To an older worker: "*You're* going back to school?"

IV.
Why Can't We Be (Facebook) Friends?
Social Media's Evolving Impact On Labor and Employment Law Issues[52]

A short decade ago, no one had ever heard of Facebook, Twitter, Pinterest or LinkedIn. Indeed, they did not exist. Today, some 1.5 billion individuals – over twenty percent of the world's population – use these and other social media sites.[53] According to PewInternet, nearly seventy percent of online adults in the United States use social media.[54] The social media boom has hit with unprecedented force and there is no sign of its abating.

As social media has come to dominate personal lives, it has inevitably spilled into the professional realm. The most basic terminology of social media amply illustrates this trend: the act of "friending" coworkers or supervisors, not to mention customers or clients, suggests a relationship beyond merely professional.

From recent NLRB decisions to state and federal legislative activity, one thing is clear: the rise of social media has created a number of never before seen legal issues for employers, their lawyers, and policymakers, who are all rushing in to fill the void.

A. *Social Media and the National Labor Relations Act*

The rights of employees under the National Labor Relations Act[55] (the "Act") are enumerated in Section 7, which provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by section 8(a)(3).[56]

Section 7 rights are enforced through the prohibition of certain conduct by either employers or unions called unfair labor practices. Prohibitions on employer conduct are contained

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[52] Kay Hodge is the author of Part IV. Ms. Hodge thanks Geoffrey Bok, John Simon and Katherine Clark, all partners at Stoneman, Chandler & Miller, LLP, for their contributions to this article.

[53] *Where in the World Are the Hottest Social Networking Countries?,* eMarketer (Feb. 29, 2012), http://www.emarketer.com/Article/Where-World-Hottest-Social-Networking-Countries/1008870.

[54] Kathryn Zickuhr, *Mobile is the needle; Social is the thread*, PewInternet 20 (2012), http://www.pewinternet.org/~/media/files/presentations/2012/oct/wsu%20mobile%20is%20the%20needle.pdf.

[55] Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2006)).

[56] Act § 7, 29 U.S.C. § 157 (2006).

in Section 8(a) of the Act, and prohibitions on the conduct of a labor organization are in Section 8(b). Each of the requirements will be discussed seriatim.

1. Section 7 – The Right to Engage in Other Concerted Activities

Although the core purpose of the Act is to protect the right of employees to unionize, Section 7 also protects the right of employees to act together as a group without a union in order to protect activities unrelated to union organization.[57] To be protected under Section 7, the employee activity must be both "concerted" and pursued either for union related purposes or other "mutual aid and protection."[58] "Concerted" means that the activity is undertaken by two or more employees or by one on behalf of others.[59]

Examples of protected concerted activity include:

- work stoppages[60]
- honoring picket lines[61]
- filing or processing grievances in concert[62]
- protests of racial or other discrimination[63]

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[57] *See, e.g.,* Mojave Elec. Coop. Inc., 327 NLRB 13, 13 (1998), *enforced* 206 F.3d 1183, 1188-90 (D.C. Cir. 2000) (employee and co-workers petitioned for injunctive relief against harassment by two officials of employer's subcontractor); Brown & Root, Inc. v. NLRB, 634 F.2d 816, 818 (5th Cir. 1981) (refusal to work in the face of dangerous working conditions); Redwing Carriers, Inc., 137 NLRB 1545 (1962), *aff'd sub nom*. Teamsters Local 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1962), *cert. denied*, 377 U.S. 905 (1964) (refusing to cross picket line located at another employer's place of business); Salt River Valley Water Users' Ass'n v. NLRB, 206 F.2d 325, 329 (9th Cir. 1953) (circulating petition to authorize individual to collect wages allegedly due under Fair Labor Standards Act); Tri-County Transportation Inc., 331 NLRB 1153, 1155 (2002) (employer violated Act by definitely laying three employees off because they, in concert, filed for unemployment benefits during summer recess).

[58] Act § 7, 29 U.S.C. § 157 (2006).

[59] *See* Meyers Industries, 268 NLRB 493, 497 (1984), *rev'd sub nom*. Prill v. NLRB, 755 F.2d 941 (D.C. Cir.), *cert. denied sub nom*. Meyers Industries v. Prill, 474 U.S. 971 (1985), *decision on remand* 281 NLRB 882, 885-87 (1986), *aff'd sub. nom*. Prill v. NLRB, 835 F.2d 1481, 1484 (D.C. Cir. 1987), *cert. denied sub nom.* Meyers Industries v. NLRB, 487 U.S. 1205 (1988).

[60] NLRB v. Washington Aluminum Co., 370 U.S. 9, 17 (1962).

[61] GPS Terminal Services, 333 NLRB 968, 970 (2001); Cooper Thermometer, 154 NLRB 502, 505 (1965).

[62] Prime Time Shuttle International, 314 NLRB 838, 841-42 (1994).

[63] Franklin Iron & Metal Corp., 315 NLRB 819, 824 (1994), *enforced* 83 F.3d 156 (6th Cir. 1996) (race); Gatliff Coal Co. v. NLRB, 953 F.2d 247, 251-52 (6th Cir. 1992) (sex); Vought Corp.-MLRS Sys.Div., 273 NLRB 1290, 1294 (1984), *enforced* 788 F.2d 1378, 1383 (8th Cir. 1986); NLRB v. Magnetics International, 699 F.2d 806, 813 (6th Cir. 1983), *enforcing* 254 NLRB 520 (1981) (filing and pursuing Title VII claim protected activity).

- employees advocating for use of sick time during FMLA leaves.[64]

Examples of concerted activity that are not protected include:

- disparaging employer's product[65]
- disloyalty[66]
- releasing confidential information[67]
- disruption of work[68]
- sit-down strikes[69]
- partial or intermittent strike[70]
- advocating for an employee stock ownership plan.[71]

2. Section 8(a)(1) – Interference, Restraint or Coercion of Rights

Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of rights guaranteed by section 7."[72] The type of conduct that will result in unlawful interference, restraint or coercion and lawful conduct is often elusive. Contributing to the difficulty of predicting in any given situation whether

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[64] Phillips Petroleum Co., 339 NLRB 916, 918 (2003).

[65] NLRB v. Electrical Workers (IBEW) Local 1229 (Jefferson Standard Broadcasting Co.), 346 U.S. 464, 475-76 (1953) (discharge of employees, who during impasse in collective bargaining, distributed handbill criticizing the quality of the employer's programming, etc. upheld for disloyalty to the employer).

[66] American Arbitration Association, 233 NLRB 71, 71 n. 1 (1977) (AAA lawfully terminated an employee who mailed a letter and questionnaire to AAA's consumers where its, "tone and content constituted disloyalty to and disparagement of [AAA's] judgment and capacity to effectively perform its services").

[67] Lafayette Park Hotel, 326 NLRB 824, 826 (1998) (divulging private, confidential information of the employer to those not authorized to receive it).

[68] Washington Adventist Hospital, 291 NLRB 95, 102-03 (1988) (discharge of employee for sending system-wide computer message protecting impending layoffs and criticizing management lawful because it disrupted the work of 100 terminal users and was in violation of the computer security agreement the employee signed).

[69] NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939).

[70] Yale University, 330 NLRB 246, 247-49 (1999) (withholding of grades by teaching fellows in effort to obtain recognition of their union was a partial strike and hence, unprotected).

[71] Harrah's Lake Tahoe Resort Casino, 307 NLRB 182, 182 (1992) (not protected as it did not advance interests of employees as employees but only their interests as entrepreneurs, owners and managers).

[72] Act § 8, 29 U.S.C. § 158 (2006).

it will be lawful or not, is the composition of the Board, the particular circuit court hearing the appeal and the inevitable differences in facts and circumstances.

In the NLRB's view, motive is not an essential element of a section 8(a)(1) violation. The NLRB follows its "well settled" test that

> interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.[73]

a. Freedom of Speech and Section 8(a)(1)

Section 8(a)(1) violations are frequently asserted in the context of verbal conduct by an employer. The starting point of any analysis of verbal conduct begins with Section 8(c) of the Act which provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.[74]

In *NLRB v. Gissel Packing Co*.,[75] the Supreme Court stated that the requirements of Section 8(c) "merely implement[] the First Amendment." However, in *Gissel*, the Supreme Court made it clear that

> [a]ny assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1) and the proviso to § 8(c).[76]

Thus, the Board is frequently called upon to balance an employer's rights to free speech and the rights contained in Section 7.

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[73] American Freightways Co., 124 NLRB 146, 147 (1959). *See, e.g.,* Correctional Med. Servs. Inc., 356 NLRB No. 48, at *4 (2010).

[74] Act § 8, 29 U.S.C. § 158(c) (2006).

[75] 395 U.S. 575 (1969).

[76] *Id*. at 617.

b. Employer Work Rule or Policy

An employer violates Section 8(a)(1) by having a work rule if that rule "would reasonably tend to chill employees in the exercise of their Section 7 rights."[77] If the work rule in question does not explicitly restrict protected concerted activity, then the Board will only find a violation of Section 8(a)(1) if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."[78]

Rules will be deemed unlawful if they are ambiguous about whether they apply to Section 7 activity, unless they contain limiting language or context that makes it clear to employees that the rule does not restrict protected concerted activity.[79] Accordingly, rules that clarify and restrict their scope by including examples of illegal or unprotected conduct so that a reasonable employee would understand that the rules do not apply to protected concerted activity will not be found to be unlawful.[80]

c. Rules Regarding Employee Use of Social Media

Against this backdrop regarding protected concerted activity, the Board has faced a variety of cases involving employer rules that restrict employees' use of social media. In many of these cases, the Board has found the rules are overbroad and unlawful because they restrict employees' Section 7 rights.

In May 2012, the Board General Counsel issued an Advice Memorandum concerning recent social media cases.[81] The General Counsel ruled that the following employer policy provisions were unlawful:

(1) A nationwide retailer's handbook statement on "Information Security" that provided:

> If you enjoy blogging or using online social networking sites such as Facebook and YouTube, (otherwise known as Consumer Generated Media, or CGM) please note that there are guidelines to follow if you plan to mention [Employer] or your employment with [Employer] in these online vehicles. . .
>
> • Don't release confidential guest, team member or company information. . . .[82]

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[77] Lafayette Park Hotel, 326 NLRB 824, 825 (1998), *enforced* 203 F.3d 52 (D.C. Cir. 1999).

[78] Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (2004).

[79] University Medical Center, 335 NLRB 1318, 1320-22 (2001), *enforcement denied in pertinent part*, 335 F.3d 1079 (D.C. Cir. 2003).

[80] Tradesmen International, 338 NLRB 460, 460-62 (2002).

[81] NLRB, Office of the General Counsel, Memorandum 12-59 (May 30, 2012) (hereinafter OM 12-59), *available at* http://www.NLRB.gov/reports-guidance/operations-management-memos.

[82] OM 12-59 at 3-4.

This provision was unlawful because it could reasonably be interpreted as prohibiting employees from discussing and disclosing information regarding their employment, which was clearly a protected activity.[83]

(2) Instructing employees to make sure their personal internet posts were "completely accurate and not misleading and that they do not reveal non-public company information on any public site."[84]

This rule was deemed overbroad because it could reasonably be interpreted to apply to discussions about and criticism of the employer's labor policies and treatment of employees.[85]

(3) Instructing employees not to post "[o]ffensive, demeaning, abusive or inappropriate remarks," and stating that "communications with coworkers ... that would be inappropriate in the workplace are also inappropriate online."[86]

This rule was deemed overbroad because it covered a spectrum of communications that would include criticism of the Employer's labor policies and treatment of employees.[87] In addition, it did not specify which communications the employer would find inappropriate at work, making it ambiguous about the rule's application to protected concerted activity.[88]

(4) Directing employees not to comment on "legal matters, including pending litigation and disputes."[89]

(5) Instructing employees to "[a]dopt a friendly tone when engaging online. Don't pick fights."[90]

(6) Encouraging employees to "resolve concerns about work by speaking with coworkers, supervisors, or managers" rather than resorting to "social media or other online forums" to resolve concerns.[91]

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83 *Id.* at 4.

84 *Id.* at 6.

85 *Id.* at 6-7.

86 *Id.* at 8.

87 *Id.*

88 *Id.*

89 *Id.* at 10.

90 *Id.*

91 *Id.* at 11.

Notably, many of these policies included "savings clauses," statements that these policies would be administered consistently with the requirements of the National Labor Relations Act. These savings clauses are generally not sufficient to cure overbroad policies that restrict Section 7 rights.[92]

On the other hand, some employer policies were acceptable:

(1) An Employer's policy stating: "[H]arassment, bullying, discrimination, or retaliation that would not be permissible in the workplace is not permissible between coworkers online, even if it is done after hours from home and on home computers."[93]

According to the Associate General Counsel's memorandum, "this provision would not reasonably be construed to apply to Section 7 activity because the rule contains a list of plainly egregious conduct, such as bullying and discrimination."[94]

(2) An Employer's policy providing: "No unauthorized postings: Users may not post anything on the Internet in the name of [Employer] or in a manner that could reasonably be attributed to [Employer] without prior written authorization from the President or the President's dedicated agent."[95]

(3) An Employer's policy providing: "Respect all copyright and other intellectual property laws ... [I]t is critical that you show proper respect for the laws governing copyright, fair use of copyrighted material owned by others, trademarks, and other intellectual property, including [Employer's] own copyrights, trademarks and brands."[96]

The Board also found that Walmart's revised social media policy was lawful. The revised policy corrected unlawfully overbroad and ambiguous provisions in the earlier policy by providing sufficient examples of prohibited and egregious conduct so that employees would understand that the revised policy did not reach or cover activities protected by Section 7.[97]

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[92] *Id.* at 12, 14.

[93] *Id.* at 13.

[94] *Id.* at 14.

[95] *Id.* at 15.

[96] *Id.* at 10-11.

[97] *Id.* at 19-20. Walmart's entire revised social media policy is attached to the Associate General Counsel's Memorandum. *Id.* at 22-24.

B. *Privacy Laws Governing Social Media in Employment*

Apart from social media postings by employees that may be considered "protected concerted activity" under the NLRA, the rise of social media in people's private and professional lives has caused a more general concern for employee privacy in the digital age. At least ten states – Arkansas,[98] California,[99] Colorado,[100] Illinois,[101] Maryland,[102] Michigan,[103] New Mexico,[104] Oregon,[105] Utah,[106] and Vermont[107] – have enacted statutes attempting to limit employer access to the social media accounts of their employees and applicants for employment.[108] Many other states are currently considering legislation that would similarly address these privacy concerns.[109]

These legislative undertakings come on the heels (and in the midst) of a number of high-profile cases in which employees were fired, or applicants not hired, because of their social media postings. The issue perhaps first drew national attention in early 2011, when a Maryland corrections officer revealed that he had been required to provide his Facebook user name and password as part of his application for recertification.[110] More recently, the internet was abuzz about the California woman who was terminated by Cold Stone Creamery for her post-election Facebook rant calling President Obama the "n" word and hoping for his assassination.[111] Similarly, in response to the outcry from veterans' groups, a Massachusetts non-profit employee was also fired after posting a photograph on Facebook taken on a work-related trip to the Tomb of the Unknowns, in which she – standing by a sign that reads

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[98] H.B. 1901, 89th Gen. Assemb., Reg. Sess. (Ark. 2013) (to be codified as Ark. Code Ann. § 11-2-24.

[99] Cal. Labor Code § 980 (West 2011).

[100] H.B. 13-1046, 69th Gen. Assemb., 2d Sess. (Colo. 2013) (to be codified as Colo. Rev. Stat. § 8-2-126).

[101] 820 Ill. Comp. Stat. Ann. 55/10(b) (West 2008 & Supp. 2013).

[102] Md. Code Ann., Lab. & Empl. § 3-712 (LexisNexis 2008 & Supp. 2012).

[103] Mich. Comp. Laws § 37.273 (West 2001 & Supp. 2013).

[104] S.B. 371, 51st Leg., Reg. Sess. (N.M. 2013).

[105] H.B. 2654, 77th Leg., Reg. Sess. (Or. 2013).

[106] H.B. 100, 60th Leg., Reg. Sess. (Ut. 2013) to be codified as Utah Code Ann. § 34-48-201.

[107] S. 7, 2013-2014 Sess. (Vt. 2013).

[108] National Conference of State Legislatures, *Employer Access to Social Media Passwords Legislation 2013*, http://mgaleg.maryland.gov/2012rs/chapters_noln/Ch_234_hb0964T.pdf (last visited July 20, 2013) [hereinafter *Employer Access to Passwords Legislation*].

[109] *Id*.

[110] Aaron C. Davis, *Md. corrections department suspends Facebook policy for prospective hires*, Washington Post (Feb. 22, 2011, 9:58 PM), http://www.washingtonpost.com/wp-dyn/content/article/2011/02/22/AR2011022207486.html.

[111] Victoria Cavaliere, *California woman fired from job, probed by Secret Service after Obama 'assassination' post on Facebook,* NY Daily News (Nov. 10, 2012, 9:57 AM), http://www.nydailynews.com/news/election-2012/woman-fired-racist-anti-obama-facebook-post-article-1.1199917.

"silence and respect" – shows her middle finger and pretends to yell.[112] A Chili's server was recently terminated for a Facebook posting in which she warned customers: "Next time you tip me $5 on a $138 bill, don't even bother coming in cause I'll spit in your food and then in your [expletive] face you cheap bastards!!!!!!!!!"[113]

As these and the many other cases in the news demonstrate, employers routinely search the internet for information on prospective and current employees and freely use the information gathered in making their employment decisions. Indeed, a CareerBuilder survey found that as of early 2012, some 40% of employers were using social networking tools to screen candidates.[114] According to human resource software maker TribeHR, in 2011, 42% of companies took disciplinary action based on their employees' social media activities, compared with 24% in 2009.[115]

These practices are not surprising; after all, private employers of at-will employees have the general authority to terminate employees for any reason that is not unlawful – good or bad, fair or unfair. Indeed, it would seem to be imprudent – if not downright negligent – for an employer on the cusp of a hiring decision not to take a minute to simply search an applicant's name in Google to see what comes up. Furthermore, because employers always have the right to ensure that employee work time is spent working and not wasted on personal matters such as texting, tweeting and surfing the internet, vetting employees' social media activity seems all the more appropriate and necessary.

However, lawmakers are now pushing back. The recent laws are by and large designed to prohibit employers from requiring that employees or applicants, as a condition of their employment, provide user names, passwords and other ways for an employer to access personal information on websites such as Twitter, Facebook and LinkedIn. The goal is generally to prevent employers from using applicant's private social media activity during the hiring process and from monitoring the off-duty, private social media activity of employees.[116]

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[112] Rheana Murray, *Woman on unpaid leave after taking disrespectful photo next to soldier's grave during work trip,* NY Daily News (Nov. 21, 2012, 8:33 AM), http://www.nydailynews.com/news/national/vulgar-facebook-pic-woman-canned-article-1.1205609.

[113] *Chili's Server Fired After Facebook Tip Rant,* Huffington Post (June 21, 2012, 11:22 AM ET), http://www.dailymail.co.uk/news/article-2163871/chilis-waitress-fired-threatening-spit-food-bad-tippers-facebook.html.

[114] *Thirty-seven percent of companies use social networks to research potential job candidates, according to new CareerBuilder Survey*, Careerbuilder.com (Aug. 18, 2012), http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr691&sd=4%2F18%2F2012&ed=4%2F18%2F2099.

[115] TribeHR Staff, *How Can Social Software Get You Fired? [Infographic],* TribeHR (Sept. 1, 2011), http://tribehr.com/blog/how-can-social-software-get-you-fired-infographic; *see also* Irma Wallace, *How Can Social Software Get You Fired?*, Infographic J. (Feb. 13, 2012), http://infographicjournal.com/how-can-social-media-get-you-fired/.

[116] It should be noted that these laws (at least facially) do not prohibit employers from accessing non-private social media content that is generally available to internet users – that is, social media postings that anyone can access without a password or "friend" status.

A review of the earliest statutes reveals lawmakers' evident belief in an individual's right to privacy in the personal information available on social media websites. The new laws also demonstrate a legislative concern about employers accessing social media accounts that would very often provide them with the ability to gain information regarding an employee's religion, sexual orientation, marital status, off-duty activities and associations, which could lead to potential discrimination in the workplace.

The first state to enact such a social media privacy law was Maryland in its User Name and Password Privacy Protection and Exclusions Act, which took effect in October 2012.[117] This statute, with certain limited exceptions related to investigations of securities fraud and trade secret misappropriation, prohibits employers from

> (1) requesting or requiring that an employee or applicant disclose any user name, password, or other means for accessing a personal account or service through certain electronic communications devices;
>
> (2) taking, or threatening to take, certain disciplinary actions for an employee's refusal to disclose certain password and related information; and
>
> (3) failing or refusing to hire an applicant as a result of the applicant's refusal to disclose certain password and related information.[118]

Illinois' Right to Privacy in the Workplace Act,[119] which became effective in early 2013,[120] makes it

> unlawful for any employer [1] to request or require any employee or prospective employee to provide any password or other related account information in order to gain access to the employee's or prospective employee's account or profile on a social networking website or [2] to demand access in any manner to an employee's or prospective employee's account or profile on a social networking website.[121]

Statutory violations expose employers to actual damages, costs, a criminal petty offense, and, if willful and knowing, a civil penalty and attorney's fees.[122]

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[117] S.B. 433 (H.B. 964), 2012 Leg., Reg. Sess. (Md. 2012) *available at* http://mgaleg.maryland.gov/2012rs/chapters_noln/Ch_234_hb0964T.pdf.

[118] *Id.*; Md. Code Ann., Lab. & Empl. § 3-712 (LexisNexis 2008 & Supp. 2012).

[119] 820 Ill. Comp. Stat. 55/1 (2008).

[120] Pub. Act 97-875, 97th Gen. Assemb., Reg. Sess. (Il. 2012) *available at* http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=097-0875&GA=97.

[121] 820 Ill. Comp. Stat. 55/10(b)(1) (2008 & Supp. 2013).

[122] *Id.* at 55/15.

In September, 2012, California passed the Employer Use of Social Media Act,[123] which became effective on January 1, 2013 and prohibits an employer from

- requesting or requiring that employees or applicants disclose social media log-in credentials;
- requesting or requiring that employees or applicants access personal social media in the employer's presence;
- requesting or requiring that employees or applicants divulge any personal social media content; or
- discharging, disciplining, threatening to discharge or discipline, or retaliating against an employee or applicant for not complying with any prohibited request or requirement.[124]

The sole exception to the California law allows employers to request that an employee divulge social media content if the employer reasonably believes is related to an investigation of employee misconduct or violation of law.[125]

More states will be enacting similar laws in the future.[126]

C. *Best Practices*

In light of these events, what are employers to do? Most obviously, employers should keep abreast of new federal and state laws and update their workplace policies and practices to promote compliance. Employers should be certain of the parameters of those laws, *i.e.,* what is and what is not permitted and any applicable exceptions. This is particularly important for employers with a presence in multiple states, as the laws in each state could (and already do) vary.

In addition, employers should be extremely careful about engaging in online research of applicants and employees. This has special ramifications in the realm of discrimination law – should an employer discover and make employment decisions based on potentially damaging information regarding an employee in a protected class, this could result in a discrimination or retaliation claim, especially where information about an employee's protected status (which employers are otherwise prohibited from requesting), is only available from his or her social media accounts. Employers should instruct hiring and human resource managers, and others conducting interviews of job applicants of any legislative changes

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[123] Assemb. B. 25, 2013-2014 Assemb., Reg. Sess. (Cal. 2013).

[124] Cal. Labor Code § 980 (West 2011).

[125] *Id*.

[126] As this article went to press, social media legislation had been introduced or was pending in thirty-five states. *Employer Access to Passwords Legislation*, *supra* note 108.

and make sure that they comply with all relevant laws. Furthermore, all employees with decision-making authority should be kept apprised of legislation that would prohibit them from requesting access to and/or investigating employees' social media accounts.

Finally, within the parameters of the NRLB's recent decisions regarding such policies, employers should adopt a clearly expressed, consistently-applied and well-communicated policy on social media use that clearly sets out acceptable and unacceptable usage both inside and outside the office. Just as with electronic communication policies regulating e-mail and internet usage in the workplace, the social media policy should clearly state that: (1) there is no expectation of privacy in digital media content accessed using company systems; (2) all communications using company systems may be monitored; (3) the use of the employer's computer system and/or internet access is for business purposes only; and (4) the use of personal electronic devices are prohibited during work time.

Employers should also consider narrowly tailored policy provisions requiring that employees: identify themselves when promoting the company or its products and services; not disclose the company's confidential or proprietary information; separate personal social networking activities from those that are work-related; not represent that their personal opinions are the views of the company; and not use the employer's electronic systems for illegal or unlawful activities.

Employers must exercise extreme caution regarding the use of social media. The law is in a constant state of flux, and will no doubt continue to evolve as social media becomes even more prevalent and our society adjusts its comfort level with it. The bottom line for employers today: employment-related decisions based on information discovered on employees' social media accounts should only be taken after careful consideration in close consultation with legal counsel.

V.
Conclusion

As Gen Y'ers enter the U.S. workforce in greater numbers, their generationally unique preferences, attitudes and work ethic are changing workplace dynamics and forcing a rapid evolution in workplace policies and practices on a wide range of issues – from new and more tolerant dress and grooming expectations, to managing intergenerational differences in order to avoid age discrimination and harassment problems, to grappling with the limits that can and cannot be placed on employee social media use in and out of the office. Employers can stay in step – and out of court – only by gaining an understanding of this new workforce generation and adapting workplace expectations, policies and practices in a way that balances multigenerational demands at work with existing employment laws.

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