

## Bullying in the Workplace

Allegations of workplace bullying, which may include verbal abuse, work sabotage, and various types of threatening behavior, have gained national attention in recent years. While there are currently no federal or state anti-bullying statutes prohibiting bullying behavior if it does not cross over into illegal activity such as discrimination, harassment, retaliation, assault or battery, it is still wise for employers to take steps to promote a respectful environment for all employees.

In the past few years, a number of cases tried to fashion a bullying claim out of other legal protections and prohibitions. However, because courts faced with this issue have applied vague standards and have reached differing outcomes, there is still no bright line standard for determining when bullying and unpleasant workplace behavior cross the line and become actionable.

Similarly, legislation on the state and federal level has not yet solidified in any tangible form. For example, the proposed Healthy Workplace Bill, which was first introduced in California in 2003 and intended to be introduced in all 50 states, is pending in the legislatures of only 13 states at the time of this publication.

### **The Healthy Workplace Bill would make an “abusive work environment” illegal. The model Bill proposes:**

- » Application of a strict liability standard for all employers
- » Discretion of the court to issue a court order to remove the offending party from the complainant’s work environment
- » Recovery of emotional distress damages (capped at \$25,000 in the absence of an adverse employment action)

The lack of legislation prohibiting bullying in the workplace is not meant to suggest that an employer ignore a complaint about workplace bullying if it’s not based on gender, race, age, etc. In fact, quite the opposite is true. Even if such conduct is not legally actionable under

current federal or state law, such behavior can still be extremely detrimental to your workforce.

A recent survey conducted by the Society for Human Resource Management (SHRM) found the three most common outcomes of bullying incidents that organizations experience are: 1) decreased morale; 2) increased stress and/or depression levels; and 3) decreased trust among co-workers.

Because virtually every employer shares the overall goals of creating and maintaining a productive, efficient, and profitable workforce, it is essential to take proactive measures to ensure that bullying behavior does not permeate the workplace.

### **Suggestions for avoiding a bullying or a disrespectful work environment**

- » Adopt and facilitate an open door policy which allows employees to participate in the workforce in a way that makes them feel valued.
- » Develop a kudos or another type of employee recognition program which serves as an excellent way to boost employee morale.
- » Consider adopting an anti-bullying policy and follow through with effective training and enforcement mechanisms.

No matter what anti-bullying measures you choose to employ in your particular work environment, stay abreast of legal developments and national trends in this area; consult with your employment attorneys before drafting any new policies; and most importantly, do not avoid the issue.

Simply put, although certain conduct may not be legally actionable, that does not mean that such behavior should be tolerated.

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## Reviewing an Applicant's Social Media Site: Legal Right or Picking a Fight?

Gathering information from social media to use in the hiring process can help employers weed out potential problem employees, as well as reinforce a good applicant's potential for success. Recent studies suggest that nearly 70% of employers have rejected candidates based upon information found online. Such a practice, however, is not risk-free.

### There are risks in checking and in not checking.

Social media often provides information that is not provided during the "traditional" application process, including allowing visitors to determine certain demographic statuses protected by local, state, and federal law. Consider an employer that learns an applicant is pregnant via her Facebook page after an interview where she was not "showing." Knowing that she is pregnant is not illegal, but by utilizing social media, the employer has likely lost any "lack of notice" argument it might have had but for a search of her Facebook page.

This does not mean, however, that employers should never review applicants' social media sites. It is not yet known whether employers have an *affirmative* obligation to review such sites. Recently, one Colorado court considered a plaintiff's argument that the employer should have reviewed social media as part of its background check process, and had it done so, it would have discovered the employee's checkered past and was therefore liable under the theory of negligent hiring. Though the court rejected such an argument, it is likely that similar suits will follow.

### But the profile is private...

Garnering significant national attention recently, some employers have even taken the controversial step of requiring applicants to provide login and password information during the application process. Such practices, privacy advocates argue, violate common law and statutory privacy rights (and for public employees,

constitutional rights). Facebook believes that requiring the login and password disclosure could not only "potentially expose the employer who seeks . . . access to unanticipated legal liability," it also is "a violation of Facebook's Statement of Rights and Responsibilities to share or solicit a Facebook password."

These practices have also attracted attention from Congress – two Senators recently asked the Department of Justice and EEOC to investigate whether such practices violate federal law and a bill is currently pending before the House of Representatives that would prohibit employers and educational institutions from gaining access to private email and social networking accounts – down to state legislatures. In April 2012, Maryland became the first state to pass legislation prohibiting employers from either requesting or requiring that an applicant or employee disclose a user name or password to the employer. The legislation also prevents employers from taking action against applicants or employees who refuse to disclose information. Exceptions to the legislation are limited to employers conducting investigations regarding securities or financial law and regulations and unauthorized downloading of the employer's proprietary information or financial data.

Several other states are also considering legislation governing such practices, including Michigan. Michigan's bill, for example, is broader than Maryland's law in many aspects: It would prohibit both employers *and* educational institutions from requesting access to the social networking accounts of applicants, employees, students, and prospective students. It also does not include any exceptions, including those for investigatory purposes.

Given the dearth of guidance on this issue, employers should tread carefully in this area and consider the business consequences of such practices. From a business perspective, while reviewing or requiring access to "private" social media sites might be justified by a



legitimate business reason, it might also be viewed as “snooping” and could limit an applicant pool or lead to decreased employee morale if employees thought big brother was watching all the time.

### Best Practices

- » Define a process for why and how to evaluate an applicant’s online presence. Account for such things as accuracy of information presented, verifiability, and how the information is obtained.
- » Consider designating a neutral party, instead of the decision-maker, to conduct the search and filter out protected status information. Note that retaining third-party vendors to review information likely triggers the procedural and notice requirements of the Fair Credit Reporting Act.
- » Maintain a record of *how* information was gathered via the Internet or social media and *what* information was gathered.
- » Train employees responsible for implementing this process.

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## Immigration Anti-Discrimination Enforcement on the Rise

Enacted as an amendment to the Immigration and Nationality Act (INA), the Immigration Reform and Control Act of 1986 (IRCA) is best known for requiring employers to verify the citizenship of its employees with I-9 forms and for making it a felony to knowingly hire unauthorized immigrants.

Less known is that IRCA prohibits employers from discriminating or retaliating against an individual because of the individual’s citizenship – and also imposes substantial penalties against those that do.

In the last month, the Department of Justice (DOJ) reminded employers that it is actively enforcing IRCA’s

anti-discrimination provisions by publishing the details of two settlements it entered into with employers that allegedly engaged in citizenship discrimination.

In the first complaint, an applicant alleged that the employer refused to honor a work authorization document and asked the employee to produce a green card, even though the employer had never refused to honor work authorization documents provided by U.S. citizens. The employer eventually settled the lawsuit, agreeing to:

- » Reinstated the employee
- » Pay \$6,384 in back pay plus interest and \$10,825 in civil penalties
- » Provide training to its HR personnel about avoiding discrimination
- » Receive 18 months of reporting and compliance monitoring by the DOJ

In the second complaint, the employer required a non-U.S. citizen to present a permanent resident card, despite the individual having already produced documents establishing his qualifications to work in the U.S. As with the other complaint, the employer never requested additional eligibility documents from any of its U.S. citizen employees. Therefore, the DOJ required the employer to settle the discrimination complaint by agreeing to:

- » Pay \$7,000 in back pay
- » Provide training to its HR personnel about avoiding discrimination in the employment eligibility verification process
- » Receive three years of reporting and compliance monitoring by the DOJ

Federal enforcement of immigration law requirements through raids and audits is on the rise and the authorities are making documentation rules stricter. Meanwhile, courts are tending to enhance the zone of federal and state liability for national origin and citizenship discrimination. Since these factors increase a company’s exposure to diverse claims, it is worthwhile to conduct a



careful review of your company's current hiring practices and to engage in compliance-oriented planning.

A bit of foresight can stave off substantial unforeseen civil damages, administrative consequences, and even criminal investigations. For employers who hire people from around the world, an ounce of prevention really is worth a pound of cure.

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## Does Your Company's Wellness Program Violate GINA?

The Genetic Information Non-Discrimination Act (GINA) expressly prohibits covered employers and health plan sponsors from asking an employee to provide genetic information in exchange for an incentive.

The EEOC has recently targeted employers that provide incentive-driven wellness programs for their employees in which an employer or health plan asks employees and their family members to complete a health risk assessment (HRA) in exchange for a discount on premiums or some other incentive.

Hidden problems often arise for employers and plan sponsors under GINA when they use the same HRAs to elicit the employee's genetic information indirectly through the employee's spouse or family member.

GINA defines "genetic information," in part, to include an individual's "family medical history" – i.e., the manifestation of disease or disorder in an individual's family members. "Family members" include up to fourth-degree genetic relatives and spouses, even though spouses generally do not share genes. Many wellness programs provide incentives to employees for completing HRAs *and* additional incentives when their dependent family members also complete HRAs. In these situations, employers and plan-sponsors may be

unknowingly eliciting genetic information of employees when asking their family members to complete HRAs. That is, an HRA may ask a question that does not directly elicit genetic information of the employee, but, when posed to the employee's family member, may violate GINA because it is eliciting information about the "manifestation of disease or disorder" of the employee's family member.

For example, a typical HRA question may ask an employee whether she "has ever been diagnosed with congestive heart disease?" Although an employee's answer to that question will not necessarily reveal *her* genetic information, as defined by GINA, *the employee's spouse's answer* to that question will reveal the employee's genetic information because the question calls for information about the manifestation of a disease or condition of the employee's "family member." That the question is posed to the employee's spouse instead of asking the employee directly to reveal family medical history is immaterial.

Although GINA prohibits the use of incentives to acquire genetic information in this manner, it does not altogether prohibit an employer or plan-sponsor from acquiring genetic information or from providing incentives for employees and their family members completing HRAs. In fact, the GINA regulations offer guidance on how to administer wellness programs that provide incentives to employees for completing HRAs without violating the statute. But even if you believe that your company is following that regulatory guidance, you should double check to ensure that the HRAs you are using for family members are not inadvertently eliciting an employee's genetic information.

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## NLRB Notice Posting Requirement and New Representation Election Rules

### Notice Posting Requirement

On August 25, 2011, the National Labor Relations Board (NLRB) issued a rule requiring essentially all private employers to post a notice informing employees of their rights under the National Labor Relations Act (the Act).

Two recent Court actions have developed regarding the notice posting. On April 13, 2012, the U.S. District Court for the District of South Carolina held that the NLRB did not have the statutory authority to require the notice posting. That decision reached a different conclusion than an earlier District of Columbia District Court opinion and set up a split in the case authority. Additionally, on April 17, 2012, the U.S. Court of Appeals for the District of Columbia ordered an expedited review and prevented the NLRB from implementing the rule until the court issues an opinion.

When the federal appellate court in DC granted the injunction, the April 30, 2012, posting deadline was suspended. The court ordered that the appeal would be expedited, scheduling oral argument for September 2012. Therefore, the notice posting requirement is now suspended until the DC Court of Appeals issues its decision on the appeal after the oral argument in September. Further, the South Carolina case is being appealed by the NLRB, which will involve additional litigation, likely pushing any implementation date even further into the future.

### Election Rule Changes

On December 22, 2011, the NLRB issued final rules designed to reduce delays and litigation relating to representation elections. The rules became effective April 30, 2012. The changes include seven primary amendments to the election rules. They include:

1. Amending board regulations to state that the purpose of pre-election hearings described in Section 9(c) of the

National Labor Relations Act is to determine whether a question concerning union representation exists that should be resolved in a secret ballot election.

2. Giving NLRB hearing officers' authority to limit the presentation of evidence in such a hearing to genuine issues of fact material to the existence of a question concerning representation.
3. Providing for post-hearing briefs with the permission of a hearing officer, rather than as a matter of right.
4. Amending Section 102.67 and Section 102.69 of the board's rules to eliminate a party's right to seek board review of regional directors' pre-election rulings while allowing parties to seek post-election review of such rulings.
5. Eliminating language in NLRB's current statement of procedure that recommends a regional director not schedule balloting within 25 days of directing an election.
6. Amending Section 102.65 of the board's rules to provide that requests for special permission to appeal a regional director's pre-election ruling will be granted only in extraordinary circumstances.
7. Amending board rules to make NLRB review of post-election disputes discretionary.

Employers should be mindful of the new election rules as well as the evolving regulatory environment at the NLRB.

However, on May 14, 2012, the U.S. District Court for the District of Columbia ruled that the NLRB did not have a required quorum when the final rule was voted on, thereby invalidating the election rules. The NLRB has suspended implementation of the new rules, and is currently considering its next step. It is anticipated that the NLRB may re-vote on implementing the rule in the future, although there is litigation pending on the validity of the recent recess appointments to the NLRB, which further complicates future action regarding the rule changes. Stay tuned for further developments as they occur.

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