As use of social media sites continues to rise, employer attempts to access social media content and passwords from employees and applicants have come under mounting criticism. By appearing to threaten private communications, this employer practice has triggered a strong legislative reaction at the state and federal levels.

On August 1, 2012, Illinois became the second state, after Maryland, to prohibit employers from seeking access to employees’ and job applicants’ social media content and passwords. The new law (HB 3782) becomes effective January 1, 2013. Similar legislation is under consideration in other states, including Michigan, Minnesota, Missouri, and Ohio.

Illinois Legislation

The new Illinois law amends the state’s Right to Privacy in the Workplace Act to make it illegal for an employer to ask potential and current employees for their social media passwords or otherwise demand access to their accounts. The law states, in part:

It shall be unlawful for any employer 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 to demand access in any manner to an employee’s or prospective employee’s account or profile on a social networking website.

While the law still allows employers to maintain lawful workplace policies related to the use of the employer’s electronic equipment, including policies regarding Internet usage, social networking site usage, and electronic mail usage, its potential reach may have unintended consequences. For example, the new law provides no exceptions for legitimate workplace investigations. As written, it appears that accessing an employee’s restricted social media account in order to conduct an investigation related to allegations of harassment or threats of workplace violence, for instance, may be off limits. Moreover, it may violate the law even to ask the employee if he or she is willing to provide voluntarily such information about a social media account.

Federal Legislation

The issues surrounding privacy and social media also are being addressed through legislative efforts at the national level. U.S. Representatives Eliot Engel (D-N.Y.) and Jan Schakowsky (D-Ill.) have sponsored the Social Networking Online Protection Act. The Act would prohibit current or potential employers from requiring the username or password to an employee’s or job applicant’s private online accounts. The bill forbids employers from seeking such access in order to discipline, discriminate against, or deny employment to any individual. A violation would subject an employer to a civil penalty of up to $10,000.

Potential Implications for Employers

Even though the new Illinois legislation does not prohibit an employer from viewing information that is not restricted by privacy settings, it highlights the increasing regulation of this important medium. For example, the Equal Employment Opportunity Commission has issued regulations under the Genetic Information Nondiscrimination Act concerning the acquisition of genetic information in social media. (For more information, see our article, “Meet GINA: The First Statute to Ban Employer Internet Searches?” at http://www.disabilityleavelaw.com/2010/11/articles/disability/meet-gina-the-first-statute-to-ban-employer-internet-searches/.) Employers wishing to utilize social media must tread carefully and monitor developments as U.S. Senators have called upon the Department of Justice and the EEOC to investigate whether certain emerging employer practices may violate existing privacy and employment laws. (For more information, see “Blumenthal, Schumer: Employer...”
Missouri Supreme Court Clarifies Enforceability of Employee Non-Competition Agreements

It has been six years since the Missouri high court in Healthcare Servs. of the Ozarks, Inc. v. Copeland, 198 S.W.3d 604 (Mo. 2006), reviewed a case involving a non-competition agreement restricting a former employee’s ability to compete with the employer after leaving its employment. The Court in its latest decision now confirms that non-competition agreements are enforceable to the extent they are reasonable and necessary to protect the employer’s legitimate protectable interests. In addition, the reasonableness of an agreement generally depends upon a fact-specific inquiry. Whelan Security Co. v. Kennebrew, 2012 Mo. LEXIS 167 (Mo. Aug. 14, 2012).

The two agreements in Whelan Security contained the following:

- customer non-solicitation provisions against soliciting clients and prospective clients,
- employee non-solicitation provisions against soliciting the employer’s employees, and
- territorial non-compete provisions against the employee’s working for a competitor within 50 miles of any location at which the employee had provided or arranged for Whelan’s services.

The Court found the customer non-solicitation provisions overbroad and unenforceable. As written, they applied to all of the employer’s existing customers throughout the nation (regardless of whether the former employees had ever dealt with them) and to all of the employer’s prospective customers from the last 12 months (regardless of how tenuous the employer’s relationships with these potential customers were or how detached the former employees had been from them). While the Court did not hold these provisions per se unreasonable and unenforceable, it blue-penciled or modified the no-solicitation-of-clients provisions to apply to existing customers with whom the former employees had dealt with during their employment. The prohibition against soliciting the employer’s prospective customers was overly broad. The Court indicated, however, that prospective customers can be covered under certain circumstances, though not in this case.

Next, the Court held the two-year 50-mile territorial prohibition in one of the agreements was reason-
able and enforceable as written. Finally, it found the one-year employee non-solicitation provision in one of the agreements was *per se* reasonable and enforceable under Section 431.202.2 of the Missouri Revised Statutes. However, it also found that a genuine issue of material fact existed under the statute as to the enforceability of the two-year employee non-solicitation provision. Section 431.202.2 contains a one-year safe harbor. As nothing in the agreement indicated that the provision was to protect interests listed in Section 431.202.2(3) (i.e., “confidential or trade secret business information,” and “[c]ustomer or supplier relationships, goodwill or loyalty”), the Court remanded the case to determine whether a statutorily valid purpose existed.

Please contact Jessica Liss, Jessica.Liss@jacksonlewis.com, Daniel O’Donnell, Daniel.O’Donnell@jacksonlewis.com, or the Jackson Lewis attorney with whom you regularly work with any questions about *Whelan Security* or non-competition agreements.

**Developing Law Briefs**

**IRS Awards Unprecedented $104 Million to Whistleblower**

In what reportedly is the largest federal payout in U.S. history under any legal framework, the Internal Revenue Service has confirmed that it has paid a $104 million whistleblower award to a former investment bank employee. The award came four years after the employee cooperated with IRS investigators who were investigating tax evasion by the employee and his investment bank employer through Swiss bank accounts over a period spanning 2000 to 2007. The now-former employee spent three years in prison after he pleaded guilty in 2008 to helping one of his clients evade taxes. For more information, see our article at [http://www.jacksonlewis.com/resources.php?NewsID=4195](http://www.jacksonlewis.com/resources.php?NewsID=4195).

**Minnesota High Court Rejects Verdict against University Coach for Negligent Misrepresentation in Hiring**

Ending five years of contentious litigation, the Minnesota Supreme Court has reversed a million-dollar jury verdict for negligent misrepresentation against the head coach of the University of Minnesota Men’s Basketball Team for offering an assistant coaching job to a former assistant coach only to withdraw the offer later. The University withdrew the offer after discovering the candidate’s prior recruiting violations at the University. This decision clarifies and narrows the scope of negligent misrepresentation claims in job offer and hiring situations for both public and private employers in Minnesota. For more information, see our article at [http://www.jacksonlewis.com/resources.php?NewsID=4168](http://www.jacksonlewis.com/resources.php?NewsID=4168).

**Proof Decision Maker Knew of Workers’ Compensation Injury Required for Retaliatory Discharge Claim**

Without evidence that the manager who made the decision to discharge him had known about his injury (even though employees in different departments had known), an employee’s termination was not causally related to his filing a claim under the Illinois Workers’ Compensation Act, the Seventh Circuit has found, affirming the dismissal of the employee’s workers’ compensation retaliatory discharge claim. For more information, see our article at [http://www.jacksonlewis.com/resources.php?NewsID=4193](http://www.jacksonlewis.com/resources.php?NewsID=4193).

**$750,000 EEOC Settlement Highlights Pitfalls of Drug Testing for Prescription Medications by Employers**

An auto parts manufacturer has entered into a consent decree with the Equal Employment Opportunity Commission requiring it to pay $750,000 to a group of current and former employees at its Lawrenceburg, Tennessee, facility based on allegations that company drug testing practices violated the Americans with Disabilities Act. For more information, see our article at [http://www.jacksonlewis.com/resources.php?NewsID=4201](http://www.jacksonlewis.com/resources.php?NewsID=4201).

**Ohio High Court Eases Employee Requirement to Notify Employer of Workers’ Comp Retaliatory Discharge Claim**

The Ohio Supreme Court has recognized a limited exception to the state’s general rule that a discharged employee must notify his former employer within 90 days of termination of the employee’s intent to file a retaliatory discharge lawsuit under Ohio’s workers’ compensation act (R.C. 4123.90). Resolving a conflict among the state’s appellate courts, it held that courts may delay the running of the 90-day notification period if the employee did not know that he had been discharged “within a
Every federal appellate circuit to have considered the issue has held the Age Discrimination in Employment Act (“ADEA”) to be the sole remedy for federal age discrimination claims. That is, until the August 2012 decision of the Seventh Circuit Court of Appeals in Levin v. Madigan, 2012 U.S. App. LEXIS 17291 (7th Cir. 2012). The Court found the ADEA is not the exclusive remedy for age discrimination claims. The Court determined the plaintiff could bring an equal protection claim for age discrimination under 42 U.S.C. § 1983. The Seventh Circuit has jurisdiction over Illinois, Indiana, and Wisconsin.

In Levin, Senior Assistant Attorney General Harvey Levin had worked for the Illinois Attorney General’s Office for six years when he was terminated at age 61. Levin filed suit against the State of Illinois, the Office of the Illinois Attorney General, the Illinois Attorney General (in her professional and individual capacities) and four additional Attorney General employees in their individual capacities. Levin’s claims included age and sex discrimination under the ADEA, Title VII of the Civil Rights Act of 1964, and the Equal Protection Clause of the Fourteenth Amendment via § 1983 (a claim available only against state and local governments).

Because states are immune from money damages under the statute, the only cognizable relief under the ADEA for public employees age 40 and older is equitable relief. However, § 1983 permits suits to enforce individual rights under federal statutes and the Constitution against state and local government officials. Although § 1983 does not create substantive rights, it is a vehicle to vindicate federal rights granted elsewhere and to access those available remedies.

Seventh Circuit Makes Waves, Holds Age Bias Discrimination Statute Not Public Employee’s Only Remedy
At the district court, the defendants sued in their individual capacity argued that they were entitled to qualified immunity for Levin’s §1983 age discrimination claim because the ADEA is the exclusive remedy for age discrimination claims. The district court disagreed and the Seventh Circuit Court of Appeals affirmed that decision.

The Seventh Circuit found the text and legislative history of the ADEA show the statute provides different rights and protections than does § 1983, and thus it does not preclude an equal protection constitutional claim:

(T)he ADEA does not purport to provide a remedy for violation of federal constitutional rights and no express language indicates that Congress intended to foreclose relief under § 1983 for constitutional violations. (Citation omitted.) Beyond that, we have a hard time concluding that Congress’s mere creation of a statutory scheme for age discrimination claims was intended to foreclose preexisting constitutional claims. Congress frequently enacts new legal remedies that are not intended to repeal their predecessors.

In addition to holding that an employee can sue a state directly for equal protection violations related to age, the Seventh Circuit held that the defendants sued in their state-official capacity were not entitled to qualified immunity from damages. Although age is not a suspect classification, states may not discriminate on that basis if such discrimination is not rationally related to a legitimate state interest. At the time of the alleged wrongdoing, it was clearly established that age discrimination in employment violated the Equal Protection Clause. Thus, the Court concluded the individual defendants were not entitled to qualified immunity.

Employers have long operated under the assumption that the ADEA is the only vehicle for a federal age discrimination claim is under. Now, at least for state and local government employers, that assumption may no longer be valid.

Please contact Robert Simandl, at Robert.Simandl@jacksonlewis.com, or Stefanie Carton, at Stefanie.Carton@jacksonlewis.com with any questions about Levin or how to minimize the risk of workplace litigation.

Jackson Lewis Blogs

Workplace laws, regulations, trends, and strategies change and evolve every day. Our blogs — written by Jackson Lewis attorneys and focusing on key issues and industries — can help you stay informed about these developments, almost as quickly as they happen. Find all of our blogs, including our two newest, Non-Compete and Trade Secrets Report and Affirmative Action & OFCCP Law Advisor, at http://www.jacksonlewis.com/blogs.php and subscribe to receive notices by e-mail. Following is a sample of recent headlines:

Workplace Law Implications of the 2012 Presidential Election

Recent OFCCP Settlements Highlight Agency’s Continued Focus on Applicant-to-Hire Adverse Impact

Appeals Court Rules Change to Workweek, Even to Reduce Overtime Costs, Not Unlawful

Construction Employers: What to Expect in 2013!

DOD, GSA, and NASA Propose New Rule Affecting Federal Contractor Requirements to Safeguard Government Information

Adverse Impact on Co-Workers of a Requested Accommodation under ADA Relevant in Determining Essential Functions

Federal Court Panel Hears Arguments on NLRB Workers’ Rights Posting Requirement

USCIS Revises Proposed New Form I-9

NFL Reaches Agreement with Referee Association, Ends Lockout
Additions Welcomed in Chicago, Cincinnati, and Memphis Offices

We are pleased to welcome Patrick Rocks to the Chicago office as Partner. Mr. Rocks, formerly General Counsel for the Chicago Board of Education and First Assistant Corporation Counsel for the City of Chicago, brings with him more than 20 years of experience in the area of public sector and education law, with particular emphasis on both systemic class litigation and labor and employment issues facing municipalities as well as large urban school districts.

We also welcome Caroline M. DiMauro to the Cincinnati office as Partner. Ms. DiMauro has more than 12 years of experience representing management in labor and employment matters, including claims involving allegations of unlawful discrimination, retaliation, wrongful discharge, leave violations, and breach of employment agreements.

We are pleased that J. Gregory Grisham has joined our Memphis office as Partner. Mr. Grisham, a native of Lawrenceburg, Tennessee, brings with him more than 20 years of experience in labor and employment law, including defense of employers in discrimination, harassment, retaliation, wrongful discharge and whistleblower claims.

Jackson Lewis Recognized as “Powerhouse” and “Standout”

We are pleased to announce the firm has been recognized as both a “Powerhouse” and “Standout” in employment litigation in a national survey of more than 350 corporate counsel published in the BTI Litigation Outlook Report 2013. According to BTI, Jackson Lewis stands “apart from the rest,” and has “positioned itself with the world’s most demanding companies as the ones corporate counsel would most like to have by their side in head-to-head competition.” Jackson Lewis was also named “The Employment Litigation Powerhouse” in the previous BTI Litigation Outlook.

We are honored by this recognition and congratulate our team of litigators across the country who, on a daily basis, are hard-working, creative and passionate in responding to our clients’ employment litigation needs. We realize these accolades are a result of our clients’ confidence in the firm and we thank you sincerely for your continued support.

Honors for Jackson Lewis

The 2012 Chambers USA Legal Guide has selected more than 50 Jackson Lewis attorneys as “Leaders in their Fields,” including:

Kelvin C. Berens (Omaha)
Joseph S. Dreesen (Omaha)
David J. Duddleston (Minneapolis)
Christopher E. Hoyme (Omaha)
Gina K. Janeiro (Minneapolis)
Maurice G. Jenkins (Detroit)
Jeffrey B. Keiper (Cleveland)
Randal M. Limbeck (Omaha)
Timothy D. Loudon (Omaha)
Jane M. McFetridge (Chicago)
James R. Mulroy II (Memphis)
Michael W. Padgett (Indianapolis)

We are pleased to announce that U.S. News and Best Lawyers® have ranked Jackson Lewis in Tier 1 nationally, in Employment Law – Management, Labor Law – Management, and Litigation – Labor & Employment, in the U.S. News – Best Lawyers “Best Law Firm” Rankings for 2013. The “rankings are based on a rigorous evaluation process that includes the collection of client and lawyer evaluations, peer review from leading attorneys in their field, and review of additional information provided by law firms as part of the formal submission process.” Our Chicago, Memphis, and Omaha offices are ranked Tier 1 in the Metropolitan Rankings.

Our Chicago office is ranked Tier 1 in Employment Law – Management, our Memphis office is ranked Tier 1 in Labor Law – Management, and our Omaha office is ranked Tier 1 in Immigration Law.

In addition, we are pleased to announce that Jackson Lewis attorneys are named in The Best Lawyers in America® for 2013. Best Lawyers is based on a national survey involving more than 4 million detailed evaluations of lawyers by other lawyers. Listed in the 2013 Best Lawyers are the following Jackson Lewis attorneys in the Midwest:

Peter R. Bulmer (Chicago)
Neil H. Dishman (Chicago)
Joseph S. Dreesen (Omaha)
G. Gregory Grisham (Memphis)
Maurice G. Jenkins (Detroit)
M. Angela Krieger (Omaha)
Stanley A. Krieger (Omaha)
Randal M. Limbeck (Omaha)
Timothy D. Loudon (Omaha)
Jane M. McFetridge (Chicago)
David K. Montgomery (Cincinnati)
We congratulate Omaha Partner Amy L. Peck on her election as a director on the American Immigration Lawyers Association’s Board of Governors. As an Elected Director of AILA, a national association of more than 11,000 attorneys and law professors who practice and teach immigration law, Ms. Peck will help set the general policies of the Association. This includes providing financial oversight, setting annual goals and monitoring Association accomplishments. This is Ms. Peck’s second term on the Board of Governors and only one of her many positions in AILA. She served as Chair of the AILA Immigration and Customs Enforcement Committee, on the AILA Interagency Committee, the Annual Conference Committee, as well as chairs the AILA FOIA Liaison Committee and the AILA Comprehensive Reform Committee.

Finally, we congratulate the Jackson Lewis attorneys named by Super Lawyers® as among the top attorneys in their states. Only five percent of the lawyers in a state are named by Super Lawyers® each year and include the following Jackson Lewis attorneys in the Midwest:

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Daniel L. Bell (Cleveland)
Kelvin C. Berens (Omaha)
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Vincent J. Tersigni (Cleveland)
Katharine C. Weber (Cincinnati)
Craig W. Wiley (Indianapolis)

Super Lawyers® named the following Jackson Lewis attorneys in the Midwest Rising Stars:

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Matthew R. Byrne (Cincinnati)
Hallie Diehelm Caldarone (Chicago)
Neil H. Dishman (Chicago)
Sean C. Herring (Chicago)
Gina K. Janeiro (Minneapolis)
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**MANAGEMENT EDUCATIONAL OPPORTUNITIES**

**Detroit Seminar Series: Critical Issues in Employment Law**

*What We’ve Learned in 2012 and What to Expect in 2013*

Tuesday, December 11-Detroit, Michigan
Registration: 2:30-3:00 p.m.
Program: 3:00-4:00 p.m.

In this session, experts from Jackson Lewis will address how key developments in 2012 will impact the workplace in 2013. This seminar will provide attendees with practical guidance on issues relevant to your business in the upcoming year, including:

- Workplace privacy and social media policies
- Disability and reasonable accommodations
- EEOC enforcement initiatives
- Cases of note

Help us celebrate the end of the year with an open house and reception in our office immediately following the program, the open house will take place between 4:00-6:00 p.m.

For further information, please contact Maggie Olschanski, olschanm@jacksonlewis.com.

To find other programs, please visit www.jacksonlewis.com/events.

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Jackson Lewis LLP represents management exclusively in employment, labor, benefits and immigration law and related litigation.

The firm has more than 700 attorneys practicing in 49 locations nationwide.

Jackson Lewis represents employers before state and federal courts and administrative agencies on a wide range of issues, including discrimination, wrongful discharge, wage/hour, affirmative action, immigration, and pension and benefits matters.

Jackson Lewis negotiates collective bargaining agreements, participates in arbitration proceedings and represents union-free and unionized employers before NLRB and other federal and state agencies.

The firm counsels employers in matters involving workplace health and safety, family and medical leaves and disabilities.

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