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Social Media Recommendations A New Risk for Employers

All employers have had a request from a potential new employer for a recommendation about a prior employee. I use the term recommendation loosely, because often the potential new employer really wants to find out if there is anything wrong with the candidate they're considering. Providing information about prior employees, or even current employees, may create the risk of claims for defamation or create other types of liability. As a result, many employers try to limit their risk by declining to provide any recommendations for employees or former employees. Other employers modify that a bit by requiring that the employee provide a release before a recommendation is given. Many employers require that all requests for recommendations or references must be forwarded to and handled by the Human Resources Department.

For years, we have warned employers to make sure that all employees know about restrictions on giving recommendations. It's easy for prospective employers and others to back door such a policy by calling supervisors or other employees directly, and those who are unaware of their restrictions may violate the policy and inadvertently create liability for the employer.

Now, a new risk has arisen in the battle to control information that is provided about employees and former employees. Social media networks such as LinkedIn have created mechanisms for reviews and comments. As employees become connected in this virtual world, they are often asked to provide a review, recommendation or comment about the work of others.

Why is this new risk such a concern? First, most employees do not think that their comments on such sites, including LinkedIn, are covered by recommendation policies. Just as important, all such comments, however ill-advised, are easy to find. Imagine a situation in which you are defending a discrimination action brought by a former employee, and trying to prove that the employee was terminated for poor performance. It is now easy for the former employee's lawyer to go online and find glowing reviews and positive comments from your supervisors and employees about the former employee. That can significantly harm your chances of success as you attempt to establish your non-discriminatory business reason for termination. It may also be difficult to establish that negative comments, such as those that might give rise to a defamation claim, are individual opinions rather than the comments of the employer organization.

What do you do to address this risk? You won't be surprised to hear me say that you need to have policies that cover all aspects of participation in social media, including the posting of comments about employees and former employees. You need to educate your employees about those policies and enforce them, so that they will stay front-of-mind for everyone in your organization.