

Social Media in the Workplace

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Part 1

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This is the first of two articles on the potential legal issues that can arise from the use of social media in the workplace. The articles will cover the use of social media in pre-employment, employment and post-employment situations.

Pre-employment screening

Employers are taking advantage of the free information on social media websites and communication tools to screen applicants or to perform pre-offer due diligence on successful applicants. It's not just people in their 20's and 30's who have online profiles and the use of social media by human resource professionals is not a passing fad.

There are a variety of resources that can be consulted such as LinkedIn®, MySpace™ and Facebook. Users of these three sites create an individual profile that can include information about their work history, extracurricular activities, and contacts. Other sites such as Twitter™ and YouTube can also yield information on applicants that might be valuable in making a decision to extend or withhold an offer of employment. For those employers who are unsure about using social media sites, a simple search using Google™ or some other search engine can also yield potentially interesting information.

What are employers looking for? Social media profiles can provide a lot of valuable information. While an employer should not rely solely on these sites to verify information on employment applications, they can be used to discredit applicants or to provide another view of the person behind the resume or online application. Online profiles can provide information on the person's:

- Professional credentials
- Career objectives
- Maturity and judgment
- Abuse of drugs or alcohol
- Current employment status
- Red flags

A June 2009 CareerBuilder survey of 2,600 hiring managers found that 45% of them use social media in the hiring process. That was double the number of hiring managers that reported such use in 2008. What's more, 11% planned to start using social media for prescreening. Eighteen percent or almost one in five hiring managers surveyed reported finding information online that encouraged them to hire candidates:

- Profile - good feel for personality and "fit"- 50%

- Profile supported professional qualifications - 39%
- Candidate was creative - 38%
- Solid communication skills - 35%
- Candidate well rounded - 33%
- Good references posted by others - 19%
- Candidate received awards - 15%

However, twice as many (35%) hiring managers reported finding information that led them to not hire a candidate, including:

- Inappropriate photos or postings - 53%
- Postings on drinking or drug use - 44%
- Bad-mouthing previous employer, co-workers or clients - 35%
- Poor communication skills - 29%
- Discriminatory comments - 26%
- Lied about qualifications - 24%
- Shared confidential information from previous employer - 20%

Potential pitfalls of screening

Screening with social media has some drawbacks. It can provide too much information about job applicants, including some information that cannot be considered in the employment decision. Some online content can be questionable in terms of its origin or truthfulness. Moreover, some employers are concerned about invading applicants' privacy.

Too much information

Certain information that can be found in an applicant's online profile cannot be used as the basis for an employment decision. These include information on the applicant's race, religion, national origin, age, pregnancy status, marital status, disability, sexual orientation (some state and local jurisdictions), gender expression or identity (some state and local jurisdictions) and genetic information. While it is best to avoid obtaining or even seeing this information, it is often prominently displayed on social networking profiles.

A potential solution is to assign one person to review the social media sites who is not part of the decision making process. That person should filter out any information regarding membership in a protected class and only pass on information that may be considered in the hiring process. The most fundamental way to protect against discrimination claims in using information gleaned from social media sites in the employment decision process is consistency. Employers should keep records of information reviewed and used in any employment decision.

Quality of information

Online information is not always reliable. The first rule is to make sure that the person whose profile you are viewing is actually your job applicant. It is not unusual for people to have similar names or even the same name. If you have confirmed the identity of the applicant, keep in mind that there is a possibility that not all of the information in the profile is correct. Profile information might have been deliberately falsified by the applicant or a friend or significant other with access to the profile login information.

Employers should also recognize that any site provides a limited picture of the individual. Remember the intended audience. On sites like LinkedIn, the intended audience is other professionals. However, on Facebook and MySpace, profiles are often developed for close friends and family. And some people enjoy creating a new persona for their online life, one that has no relationship to who they are in real life.

Invasion of privacy

Employers have little risk that viewing applicants' profiles, blogs or other online postings will give rise to invasion of privacy claims. Users of social networking sites usually have the option to set privacy settings on their personal pages. Their personal pages can be available to any user of the network, or can be restricted to only individuals authorized by the user. A critical question to ask in evaluating an invasion of privacy claim is whether there was a reasonable expectation of privacy. To avoid the potential for liability, employers should avoid attempts at circumventing the privacy settings put in place by users. Only view information that is readily accessible and intended for public viewing.

Google™ and other search engines

In a recent Monster.com report, 77% of employers surveyed reported performing a "Google" search on job applicants. Google is popular for the amount of information that can be discovered and the ease of use. In addition to the concern noted above that a Google search might return too much information, there are additional concerns about the quality of the information retrieved. The breadth of information that a Google search can produce has its own drawbacks including difficulty in identifying sources of search results.

As of now, employers are unlikely to incur liability based on Google searches of job applicants. To further protect against liability, employers should be consistent in their search practices, recognize the limits of online searches, and be sure the information they find actually relates to their applicants.

Current law on reviewing social media sites

There are no court decisions yet imposing liability for an employer's review of a social networking site in the pre-employment context. This is not a guarantee that such liability will not be imposed in the future. For now, the potential for liability is minimal in the absence of misconduct or discrimination by the employer. The potential for liability can be further reduced by:

- Being consistent in prescreening all applicants for certain positions or only those already selected for interviews
- Having someone other than the decision maker filter out protected class information if possible
- Keeping records of the basis for each employment decision

- Not circumventing privacy settings established on applicants' networking sites

If employers have any questions about whether information found through pre-employment screening should be used in the decision making process, they should consult employment counsel before using that information.