

CORPORATE COUNSEL

Preventing Problems Arising Out of Employers' Use of Social Media Tools to Make Employment Decisions

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We live in a constantly expanding world of technology.

Every day we learn of new and improved social media tools that permit individuals to connect with old friends, stay in touch with acquaintances, and keep current on events of interest. We also hear stories of specific instances where social media tools have created opportunities, as well as instances where people have found themselves in difficult situations because they used social media inappropriately.

The workplace is no different. Indeed, social media tools create numerous opportunities for employers to learn information about applicants and employees. Used correctly, social media can provide an excellent and unprecedented resource. Used improperly, however, social media can lead to issues, concerns and claims not seen previously in the employment context.

The proper use of social media by employers requires a three-step process: (i) recognizing the potential liabilities arising out of the use of such tools; (ii) creating policies for (a) using social media to make decisions about applicants and employees and (b) addressing employees' use of social media; and (iii) ensuring that such policies and practices are implemented consistently and are well documented.

Background

There is no question that social media tools are growing in popularity. According to some sources, approximately 200 major active social networking sites currently exist. Ten such sites have at least 100 million registered users.

Though actual figures are elusive, a large and growing percentage of employers routinely access a variety of information



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about potential and current employees through:

- Social networking sites — Facebook, LinkedIn, and Twitter;
- Video-sharing web sites — YouTube, Metacafe; and
- Personal/affinity blogs.

Facebook alone may have 500 million users worldwide, and some studies suggest at least half access their Facebook page every day at work, where they may be commenting on their company, its products, its corporate strategy, or just wasting time. Sources also report that a majority, perhaps 70 percent, of human resources professionals routinely use social media sites to review job applicants and monitor the use of such sites by employees.

Traps for the Unwary

The first step that a company should take in properly using social media in the workplace is to recognize the potential pitfalls it faces.

Using social media sporadically, inconsistently, or haphazardly can cause problems that employers would not otherwise

confront, and thus may not have considered. For example, overusing social media tools or accessing information improperly or in a deceptive manner may give rise to claims for invasion of privacy.

Moreover, when a job candidate is the subject of a social media search there is a possibility — even a strong likelihood — that the search will yield information that, by law, cannot be considered by the employer. Such information may include the applicant's or employee's membership in a protected class based on, among other classifications, race, ethnicity, national origin, disability, or gender.

Given that social media tools make available a great deal of demographic information (such as photographs, group affiliations, and hobbies) that is not otherwise apparent on the face of an applicant's or employee's submission or in-person presentation, an employer's availing themselves of such information could pave the way for allegations of discrimination if the employee or applicant believes that the employer used such information to make an adverse employment decision.

The fact that social media sites may be publicly accessible does not insulate employers from claims. Applicants and employees should have a decreased expectation of privacy given that they voluntarily placed information on a social networking site. Employers, however, should still expect employees and applicants to attempt to assert claims resting on such information.

For example, these claims could arise out of allegations that an employer only conducts searches of applicants or employees that have names suggesting certain ethnicity or that the employer learned of — and used

— impermissible information in making an adverse employment decision.

A search may also lead to allegations that, although the employer conducts searches on all candidates, the employer evaluates information learned through such searches differently depending on the employee's race, gender, etc.

On the other hand, employers may face liability for negligent hiring if they fail to learn of readily accessible information about an applicant or employee that should have put the employer on notice of certain concerns. Moreover, an appropriate search may turn up other information that is critical for the employer to know prior to making an employment decision, such as the posting of disparaging and offensive remarks about individuals or a former employer.

Recommended Practices

Employers should consider implementing data collection and technology usage policies that address two core subjects: (i) the company's use of social media tools to collect data that it may use to make employment decisions and (ii) restrictions and limitations on employees' use of technology in, and concerning, the workplace.

Creating such policies takes time and reasoned thought and depends on the type of work that the company performs. Policies must also be sufficiently flexible to permit the company to respond to changes in the rapidly evolving world of social media without requiring a cumbersome revision process.

Data Collection Policies

A company's policy concerning its use of social media to collect data should, at a minimum:

- Be accessible to every employee and candidate by including a statement or cross-reference on the employment application or in the employee manual;
- Be based on job-relatedness, and state expressly that only information learned through social media that affects an employee's job performance will be considered;
- State expressly that, to the extent the employer learns of information that cannot be lawfully considered in making employment decisions (such as

religious affiliations, disabilities, race, or other protected classifications), the employer will not consider such information;

- State that the company may conduct periodic Internet searches and that continued employment constitutes a waiver of any objection to the employer's use of such information;
- State that the employer is using social media sites to supplement the application process and that such checks are run on all applicants;
- State that the employer reviews only reputable sites as part of the screening process; and
- State that the company searches only publicly available sites and does not seek to circumvent privacy settings or otherwise access restricted information.

Creating a policy is only the first step. Each company must also ensure that its policy is implemented appropriately and consistently. For example, employers should only conduct job-related searches.

To the extent that an employer is considering making an adverse decision based on information learned through a social media search, the employer should be able to make a defensible connection between the information and the decision. The company should also document carefully what sites were searched, what search terms were used, and other similar administrative information.

Moreover, to reduce the possibility of allegations of discrimination, the company may want to consider having a non-decision maker conduct the search and filter out impermissible information before the decision maker reviews the search results.

Technology Usage Policies

A company's technology-usage policy should:

- Address the extent to which, if at all, usage is allowed by employees on work time;
- State that the employer has the right to monitor any computer usage conducted via its system, including the content of e-mails and sites accessed, etc.;
- State that employees may not use

social media (at home or work) to inappropriately disparage the company or disclose confidential information;

- Prohibit employees from disclosing personal information concerning other employees or customers;
- Proscribe the employee's violating the company's antidiscrimination policy, code of conduct, or other applicable policies;
- Prohibit employees from making libelous, defamatory, or harassing statements online and from engaging in other unlawful conduct;
- State that the employee must not state — or in any way imply or suggest — that they represent the company or are acting on its behalf when making statements online; and
- If applicable, state that in addition to the fact that all employees are employees at-will, employees who violate the usage policy may be subject to disciplinary action, including immediate termination.

Again, creating policies is only the first step. Given that usage policies may lead to disciplinary decisions, companies must be sure to implement them consistently and document any resulting decisions.

Conclusion

Social media tools can provide significant advantages to employers. When such tools are used properly, they permit employers to benefit in unprecedented ways and make decisions that maximize the company's productivity and best protect its interests.

Although there are inherent risks in using social media tools, employers can minimize such risks by evaluating fully the issues involved, adopting appropriate policies, implementing such policies consistently and documenting the process.

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