

**USING SOCIAL NETWORKING WEBSITES FOR
HIRING DECISIONS
Legal and Ethical Considerations**

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Mr. Wyatt came to the Firm as an associate in September 2007 from a civil litigation firm in Dallas where he gained extensive experience in all types of litigation and trial work including. Mr. Wyatt participated in litigating a wide variety of complex commercial matters for clients in diverse industries in federal and state court, including employment matters, contract cases, real estate and oil and gas disputes, insurance coverage and defense, and intellectual property cases. Since joining the Firm, Mr. Wyatt has provided general civil legal services for the Firm's municipal clients in a wide variety of matters including planning and zoning, human resources, code compliance, open government, procurement, and advising on relevant constitutional issues while continuing his litigation practice. Currently, Mr. Wyatt acts as Assistant City Attorney for the Cities of Richardson, Allen, Farmers Branch and Sachse. He also acts as assistant general counsel for the Denton County Transportation Authority, the Dallas Central Appraisal District.

Mr. Smith and Mr. Wyatt are both frequent speakers on a wide variety of legal topics that affect local governments.

INTRODUCTION

Online social networking has rapidly developed from the time where it was considered novel to simply email a picture to another person to one of the most powerful recruiting tools available to employers. Today, hundreds of millions of potential job candidates offer intimate, often instant, contact with recruiters and human resource personnel through online social media. Some studies indicate that over 79% of human resource departments now use online social media when evaluating candidates for potential jobs.¹ Consequently, 70% of those departments say they have rejected candidates due to a candidate's online information.

The rapid growth of social media has outpaced legislatures and courts alike and created a legal minefield where employers are left with an unanswered question – “*How can we legally and ethically use online social media in the hiring process?*” This handout provides a brief overview on what types of social networking are available online and how employers can make the most of what social media sites have to offer. This handout also discusses the potential legal and ethical pitfalls of using online social media and illustrates essential steps involved in developing a comprehensive social media use hiring policy that will help ensure employers maintain compliance with the law.

WHAT IS ONLINE SOCIAL NETWORKING?

Online social networking is the use of the internet, typically through social media websites, for interaction between two or more people. Hundreds of millions of people visit and post personal information on social networking sites each and every day.² Moreover, millions of new people are visiting social networking sites each day. The simple fact is that accessing online social networking has become an important part of life for many individuals and it is here to stay.

Some of the more popular ways to network online include using social media websites such as Facebook, MySpace, LinkedIn and Twitter. Social networking also occurs through the use of personal websites such as blogs where individuals can go online and provide information and media to the world through their own website. While there are literally millions of websites dedicated to social networking, employers should be able to differentiate between the two major “types” of sites that provide personal information about potential candidates for employment – comprehensive information sites and topic specific information sites. Below we compare these two distinct types of social media and the benefits each can provide in the hiring process.

I. Comprehensive Information Sites

Facebook, MySpace and LinkedIn. Facebook is a prime example of a comprehensive social media website because it encourages users to post and share a unlimited amount of personal information including name, birthday, hometown, educational history, career

¹ Dickinson Employment and Labor Law Group, *Social Media and the Hiring Process, Part I: Benefits and Risks*, <http://iowaemployerlaw.com/2010/04/15/social-media-and-the-hiring-process-the-important-considerations/> (April 15, 2010).

² See generally, www.econsultancy.com (Statistics from 1/29/2010, last visited May 23, 2010).

information, religious preferences as well as personal, and often intimate, information.³ Recent data suggests that Facebook currently has over 400 million users, including 200 million visitors to the site each day.⁴ Facebook users commonly post personal media including photos, videos, and electronic comments for viewing by anyone who visits the site. Users network by linking to other users, or "friends," sending friends messages, and keeping friends updated on their status by updating their user's profile.⁵ With Facebook, a user's group of friends or social network are often connected to that person's personal affiliations, such as the city that person lives in, college attended, or the place of employment. As users add more affiliations, users continually increase the size of their online network.

There are many other similar sites such as MySpace and LinkedIn, (a business oriented social media site), each of which also have millions of users who post vast amounts of personal information in a similar format for the world to see. With such vast and rapidly expanding networks, comprehensive social media sites such as this offer an employer access to a seemingly infinite amount of information relating to the user.

II. Topic Specific Information Sites

In contrast to comprehensive social sites like Facebook, MySpace and LinkedIn, there are social media sites that provide more focused topical information about the user.

Blogs. The most common type of topic related website is the blog. A blog is simply a site where a person posts commentary on the internet. Blogs often provide commentary or news on a particular subject, such as food, politics, or local news; others simply function as personal online diaries. Blogs epitomize the concept of social media whereas the public typically has the ability not only to read a blogger's posts but also to interact and leave comments on the posts. Though primarily text-based, bloggers occasionally post non-textual media such as art, photographs, videos, music, and audio. National news outlets frequently use discussions in the 'blogosphere' as a gauge of public opinion on various issues.

Twitter. Twitter is unique among social media. Twitter provides a service that allows users to communicate through short posts known as "tweets."⁶ Tweets are personal posts of up to 140 text-characters, which Twitter displays on the user's profile page and delivers to the user's subscribers, known as followers. In this regard, Twitter is essentially a mini-blog. Users can limit delivery of their tweets to their circle of friends or, by default, allow anyone to access their page. Users can send and receive tweets directly on the Twitter website or on their mobile device (e.g., cell phone, iPhone, and Blackberry). Tweets are very similar in this way to their offline cousin – the text message.

Whether comprehensive or topic specific, online social media arguably provides the best way to reach out to passive job candidates, verify applicant's résumé claims, gain insight into their personalities, and unearth undesirable behavior or character traits. However, as we discuss

³ See Facebook, Product Overview, <http://www.facebook.com/press/product.php>.

⁴ See *id.*

⁵ See *id.*

⁶ See Twitter Support, Frequently Asked Questions, <http://twitter.zendesk.com/forums>.

below, using online social media for hiring presents several legal and ethical problems that employers must understand and take into consideration during the hiring process.

LEGAL CONSIDERATIONS WHEN USING SOCIAL MEDIA FOR HIRING

The rapid growth in popularity of online social media has outpaced legislatures and courts alike. No laws yet directly address an employer's ability to use social media for hiring decisions. There is certainly nothing inherently wrong with rejecting an applicant with personal characteristics that will negatively affect job performance. That is part of any employer's mandate. However, when employers obtain such information through social media, they are unable to ensure that all of the information they uncover will be job-relevant. Some personal information (e.g., sex and race) would normally be obtained through a conventional interview. But other information such as country of origin, religious preference, pregnancy, age, disability or sexual orientation might not. Social media sites offer employers (as well as the entire world) an uncensored peek into how job candidates act in all environments, including unguarded moments. Therefore, the common sense principals behind conventional interview methods should be applied to an employer's use of social media in the same manner – in other words, employers must not discriminate against a candidate based upon a characteristic or behavior discovered through online social media that is not job-relevant.

Disparate Impact. Discrimination generally occurs two ways in the context of a hiring decision. The employer might cause a “disparate impact” on a class of potential applicants or “disparate treatment” toward an individual applicant. Disparate impact occurs when the hiring practices of an employer have the impact, whether directly or indirectly, of discriminating against applicant classes. The potential for disparate impact is much greater when employers look toward online social media for their hiring decisions due to the fact that certain classes of individuals are likely not to be proportionately represented in a particular online social network.

Age presents a prime example of a class of individuals that may disparately impacted through the use of online social media in the hiring process. Statistics reflect that at this time approximately 29% of the civilian labor workforce is over the age of 50.⁷ Nonetheless, only 13% of all the users of Facebook are currently over the age of 50. Though the employer may not be aware, this class of individuals (50 and over) is clearly underrepresented by using Facebook as a hiring tool.

Disparate Treatment. Discrimination by disparate treatment is usually easier for an employer to detect. Disparate treatment occurs, as the name implies, when the employer treats an individual applicant differently than other applicants due to a characteristic of the applicant that is not job-relevant. Employers are generally entitled to judge applicants on any characteristic relevant to the job. However, when an employer disqualifies an applicant solely based upon a characteristic that is not necessarily relevant to the job, the employer is likely engaging in disparate treatment.

⁷ *Using Social Media for Recruiting? Beware of Disparate Impact Claims*, Stephanie R. Thomas, April 21, 2010. <http://www.workplaceinvestigationblog.com/2010/02/articles/social-media/recruiting-social-media-and-disparate-impact/>

Discrimination through disparate treatment generally poses the greatest danger to the employer. Take the following example:

Employer interviews an applicant in person and believes the applicant is a perfect fit for the job. Employer decides to make an offer to this applicant. However, prior to making the offer, the employer goes on to the applicant's Facebook page (to "check this person out") and finds out that the applicant frequently posts commentary about the applicant's religious beliefs on Facebook. Believing that the applicant may bring their religious beliefs into the workplace, employer decides that applicant is not a fit after all.

Is this discrimination? Probably yes – this appears to be disparate treatment based upon the applicant's religious commentary posted on Facebook. Had the employer not made the last minute decision to check out Facebook, the applicant would have received the job.

Federal Guidelines. The federal Equal Employment Opportunity Commission (EEOC) provides guidelines on their website as to what constitutes appropriate interview questions.⁸ The EEOC provides a list of certain classes of information that employers are generally prohibited from asking an applicant. The list is as follows:

- Age
- Disability
- Genetic/Family Information
- National Origin
- Pregnancy
- Race/Color
- Religion
- Sex
- Political views

These classes of information are considered "protected information" under federal civil rights laws, including Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA). Under federal law, employers must demonstrate that the information gained by inquiring into one or more of the above-referenced classes is relevant to determining an applicant's fitness to perform the job. Otherwise, such inquiries are presumed discriminatory by the employer. To assist employers, the EEOC provides the following summary of disallowed hiring practices on their website:

As a general rule, the information obtained and requested through the pre-employment process should be limited to those essential for determining if a person is qualified for the job; whereas, information regarding race, sex, national

⁸ See generally, www.eeoc.gov.

origin, age, and religion are irrelevant in such determinations. Employers are explicitly prohibited from making pre-employment inquiries about disability.

Although state and federal equal opportunity laws do not clearly forbid employers from making pre-employment inquiries that relate to, or disproportionately screen out members based on race, color, sex, national origin, religion, or age, such inquiries may be used as evidence of an employer's intent to discriminate unless the questions asked can be justified by some business purpose.

Therefore, inquiries about organizations, clubs, societies, and lodges of which an applicant may be a member or any other questions, which may indicate the applicant's race, sex, national origin, disability status, age, religion, color or ancestry if answered, should generally be avoided. Similarly, employers should not ask for a photograph of an applicant. If needed for identification purposes, a photograph may be obtained after an offer of employment is made and accepted.⁹

Ethical Considerations. Employers should also be cautious about judging applicants on characteristics that are not necessarily protected by law. Risks exist where an applicant is evaluated on non-protected characteristics as well. Take the following example:

Employer interviews an applicant in person and believes the applicant is a perfect fit for the job. Employer decides to make an offer to this applicant. However, prior to making the offer, the employer goes on to the applicant's Facebook page and finds out that the applicant posted a picture of himself drinking a couple beers at once on Facebook. Believing that the applicant may have a drinking problem, employer decides that applicant is not a fit after all.

Is this discrimination? Probably yes again, although neither state nor federal law protect a person's "drinking problem" this may be disparate treatment toward the applicant. It appears that the decision to not hire the individual was ultimately based upon the employer viewing the picture online when the employer has not demonstrated the picture (or its content) to be relevant to the particular job.

The scenario above illustrates the most difficult part of using online social media in the hiring process. When an employer visits a person's social website, the employer is instantly given access to everything that person has chosen to share with the world. Much of the information is not protected by law but also is not relevant to the job. In addition to the legal duty of the employer not to discriminate based upon a person's protected characteristics, there is also an ethical duty for the employer not to discriminate based upon any characteristics that do not affect the job. Often the mere appearance of discrimination is enough for an employer to face a discrimination lawsuit.

It is therefore imperative that employers establish a comprehensive written policy pertaining to the use of social media in the hiring process so as to obtain the benefits social

⁹ See *id.*

media can provide without violating the employer's legal and ethical obligations. This final section highlights the essential aspects employer social media policies.

USING SOCIAL MEDIA IN THE HIRING PROCESS

The Social Media Policy

Employers should engage either in-house or contract legal counsel to assist in drafting a social media policy. Courts and legislatures alike are increasingly weighing in on the practice of using social media in all areas of the workplace and the employer's policy should take into account the current legal landscape. Below are some of the most important considerations when preparing a social media hiring policy.

Use of Social Media Generally. The employer's policy should begin by asking whether or not the use of social networks is really necessary in a particular situation, or whether an alternate interview approach will be equally effective. For example, if drug use is a concern, there are well established approaches to screening candidates that pose no legal risk whatsoever. The same applies when verifying professional qualifications of an applicant since licenses and degrees can be independently verified without the use of social media.

Type(s) of Social Media to be Used. The policy should take into account the types of social media to be used and the manner in which the employer will access the information. Comprehensive social media is undoubtedly a great tool whereas sites like Facebook, MySpace and LinkedIn provide extensive information relating to college education, prior work experience and other relevant demographics. Conversely, topic specific social media generally focuses on personal opinions and beliefs through personal commentary. The use of topic specific social media should therefore be limited to only those situations where it can be reasonably shown that such commentary would provide the employer job-relevant information.

Manner of Use. The policy should further provide (1) who within the employer's organization may use social media and (2) to what extent the online content may be used in the hiring decision. For instance, it may be prudent to create a two-step process for accessing social media whereby one person goes onto an applicant's social network and gathers information and then transmits only the job-related information to the person making the hiring decision. In this scenario the "drunken Friday night party photograph" does not reach the decision maker and the risk of discrimination is mitigated.

Maintaining Records of Use. Finally, the policy should provide for maintenance of records reflecting the actual use of social media. When the discrimination lawsuit arrives, the plaintiff's attorney will likely request records as to how social media was used in the hiring process. A judge or a jury may draw an inference that if you didn't maintain records, the records must have been prejudicial.

These are only a few of the considerations employers should make when preparing a hiring policy; employers should work directly with legal counsel before implementing a final policy governing social media use so that individual employees understand their legal limits.

SUMMARY

Online social networks have their risks; but, on the other hand, they are arguably the best way to reach out to passive candidates, verify candidates' résumé claims, gain insight into their personalities, and unearth undesirable behavior or character traits. Furthermore, they are a free resource for employers. Until applicants realize the importance of keeping their personal and professional worlds separate, recruiters are in the precarious position of using the information on social networks cautiously and selectively. Employers should be mindful of legal and ethical pitfalls and rely on a current hiring policy to guard against costly lawsuits.

For more information about social media hiring policies feel free to contact us at:

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