SOCIAL MEDIA

IN YOUR EMPLOYMENT PRACTICES

irwin siegel agency, inc.
risk management services


SOCIAL

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INTRODUCTION

In 2010, two thirds of the world's population visited social networking sites. People use social networking sites for numerous reasons. Sites such as Facebook, Twitter, and LinkedIn are used to keep in touch with family and friends, job seeking, and self expression. As social networking has evolved so has its purpose. In this competitive job market, employers are particular about selecting the right candidate. It is important that they aren't investing time and funds on the wrong person for the job. Therefore, many employers have turned to social networking sites with the perception that the information is a more accurate representation of the applicant. Social media may allow an employer to learn a lot of information about an applicant; however it can also pose significant legal risks to the organization.

WHAT IS THE RISK?

RISK: The search may identify an applicant's protected characteristics. The Equal Employment Opportunity Commission (EEOC) enforces laws against workplace discrimination. The EEOC provides a list of certain classes of information that employers are generally prohibited from asking about in an interview. These include age, disability, genetic/family information, national origin, pregnancy, race, religion, sex, political views, etc. When viewing an applicant's social networking site, it is very easy to discover this content. Photographs of the applicant may reveal information about disabilities that would not be permitted under the ADA and other federal and state employment laws. When an employer learns specific traits about an applicant that would otherwise have been prohibited, it is difficult to defend any discrimination claims. Often, the mere appearance of discrimination is enough for an employer to face a lawsuit.

⇨ SOLUTION: Have a non-decision maker conduct the search and filter out protected information. Personnel responsible for conducting the search should be trained to avoid improper access to information that can not be lawfully considered in the decision-making process.

RISK: The information found on the internet may be false. A lot of information found on the web may not be accurate. An individual's Facebook page could have been hacked or altered, or a third party made negative comments on the applicant's page. It is important to keep in mind that what is seen may not be true.

⇨ SOLUTION: Carefully investigate not only the candidate but the source of information. Try to confirm the information obtained.

RISK: Most of the good information about applicants on the internet requires you to get past security tools. Privacy settings may not allow you to view an individual's profile. Don't attempt to access "invitation only" media sites without the applicant's permission.

⇨ SOLUTION: Do a better job interviewing. Do not use false identities or require applicants to provide you with passwords.

GUIDELINES FOR INTERNET SEARCH OF APPLICANTS

- Develop a written policy and enforce it consistently.
- Rely on job-related criteria.
- Make sure to comply with all third-party terms of use agreements.
- Make sure candidates are notified in writing about the company's use of social networking sites to gather information.
- Document the search and determine how the information is relevant to the job.
- Ensure employment decisions are made based on the applicant's qualifications and abilities.
- Consider searching social networks only after the initial in-person interview.
- Identify a legitimate, non-discriminatory reason for the hiring decision and provide supporting documentation.

CASE STUDY: GASKELL v. UNIVERSITY OF KENTUCKY

In 2007 C. Martin Gaskell, an astronomer at the University of Nebraska, was a leading candidate for a job running an observatory at the University of Kentucky. After doing an internet search on Dr. Gaskell, one of the hiring committee members viewed Mr. Gaskell's personal website and read an article he wrote titled "Modern Astronomy, the Bible, and Creation," as well as lecture notes on the topic. The content referenced several religious topics. When interviewed, the chairman of the physics and astronomy department asked Dr. Gaskell about his religious beliefs. The chairman stated that he had researched these beliefs and "expression of them would be a matter of concern." An email was also uncovered that a department staff member sent to the chairman. The staff member wrote, "Clearly this man is complex and likely fascinating to talk with, but potentially evangelical. If we hire him, we should expect similar content to be posted on or directly linked from the department website." Dr. Gaskell claimed he was not hired due to his religious beliefs and his expression of those beliefs. The University of Kentucky argued that Dr. Gaskell's beliefs were "a valid scientific concern." Of particular concern was that Gaskell's views on evolution would interfere with his ability to serve effectively as director of the observatory. They also stated "that there were other factors, including a poor review from a previous supervisor and UK faculty views that he was a poor listener." The case eventually settled for $125,000, paid to Dr. Gaskell and his lawyers.

(Sources: NY Times, Jackson Lewis)

Did You Know?

- The Federal Trade Commission (FTC) has stated that a third party social checking service "is a consumer reporting agency because it assembles or evaluates consumer report information that is furnished to third parties that use such information as a factor in establishing a consumer's eligibility for employment." This means that if your organization is using a third party to conduct this research, you must be in compliance with the FCRA. If you are doing social media background checks in-house you are not subject to the FCRA.
- As of April 30, 2012 most private sector employers are required to post a notice advising employees of their rights under the National Labor Relations Act (NLRA). (Download a poster at www.NLRB.gov)
- If you're investigating prospective employees, they are investigating you too:
  - www.jobvent.com
  - www.fthisjob.com

DEVELOP AN ELECTRONIC COMMUNICATION POLICY

Millions of people have an online presence. It is common for people to post content without thinking about how it could be perceived. Are your employees commenting publicly about your organization? Are they posting about their managers or coworkers? With such tremendous growth in social network use, it is important to take these questions into consideration, and to develop an electronic communication/technology policy.

Policy Guidelines

- Include in your policy whether Human Resource Professionals and/or IT are permitted to access social media networks to screen applicants. Include whether IT professionals will be monitoring use during working hours.
- Consider whether to block employee access to social networking sites through company computers or to limit access during working hours.
- What is the philosophy of your organization? Is it business only? Or can employees have limited time to access their personal websites?
- Advise employees they should have no expectation of privacy in emails, or when using any company equipment.

- Have employees review your code of conduct and state that they must abide by any non-disclosure and confidentiality policies in place when posting information.
- State that if an employee is going to write about the company they must include a disclaimer. For example, "The views expressed in this blog are my personal views and opinions and do not necessarily represent the views or opinions of my employer."
- Restrict people from using company logos unless permission is granted.
- If using social networks for company brand development, consider designating certain individuals to speak for your organization.
- Employees must comply with company policies with respect to their electronic communications, such as policies prohibiting harassment and standards of conduct.
- State that the organization reserves the right to take disciplinary action if the employee's communications violate company policy.
- If allowed at work, time spent social networking/blogging/texting should not interfere with job duties.
- Remind employees that they are expected to behave professionally.
- Do not prohibit employees from discussing terms and conditions of employment.
- Create boundaries for business relationships. Managers should not 'friend' their subordinates, nor should managers give recommendations via LinkedIn.
- Obtain signed acknowledgements of the policy.

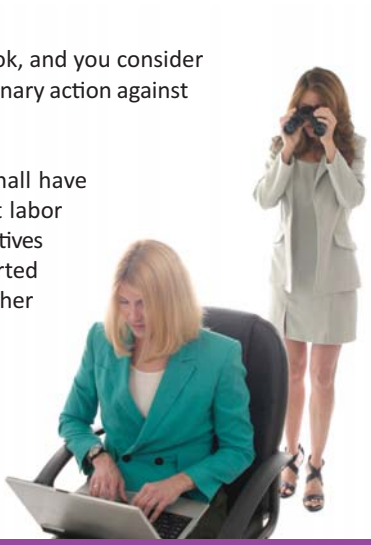
It is advisable to have your policy reviewed by a labor law professional to ensure it is not overbroad.

THINGS TO CONSIDER

What if one of your employees is posting on Facebook, and you consider the activity to be inappropriate? Before taking disciplinary action against an employee consider the following:

National Labor Relations Act (NLRA): "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…"

- Is the employee engaged in protected concerted activity under the NLRA?
- Could the employee be protected under a whistleblower statute?



- Was the communication a "legal off-duty activity" which may be protected by state law?
- Was the communication related to political activities or affiliations?
- Is the speech protected by the First Amendment?
- Would discipline of the employee violate any anti-discrimination or anti-retaliation laws?
- There are over 24 pending lawsuits involving social media firings, and most of these involve the National Labor Relations Board (NLRB).
- On August 18, 2011, the NLRB's Acting General Counsel released a report on the agency's handling of 14 cases involving employers' social media policies and their application in specific situations. In four cases involving employees' use of Facebook, the NLRB found that the employees were engaged in "protected concerted activity" because they were discussing terms and conditions of employment with fellow coworkers. In five cases, some provisions of employers' social media policies were found to be unlawfully overbroad.

  (NLRB, Jackson Lewis)

What activity is most likely protected?

- Employee conduct on social media sites that expressly engages co-workers or seeks to promote group action with respect to an issue related to terms and conditions of employment.
- An employee's social media post will likely be protected if it suggests implicitly or explicitly an intention to promote group action or support, particularly if it solicits co-worker comments.
- A post that does not expressly solicit co-worker input but nonetheless generates co-worker comments that grow into a substantive conversation concerning terms and conditions of employment.
- Disrespectful comments concerning the employer and/or supervisors will be protected, even if they include vulgar or rude language, unless they are so outrageous or offensive as to lose the protection of the NLRA.

What activity is not protected?

- An employee's post that is neither directed to coworkers nor engages coworkers.
- A post that does not address issues of mutual concern to other employees will likely be treated as an unprotected individual complaint.
- Discriminatory comments or posts that advocate unlawful action.

  (Laborrelationsupdate.com)

**Before implementing disciplinary action, employers should consult with counsel and carefully weigh the risks.*

CASE STUDY: NLRB'S "FACEBOOK FIRING"

In October of 2007 the NLRB issued a complaint against American Medical Response of Connecticut, Inc. for firing an employee who criticized her supervisor on her Facebook page. The employee, Dawnmarie Souza had requested union representation before she was to respond to a supervisor's questions about a customer complaint. Her request was denied. She then posted negative remarks about the supervisor on her Facebook page which drew supportive comments from coworkers. Souza alleged she was fired due to the comments made on her Facebook page. The NLRB stated that the comments were a "protected concerted activity" and that AMR's blogging and internet posting policy was overbroad and contained unlawful provisions. These provisions interfered with employees' rights under Section 7 of the National Labor Relations Act. The case eventually settled, the company agreed to revise its policy, and employee requests for union representation would not be denied in the future.

(Jackson Lewis, Law.com)

*Non-union employers must not lose sight of the fact that their employees are also protected by the NLRB, and these standards apply whether or not employees are represented by a union.

The law in relation to social media is very unsettled. Social media is always changing, and employers should educate themselves on how it relates to the workplace; especially in the areas of discrimination and privacy. It is important to balance an individual's rights to expression and privacy against the employer's business needs.

NOTES

NOTES

ABOUT IRWIN SIEGEL AGENCY, INC.

Irwin Siegel Agency, Inc. (ISA) is a leading insurance and risk management organization serving the Human Service field and insures service providers in 50 states. ISA continues to set the standards of quality, innovation, and value when it comes to developing new programs that meet the dynamic nature of the Human Services field.

We are here to support your efforts of supporting others, to provide the products and coverage your facilities need, to develop and share risk management tools and services to protect, while maintaining the compassion and education that holds ISA above ordinary insurance providers

Insurance coverages include General Liability, Professional Liability, Property, Inland Marine, Crime, Umbrella and Commercial Automobile. Additional coverages are available for Youth Protection, Directors & Officers, Volunteer Accident, Environmental and Pollution Liability, HIPAA Protector, and Workers' Compensation.

ARE YOU COVERED?

Some relevant products available through ISA include:

- Volunteer Accident Insurance
- Directors & Officers Liability Insurance
- Fiduciary Liability Coverage
- HIPAA Coverage (Health Insurance Portability & Accountability Act)
- Cyber Liability and Identity Theft Coverage

Availability may vary by state

SAMPLE OF AVAILABLE RESOURCES

Printed Publications

- Compliance and Ethics: A Guide to the Development of a Compliance Program
- Employee Dishonesty
- Exit Interview

Flyers & Bulletins

- Interviewing Basics
- Selection Process
- Keep Agency Data Safe

Video Lending Library

- Winning Workforce: Diversity and Discrimination
- Confidentiality: Everyday Practices
- Cyber Crime

Partner Programs

- Online Training
- Background Checks and Screening Services
- Vehicle Incident Monitoring

And much more...

Contact our Risk Management Division
for additional resources and partner services

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