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A Site (Un)Seen: Using Social Media in Hiring Decisions

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It started a couple of years ago — my interest in social networking websites, that is. My wife, Jamie, had just gotten off a call with one of her oldest friends. Apparently, her friend had just joined some computer-based group that enabled her to get back in touch with some of her childhood friends with whom she had lost contact. Jamie asked me, "Have you ever heard of something called Facebook?"

I responded, "Facebook, what's Facebook?" To the computer we went. I speak without hyperbole when I say that our lives would never be the same.

For the next several weeks, Jamie and I would put our daughters to bed and retire to the couch for dinner (yup, that's where we eat dinner) for what I expected to be conversation about our days. That's not what happened. Instead, Jamie would grab the laptop, put it on her lap — which is of course where laptops are supposed to go — and disappear into the time warp that is Facebook.

Concerned that I might temporarily be losing my wife to the social media, I did what any caring partner would do: I mocked her.

"Are you 14 years old?" I taunted when she logged onto the site. "That was your high school boyfriend? Did he have more hair when you dated?" I ribbed. Nothing worked. She was hooked.

You've heard the phrase, "If you can't beat 'em . . ." Yup, I joined — with vigor.

I signed up, completed my profile and immersed myself in the Facebook experience. I reconnected with old classmates, read my "friends" posts, showed off pictures of my beautiful wife and daughters and frequently updated my status. I began to use words previously not contemplated as verbs, such as "facebooked" and "friended." As a then-37-year-old human, I was loving my Facebook adventure.

As an employment lawyer, however, I began to imagine the future and the potential risks to employers who planned to use these sites as part of the hiring process.

Since that time, I have delivered seminars throughout the United States, discussing the risks and benefits of using these sites for employment purposes. Human resources professionals, managers and executives alike, raise one obvious issue repeatedly: What are the risks to organizations that use social media in the hiring context?

Federal, state and local anti-discrimination laws protect an applicant from unfair treatment in the hiring process based on the applicant's membership in a protected class. Laws such as Title VII of the Civil Rights Act of 1964, the Pennsylvania Human Relations Act and the Philadelphia Fair Practices Ordinance all generally prohibit the consideration of any protected class information in making employment decisions. Why is this relevant to the use of social networking websites in the hiring process?

I answer that question with another — have you ever been on someone's Facebook or MySpace page? If not, please take a look. These pages are replete with information related to the member's protected class information. Given this fact, why then would a manager knowingly put his or her organization at risk by searching a website chock full of this potentially liability-inducing data?

Take my Facebook page, for example. If you and I were to become "friends," you would discover many things about me. You would learn of my obsession with my family, my love of the Philadelphia Phillies and "The Daily Show" and my belief that Mel Brooks and Chris Rock are the funniest humans ever to set foot on planet Earth.

No harm there.

Unfortunately, your knowledge base would be heightened in other respects, including my age, race, color, religion, marital status and sexual orientation. Is that information you want about a candidate in the hiring context? Would you walk into an interview with me and say, "So, Mr. Cohen, tell me how old you are? Oh, that's nice. By the way, do you celebrate Christmas? Okay, got it. Last question, are you gay?" Of course you wouldn't!

By going on my page, you may be doing exactly the same thing. At a minimum, by allowing your managers to access this social medium for screening purposes, you may be creating a risk that this protected class information actually is being considered or, even if it is not, putting your organization in the position of having to defend a claim knowing that this information existed on the sites you visited.

Imagine, for example, that you see on a prospective employee's social media page a series of pictures of him or her drinking alcohol. Very often as a result of these pictures having been published on the page, a hiring manager may disqualify the candidate based on the notion that the candidate "exercised bad judgment." I think there are a couple of potential issues with that kind of articulation.

First, who among us has never exercised bad judgment? Using the fact that a candidate exercised bad judgment is a pretty slippery slope as a basis for disqualifying him or her for a position. Are we ready to start refusing to hire any person who has ever engaged in conduct that we may deem to be inappropriate? That is a pretty high standard, and I will suggest that you may have trouble filling vacant positions.

So the answer must be to drill down a bit. Be more precise with the articulation of why this person was not hired. Now the organization decides that the specific reason the person is not being offered the job is because of the large number of pictures of him or her drinking on the Facebook page. The thing is, the Americans with Disabilities Act protects as a disability an organization's perception that an applicant abuses alcohol. This new, more specific explanation, may have opened the door to a potential claim. Welcome to the wonderful world of the ADA and all of the joy that accompanies the defense of that claim.

Proponents of using the sites for screening purposes argue that the more information obtained about a candidate, the more informed the hiring decision and, ultimately, the more likely the best person for the job will be hired. And I don't disagree.

However, this argument presupposes that the information obtained by visiting the sites is truthful and is used appropriately by those accessing the sites. I will suggest to you that those assumptions very often are faulty.

Plain and simple, information posted on social networking pages is not always accurate. People often exaggerate or make jokes. Moreover, and far more concerning, is the fact that some members of social networking sites have their pages hacked into and have malicious content posted. A friend of mine was on vacation for a week and, while he was away, someone hacked into his Facebook page, changed his profile picture to a picture of Adolf Hitler and posted anti-Semitic messages. Now, you're the hiring person who just interviewed him and, as part of the screening process, you access his page. How do you feel about him now? Will you hire him?

There also exists the very real possibility that members of your organization with hiring responsibilities are considering information that they ought not consider. For example, one of your managers "stumbles upon" pictures on the candidate's Facebook page. How a woman looks in a bikini or a man looks in a wetsuit really is of no consequence when hiring for most positions. Yet, there are managers considering exactly this kind of information in making a decision.

For those organizations that, after careful consideration, determine they are willing to assume the risks discussed above and use the social media sites for screening purposes, there is yet another hurdle. How will you actually do it? How will you obtain access to the candidates' pages? Please take note that the word was "candidates" not "candidate's." Plural. Meaning, first, if your organization is going to screen applicants using social media, you really ought to be doing it consistently. If you are going to do it for any applicant, then you need to do it for all applicants. If you are going to do it for all candidates who have been given a conditional offer of employment, then it needs to be done for all similarly situated individuals.

Next, how will you obtain access to the candidate's page? Many, if not most, Facebook members have some degree of privacy established in their settings. As a result, access to the candidate's page may require your "friending" the applicant and the applicant accepting the request. This begs two questions. First, how will you find out whether the applicant has a social networking page? Will you ask in person? Via employment application? Second, if the person answers in the affirmative, how will you "friend" him or her? Will the organization establish a dummy page for this purpose? Is there another way? All of these issues must be addressed.

Furthermore, assuming that everything works as it should, are you sure that the page you are accessing even is the candidate's real page? My wife and I are friendly with a couple who have a 17-year-old daughter — let's call her Sarah. Sarah's mom and dad have access to Sarah's Facebook page and they check it periodically to make sure Sarah's not engaging in any problematic conduct. What Sarah's mom and dad don't have access to, however, is Sarah's other Facebook page — the one that she uses far more frequently and which contains different information and on which she has different "friends." There is a real risk that when you obtain access to a candidate's page, you may not even be getting the information for which you are looking.

Social media are here to stay and can be an amazingly effective tool for certain business purposes. However, given the real possibility for inappropriate and illegal uses in the hiring context, organizations need carefully to consider how, if at all, they utilize the sites when screening candidates.

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