

Oregon Law Practice Management

Practice Management Tips for Oregon Lawyers



Digital Dirt – Traps for the Unwary Employer

In an earlier post, I shared the best of [Ethical Traps in Cyberspace](#), a Presidential Showcase CLE at the 2010 [ABA](#) Annual Meeting. Among the tips – how to avoid running afoul of state and federal laws when using the Internet to research candidates or employees. The Presidential Showcase CLE provided a good overview of the topic, but I was delighted to see [Tamara Russell](#) of [Barran Liebman](#) tackle this subject in depth in the August/September issue of the [Oregon State Bar Bulletin](#). Here are some excerpts from her excellent article:

Potential Equal Employment Opportunity Liability

“If an employer [Googles](#) an applicant’s name or reviews an applicant’s [Facebook](#) public profile, the employer could technically be “interviewing” that applicant. An Internet search, for example, could reveal that an applicant is on a cancer survivor’s Web site, or pictures of the applicant wearing a burqa – both of which place the applicant in protected class categories. If an unsuccessful applicant learns about that Internet search, the applicant might argue that the employer based its decision (either consciously or unconsciously) with a discriminatory bias.”

Genetic Information Nondiscrimination Act (GINA)

Currently, employers are liable for acquiring genetic information about an employee unless the information is commercially and publicly available. (The Internet fits within this definition.) However, final regulations have yet to be adopted, and it is possible the EEOC will exclude personal Web sites or social networking sites if password protected.

Criminal Background Checks

“If an employer [Googles](#) a candidate and discovers on a newspaper’s Web site that a candidate has a criminal background, the employer must be mindful of the civil rights laws that may be implicated if the candidate is disqualified from employment for that reason.” (See Ms. Russell’s discussion of the recent case, *EEOC v. Freeman*, in the [original article](#).)

Credit Check Reports

Effective July 1, 2010, Oregon law prohibits employers from using or obtaining a job candidate’s credit history for employment purposes. Limited exceptions apply. “An employer who conducts Internet searches on a candidate, discovers information about an applicant’s credit history, and refuses to hire that person because of the results of that search may violate this new law.” (And other civil rights laws discussed in the [article](#).)

Bankruptcy and Civil Court Filings

Federal law prohibits employers from discriminating against an applicant based on the applicant’s bankruptcy history. Oregon laws provide additional protections for certain civil and administrative filings.

Stored Communications Act

Federal law “makes it illegal for any person to intentionally access stored communications without authorization.” The only exception? If the user authorizes access. “Any time an employer accesses a restricted Web site to look into the activities of an applicant or an employee, it must do so with the full and free consent of someone who already has access to that site. Getting that consent in writing is a good idea.”

Fair Credit Reporting Act

Employers who use third-party services to run background checks must follow FCRA notice and disclosure requirements. “Whether an employer implicates FCRA when it does an Internet search on a candidate apparently has not yet been tested in the courts. It seems unlikely, however; [Google](#) and [Facebook](#) would not likely fall within the statute’s definition of a ‘consumer reporting agency.’”

Will the Real Beverly Michaelis Please Stand Up

As Ms. Russell points out, the final trap to using the Internet as a screening device may be the search itself. Unless a searcher is precise and careful, it is easy to bring up multiple instances of a candidate’s name. For example, I like to think of my name as relatively unique, however there is a public profile for a “Beverly Michaelis” on [Facebook](#) (not me) and I have received at least two [Google Alerts](#) informing me that “Beverly Michaelis” died. (I’m happy to report *this* Beverly Michaelis is alive and well.)

Ms. Russell concludes with some final words of wisdom – both to employers and prospective candidates. Her [article](#) is well worth reading. For tips on hiring (and screening) potential job candidates, see [Know Who You Hire](#).

Originally posted at <http://oregonlawpracticemanagement.wordpress.com/2010/09/13/digital-dirt-%e2%80%93-traps-for-the-unwary-employer/> on September 13, 2010.