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The Risks of Pre-employment Social Media Screening

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An increasing number of states have recently passed laws that prohibit employers from obtaining passwords to a job applicant's social media accounts. Such legislation highlights companies' interest in finding out as much as they can about potential and even current employees.

Even though conventional wisdom has encouraged employees and job applicants to exercise restraint in what they post on social media sites, the ease with which pictures, information and opinions are posted (with just a few taps on a smartphone or tablet) has made social media—or even a Google search, for that matter—a treasure trove of information that potential employers will not find on an application or learn about in an interview.

In states where employers are still able to ask for social media passwords or even those where they can only informally search the Internet for public information, they should ask themselves, "Is a pre-employment peek at an applicant's social media presence a good idea?"

The upside to such unofficial sleuthing is obvious. It's no secret that candidates seek to portray themselves in the best light possible when applying for a job. Finding out that someone has been dishonest in the application could prevent an organization from heading down a painful, aggravating and even expensive road. A potential employer may also find out information about an applicant that bolsters the decision to hire the individual. However, businesses need to be aware that these possible benefits do not come without risks, including that they could discover things about an applicant that they couldn't legally use in making a hiring decision.

Hypothetically Speaking

Let's say that after an interview, a hiring manager decides to jump on Facebook and see what is publicly available about a candidate. The manager quickly finds her Facebook page and sees that anyone, not just her "friends," can access her posts, pictures and "likes." The manager is able to not only quickly confirm a few of the facts the applicant mentioned in the interview but also learn some other interesting but undisclosed background info—namely, that she is in a same-sex relationship and is planning to marry in another state that recently legalized gay marriage. Moreover, the manager discovers that the candidate and her to-be spouse are

planning to adopt a baby from another country and take as much maternity time as they can after the baby arrives and that the applicant is considering being a stay-at-home mom while her partner serves as the breadwinner.

The hiring manager may also learn other details about this candidate—such as religious beliefs, political opinions, race, ethnicity, age and medical conditions—that cannot be used to make an employment-based decision under federal, state and local laws. And even if a company would wholeheartedly welcome an individual with the background and plans of this fictional candidate, she could challenge an adverse employment decision made for a legitimate, nondiscriminatory reason because of the information the employer obtained.

In other words, it is much easier for an organization to defend against a discrimination claim when it never knew of the discriminatory grounds in the first place. The frank reality is, once this knowledge has been learned, it cannot be forgotten. Once the bell has rung, it is impossible to un-ring it.

Reality Check

In a recent case a person claimed that an employer discriminated against him based on his age. Some social media sites, such as LinkedIn, permit the site owner to see who has viewed the site. In this instance the applicant discovered that the employer had viewed his LinkedIn page, and he knew that the employer was able to determine his age from the site. This knowledge, among other arguments, allowed the applicant to present a case for discrimination and file a lawsuit. Even though the employer was found to have acted for a legitimate, nondiscriminatory reason and was thus not liable, the company may think twice before finding out all it can about future candidates.

To minimize the risks of doing informal Internet searches on applicants, some employers have sought to allow only non-decision-makers to do such searches. In these cases the searcher will gather the online information and pass on to the decision-makers only that which is permissible for consideration. This strategy provides the organization with the legitimately helpful facts while arguably protecting it from a discrimination claim. However, the strategy isn't without risks, as an applicant could argue that the employee completing the investigation tainted the process after learning information the employer is trying to keep from the decision-makers.

Employers should also realize that there is a fine line between a background check and a pre-employment social media screening. If the latter qualifies as a background check, then the company needs to comply with the Fair Credit Reporting Act, including providing applicants with a disclosure that a background check will be performed and obtaining their authorization to proceed with the check. Employers should talk with counsel about their practices and procedures and ensure that they are both legal and done in a way that reduces exposure to liability.

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