

Are You Ready for the New Holacracy? Update on Social Media and the Hiring Process

By: Harold Pinkley



The innovative folks at Zappos have eschewed the traditional job application/interview/job offer process for a social-media-driven process on a Zappos platform. While very up-to-date, does this push the envelope to the point of bursting it?

Getting a job at Zappos—the world’s first holacracy

Only a few months after announcing that it was no longer going to have job titles or a hierarchical structure, thus establishing the world’s first known holacracy (from the Greek *holos* meaning whole—it’s not clear how holo became hola), the online shoe peddler Zappos has now done away with job applications. If you visit www.jobs.zappos.com, you will see that you are invited to join Zappos Insider, which, as it turns out, is Zappos’ own in-house social media site. After joining and posting a video cover letter, the interested job-seeker can interact with current Zappos employees, choose her “circle” (which is apparently Zappos-speak for department), and do whatever one does on social media sites. After you’ve been there for a while, if your social-media-mates like you and think you will fit in, you may eventually be offered a job. There are no job applications; this is the only way to get a job at Zappos. This sounds, of course, very cool and quite millennial, but are there problems lurking in those weeds?

Effect of online privacy laws

Legislation possibly affecting such a policy has been drafted by the American Legislative Exchange Council (“ALEC”, perhaps best known as one of the promoters of “Stand Your Ground” self-defense laws) and has recently been introduced in as many as twenty-six states and enacted in four. The model act is called the Employee Online Privacy Act, and both Tennessee (Pub. Chap. 826) and Louisiana (Act No. 165) have recently enacted versions of it. (A similar bill was introduced in Mississippi, but it has so far failed to pass.) Tennessee’s version is an almost verbatim copy of the ALEC version, while Louisiana’s contains provisions making it applicable to educational institutions as well as to employers. These statutes forbid employers (and schools in Louisiana) from requiring employees, including applicants for employment, or (in Louisiana) students to disclose their passwords to personal social media accounts. So what do these laws have to do with Zappos? Just this: by requiring job applicants (or “Insiders”) to join their captive social media network, Zappos may arguably be violating these laws. The statutes forbid requiring applicants to disclose their passwords, and since Zappos controls the network, presumably it would have access to the passwords. And Zappos requires applicants to join its network or they won’t be eligible to be hired. This has exactly the same effect as requiring an applicant to disclose his password. As a

comment on an HR blog notes “Zappos Insiders, judging from the sidelines as a parent of 2 neuro-typicals, ranks up there with companies demanding Facebook passwords.” May 30, 2014, www.recruitingblog.com/profiles/blogs/zappos-insiders-em, last visited June 27, 2014. Zappos can probably breathe easy in Tennessee and Louisiana, though, because unlike the ALEC original, neither Tennessee’s nor Louisiana’s version of the statute contains a remedy provision. So it’s not clear that an aggrieved person in those states could even sue for redress under these laws.

Other unintended consequences

Even in those states that haven’t passed a similar online privacy law, a recruiting tool like Zappos Insider could be legally problematic. Such use of captive social media could restrict the pool of potential applicants to affluent, white, Type A people; that is, the kind of people more likely to sign up on social media, as noted by the HR blogger quoted above. If indeed this policy is found to have a disparate impact on a protected class (pretty much everyone is a member of one or more such classes), could Zappos justify it as being required by business necessity? Since they are about the only business using this method, the answer is probably not. And, as is true with all social media research, the recruiters are actively looking at the kind of information that HR experts have been telling us up to now to avoid learning—such as age, race, religion, sex—all of which are readily available on an active social media user’s account.

Bottom line

While few employers will likely follow Zappos’ lead (they are, as noted by some wag in another context, not on the leading edge but on the bleeding edge), it is a good idea to remind ourselves of how to use social media information responsibly.

- Delay doing any social media research or background checks until meeting the applicant face-to-face.
- Don’t let the hiring decision-maker do the research. Have it done independently and create a firewall between the researcher and the decision-maker. The researcher should be working from a list—in writing—of the types of information that that would be either positive or negative in evaluating the candidate.
- Keep Fair Credit Reporting Act requirements in mind.
- Don’t automatically disqualify applicants for not having an active social media presence (active Facebook page, lots of Twitter followers, high Klout score) since it is true that some minorities are under-represented on social media.

Always keep in mind that while new ideas, especially ones involving innovative use of digital technology, are wonderfully up-to-date and exciting, the law may be trailing behind, waiting to bite those who have gotten out in front of the pack and don’t really know where they’re going. If you have any questions or concerns regarding your company’s hiring practices, please contact the author of this article or any member of Butler Snow’s Labor and Employment group.