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SOCIAL MEDIA AND EMPLOYMENT

by: Laura Sitar, Esq.

You have six solid resumes for an open Executive Director position and would like to narrow the interview process to the top three candidates. Where to begin? How about a "Google" search? Maybe a search of Facebook or LinkedIn? Before you type any applicant's name onto the search line and hit enter, there are a few important things to consider.

SOCIAL MEDIA AND THE HIRING PROCESS

Social media such as Facebook, LinkedIn and Twitter provide valuable sources of information regarding job applicants, but there are also serious pitfalls related with their review during the hiring process. Social media sites often contain far more information about a person than a standard application or resume, however, much of the information should never be considered when making a hiring decision.

Consider that pictures and other information posted on an applicant's Facebook page may disclose the applicant's age, race, national origin, marital status, sexual orientation, disability, religion or military status. Inappropriate use of any of this information when hiring can lead to claims of discrimination under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the American's with Disabilities Act and even GINA, the Genetic Information Nondiscrimination Act. When facing a claim of discrimination in hiring, it may be difficult to prove your decision to reject an applicant was not influenced by the blog you read discussing the applicant's recent triumph over cancer or large donation to a controversial political organization.

On the other hand, there is valid information that can and should be collected from social media sites. What about evidence of illegal drug or alcohol use, a poor work ethic, poor communication skills, negative attitudes about former employers, racism, discriminatory or harassing statements or general poor judgment? What type of decisions can you expect from an applicant who posts nearly naked pictures from a riotous party on his or her Facebook page? How much attention to detail can you expect from an applicant whose blog is riddled with spelling and grammatical errors? These questions can and should be considered during the hiring process.

The key to avoiding liability is to collect and use information gathered from social media sites wisely. Employers should conduct uniform screening of social media for information regarding all applicants being considered, rather than performing searches only on selected applicants. Screening should be done by a neutral party who only shares relevant, non-protected information with the person making the hiring decision. Subterfuge should never be used to get into an applicant's private social media sites. If the applicant's "friend" works for the company, resist the temptation to ask the friend to provide access to restricted areas. And always document the legitimate non-discriminatory basis for making any hiring decision.

SOCIAL MEDIA AND YOUR EMPLOYEES

Employers should also be conscious of the limitations they can and cannot legally place on their employees' use of social media. California law prohibits employers from taking any job-related action against an employee based on the employee's lawful conduct off the job. Further, under the National Labor Relations Act it is illegal for an employer to monitor an employee's union activities, including off-the-job meetings or gatherings. That prohibition also applies to any "concerted activity", which is simply activity undertaken by employees acting together, rather than individually, even if no union is involved, as long as the employees are discussing their work conditions or terms of employment. Social media sites and blogs often inadvertently become venues for employees' concerted activity. Employers must be careful in their attempts to monitor, restrict or discipline employees for what they post on social media sites. That said, there are some clear parameters which can and should be spelled out.

All employers should address the following topics in their Social Media Policies:

- Clearly articulate the parameters for use of social media sites during working hours.
- Communicate a means by which employees can bring forward work-related complaints before posting those complaints on social media sites.
- Reiterate that company computers and email systems are company property intended for company use and that they can and will be monitored.
- Prohibit the use of company logos and trademarks on social media sites without appropriate approval.
- Prohibit the disclosure of confidential or proprietary information, trade secrets or intellectual property of the employer.
- Prohibit posting information which would be a violation of the privacy rights of third parties, including information protected by HIPAA.
- Prohibit posting information which could be viewed by other employees as harassing, threatening or retaliatory.
- Prohibit posting false or misleading information regarding the company, its employees, and clients.
- Reiterate that conduct that would be grounds for discipline or dismissal if performed at work is also grounds for discipline or dismissal if performed on-line.
- Require social media users to report violations they discover.
- State that misuse of the company's Social Media Policy is grounds for discipline, including termination.
- Require employees to sign a written acknowledgement that they have read and will abide by the policy.

The best social media policies also identify a contact person who can answer questions and give direction regarding the company's policy and encourage users to seek an "official" answer prior to posting questionable material. And when in doubt, seek legal advice when addressing thorny questions regarding your social media policy or disciplinary action resulting from its violation.