

LEGAL TRENDS

Social Media Use in Hiring: Assessing the Risks

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When it comes to using social media for hiring, it's all about balancing risk.

By Jonathan A. Segal

Permissions

Social media is no longer cutting-edge; it is mainstream. For HR to overlook it today would be like ignoring e-mail 20 years ago.

One of the most important intersections between social media and employment is in the hiring process. It is here where there are great potential risks and rewards.

Employers can use social media in two ways when hiring: to recruit candidates by publicizing job openings and to conduct background checks to confirm a candidate's qualifications for a position.

The Society for Human Resource Management (SHRM) surveyed its members in 2008, 2011 and 2013 on the use of social media for employee recruitment and selection. Its 2013 study revealed that 77 percent of respondent companies use social networking sites to recruit candidates for specific jobs, up from 56 percent in 2011 and 34 percent in 2008.

Smart employers want to cast as broad a net as possible to reach as many potential candidates as they can, and they are increasingly harnessing social media as part of their recruitment strategy. But it should be only a part of the strategy.

EEO Concerns

Not every job seeker uses social media. This raises a concern about potential adverse impact on those who are economically less advantaged, which may correlate with certain racial and ethnic groups.

So, diversify your recruiting approaches to reach potential talent and cast a broad net. Use social media as one of many tools—not the sole one.

Remember that social media postings are “advertisements” that must include the appropriate equal employment opportunity (EEO) and/or affirmative action tagline. Further, the postings must be retained like all other hiring documents as required by law (or longer if the employer’s policy has a longer duration period).

When it comes to screening job applicants, it appears that fewer employers are using social media than in the past. In the 2013 SHRM survey, 22 percent of respondents said they use social media websites like Facebook or Instagram to research job candidates, a decline from 34 percent in 2008.

7 Ways to Maximize Benefit and Minimize Risk Employers are well-advised to follow this guidance when using social media in the hiring process:

Never ask for passwords. In several states, employers cannot ask an applicant (or employee) for his or her social media password by law. In all 50 states, asking for an applicant’s (or employee’s) password creates a real risk of violating the federal Stored Communications Act. For this reason, employers should look only at content that is public.

Have HR do it. It is best if someone in HR, rather than a line manager, checks candidates’ social media profiles. The HR professional is more likely to know what he or she can and cannot consider.

Look later in the process. Check social media profiles after an applicant has been interviewed, when his or her membership in protected groups is likely already known.

Be consistent. Don’t look at only one applicant’s social media profiles.

Document decisions. Print out the page containing social media content on which you base any hiring decision and record any reason for rejection, such as bad judgment. This protects you if damaging content has been deleted by the time a decision is challenged.

Consider the source. Focus on the candidate’s own posts or tweets, not on what others have said about him or her. You may want to give the candidate a chance to respond to findings of worrisome social media content. There are impostor social media accounts out there.

Be aware that other laws may apply. For example, if you use a third party to do social media screening, you are probably subject to the federal Fair Credit Reporting Act (and similar state laws). Also, some state laws prohibit adverse action based on off-duty conduct, except under narrow circumstances.

When surveyed in 2013 about why they decided not to use social networking sites for candidate screening, 74 percent of organizations said they were concerned with legal risks or discovering

information about protected characteristics when perusing candidates' social media profiles. This is a legitimate concern.

For example, from a candidate's picture, an employer may learn his or her likely race, approximate age and more. People also commonly post personal information such as medical or family problems.

However, the fact that the employer may learn information about a candidate's protected-group status or other information does not mean that the employer will use it.

This same risk arises during an interview. Candidates often disclose information that an employer cannot consider.

I have heard it said that there are only two times when a person is perfect: at birth and at the job interview. Employers use background checks to get a fuller picture of the candidate than an interview reveals. Social media screening is one way to enhance the background check to determine whether a candidate should be hired.

There can be valuable information on a candidate's social media pages that an employer lawfully can consider. Individuals have posted everything from pictures of themselves scantily clad to racist rants—reasons not to hire them! Employers may also learn things that weigh in favor of hiring them, such as their relevant volunteer work.

As with other kinds of background checks, there is no "on-off" switch when it comes to using social media when hiring. Rather, key questions that should be considered include when it is done, what is looked at, who is doing the looking, and what is and is not considered in the decision-making process.

Here to Stay

Social media engagement is a relatively new territory for both employers and employees. On the employer side, the key questions are how to get business benefits out of these platforms and how to ensure that employee use of social media while at work is neither distracting nor potentially harmful to the organization.

Today, Millennials account for 36 percent of the U.S. workforce, according to the Bureau of Labor Statistics, and they will account for 75 percent of the global workforce by 2025. Given that this group of employees has grown up actively communicating via myriad social media sites and devices, the use of social media is a workplace trend with staying power for the foreseeable future.

Existing laws provide a useful framework for social media use in hiring. Although the communication methods are new, the legal issues they raise are not.

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