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Social Media and Background Checks: A New Wrinkle on an Old Skill

*You could be liable if you use what you find in a hiring decision.
Then again, you could be liable if you don't.*

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Background checks are designed to use past performance—at work and beyond—to predict future success at work. The key to successful background checks is locating an unfiltered source to reveal what the applicant is really like. Of course, asking the applicant and her references seldom produces useful insight unless you can choose the referral source (e.g. the last supervisor) or get the applicant to unwittingly divulge the truth through careful questioning. Social media now offers a new approach to uncover the truth about your applicant.

The Social Media Explosion

Facebook boasts that over one third of all Americans are members. Add LinkedIn, Twitter, blogs, message boards, etc. and the numbers are staggering. While LinkedIn is often a polished view of oneself, the same is generally not true of Facebook and Twitter. These latter forms of social media encourage users to let their hair down, which gives recruiters a unique opportunity to see the real candidate. While security enhancements are somewhat limiting access to some forms of social media, the limitations are still modest.

What You Can Learn Through Social Media

Much of the social media content is unlawful for employers to consider. The typical Facebook page will reveal race, sex, sexual preference, familial status, ethnic background, and more by just looking at the pictures and profile. Religion, especially if it is a strong part of the member's belief system, is often front and center. Social causes are also often prominently displayed. As any seasoned recruiter knows, none of these factors should be considered in the recruiting process. However, more information is often available which is legal to consider.

Surprisingly to the inexperienced visitor, social media often offers insight into job satisfaction and performance is-

ues. Members regularly opine on their desire to find new job opportunities. They also comment on how they feel about their job, their employer, and the stress and strain of work. All of this is very enlightening and lawful to consider.

Real-life Examples

A fast food restaurant was told by a state Wage and Hour Auditor that a specific employee filed the complaint that prompted the wage and hour audit. When we used Facebook to learn more about the Complainant, we found she wrote on Facebook that she hated her job, she thought management was unfair, and she was looking for a new position.

In another instance, an employer wanted to confirm the employment history of an individual, and it searched the person's name on LinkedIn. The Company discovered a current job that it was unaware the person had obtained.

The final example is the most devastating. A law student obtained an offer from a prestigious metropolitan law firm. As her last hurrah before graduation, she made a sexually revealing video tape of herself and placed it on YouTube. Her law firm found the clip and withdrew the offer.

Legal Concerns

For more than 50 years, recruiters have been told there are certain factors that must not be considered in the recruiting process. Social media doesn't change this. It simply grants the recruiter an enhanced likelihood of coming upon such protected information. The following is a list of some of the more common laws that prohibit consideration of such factors. As you review each factor, imagine how social media will enhance the likelihood that a recruiter will learn of such factors. Please note: this article assumes the recruiter is doing the background check "in house." If this responsibility is assigned to an outside vendor, make sure there is full compliance with the Fair Credit Reporting Act.

Civil Rights Statutes

Federal, state, and local governments all have statutes prohibiting adverse employment actions based on such things as the applicant or employee's race, sex, age, religion, national origin, sexual preference, arrest record, disability, etc. To the extent any such qualities are discovered in the interviewing process or in a background check, including through social media, they must not be considered.

State Off-Duty Conduct Statutes

Many states across the country have statutes that declare it unlawful to discriminate against an employee based on engaging in legal conduct while off duty. Examples of such conduct include owning a firearm, consuming alcohol, smoking, and participation in political activities. To the extent such information is found through social media, it should not be considered.

The National Labor Relations Act

The National Labor Relations Act is a federal law that regulates union related activity in the United States. It also regulates "concerted" or group activities by employees involving the workplace. To the extent one learns an employee is an advocate for other employees at work, that conduct is protected and should not adversely affect the candidate.

One Final Concern—Negligent Hiring

As a recruiter, your job is to find the best candidate. If you are wrong about a candidate, the new hire leaves, you (hopefully) redo the search and life goes on ... but not always. There is a concept known as "negligent hiring." This occurs when a candidate is hired, he or she damages another person—usually a customer or fellow employee

(physically or their property)—and then you learn that something in the candidate's background foretold of this risk/damage.

The worst cases are when convicted pedophiles are unknowingly hired to work with children or convicted thieves are allowed access to a customer's home. In a few cases, where a reasonable background check would have uncovered such history, the employer has been held liable for the damages this employee caused. Now consider if social media would have helped you discover such a hidden background. If so, the next question is: are you liable for not using social media to this end? We know of no such case, but as social media becomes part of our everyday lives, this theory is bound to be argued. Only time will tell if it succeeds and huge judgments against an employer follow.

Conclusion

One out of three managers already use Google as part of their background check, and one out of five use social media. The question is whether everyone else will embrace this or try to fight it. If you want to fight it, how will you win the fight? Since fighting this is nearly impossible, why not prepare for it and advise your team how to use it? Remind everyone that the laws that limit areas of legal inquiry, such as age and family status, are as strong as ever. The source of prohibited information is no defense. Therefore, remind everyone of the rules, and remind them not to make notes about information that is not job-related and is protected. At the same time, take advantage of the legal information social media may provide.

This article is provided for informational purposes only and is not intended to offer specific legal advice. You should consult your legal counsel regarding any threatened or pending litigation, or for any advice.



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