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# What's Your Site – The Use of Social Media in Employment



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## Introduction

1. Examples of Social Media?
  - a. Social Networking sites, such as Facebook
  - b. Video and photo-sharing websites, such as YouTube
  - c. Micro-blogging sites, such as Twitter
  - d. Blogs, such as Huffington Post
  - e. On line forums, such as Google groups

# HIRING/PROMOTING

# The Websites Used in Screening

1. Facebook
  - a. Founded 2004
  - b. Over 1.1 billion active users (as of 5/2013)
    - i. Approximately 750 million use Facebook mobile
    - ii. Approximately 665 million active users log on every day
    - iii. Average user: Over 400 minutes/month
    - iv. Average U.S. user has 262 “friends”
  - c. More than 30 billion pieces of content shared each month (web links, news stories, blog posts, notes, photo albums, etc.)
  - d. Approximately 250 million photos uploaded each day
  - e. Approximately 25% of users have not set any privacy controls

# The Websites Used in Screening

## 1. Twitter

- a. Estimated over 500 million users
- b. In 2012, approximately 1 million accounts added everyday
- c. Approximately 175 million “tweets” per day
- d. Approximately 50% of users access Twitter mobile

## 2. Google

- a. Founded in 1996
- b. Most visited site in world

## Why Use The Sites?

1. Obtain/confirm background information
  - a. Qualifications
    - i. 44% of applicants lie about work history
    - ii. 41% of applicants lie about educational history
    - iii. 23% of applicants falsified information
2. Identify other possible candidates for open positions
3. Communication between employees
4. Advertising
5. Judgment

## Why Not Use The Sites?

1. Information obtained may not be accurate
  - a. Mistakes
  - b. Exaggerations
  - c. Maliciously planted
2. Learn more than you want to know
  - a. Risk of discrimination claims
  - b. Use of information inappropriately

# Discrimination Claims

1. Protected classes
  - a. Federal law
  - b. State law
  - c. Local law



# Discrimination Claims

## Examples of “protected groups”

- Age
- Citizenship
- Disability (physical or emotional)
- Gender identity and expression
- Genetic information
- Marital status
- National origin/Ancestry
- Parental status
- Pregnancy
- “Protected” complaints
- “Protected” leave
- Race/Color
- Religion/Creed
- Sex
- Sexual orientation
- Veteran’s status/Military status

## Discrimination Claims

2. Risks for specific protected classes
  - a. Disabilities (ADA/State Fair Employment Practice Act)
    - i. Physical
    - ii. Emotional
    - iii. Substance abuse
  - b. Sexual orientation
  - c. Religion

## Discrimination Claims

2. Risks for specific protected classes (continued)
  - d. Age
  - e. Race/color
    - i. Convictions
    - ii. EEOC Guideline re: criminal background checks
  - f. Protected complaints
  - g. Pregnancy

# Hiring/Promoting

1. Recommendations (if engage in social media checks):
  - a. Ensure state/local law allows such checks
  - b. Review only after interview candidate and only if interest in candidate
  - c. Be consistent — danger in selective checks
  - d. Document what is considered (and by implication what is not)
  - e. Verify information as necessary (if from third party site as opposed to candidate's own site)
  - f. HR should perform function (as integrated part of background check process)
  - g. Prohibit hiring managers from performing function independently

# POLICY DRAFTING

# Policy Considerations

1. Do we want a policy?
2. To allow access or not
  - a. If not, will it be enforced?
  - b. If yes, when and how much?
3. If not allow
  - a. State in policy
  - b. Is it consistent
4. If allow
  - a. Prohibited times?
  - b. Prohibited uses?
    - i. Incorporate by reference EEO Policy
    - ii. Other policies

# Policy Considerations

## 5. Other elements of Policy

- a. Prohibition on disclosing confidential/proprietary information
- b. Prohibition on supervisors' commenting on subordinates (even if not by name)
  - i. "Friending" issue (discussed below)
- c. Requirement that individual state not speaking for employer when engaging in personal social networking
- d. Possible restrictions on disparagement (subject to reality that certain "disparagement" is protected)
- e. Possible restrictions on postings that may reflect negatively on employer (subject to reality that certain "disparagement" is protected)
- f. Application of relevant policies (EEO, Conflicts of Interest, Confidentiality, etc.)

# DAILY WORKPLACE ISSUES



## “Friending” Subordinates

1. Obtaining information about illegal and other conduct of potential concern
  - a. Illegal conduct — illicit drug use
  - b. Dangerous — excessive drinking
2. Obtaining information about protected status
  - a. Religious beliefs
  - b. Medical treatment
  - c. Domestic partner

## “Friending” Subordinates

### 3. Risks

- a. Silence may be seen as condoning illegal or dangerous conduct (but getting involved potentially problematic too)
- b. Knowledge of EEO information may be seen as basis for adverse employment action

### 4. Recommendations

- a. Consider guidelines/restrictions on “friending” subordinates or others over whom direct/indirect authority

## References

1. Issue: Casual references on LinkedIn or other professional social media sites
2. Legal risks
  - a. Defamation (if negative and untrue)
  - b. Misrepresentation (if positive and untrue)
3. Instruction to managers/supervisors: application of “no reference” rule to social media; must refer to HR
4. Guidance to HR: danger in relying upon informal social media references

# Harassment

1. Examples
  - a. Discriminatory comments
  - b. “Jokes” about protected groups
  - c. Sexual disclosures or innuendo
  - d. Photo-shop
2. Recommendations
  - a. Harassment policy should expressly apply to social media (and vice versa)
  - b. Both policies may apply to personal social media postings directed to or seen by employees or others who work with your organization (even if not directed at or about them)

# BACKGROUND CHECKS — CRIMINAL AND CREDIT

# EEOC Guidance

1. Introduction
  - a. No dramatic changes
  - b. Increased scrutiny
  - c. Focuses on race and national origin discrimination
  - d. Arrests v. Convictions

## EEOC Guidance

### 2. Arrests

- a. Arrest not establish that criminal conduct occurred
- b. Exclusion based on arrest, in itself
  - i. Not job related
  - ii. Not consistent with business necessity
- c. Conduct underlying arrest may justify business decision
  - i. Investigation Fact-based analysis

## EEOC Guidance

3. Convictions — Disparate Treatment
  - a. Treat criminal history differently for different protected classes (e.g., race, national origin, etc.)
  - b. Possible evidence
    - i. Biased statements
    - ii. Stereotyped thinking
    - iii. Inconsistencies in process
    - iv. Comparators
    - v. Statistical evidence (employer's applicant data)



## EEOC Guidance

4. Convictions — Disparate Impact
  - a. Neutral policy/practice that disproportionately impacts protected class is discriminating unless:
    - i. Job related and
    - ii. Consistent with business necessity
  - b. Examine employer's data to determine if D.I.

## EEOC Guidance

4. Convictions — Disparate Impact (continued)
  - c. If D.I., employer has chance to show job related and consistent with business necessity
  - d. Job related and consistent with business necessity — Targeted Screen
    - i. Nature and gravity of offense/conduct
    - ii. Time passed since offense/conduct/completion of sentence
    - iii. Nature of job sought

## EEOC Guidance

4. Convictions — Disparate Impact (continued)
  - d. Job related and consistent with business necessity — Targeted Screen (continued)
    - iv. Provide opportunity for individualized assessment
      - Notice to employee
      - Opportunity for employee to show exclusion should not be applied
      - Consideration of additional information by employer

## EEOC Guidance

4. Convictions — Disparate Impact (continued)
  - e. Job related and consistent with business necessity — Uniform Guidelines on Employee Selection Procedures
    - i. Available for job
    - ii. Applied appropriately

## Laws Governing Background Checks

1. Are they required?
  - a. Federal Express/Kinkos case
2. Federal law
  - a. Minimal guidance
  - b. Fair Credit Reporting Act
3. State law

# Fair Credit Reporting Act Background

1. Key definitions
  - a. Consumer: applicant/employee
  - b. Consumer Reporting Agency (CRA)
  - c. Consumer Report
  - d. Investigative Consumer Report
  - e. User

# Fair Credit Reporting Act Background

## 2. When is it implicated?

### a. Yes: Outside company

- i. Consumer reporting agency
- ii. Business that for monetary fees, dues, or a cooperative nonprofit basis, regularly engages in assembling information on consumers for the purpose of furnishing consumer reports to third parties

# Fair Credit Reporting Act Background

2. When is it implicated? (continued)
  - b. No: Do it myself
    - i. References verified
    - ii. Utilize public source
  - c. Must have employment purpose



# Fair Credit Reporting Act Background

3. Why use CRA
  - a. Difficulty in obtaining information
    - i. Specific skills/knowledge/techniques
  - b. Risk of liability
    - i. Negligent performance
  - c. Privacy concerns

## Fair Credit Reporting Act Background

4. Legal restrictions on background check
  - a. Criminal convictions
    - i. 1998 amendments (7 year rule eliminated)
    - ii. State law
      - California (7 year rule)
      - Pennsylvania (Criminal History Record Information Act)

# Fair Credit Reporting Act Compliance

1. Steps to compliance
  - a. Permissible purpose
  - b. Consent and disclosure
  - c. Pre-adverse action notification
  - d. Reasonable time to explain
  - e. Final Adverse Action Notice

# Fair Credit Reporting Act Compliance

## 2. Permissible purpose

a. Employment purpose

b. Other purposes

i. Extension of credit

ii. Legitimate business needs in connection with business transaction initiated by consumer

iii. Underwriting of insurance due to application by consumer

# Fair Credit Reporting Act Compliance

## 3. Consent and disclosure

### a. To the Consumer

#### i. Clear and conspicuous

- Before report obtained

#### ii. In writing

- Access to reports during term of employment may be obtained at once

#### iii. For employment purposes

#### iv. Stand alone document

- Consent may be part of disclosure

# Fair Credit Reporting Act Compliance

## 3. Consent and disclosure (continued)

### b. To the CRA

- i. Gave consumer “clear and conspicuous” written disclosure that report may be obtained
- ii. If take adverse action based in whole/part on report, will provide consumer with copy of report and Summary of Rights
- iii. Will not use information obtained in violation of EEO laws or regulations

# Fair Credit Reporting Act Compliance

- 3. Consent and disclosure (continued)
  - c. Common mistakes
    - i. Reliance on Employment Application
    - ii. Waiver language
    - iii. Other information on disclosure

# Fair Credit Reporting Act Compliance

4. Pre-adverse action notification
  - a. Definition adverse action
    - i. Deny employment
    - ii. Deny promotion
  - b. Notification provided
    - i. Copy of consumer report
    - ii. Summary of Rights
    - iii. Opportunity to dispute/correct/explain



## Fair Credit Reporting Act Compliance

4. Pre-adverse action notification (continued)
  - c. 5-day Rule
    - i. 1997 FTC Opinion Letter
    - ii. 5 business days
5. Characterizing adverse action
  - a. Truthful reason
  - b. Problems with absence of candor

# Fair Credit Reporting Act Compliance

6. Adverse action
  - a. Manner of notice
    - i. Oral
    - ii. Written
    - iii. E-notice
    - iv. **DO IT IN WRITING!**

# Fair Credit Reporting Act Compliance

## 6. Adverse action (continued)

### b. Contents of notice

- i. Name/address/phone number of CRA
  - Toll free number if nationwide
- ii. CRA not make adverse employment decision
- iii. CRA not able to give specific reasons why adverse action taken
- iv. Right to dispute information in CRA
- v. Right to obtain free copy of entire report from CRA
  - Request within 60 days

# Fair Credit Reporting Act Compliance

6. Adverse action (continued)
  - c. Adverse action based only, in part, on report
  - d. No requirement consumer be told what information contributed to adverse action

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1. Michael S. Cohen concentrates his practice in the areas of employment law training and counseling. Mr. Cohen has trained and counseled employers throughout the country on subjects including harassment prevention; workplace diversity; discipline and discharge; hiring and recruiting practices; performance evaluations; FMLA, ADA and FLSA compliance; leave of absence policies; performance management; workplace privacy; sexual orientation and gender identity in the workplace; substance abuse testing; workplace violence; records retention; conducting background checks; teens in the workplace and managing attendance problems. He has conducted trainings for executives, directors, managers, supervisors and employees in many industries, including financial services, healthcare, pharmaceutical, manufacturing, retail, real estate development, law firms and human services. Mr. Cohen also has conducted trainings for executives, deans and faculty in several institutions of higher education and secondary education. He has conducted more than 150 trainings in the last year.
2. Mr. Cohen has conducted investigations into claims of harassment and discrimination and has drafted employee handbooks, employment agreements, noncompete agreements and post-termination agreements. He has represented clients throughout the country in EEO and other administrative proceedings.
3. Mr. Cohen has been cited as a national authority on employment issues by The New York Times, The Associated Press, USA Today, MSNBC.com, The New York Daily News, New York Newsday, The San Francisco Chronicle, Law National, Law.com, HR Magazine, HR Executive Magazine, HR Executive Online, SHRM On-Line, Employment Law 360, Inside Counsel Magazine, What's Working in Human Resources, Workforce Management Magazine, Human Rights Campaign On-Line, Yahoo! Sports, The Sporting News, The Newark Star-Ledger, The Houston Chronicle, The New Orleans Times-Picayune, The Pittsburgh Tribune-Review, The Syracuse Post-Standard, The Ann Arbor News, The Harrisburg Patriot News, The Mobile Press Register, The Flint Journal, The Desert Sun, The Courier-Post, The Honolulu Advertiser, The Stamford Advocate, The Huntsville Times, AM New York, The Workplace Substance Abuse Advisor, Legal Issues in Collegiate Athletics, Talent Management, BusinessInsurance.com, AZcentral.com, Fort Worth Star Telegram, Honolulu Star-Bulletin, The Columbus Dispatch, The Myrtle Beach Sun News, Richmond Times Dispatch, Detroit News and Business & Legal Reports, Inc. He has been a regular guest lecturer on human resources issues at Temple University and West Chester University for its Masters of Science in Administration program.
4. Mr. Cohen is a 1997 magna cum laude graduate of Temple University Beasley School of Law and a cum laude graduate of the University of Pennsylvania.
5. Areas of Practice - Employment Law
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8. Education
  - a. Temple University Beasley School of Law, J.D., magna cum laude, 1997
  - b. University of Pennsylvania, B.A., cum laude, 1993
9. Selected Speaking Engagements
  - a. Speaker, "What's Your Site – Social Media in Hiring" and "Documenting Performance – Yes It Does Matter," SHRM Talent Management Conference, May 16-17, 2012, Las Vegas, Nevada
  - b. Speaker, "Out of the Closet and Into Your Workplace – Sexual Orientation and Gender Identity" and "Background Checks – The Law Has Changed," Lehigh Valley SHRM Annual Conference, October 5-6, 2012, Bethlehem, Pennsylvania
  - c. Speaker, "Time to Go Back to School – Updating Your Employee Handbook" and "The ABCs of the FMLA and ADA." Association of Legal Administrators National Conference, May 24-25, 2011, Orlando, Florida (#1 Rated Speaker at Conference)
  - d. Speaker, "Get Ready to Hire Again" and "Diversity and the Law," Association of Legal Administrators National Conference, May 4-5, 2012, Boston, Massachusetts (#1 Rated Speaker at Conference)
  - e. Speaker, "Hiring and Interviewing" and "It's Not Just a Game: Examining Employment Law Subjects Through the World of Sports," SHRM National Staffing Conference, Las Vegas, Nevada, April 29-30, 2009
  - f. Speaker, "Complying with Major Discrimination Laws and Union Awareness," Pennsylvania Chamber of Commerce, Valley Forge, Pennsylvania, April 21, 2009
  - g. Speaker, "Sexual Orientation and Gender Identity Issues In The Workplace," SHRM National Employment Law and Legislative Conference, Washington D.C., March 9, 2009