

## The Use of Social Media During the Hiring Process: Do the Benefits Outweigh the Risks?

As the social media phenomenon continues to dominate our culture and its use has become second-nature, it is worthwhile to revisit some of the issues presented by an employer's use of social media, particularly in the context of hiring.

Social media presents a unique workplace conundrum. On one hand, employees generally believe that their use of social media outside of work is none of their employer's business. However, employers need to make employment decisions based on the best available information, which sometimes includes information an employee or potential employee shares on social media. In the context of hiring, a candidate's social media page can provide invaluable insight into the candidate's character. Generally, people tend to be much more candid on social media than they would be during a job interview, and, as the saying goes, "a picture is worth a thousand words."

While there are currently no laws prohibiting New York employers from accessing an applicant's social media information during the hiring process, there are potential legal pitfalls depending on how a candidate's social media information is accessed, what information is obtained, and what information is considered when making a hiring decision. Social media sites contain a lot of information that employers are legally prohibited from considering during the hiring process (e.g., age, sexual orientation, race, religion, ethnicity, etc.). Simply possessing this type of knowledge about a candidate could ruin an otherwise well-based decision not to hire an individual, because it could create an inference that this information was part of the basis for the decision. Thus, employers that use social media as a hiring tool must exercise caution and take the appropriate steps to address these concerns.

At the outset, an employer should determine whether a social media search will be conducted as part of the hiring process, and if so, develop a policy regarding the use of social media in hiring. The policy should address what positions the search will be used for, the scope of the search, and when the search will occur, which is ideally later in the process to limit the number of candidates who are affected. The policy should also clearly identify what information will not be looked at or considered (i.e., protected characteristics), and what will be reported to those involved in hiring. Employers must ensure that this policy is distributed and communicated to hiring managers, and that they understand the purpose of the policy. As with any other policy, it is important that it is followed and applied consistently.

With respect to implementation of the policy, it is imperative that direct hiring managers do not access social media as part of the hiring process. A non-decision-maker should conduct the search and report only relevant, non-protected information to the decision-maker. To ensure this process is effective, the non-decision-maker conducting the search must understand what information the employer is legally prohibited from using when making a hiring decision.

An employer should never access any site that they have not been authorized to access, nor should employers require a candidate to provide them with access to their personal social media accounts. As reported in our [April 28, 2012 New York Labor and Employment Law Report post](#), legislation was introduced in the New York State Senate that was intended to prohibit employers from failing to hire an applicant based on his/her refusal to provide login information to the employer. Although this bill has not been passed, it is still the best practice to refrain from requiring candidates to provide access to their social media accounts as part of the application process, or as a condition of an offer of employment. In fact, multistate employers should be aware that at least

18 states, including Arkansas, California, Colorado, Delaware, Illinois, Louisiana, Maryland, Michigan, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Vermont, and Washington, have enacted legislation regulating an employer's social media activity, most of which contain prohibitions against requiring applicants or employees to provide the employer with his/her personal login information. Further, employers should not falsify information or impersonate an individual to gain access to the page. In other words, an employer must not ask an employee who is "friends" with a candidate to access his/her page. As a rule of thumb, only view information that is open to the public.

Employers should attempt to verify information before relying on it. Employers should also document and retain the information obtained in the search, including the search criteria and the information considered as a basis for their hiring decisions.

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