

USE OF THE INTERNET IN EMPLOYEE BACKGROUND CHECKS

As more and more people become members of online social networking sites, such as Facebook and MySpace, it is tempting for employers to search the internet to learn about potential employees. In some cases, the simple act of “Googling” the name of an applicant yields far more personal information than the employer could have ever anticipated, and much of it having little to do with the applicant’s workplace skills and competencies. This is why it is important that employers tread carefully with the newfound information. Improper use of information gleaned from internet searches can expose an employer to discrimination suits.

A recent Pew Internet & American Life Project survey found that thirty-five percent (35%) of adult internet users now have a profile on at least one online social networking site. According to web analytics company, Compete.com, as of January 2009, Facebook had 68 million unique users while MySpace boasted 58 million unique users. For some, use of online social networking sites advance legitimate business goals of reconnecting and remaining connected with old friends, classmates, and business contacts. But often people use online social networking sites to broadcast the intimate details of their personal lives (along with the personal lives of others) through words, pictures, and videos.

Employers across the country have quickly realized that the internet can uncover a wealth of information about applicants. Some employers now consider internet searches an important screening tool in the hiring process that can help identify an applicant’s maturity level and professionalism and uncover behaviors that could threaten the employer’s business reputation or expose them to litigation. In fact, some National Football League (NFL) teams aggressively use online social networking sites as employment prescreening tools. Recent reports reveal that NFL teams create phony Facebook profiles (posing as attractive young women) and use the profiles to become “friends” with college players/prospects. Once in the inner circle of these prospects, these teams benefit from unfettered access to personal information that could predict the risk associated with recruiting the prospects.

While internet searches can yield some valuable information, it can also place the employer at risk for an employment discrimination claim. People often post information to social networking sites that reveals the applicant’s inclusion in a protected class, based on the applicant’s age (over 40), race, color, religion, national origin, ancestry, medical condition (e.g., pregnancy), disability, marital status, and sexual orientation. Consideration of these factors is



off-limits in the hiring process. Basing a decision not to hire an applicant on any of these criteria may subject the employer to an employment discrimination suit. If such a suit were brought, the employer may have to address whether it took into account off-limit information revealed in the internet search in rejecting an applicant for employment.

New Jersey law also prohibits employers from refusing to hire an applicant who smokes or uses tobacco products unless the refusal to hire is rationally related to the employment. Similarly, New York enacted laws that specifically protect employees' privacy interests with respect to certain types of legal, off-duty conduct. New York Labor Law section 201-d makes it unlawful for an employer to refuse to hire an applicant because of the applicant's (i) political activities outside of working hours, provided such activities are legal; (ii) legal use of "consumable products" prior to the beginning or after the conclusion of the employee's work hours; and (iii) legal recreational activities.

Employer use of online social networking sites as an employment prescreening tool may also implicate other federal laws such as the Stored Communications Act and the Fair Credit Reporting Act, international, federal, and state privacy laws, and terms of service agreements - agreements online social networking sites require users to sign before a profile can be created and the site can be used.

Employers should be cautious about the reliability of the information they obtain from the internet as well. Internet searches can uncover information about someone with the identical name as an applicant. There is also the possibility that information that appears on the internet about an applicant was not actually posted by the applicant, particularly defamatory information posted to a blog by a third-party with ulterior motives.

With the risks posed by internet searches, there is no simple answer for whether employers should use internet searches as an employment prescreening tool in their hiring process or abandon it all together. However, one way to reduce the likelihood of discrimination claims or violations of other laws is for employers to adopt a standard, written internet background search policy. The policy should require that internet searches be conducted in the same fashion for all applicants, *i.e.*, either all or no applicants for a particular position are going to be "Googled" as part of the screening process.

We are available to assist you as you weigh the benefits against the legal risks of conducting internet searches on applicants and to develop a written internet search policy.

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