

Risky Business: The Double-Edged Sword of Social Media - Part 2: Smart Hiring, Monitoring and Firing Practices

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ABOUT THIS WHITE PAPER:

When it comes to hiring, social media is a gift. The amazing amount of information available—at low or no cost—makes it a preferred way to gather intelligence on a person.

However, many of the laws being applied to social media for hiring people and letting them go are vague and outdated. This is not expected to change any time soon.

Use best practices when looking at information on social media. This includes having a responsible and repeatable process to gather this background, ensuring employment decisions aren't based on protected information, maintaining a current social media policy, and clearly documenting cases where employees don't adhere to these guidelines. Speak with a lawyer who specializes in this area to protect yourself.

Who knows better than you about the talent shortage your company is facing? It doesn't help that your average new hire will leave within five years.¹ These are two great reasons that social media is such a boon for you! Now it's easier than ever to locate and contact good candidates—particularly the coveted ones who aren't currently looking for a job.

So, what's the downside?



We are operating under rules, regulations and legislation that were formulated before anyone outside of universities or the U.S. military was even *thinking* of using an electronic network to share information.

This means gathering and using information from social media can be a legal minefield. In addition, your employees can be using it in ways that embarrass your company or create liabilities for you—and make it harder for you to fire those who aren't performing.

That's the purpose of this paper: to offer useful background and best practices for hiring, monitoring and firing employees. (The first paper in this series covers using social media for debt collection and skiptracing professionals.)

Avoiding a Hiring Nightmare

The University of Kentucky was searching for an astronomy professor to head its student observatory. Martin Gaskell was a front-runner for the position. However, one of the people in charge of hiring noticed that Gaskell had made repeated postings about his belief in creationism on his Facebook page. That person shared this information through emails to others who were reviewing applicants. Gaskell was not hired.

He sued the University, alleging he was passed over because of his religious convictions. Was this true? There was some documentation—those emails—to support at least the *appearance* of improper behavior. That was enough to lead the University to give Gaskell a six-figure settlement.

No laws specifically state that you can't use information found on Facebook as a reason not to hire someone. However, some of the Acts you already are familiar with are now being applied to what you may see on social media. Let's look at some practical strategies you can use to sidestep the new issues you face.

Acts that Outline Potential Discrimination Claims



You know you can't ask for any of the information covered in these Acts during an interview or performance appraisal. However, you also shouldn't search for and find it on social media. If you do see it there, don't consider it in any decisions about present or potential employees.

Title VII of the Civil Rights Act – This prohibits 1) intentional discrimination and 2) practices that have a disproportionate effect on members of protected groups. In essence, companies can't discriminate based upon race, color, national origin, religion, or sex concerning hiring, pay, benefits, firing, promoting, demoting, training, and any other term or condition of employment.

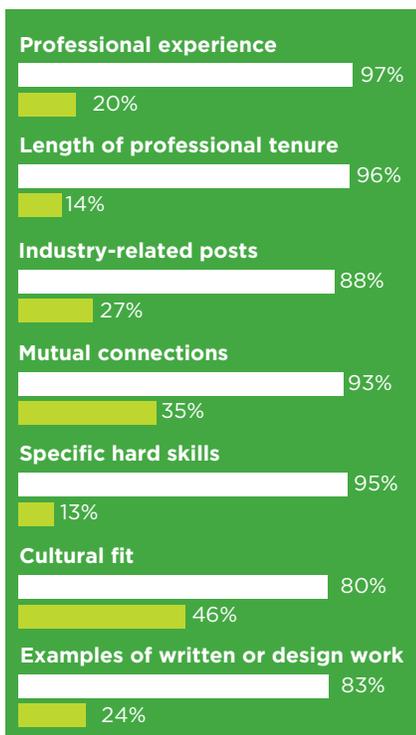
Age Discrimination in Employment Act – Employers can't refuse to hire people, or fire them, or discriminate against those who are 40 years or older, only on the basis of age. They also can't deny an employee pay or fringe benefits when the only justification is age. Nor may a company put employees into groups based on age when this unfairly deprives workers of employment opportunities.

Americans with Disabilities Act – Companies with more than 15 employees can't discriminate against qualified job applicants and employees based on a disability. It's illegal to ask a person about a disability during the interview process. A person may choose to talk about a disability when asking for changes that will help in doing a job.

National Labor Relations Act – Among other conditions, companies can't prevent one or more employees from improving their working conditions by raising work-related complaints directly with their employer or a government agency, and seeking help from a union.

How Recruiters Use Social Media

According to a Jobvite survey, 93 percent of recruiters review a candidate's social profile before making a hiring decision. Here is how they use LinkedIn and Facebook to do this:



Source: Jobvite 2014 Social Recruiting Survey

Social Media: Fertile Ground for Recruiting

Social media has created a vast amount of data—and every second we add more to it:

- 4.75 billion pieces of content are placed on Facebook each day²
- Every 60 seconds on Facebook: 510 comments are posted, 293,000 statuses are updated, and 136,000 photos are uploaded²
- 172,800 new users join LinkedIn daily
- 200 group conversations happen on LinkedIn every minute³
- 500 million tweets per day appear on Twitter⁴
- 70 million photos are posted on Instagram each day⁵

This amounts to an absolute goldmine for recruiting. In a 2014 survey of 1,855 recruiters and human resources professionals, 73 percent noted they had used social media to hire someone.⁶ Most of them relied on LinkedIn (79 percent), Facebook (26 percent), Twitter (14 percent) and blogs written by candidates (7 percent).

In addition, 55 percent of these people have *reconsidered* a candidate based on that person's social profile. Sixty-one percent of those reconsiderations were negative. That means candidates were screened out based on characteristics that include illegal drug references, sexually related posts, poor spelling and grammar, use of profanity, and mentions of guns or alcohol. Volunteering and donations were considered positively, and a neutral stance was taken on candidates' political affiliations. None of these is a protected area.

Using social media in screening candidates raises a number of issues. What constitutes an invasion of someone's privacy? How can you be sure that the information is accurate? What happens when the information is used in a way that doesn't comply with the rules—such as in the University of Kentucky case?

We can expect to see more lawsuits spring up that involve every aspect of social media. For example, LinkedIn is being sued because it offers Premium Service members a "Reference Search." This generates a list of people who worked with a job candidate in current or prior positions. Companies then may easily contact these colleagues for background on a potential hire. Some people who were the subject of these searches have cried foul: claiming they were not hired as a result.

² Zephoria. "The Top 20 Valuable Facebook Statistics—Updated February 2015." Viewed on March 6, 2015, at <https://zephoria.com/social-media/top-15-valuable-facebook-statistics/>.

³ Pick, Tom. "106 More Amazing Social Media and Marketing Statistics for 2014 and 2015." February 11, 2015. Viewed on March 6, 2015, at <http://www.business2community.com/social-media/106-amazing-social-media-marketing-statistics-2014-2015-01151764>.

⁴ Twitter. Viewed on March 6, 2015 at <https://about.twitter.com/company>.

⁵ Instagram. Viewed on March 6, 2015, at <https://instagram.com/press/>.

⁶ Jobvite. "2014 Social Recruiting Survey." Viewed on March 6, 2015, at http://www.jobvite.com/wp-content/uploads/2014/10/Jobvite_SocialRecruiting_Survey2014.pdf.

Social Media Search Questions



As you do online research—conducted internally or by a third party—ask yourself these useful questions to reduce your risk and improve the quality of what you’re reviewing:

1. How do you determine the accuracy of the information provided to you on candidates and employees?
2. How do you know if information found on a website is parody, defamatory or false?
3. Are you able to differentiate among applicants with common names?
4. Can you determine if information has come from an archived version of an inaccurate site—which may or may not have been updated later (such as Wikipedia)?
5. Are you telling employees or candidates where you search for information (such as LinkedIn, Facebook, Twitter, etc.)?
6. Are you limiting the information you receive to what can be seen by everyone, or have you tried to access restricted information?
7. Are you violating any candidate’s or employee’s intellectual property rights by taking pictures from their social media sites without getting their prior approval?

Smart Hiring Practices

What can *you* do to avoid legal ramifications when using social media to make smarter hiring decisions?

Keep This in Mind when Doing a Background Check

You may turn to a consumer-reporting agency (CRA) for help with this process. Its role is to gather information and evaluate a person’s credit, character, reputation and mode of living.

The CRA must comply with the Fair Credit Reporting Act (FCRA), whose purpose is to promote fairness and accuracy in credit reporting. The Act governs consumer reports “used for the purpose of evaluating a consumer for employment, promotion, reassignment, or retention as an employee.”

To protect your company, you need to check that the CRA follows these three guidelines:

- It respects consumer privacy and is fair and impartial when gathering and reporting information.
- It uses all “reasonable procedures” to assure the information being reported is accurate.
- It must verify that a candidate’s credit history is accurate—if that candidate disputes this information.

Before using a CRA—or any other third party—to provide a report on a candidate, you must send a written request to the person whose background is being checked. (This also applies to any search you conduct with internal resources.) The notice needs to be “clear and conspicuous” and not cover any other subjects. Explain that it’s company policy to do an Internet search on candidates before making a job offer. Candidates must return a written consent. This gives you a blanket, one-time authorization.

Here is some sample consent language:

I authorize [company name] and its designated agents/representatives to conduct a review of my background. I understand the scope of this background check may include [list the sources included in your company’s policy].

What if you decide *not* to hire or promote the person—or actually fire someone—based on the information in this report? Then you must send a copy of the report to the candidate or employee, accompanied by a document that outlines that person’s rights under the FCRA.

Best Practices for Social Media in Hiring

Using the results of social media searches in a background check creates the risk that a rejected applicant may claim discrimination. However, failing to look at social media before hiring an employee, or not acting on information it reveals about the person, could lead to negligent hiring claims.

Filter Out Protected Information



The U.S. Equal Opportunity Commission (EEOC) has a long-standing position that you can't use this protected personal information posted on social media in employment decisions:

- Age
- Race
- National origin
- Religion
- Sex
- Sexual orientation
- Pregnancy
- Political affiliation
- Marital status
- Disabilities
- Genetic information
- Veteran status

Watch for Sticky Situations



A candidate for a job at your company is out with a friend. He is the designated driver, so he only drank soda and water that evening while his friend got drunk. As they return to his car, the friend hands him an empty beer bottle, snaps a picture, and posts this on Facebook. Does this make your candidate a drunk driver?

Here are eight best practices to help you handle this double-edged sword.

#1: Remember the purpose of your search. Have clear goals for your background check. We recommend these: 1) to identify the preferred candidate for the job, and 2) to reduce your potential liability in this process. Make sure the information you're looking for is job-related and *necessary* to making a sound hiring decision.

#2: Don't try to circumvent privacy settings. One example would be sending a "friend" request to a candidate whose profile isn't open to the public—to get information you otherwise couldn't access. You can't violate someone's expectations of how their online information will be used.

#3: Keep research and hiring separate. The person viewing the social media information shouldn't be the same as the one (or more) making the hiring decision. (Remember the University of Kentucky!) This allows the researcher to remove comments about protected categories and activities before sending a report to those who interview and decide on candidates.

#4: Take a consistent approach. Create policies for background searches. Then conduct each review in the same way. Train the hiring professionals in your company on this policy—as well as on the inherent risks of using social media information for employment screening.

#5: Time your search appropriately. Only do this after the initial interview, when you have some interest in a candidate.

#6: Have documents that support your decisions. Note the legitimate, non-discriminatory reasons for hiring or not hiring someone. Include the results of your background checks, as well as how you gained access to any social media information.

#7: Check the accuracy of the information. Be sure you're reviewing the right information about the right person. Cases of mistaken identity abound. Also take steps to verify the social media information you uncover.

#8: Get familiar with "off duty" laws. Many states prohibit companies from firing or not hiring people based on their lawful activities when *not* at work. Learn the ones for each state where you have—or will hire—employees.

Smart Employee Monitoring and Firing Practices

Your best protection is a clear social media policy, which you have employees read and sign. That means posting it on your Intranet or including it in orientation packages is not enough. The policy ought to be reviewed and updated every one to two years. Each time, employees should sign a form noting they have seen and understand the changes.

Employee Social Media Policy Best Practices

There is no "one size fits all" policy—because every company is different. However, there are some general policy and procedure guidelines.

Free Speech versus Employer Interests



Jennifer O'Brien taught first and fifth grades. She made two postings on her Facebook page: "I'm not a teacher—I'm a warden for future criminals." and "They had scared straight program in school...."

Her principal learned of these actions and suspended O'Brien without pay.

At a tenure hearing, O'Brien argued her comments were protected by the First Amendment. A reviewing court found that she had a right to express herself. However, the district's right to efficiently operate its schools outweighed this.

Start with the policy. Spell out the reasons for the policy and what the company considers as social media:

This policy is designed to help our employees use social media safely, responsibly and professionally. We define social media as blogs, wikis, microblogs, message boards, chat rooms, electronic newsletters, online forums, social networking sites, and sites and services that allow people to share information with others at the same time.

Share specific procedures. Make it clear that these apply to 1) using social media on the company's behalf, and 2) references about the company that employees make in their personal use of social media. The Association of Certified Fraud Examiners recommends including these ideas.⁷

- Know and follow the company's Code of Conduct, Employee Handbook, and other policies when using social media in reference to the company.
- Be aware of the effect your actions may have on your—and the company's—image, and that this information may be public for a long time.
- The company may observe what you post on social media. Use your best judgment to avoid sharing information that is inappropriate or harmful to the company, its employees or customers.
- Although not an exclusive list, here are examples of prohibited social media conduct: posting commentary, content, or images that are defamatory, pornographic, proprietary, harassing, libelous, or can create a hostile work environment.
- Don't publish, post or release any information that is considered confidential or not public. Check with the Human Resources Department and/or your supervisor if you're not sure.
- If contacted by the media or attorneys because of a post you've made, refer these people to a company spokesperson.
- If you encounter a social media situation that threatens to become antagonistic, politely stop the dialog and get advice from your supervisor.
- Get permission before you refer to or post images of current or former employees, vendors or suppliers. Also get permission to use a third party's copyrights, copyrighted material, trademarks, service marks or other intellectual property.
- Using social media shouldn't interfere with your responsibilities at work. Our company's computer systems are to be used for business purposes only. You *may* use them for business-related social media postings (to Facebook, Twitter, company blogs and LinkedIn, for example). However, using social media for personal reasons is discouraged and could result in disciplinary action.
- After-hours online activity that violates our Code of Conduct or any other company policy may result in disciplinary action or end your employment.

⁷ Association of Certified Fraud Examiners. "Sample Social Media Policy." Viewed at http://www.acfe.com/uploadedfiles/acfe_website/content/documents/sample-documents/sample-social-media-policy.pdf on March 27, 2015.

- If you publish content after hours that involves work or subjects associated with our company, you need to use a disclaimer such as this one: “I created this post and it may not represent [company name’s] positions, strategies or opinions.”
- If possible, you should have separate social media accounts for company work and personal use.

Keep a “Paper Trail”

You must keep good employee records to reduce the risk of losing a lawsuit if someone is fired for misusing social media. This begins with employee signatures on the existing or updated policy. It also should be clear that employees know the ramifications they face by violating any of these policies—which can serve as a powerful deterrent.

Also know your internal capabilities for monitoring social media. Do you have the bandwidth to do this or should you retain a third party? In both instances, document the process used to collect and report the information.

Any infractions and the actions taken (such as warnings or suspensions) need to be noted. Of course policies must be enforced consistently, which may mean educating managers on this as well. For example, we recommend that supervisors or executives not “friend” the people who report to them, as a way to monitor their activity. Companies also should not require that employees follow the business on social media networks.

Be Smart

It generally takes a number of years for new case law to be created in the courts, which is true with social media. While the volume of cases in this area is growing, to date the trend is to reinforce the established protections already in place rather than break new ground.

However, you don’t want to become the test case for new laws and regulations.

You would be foolish not to use social media when hiring and monitoring employees, or firing people who are using it irresponsibly. When you’re looking for candidates, abide by the Acts in place. This means you aren’t violating anyone’s rights by basing decisions on protected information. Protect yourself by separating the people conducting social media research from those who make the decisions. Have a consistent and well-documented process.

When it comes to monitoring employees’ use of social media, have a clear and transparent policy—so everyone knows what’s expected. Update this regularly, as the company and social media world change. And if people run afoul of your policies and procedures, ensure this is well documented before seeking to end their employment.

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It's much less expensive to put these systems in place upfront than it is to suffer through the lost time and cost of a discrimination or wrongful termination lawsuit. If you need assistance, contact a lawyer who specializes in the use of social media. This helps you to enjoy the benefits of the online world while reducing its legal risks.

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