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The Risky Business of Screening Social Media in the Hiring Process

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LinkedIn, Facebook, Twitter and blogs. Social media have proliferated in recent years and their use by individuals — including potential employees — is beyond commonplace. Facebook has more than 150 million users in the United States. As of February 2010, Twitter reported that its users were issuing 50 million tweets per day.

Employers are taking notice. A 2009 study by CareerBuilder concluded that 45 percent of employers used social media to screen applicants. Should employers incorporate social-media research as part of their hiring process?

If you are one of the many employers who look to social media to evaluate applicants, or are considering incorporating social media, what tips, tricks and pitfalls should you be aware of? This article reviews the preliminary considerations for deciding whether your business should adopt a program of incorporating social media in the hiring process, and recommendations for an effective program that minimiz-

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es the employer's legal risk.

The Potential Sources of Social Media Information

A basic understanding of the following primary sources of social media is necessary prior to determining whether to incorporate social media into the hiring process and designing a program for its use.

Google and Other Search Engines. The most basic source of social media is a search engine, such as Google, Yahoo or Bing. These search engines allow employers to search for general web content involving an applicant as well as images, videos and blogs.

Facebook, BranchOut and BeKnown. Social networking sites, such as Facebook, allow users to post pictures and comments, send and receive messages and identify certain personal information about themselves. These sites typically allow a user to determine how much content is publicly accessible and may effectively allow users to block employers from accessing their information. BranchOut and BeKnown are similar, professional-focused sites.

LinkedIn. LinkedIn, another social networking site, typically includes more business-oriented information about individuals.

YouTube. YouTube allows users to share videos they have created with others over the Internet. Typically, anyone has

access to these materials.

Twitter. An information network, Twitter allows users to share short comments, called "tweets," in a streaming fashion. An employer can "follow" a Twitter user to view their postings.

Blogs, Forums and Message Boards. Blogs, forums and message boards may be oriented around a topic, including industry-centered sites, or dedicated to a particular individual.

Whether to Incorporate Social Media Into the Hiring Process

The temptation exists to simply follow the lead of other companies, but employers should evaluate their own individualized need for reviewing social media in hiring decisions. If an employer has had success with its current practices, it may be unnecessary to incur the additional risks of using social media. Employers should also evaluate whether a more robust interview process or other alternatives would better achieve their goals.

Social media may provide a real benefit, however, for an employer who faces overwhelming numbers of applicants for open positions, as well as those who have been disappointed by some of their past hires or experienced difficulty obtaining meaningful information from prior employers. On the positive side, these employers may learn that an applicant is active in industry-focused groups or

blogs, with writing that is concise and insightful. Conversely, social media may expose applicants who have engaged in illegal conduct, provided false or misleading information, or merely lack good writing skills.

The first step is to determine what the social-media screening process is intended to achieve, and to tailor a program accordingly. If an employer is most concerned about inappropriate behavior, it may choose to focus on social-media sites involving personal content. Those concerned about résumé fraud may find LinkedIn is sufficient. But if the screening process is designed to locate experienced employees, then blogs and industry forums are likely the best source. If an overall picture of an applicant is desired, an exhaustive search may be appropriate.

Employers should also determine at what point in the hiring process to introduce a social-media search. If the problem is an overwhelming number of applicants, an employer may find social media useful to narrow the field. Other employers may be satisfied with incorporating social media only after narrowing the pool or as a final screening. Whatever the goal, it should drive the social-media program.

Potential Issues Raised by Social Media

Once the decision is made to incorporate social media, employers should be prepared to address the types of information they may find, and the related problems and risks this information may pose.

Protected Class or Medical Information. Social-media sites may provide information that an employer would otherwise be prohibited from soliciting or relying upon during the hiring process. For example, an applicant may identify his or her birth date on a Facebook page or list affinity groups suggesting his or her religion. Similarly, an employer may have access to medical or genetic information, such as when an applicant discusses his or her own or a family member's illness, the use of which would run afoul of the Americans with Disabilities Act or the Genetic Information Nondiscrimination Act.

Off-Duty Conduct. Employers relying on social media may encounter pho-

tos, videos or comments of applicants engaging in activities such as excessive alcohol use or "unbecoming" conduct. Many states, however, have laws prohibiting employers from making employment decisions based on legal off-duty conduct.

Section 7 Rights. The National Labor Relations Act protects employee speech that constitutes protected concerted activity even if the employee is not a member of a union. Social-media sites may contain such protected speech. For example, an applicant may have tweeted or posted comments regarding the working conditions at his or her former employer, such as complaints about compensation or treatment by a former supervisor. The National Labor Relations Board has been focused on Section 7 rights in the context of social media.

Arrests and Convictions. Many states have laws concerning the use of arrest and conviction records in employment decisions. In addition, the EEOC has declared that the use of such information creates a disparate impact on certain groups and should not be considered unless job-related and consistent with business necessity. Some states and the EEOC are also moving to restrict the use of information concerning the creditworthiness of individuals in employment decisions. Employers should be cautious when social media reveals such information concerning an applicant.

Accuracy. The accuracy of social-media content is a two-fold problem. First, it may be difficult to confidently locate information on an applicant. Although the number of Facebook users suggests there is a good chance any applicant would have an account, it also means there may be several accounts with the same user name. Applicants also may not provide strictly accurate information where the site is personal or social or where the site provides content by other users, such as the comments page of Facebook. This could result in either an overly negative or overly positive image of an applicant.

Privacy. For publicly disseminated information, applicants do not have a reasonable expectation of privacy in

such content which would justify an invasion of privacy suit. But employers should not send a "friend request" to an applicant or engage in any efforts to circumvent privacy protections and expectations on social-media sites.

Recommendations for Minimizing Risk

The potential legal issues raised by incorporating social media into the hiring process should not be a deterrent for employers. Instead, employers must be aware of the need to design a program that addresses such concerns. As an initial matter, any employer should consider its goals when using social media in the hiring process and develop a program tailored to meet those goals, being careful to limit the review of social media to that which is necessary to achieve the goals. Searches of social media should be conducted consistently for all applicants within a job classification. Employers should also designate an individual who is not involved in the hiring decision or any part of that process, to review social-media content and cull out any protected information, such as an applicant's protected class, medical or genetic information, protected concerted activity, off-duty conduct or arrests and convictions (to the extent required by applicable law).

Third-party services are available to conduct such screening. However, the Federal Trade Commission recently issued a closing letter concluding that such companies are subject to the Fair Credit Reporting Act, and that employers must therefore provide employees with notice and obtain their consent prior to collecting such information. Consequently, we recommend conducting the review of social-media information in-house. The responsible employee should be trained in the various employment laws. In addition, employers should develop internal procedures for reviewing and using social media in the hiring process, including clear guidelines for quarantining protected information. Consultation with legal counsel to assess the need for social-media resources, develop a program to achieve goals, design internal procedures and train the employees involved can help to minimize the inherent risks involved in this process. ■