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Social Networking: "You're Hired to You're Fired" The Legalities of Social Networking in Employment Practices

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Recently Facebook announced that it has surpassed 500 million registered users on its web site. LinkedIn boasts 70 million members with a new member every second. Twitter and MySpace each claim over 100 million registered users. Human resources practitioners who think that their employees and applicants are not using at least one of these web sites must work with Fred Flintstone at Slate Rock and Gravel Co. So what is a human resources practitioner to do with the plethora of public (and private) information on applicants and employees that is available on social networking web sites? The easiest and most important answer to this is question is to never, ever use information found on a social networking web site to discriminate on the basis of a protected characteristic (age, gender, race, nationality, disability, etc.). Now that we have that out of the way, what are the legal uses of social networking in employment practices? The answer: plenty. Social networking information can be useful – and lawful – at every stage of the employment lifecycle, from recruiting, to hiring, to active employment, to terminated employee, to former employee.

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Many human resources practitioners and recruiters have learned that social networking web sites, LinkedIn in particular, are valuable tools to do an initial search for exactly the right candidate. LinkedIn provides information that is easily searchable with a virtual resume on each user. Even more convenient for recruiters is that each user can indicate whether or not he or she would be open to job inquiries. However, there are several potential pitfalls. First, if the only place an employer is looking for candidates is on LinkedIn, the diversity of the potential candidates is limited. It is estimated that less than 10% of LinkedIn users are African-American or Hispanic. This could open up the careless recruiter to allegations of discriminatory hiring practices. Therefore, use of social networking sites for recruiting should be one of many tools the recruiter uses to compile the pool of potential candidates. Employers that are federal contractors should be keenly aware of the datakeeping and reporting requirements on internet applicants.

The second concern with the use of social networking web sites in recruiting and in pre-interview hiring practices is the likelihood that the web sites will provide information about the candidates' protected characteristics about which employers are not permitted to inquire. Many web sites have photos and other information which would reveal gender, list date of birth and even could disclose national origin and disability information, all no-no's under state and federal discrimination laws. Therefore, these tools should be used carefully in the recruiting and pre-interview stages of hiring.

Instead of avoiding social networking web sites, some cautious and yet forward-thinking recruiters have developed a system to screen the individuals making the hiring decisions from those that are reviewing the social networking web sites. Basically, one individual is given the tasks of reviewing social networking sites for relevant hiring information and removing all protected characteristic information from the data provided to the decision-maker. For example, it is very relevant to know that the applicant being considered for the commercial truck driver position has multiple posts on his Facebook page about his many DUI convictions. It is not relevant to know that he just returned from a trip visiting his mother who is ill with a rare genetic disorder. To avoid a claim alleging genetic information discrimination, the decision-maker should only receive the information that is relevant to the position. More conservative practitioners involved in hiring elect to wait until the post-interview stage, and some even wait until post-offer stage, to review information publicly available on social networking sites. These also are viable and legally defensible alternatives.

So what happens after hire? For years, employment law attorneys have been having employers distribute and enforce electronic equipment policies. Now is the time to update those policies to include the company's position on the use of social networking web sites. Employers also may want to develop policies covering blogging by employees. Some employers choose to make a blanket prohibition on the use of social networking web sites during working hours. Other employers actually require their employees to use it for product promotion or sales. Where your company draws the line is largely determined by the company's business and culture. Wherever the line is drawn, however, a policy must be in place to put employees on notice of the company's expectations.

Some of the basics of the old electronic equipment policy apply equally to the social networking and/or blogging policy. Employees should have no expectation of privacy when using company provided equipment and should be told that their usage will be monitored. (See also "Lessons Learned from *Quon*," an article in this issue discussing privacy implications for public employers). Employers must reiterate that the company's harassment policy also applies to the use of electronic equipment and prohibit any form of harassment in social networking web sites. These policies also should be written with enough discretion for the employer to impose discipline for employees violating company policies when using personal (non-work) computers if that use effects the workplace.

Employers also may want to consider whether they want a policy limiting "friending" (the practice of connecting with someone on social networking sites and permitting them to see all private information and posts not otherwise available to the general public). Some employers prohibit friending between supervisors and subordinates, between co-workers, and/or between employees and customers/clients. Similarly, a supervisor that "recommends" an employee on LinkedIn may be haunted by that post someday when the employee is discharged for unsatisfactory performance. Therefore, a policy on recommending current employees also may be appropriate, and is really not any different from policies that require all reference checks to go through an employer's human resources department.

The revised electronic equipment policy also should indicate whether employees are permitted to hold themselves out as an employee of the company on social networking sites or should specifically indicate that they are acting as a private individual and not as an employee. In fact, recently the Federal Trade Commission revised its "Guides Concerning the Use of Endorsements and Testimonials in Advertising" to provide a specific duty to disclose an employment relationship if the employee provides an endorsement or testimonial for the employer's product, even if the endorsement is not on the employer's web site. The employer may be held liable for false statements about the employer's product made by employees on social networking web sites.

Employers with trade secret and confidential information also should warn employees that this information must not be disclosed through social networking. Several lawsuits also are pending involving non-competition agreements and the use of social networking web sites. Employers may be hard-pressed to establish the confidentiality of a client list when the employer's salesperson is connected with every one of his or her clients on LinkedIn. Courts will likely decide this based upon the specific facts of the case.

Sometimes an employee's computer use that affects the workplace is not done on a work computer or during working hours. In order to protect individual rights, some states have gone as far as prohibiting employment action based upon "legal recreational activities." Initially sought to prohibit employment decisions based upon legal activities such as smoking and gambling, this could be extended to social networking as well. Ohio has not taken this step yet. However, as with most new areas of protection, this may be an area that is first protected by the courts and later through legislation. Therefore, tread lightly on making employment decisions that are done on personal computers on personal time unless that usage implicates another company policy such as the company's harassment policy.

One area that is protected through legislation is any conversation regarding wages, hours and working conditions. The National Labor Relations Act protects non-supervisory employees engaged in "concerted activities" and a discussion of wages on a social networking site could be considered concerted activity. An unfair labor practice charge may result if an upset employer discharges an employee for "tweeting" confidential wage information.

Once a revised electronic equipment policy is in place and the policy is distributed to and acknowledged by the company's employees, what may an HR practitioner do with discipline issues involving social networking? Assuming the employee is at-will, that the objectionable post/photo/activity is not protected and the electronic equipment policy is consistently administered, an employee that violates the electronic equipment policy may be discharged. Post-discharge litigation that results likely will involve discovery into whether this employee was targeted or whether the policy is consistently applied. Further, the defendant-employer likely will be required to submit to electronic discovery which would require the employer to preserve certain electronic information and prohibit destruction or tampering with electronic information. Therefore, the policies must be uniformly and fairly administered.

The flip side is that in any resulting lawsuit, the former employee/plaintiff's own social networking accounts also will be discoverable. Multiple court cases currently are pending involving subpoenas served on Facebook and MySpace seeking information that the plaintiff deleted, but still would be contained in the web sites' servers. Further, anything that is readily accessible to the general public is fair game in discovery. The plaintiffs' bar has caught on to this and the astute plaintiff's counsel will admonish his or her client to immediately restrict access to the plaintiff's social networking pages. We frequently are surprised at how many do not.

The new world of social networking should not be ignored by the human resources practitioner. It is important to know how, when and why to use the information that is publicly broadcast on social networking sites. Employers with properly written electronic equipment and social networking policies will be a step ahead of employees that may be out undermining the company on the internet. The Labor and Employment attorneys at Eastman & Smith Ltd. would be happy to discuss how social networking should be addressed in your workplace.

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