

SAFEGUARDS AN EMPLOYER MUST TAKE IN THE INTERNET INVESTIGATION OF EMPLOYEES AND PROSPECTIVE EMPLOYEES

*POZZUOLO RODDEN, P.C.
COUNSELORS AT LAW
2033 WALNUT STREET, PHILADELPHIA, PA 19103
215-977-8200/FAX 215-977-9663
www.pozzuolo.com*



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REPORT FROM COUNSEL

**THE EMPLOYMENT DISCRIMINATION RULES STILL APPLY TO THE NEW WORLD OF
THE INTERNET**

Social networking sites such as Facebook and MySpace give employers access to non-traditional information on employees and job applicants. In fact, a January 2009 survey compiled by CareerBuilder.com showed that 45% of employers have searched for the social networking sites of job applicants during the hiring process and 35% of these employers admit that they have used the information they found in their decision not to hire a candidate.¹

But employers must beware. The exact same federal, state and local laws that govern an employer's relationship with job applicants and employees apply to the access and use of social networking sites when making employment decisions. This means that an unsuspecting employer could access a social networking site with the harmless intention of finding the best person for an available position and find itself violating federal and state discrimination laws. It is imperative that well settled employment law principles be considered when accessing social networking sites. If not, an unsuspecting employer could find itself defending a discriminatory hiring legal action.

Federal, state, and local laws require equal opportunity in employment and hiring decisions. Federal, state and local laws prohibit discrimination in the terms and conditions of employment on the basis of race, color, gender, national origin, religion, age and disability. While it is not illegal for an employer to learn the race, gender, age, or disability of an applicant before an interview, discrimination laws require that applicants receive equal treatment throughout the process.

¹<http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr519&sd=8/19/2009&ed=12/31/2009&cbRecursionCnt=3&cbsid=26ce2808344d4d66a4bc7825c673a65f-307112466-R4-4>.

An employer's knowledge of any of these protected characteristics increase the possibility of a discrimination lawsuit from a rejected applicant. For example, if an employer performs a web search and learns an applicant's religion, under the Anti-Discrimination Act, the employer cannot base a hiring decision on the applicant's religion. Similarly, an employer may learn of an applicant's past drug or alcohol use which raises numerous issues under The American with Disabilities Act and may not be used as the basis to deny the applicant employment unless reasonably related to the job functions. Also, employers must keep in mind that the information on social networking sites may be false, posted by someone other than the applicant and may be unreliable. Some states, such as California, have laws prohibiting employers from taking into consideration lawful off-duty activity, such as drinking alcohol, when making employment decisions.

Remember all applicants must be treated alike. If an internet search policy is enacted for a job applicant, the policy must be performed on every applicant applying for a job. Failure to follow this policy, or any policy, shows different standards and procedures for different applicants and could result in a disparate treatment argument. Employers should also save a copy of any information retrieved off of the internet as employment laws require employers to maintain records of any material used in making hiring decisions.² Also, it is prudent to keep a copy of any information found on the internet in case a lawsuit arises. Just like in any background

² See 29 C.F.R. §1602.14, *see also* 41 C.F.R. §60-1.12.

³ 18 U.S.C. § 2701

⁴ 564 F. Supp. 2d 441 (E.D. Pa. 2008).

⁵ *Hill v. Borough of Kutztown*, 455 F.3d 225, 241 (3d Cir. 2006) (*quoting Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)).

check, the applicant should be informed that a background check will occur including social networking sites.

Statutes also regulate the way employers can gain access to and use information on social networking sites. The Stored Communications Act: (1) prohibits intentionally accessing a social networking site without authorization; (2) prohibits intentionally exceeding an authorization to access a social networking site; and, (3) authorizes criminal and civil actions in an event of a violation.³ For example, requiring employees to give their passwords to social networking sites or accessing them without an employee's permission could expose an employer to injunctive relief, damages including punitive damages and attorneys' fees. In *Pietrylo v. Hillstone Restaurant Group d/b/a Houston's*, a manager required an employee to give him the password to her MySpace account.⁴ When he used the password to access the site multiple times she commenced litigation as an aggrieved person. Testimony revealed that the employee felt that she may have faced repercussions if she refused to give the manager her password. In denying the employer's motion for judgment as a matter of law, the Court found that a jury could reasonably infer that the employee's "authorization" was coerced.

Finally, public entities and employers have to be particularly cautious when researching employee's posts on social networking sites because of First Amendment and Due Process issues. A public employee's statement is protected by the First Amendment when: (1) the employee spoke as a citizen; (2) about a matter of public concern; and, (3) there is no justification for treating an employee different than a member of the public when a statement is made.⁵ Employers may not discipline an

employee when their statements are considered protected speech.

In conclusion, social networking sites provide a stream of knowledge on employees and job applicants. While this is a relatively new concept, old employment laws still apply. Keeping these old rules in mind when conducting internet research on applicants and employees will help to keep your business insulated in the event of a lawsuit.

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