

# Social Media Screening

## Question:

Should we conduct social media screenings on applicants and employees?

## Response & Analysis:

In recent years, many employers have been enticed by the prospect of using social media searches as part of their applicant screening process in order to learn more about prospective or current employees and to avoid costly bad hires.

However, there are several risks involved with using information found on social media sites to make hiring or other employment decisions, thus requiring employers who choose to conduct social media screening to tread cautiously.

The first major risk is that an applicant's digital footprint can reveal protected characteristics, and you need to be aware of the employment law implications of using such information. In addition to information that may not be relevant to job performance, social media searches may reveal information about an applicant's private life – age, religion, sexual orientation, disability, national origin and race – that you can't ask about in an interview. By viewing a candidate's blogs, posts, photos and videos, you open yourself up to information that legally cannot be used in the decision-making process. The dilemma is that such information cannot be "unseen," and you may find yourself in the difficult situation of having to prove that your decision not to hire someone was not based on discriminatory information you found via a social media search.

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In addition to the possibility of learning “protected” information, social media information may not be reliable and is often very difficult to verify — and when conducting background screening for employment purposes, accuracy of information is paramount for both the employer and employee.

Further, the Fair Trade Commission issued a staff opinion letter in 2011 emphasizing that FCRA “compliance obligations apply equally” when a third-party service provider is used for social media screening, including the requirement to follow reasonable procedures to ensure the maximum possible accuracy of the information reported. As a result, companies that conduct social media background searches on behalf of employers in compliance with the FCRA will often exclude any information not legally permitted to be considered for employment decisions, and may only report content that is “work-related” (e.g. illegal activity, violent conduct, demonstrations of racism or intolerance, sexually explicit material).

Additionally, when the search is conducted through a third-party, the applicant must be provided with pre-adverse/adverse action notices and an opportunity to dispute the information before a final employment decision is made.

If you still decide to supplement traditional screening processes with social media searches, carefully consider the legal risks of such an approach and implement the following best practices:

- Develop a consistent policy that clearly states the legitimate business purpose for the policy, what searches will be conducted, the types of information that will be considered, and then use the same criteria and procedures for all applicants/employees to reduce potential discrimination liability;
- Don’t make hiring, retention or other employment decisions based on membership in a protected class revealed through social media;

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- Conduct the screening only after extending a conditional offer of employment;
- Make hiring, retention or other employment decisions using accurate and verified information only that is documented and saved for future reference;
- Review policies and practices to ensure compliance with applicable state social media password and account protection laws and do not access restricted or password-protected information;
- Don't discriminate against employees and applicants based on activity protected under the National Labor Relations Act revealed through social media;
- Comply with the FCRA and its state equivalent, if applicable, even if conducting searches in-house as a best practice;
- Ensure that you are complying with the "terms of use" policies of social media websites; and
- Train human resources personnel and hiring managers to ensure they are aware of and understand the various restrictions on the use of social media search information when making employment decisions. ■

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