Social Media’s Impact on Pre-Employment Screening
Owensboro SHRM

Matt Messersmith & Karl Ulrich Esq.

October 10, 2017
Social Media: An Overview

- **Social media**: the interaction among people in which they create, share or exchange information and ideas in virtual communities and networks

- Top 5 Social Media Sites January 2017:
  1. **Facebook**: 1,100,000,000 (unique monthly visitors)
  2. **YouTube**: 1,000,000,000
  3. **Twitter**: 310,000,000
  4. **LinkedIn**: 255,000,000
  5. **Pinterest**: 250,000,000

Who uses Social Media?

http://www.pewinternet.org/fact-sheet/social-media/

72% Women
66% Men
Who uses Social Media?

http://www.pewinternet.org/fact-sheet/social-media/

% of U.S. adults who use at least one social media site, by age

- 18 – 29 86%
- 30 – 49 80%
- 50 – 64 64%
- 65+ 34%
Who uses Social Media?

http://www.pewinternet.org/fact-sheet/social-media/

% of U.S. adults who use at least one social media site, by education level

- High School or less 59%
- Some College 73%
- College Graduate 78%
Why do we use Social Media?

- Personal Benefits
- Online Communities, User Groups and Professional User Groups (Networking)
- Sharing pictures and information with families and friends
- Cheap and easy way to communicate with people all over the world

- Business Benefits
- World wide reach of branding
- Company news
- Referrals
- Fundraising
- Sales
What does this mean to HR?

• There are 3 key impacts social media has on Human Resource functions

  1. Recruiting; finding top talent
  2. Hiring; pre-employment screenings
  3. Monitoring; ongoing reviews of employees social media activities
Want to Avoid Hiring Them?

Justine Sacco
@JustineSacco

Going to Africa. Hope I don’t get AIDS. Just kidding. I’m white!

Katie Rich
@katiemaryrich

Barron will be this country’s first homeschool shooter.

1/20/17, 1:07 PM
“Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work”
Common Screenings

- What do these searches have in common?
- How are social media searches different?
Social Media Screening

- A look at someone’s social media activities
- Used to evaluate:
  - A candidate’s professionalism in terms of social conduct
  - How a candidate will fit into the company culture
  - A candidate’s qualifications
- Help make better hiring decisions
Social Media Screening

The Wrong Way…

- Social Media Stalking
  - Religious affiliation
- Age
- Sexual orientation
- Marital Status
- Children

The Right Way…

- Use Pre-Employment Screening Service to ensure:
  - **Consistency** and accuracy in reporting
  - Relevancy of data
  - Legal Compliance
FCRA Compliance

• Search Criteria is entered
• Computer “scrapes” websites for hits and matches
• Human beings review hits and eliminate any discriminatory information
• A FCRA compliant report is generated
Legal Considerations
Some Cautionary Tales

• The Case of the Spurned Scientist – *Gaskill v. University of Kentucky*

• With Facebook Friends Like These, Who Needs Enemies – *Ehling v. Monmouth Ocean Hospital Services*
The “Law” and Social Media in Pre-Employment: Playing Catch-Up

• Discrimination: Title VII; ADEA; ADA; GINA; IRCA
  – Disparate treatment
  – Disparate impact

• Invasion of Privacy

• Federal Stored Communications Act
An Old Law With New Tricks

Federal Stored Communications Act ("SCA"): Protects information the communicator meant to keep private.

Applies to: (1) electronic communications; (2) transmitted via electronic communications service; (3) that are in electronic storage; and (4) that are not public.

Authorized User Exception
Other Laws Affecting Pre-employment

• Fair Credit Reporting Act – Basic requirements for obtaining outside background checks:

  – Disclose to the applicant that report will be obtained for employment purposes;
  – Obtain applicant’s authorization;
  – In the event of adverse action, provide a copy of report and a description of applicant’s rights to applicant
Recent NLRB Developments

• National Labor Relations Act

  – Section 7: Employees have the right to organize and engage in “concerted activities” for “mutual aid and protection.”

  – Section 8: Expression of opinions, whether in “written, printed graphic or visual” form (without threat or promise) is not an unfair labor practice. Restraints on employee’s expressions may be an unfair labor practice.
Recent NLRB Developments

• Adverse Action for Facebook posts unlawful where employee complained/discussed with co-workers and others about job transfer.
  
  – Where employees discuss terms and conditions of employment on social media, it is protected.
  
  – Must have a specific audience in mind and engaged with or on the authority of other employees (e.g., concerted), but mere venting for employee’s own solitary benefit not enough for protection.
Recent NLRB Developments

• Social media policies must be narrowly tailored to avoid infringing upon employee’s rights of free expression.
EEOC Enforcement Guidance on Arrest and Conviction Records - 2012

• Highlights of Guidance:

  – Avoid blanket “no criminal conviction” policies/practices
  – May consider convictions if “job related and consistent with business necessity.”
  – Cannot disqualify on fact of arrest alone.
  – Targeted Screens are valid if they consider (1) nature of crime; (2) time elapsed; and (3) nature of the job.
  – Individualized assessment.
State Law Regulating Social Media Background Checks

- States who prohibit access to Passwords and/or Usernames.
  - Arkansas, California, Colorado, Illinois, Maryland, Michigan, Nevada, New Jersey, New Mexico, Oregon, Utah and Washington.
  - Ohio, Kentucky – Not yet.
Social Media Minefields

- False Identity
- Inaccurate Information
- Disparate Treatment/Impact
- Impermissible Subject Matter
Some Best Practices

• Tailor Background Checks to Bona Fide Qualifications of Position in question

• Be consistent for all competing candidates

• Separate the searcher from the decision-makers

• Avoid “suspect” terms in search criteria

• Corroborate Information Via Other Sources
Karl Ulrich, Esq.
Sebaly Shillito + Dyer
9100 West Chester Towne Centre Drive
Suite 210
West Chester, Ohio 45069
513-644-8125
kulrich@ssdlaw.com
www.ssdlaw.com

Matt Messersmith
Signet Screening
8080 Beckett Center Drive
Suite 305
West Chester, OH 45069
513-330-6695
mtm@signetscreening.com
www.signetscreening.com