

# Social Media

April 5, 2019



# Social Media and Privacy

- Recruitment and screening using social media
- Monitoring and controlling employees' social media use
- Problematic personal use and off-duty conduct



## Potential Legal Concerns

- National Labor Relations Act
- Fair Credit Reporting Act
- Anti-Discrimination Statutes (Title VII, ADEA, ADA)
- General privacy rights (First Amendment, SCA, FWA)



# National Labor Relations Act

Section 7 of the NLRA guarantees the right to **organize, join, or assist unions**, and to engage in **“concerted activities”** for the purpose of **“mutual aid or protection.”**

- Policy prohibiting discussion of wages or terms and conditions of employment on social media is an unfair labor practice in violation of Section 8(a)(1).
- Employee comments on social media are generally not protected by federal labor law if they are unrelated to group activity among employees.

# National Labor Relations Act

The following employer social media guidelines have been deemed problematic by the NLRB:

- ❌ Do not use language “of a general offensive nature” or be “rude or discourteous” to a client or coworker.
- ❌ Do not make “disparaging or defamatory remarks about company.”
- ❌ Do not make statements that may be considered “objectionable or inflammatory – such as politics or religion.”
- ❌ Do not distribute “libelous, defamatory, scurrilous, abusive, or insulting” literature.

# Recruitment and Screening

The Joy of Tech™

by Nitrozac & Snaggy



Signs of the social networking times.

## Fair Credit Reporting Act

- Requires a job applicant or current employee's consent before the employer hires a third party to run background checks.
- Social media searches can be considered part of background checks. If the proper consent is not obtained, the employer could violate the FCRA and be subject to civil penalties.

## Anti-Discrimination Statutes

- Proceed with caution: Employers conducting social media searches as part of making employment decisions will normally obtain information about the candidate's protected characteristics, such as age, race, religion, etc. (profile, photos, group affiliations).
- The company can become liable for discrimination based on knowledge of those characteristics.
- Also take care not to rely upon limited source of applicants. Varying rates of participation among certain races, ages and nationalities.



## General Privacy Rights

- There may be a common law right to privacy in non-work-related invitation-only social media spaces.
- Certain states have laws prohibiting employers from requiring social media usernames and passwords, or from requiring employees to access social media pages in front of employer.



## Employee Social Media Privacy Law

- Maine law prohibits employers from requiring or coercing employees to:
  - Disclosure of social media passwords
  - Access personal social media accounts in employer's presence
  - Disclose any personal social media account information
  - Add anyone to contacts ("friends")
  - Render their account public or otherwise accessible to the employer

# Recruitment Using Social Media

- Make policy decision whether or not to conduct Internet or Social Media searches of candidates.
- Establish search protocols and procedures and apply them consistently.
- Provide EEO training for those reviewing.
- Search only publicly-available information (no “pretexting”) and do not ask for passwords.
- Insulate decision maker from impermissible considerations.
- Check your facts.
- Document reasons for denials.

# Social Media Policy Best Practices

- ✓ Must be reasonable and related to a legitimate business interest.
- ✓ Must not chill Section 7 rights.
- ✓ Must not outweigh employee privacy.
- ✓ Outline when, if at all, it is permissible to use social media at work.
- ✓ Be clear about when and how you will be monitoring employee social media usage.
- ✓ Reference other policies such as Confidentiality, anti-discrimination, and anti-harassment.
- ✓ Consider whether you need a separate policy for use of the company's official social media.

# Presenter

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