



Social Media

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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.

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.

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