

Social Media and Emerging Technologies: What Every Employer Needs to Know

Social Media Traps for Employers



- Employment Decisions
- Employee Devices
- Marketing

Employment Decisions

Use of Social Media in the Hiring/Recruitment Process:

- **Benefits:** information is free, easy to access, provides insight, information beyond the resume and recommendations
 - **LinkedIn Searches are OK:** Reference Searches on LinkedIn held not to be considered a “consumer background check” and OK for employers without consent of applicants

Employment Decisions

- **Potential Trap:** access to personal data reveals information regarding protected characteristics of applicants

Employment Decisions

- Federal and Michigan Protected Classes:

- *sex, age, race, color, religion, sexual preference or orientation, marital status, national origin, ancestry, citizenship, genetic information, military status, veteran status, disability, height, weight, misdemeanor arrest record or membership in any other legally protected class*

- *Locally protected classes*

Employment Decisions

Decisions based on information acquired through social media: rejecting/disciplining/failing to promote or other employment actions toward an applicant/employee based on information concerning a protected class gathered through social media is unlawful and can expose the employer to liability

- Even if information concerning a protected status acquired through a social media review was not used in an employment decision, **the mere fact that an employer accessed the information may be used to infer improper motive by the employer in making the employment decision**

Employment Decisions

- Aftermath: access to social media can be evidence of discrimination
- “A court denied its motion for summary judgment after the university considered a top candidate’s religious views shown on his website when rejecting him for a position with the school. The court rejected the university’s argument that the scientist’s religious views on evolution would compromise his role as a scientist. The university settled for \$125,000 less than a month prior to trial.” *Gaskell v. Univ. of Ky.*, No. CIV.A.09-244-KSF, 2010 WL 4867630 (E.D. Ky. Nov. 3, 2010)
- “The plaintiff job applicant claimed that employer **discovered his age by seeing the year he graduated from college** on a business networking site (LinkedIn) and asking during a telephone interview, and subsequently discriminated against him on the basis of age when it denied him employment. The court found that the pro se plaintiff had alleged sufficient evidence of age-discrimination to deny defendant's motion to dismiss, even though plaintiff never explicitly pled that his employer determined his age. For one commentator, this case demonstrates that the “mere existence” of social media information can support a claim of discrimination.” *Nieman v. Grange Mutual Casualty Company*

Employment Decisions

Recommendations:

Many job-seeker sites, or resume posting websites provide users the ability to upload letters of recommendation from previous employers to be sent directly to prospective employers

Benefit: previous employers can provide honest feed back concerning former employees, whether good or bad

Employment Decisions

Potential Trap:

- **Positive Review:** posting an overly positive recommendation of an employee exposes the employer to a potential wrongful termination suit
- **Negative Review:** employers open themselves up to discrimination, defamation or workplace retaliation claims by former employees
- **Best Practices:** just the facts of employment

Employment Decisions

Accessing Employee's Accounts:

Michigan Internet Privacy Act - employers may not request, discharge, discipline, fail to hire, or penalize an employee or prospective employee for failing to provide the employer with access to their personal account or allow observation of their personal account

- Employers may not ask for or required employees or prospective employees to provide their user names or passwords

Employment Decisions

Employers may:

- (1) access information stored or transmitted on employer owned Devices ,
- (2) access an account or service provided by employer to employee for use within employee's employment,
- (3) discipline an employee for transferring the employer's proprietary or confidential information without authorization,
- (4) conduct an investigation if there are specific facts about employee's activity on personal accounts for the purpose of ensuring compliance with law, prohibitions against work related misconduct, or information about unauthorized transfers of proprietary or confidential information
- (5) Employers may not require employees to add them as friends or force employees to change their privacy settings

Employment Decisions

Disciplining/Terminating Employees for Social Media Activity:

- Social Media Handbook Policy: the best way to combat issues presented by employees' social media usage is through a comprehensive social media policy with sufficient examples, distributed at the commencement of employment rather than when incidents occur, and enforced consistently

Social Media Policies

NLRB's General Counsel's Memorandum 15-04 on Employer Rules: tremendous scrutiny has been given to handbook policies including social media, confidentiality, employee conduct toward employers and other employees, use of company logos and copyrights, use of recording devices, leaving work, and conflicts of interest

- *Policies cannot have a chilling effect on an employee's Section 7 of the NLRA right to engage in concerted activity, or would be reasonably construed to prohibit and employee's Section 7 rights*

Social Media Policies

Protected Activities:

- Right to discuss terms/conditions of employment (wages, hours, policies, complain), cannot ban discussion of non-public information
- Right to criticize employer's labor practices and treatment, cannot restrict disrespectful conduct, cannot require employees courteous, or professional to coworkers, supervisors, or the company
- Right to discuss terms and conditions of employment with third parties, including the media
- Right to use company name and logos on protest materials
- Right to use cameras and recording Devices on company property
- Right to leave the premises without permission

Social Media Policies

Activities that are NOT Protected:

- Where the employer has a legitimate protectable interest:
 - Interaction with clients and customers
 - Protection of proprietary information
 - Can require employees to cooperate with each other
 - Can designate an official spokes person of the company
 - Require employees to respect intellectual property laws

Social media can operate as a watch dog, where employers can monitor employee off-duty conduct that violates reasonable handbook policies or show signs of otherwise undesirable behavior

Electronic Devices at Workplace

– **Wage and Hours issues:**

- FLSA: requires non-exempt employees be paid at least federal minimum wage for all hours worked, non-exempt employees must be paid overtime for hours worked over 40 per week
 - Requiring or expecting employees to check work email on their own time can create wage/overtime liability for employer
- Reimbursement: employers may reimburse for work related expenses including the cost of cell phone calls, data or email on personal Devices , but wages and reimbursement combined may not bring employee's total salary below minimum wage

Electronic Devices at Workplace

- Issues with Personal Devices used for Work:
 - Breach of confidentiality
 - Breach of legal obligations
 - HIPPA
 - Client information
 - Lost Devices , lost information

Electronic Devices at Workplace

- Issues with Work Devices used for Personal Purposes:
 - Loss of information:
 - Contacts – employers lose control of employees relationship with customers, vendors, and others when employees use person Devices , emails and phone numbers to communicate
 - **Post-Termination non-solicitations/ compete issues**

Electronic Devices at Workplace

How to protect the company:

- Confidentiality policies
- Control Policies: require password protection, install apps or services that can wipe out contents upon termination

Company Drivers

- **Vicarious Liability for Accidents involving Cell Phones:**
 - Drivers: liability employees who cause traffic accidents within the scope of their employment, while on personal or employer provided Devices can expose companies to major liability when:
 - Drivers are required to check in
 - Texting while driving within scope of employment
 - Accidents occurred with employer provided vehicle/phone
 - Encouraging off duty calls

Social Media Marketing

- *Social media marketing campaigns are a cost effective way to engage a target community of consumers that is user friendly, easy to implement, creates instant legitimacy among audience*
 - Risks: any campaign in which third parties or users generate content that becomes published under an employer's name poses risk of trademark and copyright infringement liability

Social Media Marketing

How to navigate social media marketing:

- 1. Compliance with General Legal Standards: Federal Trade Commission Act prohibits false advertising, deceptive and misleading conduct such as misleading price comparisons, rebates, or sweepstake promotions
 - Adds and promotions must be checked for accuracy and truthfulness before being published
- 2. Third party advertising affiliates: ensure compliance with marketing laws
 - Companies require indemnification for any liability arising out of third party's conduct on behalf of employer, require marketing agent carry sufficient insurance, and execute a sufficient confidentiality agreement regarding the content and material you provide the marketer

Social Media Marketing

- 3. Compliance with third-party platforms terms and conditions: every social media site requires compliance with the site specific terms and conditions for employers to advertisements and engage in promotional activities
 - **Possible liability:** a marketing campaign that leads consumers to violate a social media site's terms and conditions can expose the company to liability, damage its reputation among customers, cause the social media site to bar the employer's use or future marketing

Social Media Marketing

- **Sweepstakes, Contests and Promotions:** capture consumers attention, incentivize consumer conduct and increases exposure to brands
 - Compliance with general legal requirements of promotions and applicable terms and conditions
 - **Facebook:** specific consent requirements to administer a promotion through Facebook's platforms – almost all social media sites have promotional and advertising guidelines that if not followed can expose the employer to liabilities for violation

Social Media Marketing

- 4. Implement Website Use Policies: website terms and conditions and privacy policies to prevent potential liability from third party users
- **Terms and Conditions: policies governing others' use of your website, social media page, prevent company employees and third parties from using the platform in an unlawful way, which would otherwise expose the employer to liability, indemnifies domain owner from other's misuse of content**

Social Media Marketing

- 5. Disclaimers for user generated content: creates legal risk for domain owners when the content infringes others intellectual property rights
- **Disclaimers: website owners should screen posters before content goes live, post notices disclaiming any association with the content or content creator and possibly express disapproval of the content, and that the content does not reflect the opinions of the website**

Social Media Marketing

- 6. Privacy and Data Security policies: companies with their own blogs or that maintain their own social media platforms should maintain comprehensive policies that disclose the company's data collection, use, and storage practices, and any responsibilities that third parties have when using the site if any data or analytics is captured by site visitors

Social Media Marketing

– 7. Endorsements and Testimonials:

- Disclosure requirements: consumers who receive or have a material connection with the company, such a compensation arrangement, is provided with free merchandise, or services, is required to be disclosed