

Issues With Social Media During Background Investigations

By Kevin Prendergast

Using social media to screen job candidates has become a hot topic of discussion. Some employers utilize the services of a background screening company while others do it themselves on a formal or even informal basis. Before delving into the world on a person's online presence, an employer should be cognizant of the risks in performing these searches.

Many people fearlessly reveal many personal details on their social media platforms, including age, marital status, medical condition, race, disability, pregnancy, status as a recovering alcoholic, religious beliefs, political beliefs and other information. Consider a fictional post that was used at a seminar I recently attended:

"OMG! Just found out I'm pregnant. Thinking about getting rid of it but that's against my beliefs. Who would think someone at my age could become pregnant especially with my medical history? It sure will be tough to give up my beloved chardonnay for nine months. At least my sponsor will be happy. I guess I'll trust in God especially if it will be another difficult pregnancy with a lot of bed rest."

The example is extreme, but illustrates the point. People post a great deal of personal information on the Internet that would be illegal for an employer to consider in making an employment decision. Once an employer is in possession of this information, it can be used against them even if the reasons for rejecting a candidate were on completely different grounds.

Employers devote significant resources in training their recruiting personnel to avoid protected class questions such as religion, race, age, medical history or political beliefs. Yet, allowing recruiters and others to view social media profiles on potential candidates can defeat the purpose of that training. If you have a presence on Facebook or other social media site, check the things your friends and family post and ask yourself: if this person was applying for a job at my company, would I want to see

this? Even simple things, like quotes from religious texts or a "like" for one's place of worship, could lead to the inadvertent discovery of an applicant's religion, opening the door to unconscious and unintentional biases. Remember, intent is not an essential element of a discrimination claim. Disparate impact is enough in many cases.

There are also issues with authenticating information from anonymous websites especially if the person disputes the information. Federal and some state laws require an investigation when a candidate disputes information in their background report and there is a legally mandated process that must be followed in processing disputes for both employers and screening companies.

If someone disputes a court record, my firm goes back to the court to verify the information. If someone disputes something on the Internet, it is sometimes difficult to verify or authenticate. If we cannot verify information, we are required to delete that data from the investigative report. There are many horror stories of posts made by jilted lovers and others with an axe to grind. While a person who posts information to the Internet probably loses any reasonable expectation of privacy in that information, what do you do when private information is uncovered online and the source is unclear? What do you do when a candidate claims they did not post the information or that a photograph was doctored? Employers are left in the unenviable position of possessing potentially troubling information upon which they cannot take adverse action against a candidate.

There are also issues in defining a "social media search." Is it a Google search or should it include much more (Facebook, LinkedIn, blog searches, other search engines, etc.)? Whatever searches are done have to be consistent so as not to discriminate against any particular group of people. An employer who chooses to perform social media searches should have a social media search policy promoting consistency. You do not want to be checking some sources for some candidates and other sources for other candidates. Consistency is crucial.

Prior to jumping into the online world, an employer must consider the benefits



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in performing social media searches since many savvy candidates have taken steps to sanitize or lock down their profiles and the returns are not always worth the risk. When conducted, it is wise to utilize the services of a professional investigative agency that can purge unwanted information prior to issuing a report to a client in the same way protected class information is cleansed from a standard background investigation.

In any event, employers conducting these searches should develop a written policy defining the exact sources to be searched, the personnel authorized to conduct these searches and the types of information that may be considered. My firm works with our clients to develop legally compliant background screening policies as well as delivering comprehensive background investigations.

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