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USING SOCIAL NETWORK SCREENING AS PART OF THE HIRING PROCESS: EMPLOYERS SHOULD PROCEED WITH CAUTION

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The use of social media sites such as Facebook, Twitter, LinkedIn, and Flickr has exploded in the past several years, allowing individuals to communicate and share data, images, photos and videos instantly. As a result of this explosion, an increasing number of employers, including school districts, have decided to use social media research and screening as part of their hiring process. The use of social media screening in the hiring process is not, by itself, a violation of any federal or state laws, and some employers say it assists them in hiring the best qualified and appropriate person for the position. However, there are certain pitfalls and legal implications that school districts should consider carefully before or when implementing its social media screening process and procedure.

School districts who have or are considering social network searches should understand that a "peek" at an applicant's social media account postings may reveal more than legitimate information about the applicant's educational and professional background. It is likely also to put the school district on notice of private or personal information about the individual, such as their status in one of employment's "protected classes". Under federal and state laws, employers are prohibited from discriminating against an individual based on race, color, sex, national origin, religion, ethnicity, disability, age, and, depending on the state, other classifications.

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An applicant in a protected class, who is not hired for a position after undergoing a social media screening, can claim that the school district's decision was discriminatory and point to the social media screenings as the basis of the district's knowledge and action.

Anticipating that social media searches may be used against the school district in this manner, school districts should analyze carefully the benefits of social media screenings, be guided by legitimate, non-discriminatory business reasons, and document this decision-making process. Articulating the legitimate goals and purposes prior to being required to defend them will help the district persuade a court that they are lawful and not a pretext for discrimination.

School districts also should review state law for any restrictions on social media research. While the writer is not aware of any state law which outright bans an employer's use of social media research, several states, including Maryland and Illinois, have enacted laws prohibiting an employer from requesting or requiring applicants or employees to disclose the user names or passwords to their social media accounts. The Illinois law makes clear that employers are not barred from using the Internet to obtain information about an applicant/employee that "is in the public domain."[1]

At the federal level, the United States Congress has been considering legislation that would prohibit employers from requesting user names and passwords from employees or applicants. In April 2012, the Social Networking Online Protection Act was introduced. That bill died when the 112th Congress ended, but it was reintroduced by Rep. Eliot Engel (D-NY) in the 113th Congress as HR 537 on February 6, 2013. Further, some United States Senators have asked the Equal Employment Opportunity Commission ("EEOC") to report on whether requiring job applicants to provide user names and passwords for social media sites violates federal anti-discrimination laws. As of this date, the EEOC has not yet issued a response to the request. Congress' interest in this topic means school attorneys and HR professionals should continue to monitor the federal front.

School districts that use a third party to conduct background reviews, including social media research, must comply with the Fair Credit Report Act ("FCRA").[2] The FCRA requires an employer to:

a. Notify the applicant or employee that the employer will be requesting a consumer report for employment purposes;
b. Obtain the applicant's written authorization;
c. Provide a summary of consumer rights to the applicant; and
d. Comply with adverse action procedures in the event that an adverse action (denial of employment) is taken as a result of the report.

Some school districts do not screen social media. Those that do, though, should consider the following recommendations as means to avoid liability and unintended violations of law:

1. Enact a written policy regarding the use of social media searches. The policy should state clearly the school district's purpose for conducting searches, which will reflect a non-discriminatory rationale that furthers legitimate business practices. The policy should detail when and how a search will be conducted, which person or department will conduct the research (preferably someone other than the final decision maker), and what will be done with the results of the employer's social media research (i.e., posts, photos, and/or videos);
2. Ensure that relevant staff members are trained on the school district's social media search policy. Training also should include a review of relevant anti-discrimination, privacy, and social media laws;
3. Obtain the written consent of applicants or employees prior to conducting a social media search;
4. Carefully document the process and results of the employer's social media site searches as is done with all other aspects of the hiring and employment process; and
5. Have a mechanism for learning about any new federal or state laws.

Social media searches and screenings are becoming a common practice in the hiring process. It's a practice that entails some risk, which should be addressed through education and planning. School districts are advised to proceed with caution, taking steps to address the legal pitfalls and liability concerns discussed above prior to using social media screening in the hiring process. I&A

End Notes

1. Public Act 97-0875 (1/1/2013).
2. 15 U.S.C. § 1681 (2013).