Workplace Privacy Data Management & Security Report

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Recruiter Misuse of Social Media Can Increase Risk of Liability

Recruiters are increasingly turning to social media to screen and recruit candidates. Jobvite's 2012 Social Recruiting Survey found that 92% of respondents plan to use social media for recruiting. Often, recruiters are viewing and considering information that should not be utilized in the hiring process. LinkedIn is replete with information that should not be considered when searching for or selecting candidates. Yet, the same survey found that LinkedIn is the most popular social networking site for recruiters.

LinkedIn profiles likely contain photos of candidates and other information identifying a candidate's race, ethnicity, age, disability, pregnancy, or religion. Federal and state anti-discrimination laws prohibit companies from using such non-work-related information when hiring. Additionally, the Equal Employment Opportunity Commission (EEOC) has issued regulations for the employment provisions of the Genetic Information Nondiscrimination Act (GINA) that prohibit acquisition of "genetic information" through social media.

The EEOC also has made clear that it is focusing its litigation efforts on eliminating systemic discrimination, such as discriminatory barriers in recruitment and hiring. The EEOC's Compliance Manual states that bias is not always conscious, and that actions infected by stereotyped thinking or other forms of less conscious bias are discriminatory. It further states that it is discriminatory to use a screening procedure that has a significantly disparate impact.

Employers can separate recruiters who screen applicants through social media from individuals who are making the hiring decision. This would require a recruiter to search applicants online, scrub prohibited information, and deliver scrubbed profiles to a decision maker. This may be difficult for employers to act on without careful attention to details and legal guidance to avoid significant risks. The process relies heavily upon a recruiter's knowledge of employment laws to scrub prohibited information. Avoiding the issue because of its burdensomeness is fast being scrubbed as an option for employers.

Companies also can utilize third parties to screen applicants through social media as long as they are aware of the pitfalls. First, many employers make little or no effort to determine whether the third party recruiters have developed appropriate safeguards. Second, the Federal Trade Commission (FTC) has stated that employers who rely upon third parties for social media information about candidates must comply with the Fair Credit Reporting Act (FCRA).

FCRA requires that an employer notify an applicant when it takes adverse actions based upon a consumer report. Employers also must provide the rejected applicant with notice of his or her right to view the data relied upon as well as give the individual the opportunity to dispute any inaccurate or incorrect information. Employers failing to comply with FCRA can be subject to tremendous liability. For example, Spokeo, Inc., a website that collects and sells detailed consumer information by compiling online data, recently agreed to pay $800,000 to settle FTC charges alleging that it violated FCRA in the employment screening context.

The EEOC, OFCCP (Office of Federal Contract Compliance Programs), and FTC are beginning to scrutinize employers that use social media to screen applicants. Unfortunately, LinkedIn and other social media sites do not yet maintain a "safe" site for recruiters. Employers need to anticipate government inquiry and not await the knock on the door. Recruiters should be restricted from considering prohibited information about applicants, whether they are working on company time or researching an applicant on their own time. They need appropriate social media guidelines and policies that are compliant with a host of laws. Further, they need to be properly trained.

Ignoring this problem or simply outsourcing recruitment to a third party without careful consideration of these issues and a recruiter's qualifications is a recipe for lawsuits.

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