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SOCIAL MEDIA –
THE DOUBLE-EDGED SWORD FOR SCREENING JOB APPLICANTS

It's become second-nature to "Google" people to whom you've been introduced or are planning to meet. For many employers, it's just as easy to engage in the same process with those applying for employment.

When an employer makes the decision to use social media, it creates a potential breeding ground for employment law issues. Depending upon how the information is used, the problematic legal issues may multiply exponentially.

The following are examples of the dangers inherent in "Search Engine Background Checks":

Imagine conducting a face-to-face interview with a prospective employee and making the following inquiries: "Are you gay?" "What is your religion?" "Do you plan on having a family?" "Are you a union sympathizer?" "How old are you?" "Do you go to church and, if so, where?" "Do you drink and, if so, are you an alcoholic?" "You appear to be part Asian -- is that true?"

In the 21st century, most employers have come to learn that those questions and others like them are unlawful and cannot be asked to a potential employee much less active employee. Nonetheless, when using social media, many employers forget all of the lessons learned over the past fifty years of Civil Rights laws and misguidedly believe that because information is on the internet, it is permissible to use it to check on potential employees.

In fact, using social media as an information source has the potential of creating a minefield of problems that may ultimately lead to expensive time consuming litigation. If an employer is only using social media background for individuals in certain protected classes, it will likely be seen as verification of a discriminatory intent. However, if an employer determines that social media will be used to screen all potential employees, there must be a well-crafted written policy in place requiring that all applicants, without exception, be submitted to exactly the same scrutiny. It is also prudent to advise potential employees that such searches will be performed.

Prospective employees often divulge personal, medical, political, union and other protected subjects on social media. Many even engage in concerted protected activity. When a potential employer enters into "social media cyber space", it will very likely heighten its awareness of legally irrelevant protected status and potentially use that information as a reason not to hire. Employers are particularly vulnerable in the area of potential violations of the ADA and the National Labor Relations Act. Given the sophistication of electronic discovery, there is no question that employers

doing social media searches, who are found to have a pattern of consistently failing to hire those who have real or perceived disabilities; or, who have engaged in protected concerted activity; or, who have any other protected status not favored by the employer, will be saddled with significant liability and exposure. These are particularly difficult cases to defend because of the "cyber tracks" evidencing the search. In order to have any chance to prevail, an employer must be prepared to present legitimate business reasons why the information obtained in the social media search had a relevant impact on why a potential employee was not suitable to perform the applied for job. Although it is not an impossible burden, it is one that requires scrupulous recordkeeping, realistic judgment and a well-defined policy that is applied exactly the same to all potential employees.

Many employers mistakenly believe that hiring a third party to perform social media checks will insulate them from liability. The Fair Credit Reporting Act (FCRA) is the federal law governing employment decisions made based on information contained in consumer reports. Under the FCRA's broad definition of "consumer report, social media background checks are "consumer reports" and thus covered by the FCRA. The FCRA imposes stringent requirements on employers that refuse to hire based upon a social media check. An employer is required to: advise applicants that it intends not to hire them based in part on social media screening; and, provide an applicant with a copy of the social media postings used; and, send a notice to the applicant advising of the applicant's rights under the FCRA; and, allow the applicant an opportunity to explain or rebut the report.

These are but a few of the potential issues that can and will be arise when an employer uses social media screening.

Lessons learned:

- Accessing an applicant's social media activity will likely give an employer knowledge of the applicant's protected status, i.e., age, religion, race, etc., factors that are impermissible and irrelevant in making hiring decisions.
- Third-party social media screening does not insulate an employer unless there is strict compliance with the FCRA and protected status is not used as the basis for failure to hire.
- Employers should not require applicants to divulge social media passwords as a condition of employment because of potential violations of both state and federal laws.
- Social media screening must be consistent and not limited to particular classes of individuals.
- Employers should not take into account an applicant's social media concerted or union activity.
- Given the sophistication of electronic discovery, all social media screening and the nuances of that screening will be discovered by a plaintiff's counsel.

Social media screening is a double-edged sword.

More Information

Please contact any member of the Cohen & Grigsby Labor & Employment Group at 412.297.4900 if you have any questions regarding this information. To receive future bulletins by e-mail, please send an e-mail to info@cohenlaw.com.