

# BURR ALERT

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## Using Social Media in Hiring Decisions: Is It Really Worth the Risk?

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Employers today often utilize social media websites such as Facebook, Twitter, and MySpace to investigate job applicants (or current employees) as part of the hiring process. This article discusses the following trends and considerations with respect to social media utilization in employment decisions:

- 1) Employers increasingly utilize social media without regard to repercussions;
- 2) Employers must understand the legal risks presented by social media access; and
- 3) To minimize such risks of social media, employers must develop policies, procedures, and effective documentation practices.

Employers accessing a job applicant or employee's social media account must do so with caution. Using social media sites to vet a candidate or employee often provides access to information, conduct, or characteristics of applicants that can expose the employer to a potential lawsuit. Protected information that employers are easily able to uncover using social media includes an applicant's race, national origin, religion, age, marital status, political affiliation, sexual orientation, disability status, workers' compensation benefits history, bankruptcy filing history, and genetic information. When such information is taken into account in employment decisions, employers place themselves at risk of or are violating federal and state employment laws which prohibit discrimination on such protected characteristics.

Recent studies have concluded that the threat of a decision maker considering protected factors gleaned from a social media page view is a real one. For example, a Carnegie Mellon University experiment found that in parts of the country where more people identify themselves as conservative, applicants with social media profiles that indicated they were Christian got callbacks 17% of the time, compared with only 2% for Muslims. While the study was unable to conclude whether the apparent discrimination resulted from conscious or unconscious decisions in the hiring process, it indicates that employers who choose to view a job candidate's social media profiles may be influenced by a protected characteristic whether they realize it or not.

Despite the legal risks of reviewing social media profiles, employers undoubtedly realize certain benefits from using social media as a pre-employment screening tool. At a minimum, employers are able to use quick social media searches to verify past employment and avoid

potentially hiring a job hopper or a perpetual griper, whiner, or complainer. Indeed, there are instances where the benefits of using social media in evaluating candidates may outweigh the legal risks of doing so. At other times, the legal risks may substantially outweigh the benefits, and striking the right balance may depend on the nature of the business and its needs. Therefore, employers who may use social media during the hiring process should develop policies and practices that maximize the beneficial use of social media in hiring, but minimize the legal risks of doing so.

An employer relying on its human resources team to use only non-discriminatory information learned via social media on the premise that "they know better" runs a dangerous risk, a decision maker's mere exposure to such information is sometimes sufficient for a disgruntled employee to make a colorable claim. For example, if an employee subject to an adverse employment action (termination, discipline, demotion, etc.) is aware that his or her employer has information about a protected characteristic, the employee may attempt to attribute the adverse action to the information and not the employee's own poor performance or conduct. Defending even a meritless claim can be both costly and time consuming, and these risks have discouraged many employers from searching social media and other similar sources for information on candidates and employees altogether.

As Facebook and other social media sites have become increasingly popular, some employers have utilized social media seeking personal information on job applicants and current employees to which they ordinarily would not have access. Exploiting the pressure of a tight job market, some employers have gone beyond simply looking at "public" images and information on applicants and now directly ask applicants for their social media passwords in order to have full access to the individual's accounts. In response to such privacy risks and issues, many states have enacted laws banning employers from requesting or requiring password-protected access to current or prospective employees' social media accounts. These states currently include Arkansas, Colorado, New Mexico, Oregon, Utah, Vermont, Washington, California, Illinois, Maryland, Michigan, Nevada and New Jersey. Other states are certain to enact similar laws soon.

We have developed guidelines to assist employers in developing policies and practices in these areas, and continue to monitor these areas of the law. Please contact us with any questions or if we can offer assistance.

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