



# Social Media – An Employment Nightmare

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**Show of hands:  
Who uses social media to screen job applicants?**

## 2012 CareerBuilder Survey

- 37% of companies use social networks to research potential job candidates.
- 65% of managers are looking at whether candidates present themselves professionally.
- 51% of managers are looking to see whether a candidate is a good fit for the company culture.
- 45% of managers are looking to learn more about the candidates' qualifications.

# 2012 CareerBuilder Survey

- 34% of hiring managers that research candidates via social media have found information that has caused them not to hire a candidate.
- Such content includes the following:
  - 49% of candidates posted provocative or inappropriate photographs or information.
  - 45% of candidates had information about drinking or using drugs.
  - 35% of candidates had poor communications skills.
  - 33% of candidates had bad mouthed previous employers.
  - 28% of candidates made discriminatory comments related to race, gender, religion, etc.
  - 22% of candidates lied about their qualifications.

# 2013 CareerBuilder Survey

- Employers who took a candidate out of the running for a job after researching social media sites reported a variety of concerning content:
  - Posted provocative/inappropriate photos/info
  - Info about candidate using drugs/drinking
  - Bad mouthed previous employer
  - Had poor communication skills
  - Made discriminatory comments related to race, gender, religion, etc.
  - Lied about qualifications

# Why Do Employers Reject Applicants?

- Lifestyle concerns
- Inappropriate comments/text
- Unsuitable photos, videos
- Comments critical of previous employers, co-workers, or clients
- Membership in certain groups
- Discovery of false information shared by candidate
- Poor communication skills displayed online
- Concern about financial background

# Invasion of Privacy

- **Intrusion upon seclusion**
  - Intrusion, highly offensive, legitimate expectation of privacy.
- ***Smart Screening Tip:***
  - Do not violate sites' terms of use.
  - Do not ask applicants for passwords to their social networking sites during the interview/application process.
    - Minn. Stat. § 181.53
    - 13 states have passed similar legislation.
    - 28 states have similar legislation pending.

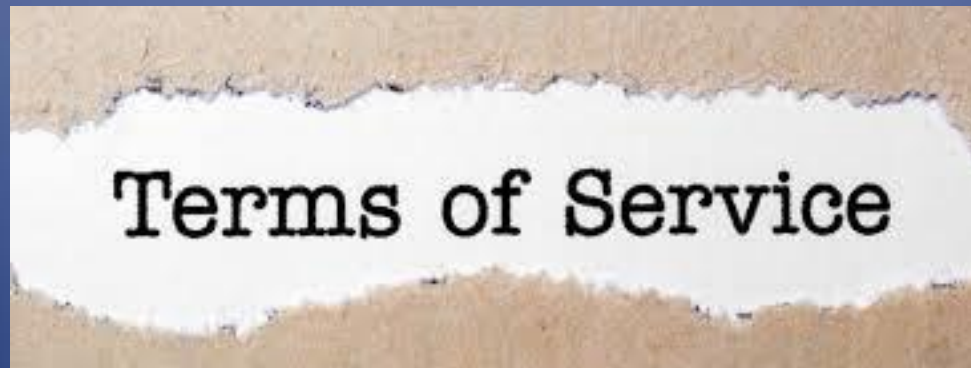
# Invasion of Privacy

- **Minn. Stat. § 181.53**
  - No person, whether acting directly or through an agent, or as the agent or employee of another, shall require as a condition precedent to employment any written statement as to the participation of the applicant in a strike, or as to a personal record, for more than one year immediately preceding the date of application; nor shall any person, acting in any of these capacities, use or require blanks or forms of application for employment in contravention of this section. Nothing in this section precludes an employer from requesting or considering an applicant's criminal history pursuant to section 364.021 or other applicable law.



# Breach of Terms of Service

- **Could arise when:**
  - Assume false identity to obtain private information.
  - Use information obtained for commercial purposes, which may be violation of a social networking company's terms of service.





# Lawful Consumable Products

- **Minn. Stat. § 181.938, subd. 2**
  - Illegal to reject for use of lawful consumable products off employer premises during nonworking hours.
    - Lawful consumable products means products whose use or enjoyment is lawful and which are consumed during use or enjoyment, and includes food, alcoholic or nonalcoholic beverages, and tobacco.
  - Reasonable expectation of privacy?
- ***Smart Screening Tip***
  - Treat all off duty discoveries equally.



# Discrimination

- All types of discrimination claims possible, although difficult to prove.
  - Race/National Origin
  - Disability
  - Age
- Are all applicants being checked equally?
- What information is discovered and used?
- ***Smart Screening Tip***
  - If searching social networking sites, conduct the same type of search on each applicant.
  - Use non-decision makers to conduct searches.
  - Pick out potentially discriminatory criteria, providing only non-discriminatory personal or employment related information.

# Genetic Information

- Unlawful to fail or refuse to hire or discriminate against applicant due to genetic information.
- Could gain illegal genetic information from information about group memberships or from family photographs depicting relatives with some known genetic physical ailment.



# “Ban the Box” Legislation

- **Minn. Stat. § 364.021 (S.F. 523)**
  - House passed the bill 107-22; Senate passed the bill 44-16; Governor Mark Dayton signed the bill on May 13, 2013. It will go into effect on January 1, 2014.
  - Minnesota extended “ban the box” to the private sector. Minnesota is the 3<sup>rd</sup> state to extend it to the private sector and 9<sup>th</sup> state to “ban the box.”
  - The legislation prohibits most private employers from inquiring, considering, or requiring disclosure of a job applicant’s criminal record or criminal history until the applicant has been selected for an interview or a provisional job offer for employment is made.

# “Ban the Box” Legislation

- **Minn. Stat. § 364.021 (S.F. 523)**

- **364.021 PUBLIC AND PRIVATE EMPLOYMENT; CONSIDERATION OF CRIMINAL RECORDS.**

(a) A public *or private employer may not inquire into or consider or require disclosure of the criminal record or criminal history of an applicant for employment until the applicant has been selected for an interview by the employer or, if there is not an interview, before a conditional offer of employment is made to the applicant.*

(b) This section *does not apply to* the Department of Corrections or to *employers who have a statutory duty to conduct a criminal history background check or otherwise take into consideration a potential employee’s criminal history during the hiring process.*

(c) This section does not prohibit an employer from notifying applicants that law or the employer’s policy will disqualify an individual with a particular criminal history background from employment in particular positions.

# “Ban the Box” Legislation

- **Minn. Stat. § 364.021 (S.F. 523)**
  - The legislation does not prohibit employers from fully reviewing criminal histories of all applicants. But employers will have to wait until either after the point of an interview or after a provisional job offer for employment is made.
  - The legislation is enforced exclusively by the Minnesota Department of Human Rights. Applicants are not permitted to bring a civil action in court.
  - Penalties
    - 2014 – A written warning for the first violation. Subsequent violations up to \$500 per violation, not to exceed \$500 in a calendar month.
    - 2015 – Penalties vary depending on the employer’s size and the number of violations, but will not exceed a total of \$2,000 per month.



# Defamation

- False, defamatory, and unprivileged communication that harms an applicant's reputation.
- Know sources of information used.
- Monitor employer sponsored blogs.
- *Smart Screening Tip*
  - Do not communicate basis for rejection of an applicant.



# Tortious Interference with Contractual Relations

- A contractual relationship exists, a third party has knowledge of such relationship, and the third party intentionally procures breach of the contract, without justification.
- Difficult claim in applicant setting:
  - No claim against employer because employer can not interfere with its own contract.
  - Possibility to sue third party but standard of intentional procurement of breach is high as is proof of no justification.

# Fair Credit Reporting Act

- Only use if a third party is conducting the search.
  - Triggers applicant rights:
    - Notice that an investigation may be performed.
    - Consent to such investigation.
    - Notice if discovered information is used to make an adverse decision against them.
  - Not applicable to internet searches performed by the employer (themselves).
    - But if a third party performs an internet search, it triggers the Act.

# Computer Fraud and Abuse Act

- Unauthorized computer access prohibited.
- Violations may occur if an employer accesses a social networking site through illegitimate means (i.e., violating a social networking site's terms of service agreement).



# Negligent Infliction of Emotional Distress

- Typically “zone of danger”
- Exception to “zone of danger”:
  - Direct invasion of rights such as defamation, invasion of privacy, CFAA or the like.
  - With severe emotional distress
    - *Yath v. Fairview Clinics*, 757 N.W.2d 34 (Minn. App. 2009).
- ***Smart Screening Tip***
  - Only possible if viable invasion of privacy, CFAA or defamation claim.

# Vicarious Liability/Respondeat Superior

- Employer arguably responsible for certain employee conduct.
- Was the employee acting within scope of duties and during work time?
- Were the employee's actions foreseeable?
- ***Smart Screening Tip***
  - Clear policies can limit these claims.

# Employee-Related Claims

- **Negligent Hiring**
  - *Smart Screening Tip*
    - When in doubt, run a search.
- **Whistleblower**
  - *Smart Screening Tip*
    - Establish thoughtful policies on searches to educate employees.

# Employee-Related Claims

- **Whistleblowing**

- The employee's social media posts may be protected under the National Labor Relations Act (NLRA).

- The NLRA grants employees Section 7 rights that allow employees to engage in concerted activities for the purpose of collective bargaining or mutual aid or protection.
- NLRA Section 8(a)(1) enforces Section 7, which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.”
- Posting on unionizing, the terms and conditions of employment, criticizing an employer's labor practices, or in regards to a labor dispute, are likely protected activities.



# Employee-Related Claims

- **Whistleblowing**
  - The National Labor Relations Board (NLRB) uses a two-step inquiry to determine if an employer violates these rights under the NLRA.
    - The First Step is that a rule is clearly unlawful if it explicitly restricts Section 7 protected activities.
    - The Second Step is that if the rule does not explicitly restrict Section 7 protected activities, it will only violate Section 8(a)(1) upon a showing that:
      - (a) employees would reasonably construe the language to prohibit Section 7 activity;
      - (b) the rule was promulgated in response to union activity; or
      - (c) the rule has been applied to restrict the exercise of Section 7 rights.

# Employee-Related Claims

- *Smart Screening Tip*
  - Establish thoughtful policies on searches to educate employees.
  - Have written policies to eliminate perception that access to information is for improper purpose and complies with the terms of use at various sites.

# General Caveats

- Background searches on ultimate hire by unsuccessful applicant's counsel.
- Availability of employer searches in discovery.



# EXAMPLE ONLINE RECRUITMENT POLICY

- **Purpose of Online Recruitment**
  - To assist in meeting Company goals:
    - By increasing recruitment opportunities; and
    - By making effective hiring decisions.
  - To enhance recognition of Company.

# EXAMPLE ONLINE RECRUITMENT POLICY

- **Conducting Online Screening:**
  - Persons responsible for Online Screening.
  - Persons subject to Online Screening.



# EXAMPLE ONLINE RECRUITMENT POLICY

- **Types of Information Sought in Online Screening**
  - Criminal background or activities;
  - Job skills;
  - Work experience;
  - Work habits;
  - Activities in conflict with employer mission;
  - Communication skills; and
  - Other unique facts bearing upon applicant's employability.

# EXAMPLE ONLINE RECRUITMENT POLICY

- **Types of information Not Sought or Considered**
  - Protected classifications;
  - Protected activities;
  - Private personal information; and
  - Trade secrets/confidential information.

# EXAMPLE ONLINE RECRUITMENT POLICY

- **Employees conducting online screening must:**
  1. limit to obtaining relevant job-related data;
  2. observe privacy restrictions and terms of use requirements;
  3. refrain from “hacking” inaccessible sites;
  4. discontinue viewing pictures, postings, etc. if it is clear they are not job related;
  5. refrain from downloading intellectual property;
  6. refrain from making false or misleading statements;
  7. refrain from defaming or disparaging statements; and
  8. make a general record of the sites used.



# EXAMPLE ONLINE RECRUITMENT POLICY

- **Use of Information:**

1. Employees conducting online screening must seek to verify accuracy;
2. All information relevant must be downloaded and retained for further review;
3. Information regarding protected classifications/activities must be removed;
4. Information collected during online screening may not be used or communicated to anybody else; and
5. Information collected during online screening may not be used for any reason other than the hiring decision.

# EXAMPLE ONLINE RECRUITMENT POLICY

- **Retaining Information Received in Online Screening**
  - All information reviewed during online screening must be retained in the applicant file for the same period of time that other materials in that file are retained.
  - Access to the applicant file is limited to HR Department employees for legitimate business use only.

# EXAMPLE ONLINE RECRUITMENT POLICY

- **Conducting Social Recruitment**
  1. Employees must clearly identify themselves as employees with responsibilities in the area of HR and recruitment;
  2. Employees may not create false identities to “friend” applicants or solicit information;
  3. Employees may not misrepresent their purpose; and
  4. Employees may not offer or solicit communication “off the record.”

# EXAMPLE ONLINE RECRUITMENT POLICY

- **Employees must act in an ethical and professional manner.**
  - Employees must behave respectfully and not harass, threaten, disparage, defame or ridicule anyone;
  - Employees must refrain from behavior reflecting a bias against or in favor of persons of a particular protected classification;
  - Employees may not act in any manner that would violate any Company policy; and
  - Employees must at all times provide only truthful statements and accurate information when engaged in social recruiting.

# Questions?