

Employment Edge 114th Edition—Look Before You Leap into the High-Tech World of Online Screening

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The rapid growth and extensive reach of online social media sites, such as Facebook, Twitter, and YouTube, has forever changed the way people communicate in and out of the workplace. As a result, employers are attempting to determine appropriate employee usage of social media given the potential upsides, downsides, and legal risks posed by social media in the workplace. Employers are also increasingly venturing onto the Web and social media sites themselves to market their business and recruit and screen potential applicants. Online tools can be highly valuable in recruiting and selecting the best candidates and screening out bad hires. As is often the case, however, new technological tools can be both a blessing and a curse. Despite the potential advantages of online recruiting and screening, these activities come with potential employment law risks that are still evolving due to the relatively recent emergence and growth of social media. Employers should, however, be aware of the following potential legal risks and should consider the following tips for minimizing those risks:

- Employers can be held legally responsible for negligently hiring an individual that could pose a safety risk to others. As such, employers should weigh the pros and cons of online screening to determine whether such screening would be helpful in identifying qualified candidates and screening out bad hires that pose risk. As part of this analysis, employers should consider whether the nature and duties of particular positions create a higher risk of harm to others if the employer has not carefully and thoroughly screened applicants for the position for safety or other risks.
- Under federal law, as well as Minnesota and many other state laws, employers that pay an outside entity to conduct an applicant background check must satisfy certain legal requirements before obtaining or acting on the background check. In connection with online screening, if an employer is paying an outside entity to do the screening or is using an online, fee-based service, the employer should make sure to comply with any applicable background check laws.
- Due to anti-discrimination laws, employers should use a consistent approach in online screening and do the same screening for all applicants for a particular position, as opposed to screening on an ad hoc basis. Employers should make certain they can justify the job-relatedness of any results used to disqualify candidates.
- Employers conducting online screening should make certain that hiring decisions are made for legitimate, business, and job-related reasons and are not based on any legally protected information obtained about an individual online. For example, anti-discrimination laws prohibit employers from making hiring decisions based on an applicant's gender, religion, age, race, national origin, disability, or

other protected characteristic. In addition, other laws may prohibit a hiring decision being based on various protected activities, such as drinking or smoking outside of work time, the filing of a worker's compensation or other legal claim, union activities, or other lawful activities by an individual. When an employer does online screening, particularly screening of an applicant's social media site, it may learn of an applicant's protected characteristics or protected legal activities. To reduce the risk that this legally protected data is used unlawfully in the hiring process, employers should construct a wall between the ultimate hiring decision maker and the individual conducting the online screening so that any legally protected information about an applicant is not shared with or considered by the decision-maker.

- An employer that conducts online screening could face privacy claims or claims that the employer has violated various electronic communications laws. To minimize the risk of such claims, employers might consider limiting online screening to a search for data that is clearly publicly accessible, such as through a public search engine like google.com or yahoo.com or an unrestricted social media site. If an employer searches on an online site with access restrictions, such as a social media site that the applicant has restricted to only authorized visitors, the employer should consult with an attorney to ensure that it accesses the restricted site through only legitimate means. Employers should not access restricted online sites in ways that might be found to be fraudulent, deceitful, or otherwise improper.
- Because not all data online is accurate and reliable, employers should carefully consider and investigate the accuracy and reliability of online data before acting. To minimize the risk of defamation and privacy claims, employers should also take care not to publicize false information about an applicant and should keep applicant data and personnel decisions as confidential as possible, sharing information only with individuals with a legitimate need to know the data for business reasons.
- Finally, given the evolving legal landscape, employers should keep current on trends, best practices, and legal developments related to online applicant screening.

If you have questions about online screening, or other employment law issues, please contact Megan Anderson or another member of the Gray Plant Mooty Employment & Labor practice group.

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