



Update Your Status: Practical Solutions For Social Media Challenges In Today's Technology-Driven Workplace

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Agenda

- Social media checks
- Monitoring employees' social media activities
- Firing employees based on social media activities
- The National Labor Relations Act (NLRA) and social media
- Other protections for employees' social media conduct
- Gathering and using ESI in legal actions



Social Media Checks

Use of Social Media Checks

- **70%** of surveyed hiring managers and HR professionals use social media sites to research job candidates
- **57%** of respondents have rejected a candidate based on content found on a social networking site
 - Inappropriate or provocative content/photos (**40%**); use of drugs or alcohol (**36%**); discriminatory comments related to race/gender/religion (**31%**); badmouthed previous employer (**25%**); poor communication skills (**27%**); lied about qualifications (**27%**)
- **47%** of respondents are less likely to interview a candidate they can't find online
- **43%** of respondents found positive information that caused them to hire the candidate
 - Professional qualifications (**37%**); great communications skills (**28%**); a professional image (**33%**); creativity (**34%**)

CareerBuilder Survey August 2018


Fair Credit Reporting Act

- **Regulates background searches by third-party consumer reporting agencies for employment purposes**
 - Example: Sterling's Social Intelligence
- **Does not regulate employer's own searches of social media:**
 - Google, LinkedIn
 - Beware: Backgroundchecks.com
- **If FCRA applies:**
 - Must provide background check disclosure and authorization
 - Must engage in adverse action process before rejecting applicant

Social Media Check

Hit Classification	Flagged
Filter	Potentially Unlawful Activity
Sub-Filter	Photos, videos or references to drugs (All others)
Category	Social Network Profiles
Source	Facebook
Matched Bys	First Name, Last Name, Current Address

Material appearing to reflect negatively on the subject was discovered.



The screenshot shows a Facebook profile page. The profile picture is a man with a beard and a white fur collar. The cover photo is a dark, abstract image. The profile name is redacted with a black box. The navigation tabs include Timeline, About, Friends, Photos, and More. The 'Intro' section shows 'Worked at Patuxent Greens Golf Club' and 'Lives in Seattle, Washington'. A post from April 13, 2013, is visible, with the text 'i gotta gold chain,,,IM ON COCAINNNEEEEE' highlighted in red.

The Creationist Astronomer

➤ **Facts:**

- University sought to recruit director for a new observatory
- Search committee initially ranked plaintiff as “the best” candidate
- Member of search committee found article on plaintiff’s personal web page expressing creationist views
- Article spurred substantial debate within the search committee over plaintiff’s religious beliefs
- Search committee chose another candidate

➤ **Claim:** Religious discrimination

➤ **Ruling:** Summary judgment denied; search committee’s debate constituted direct evidence of discrimination

Gaskell v. Univ. of Ky., 2010 WL 4867630 (E.D. Ky. 2010)

Other Considerations

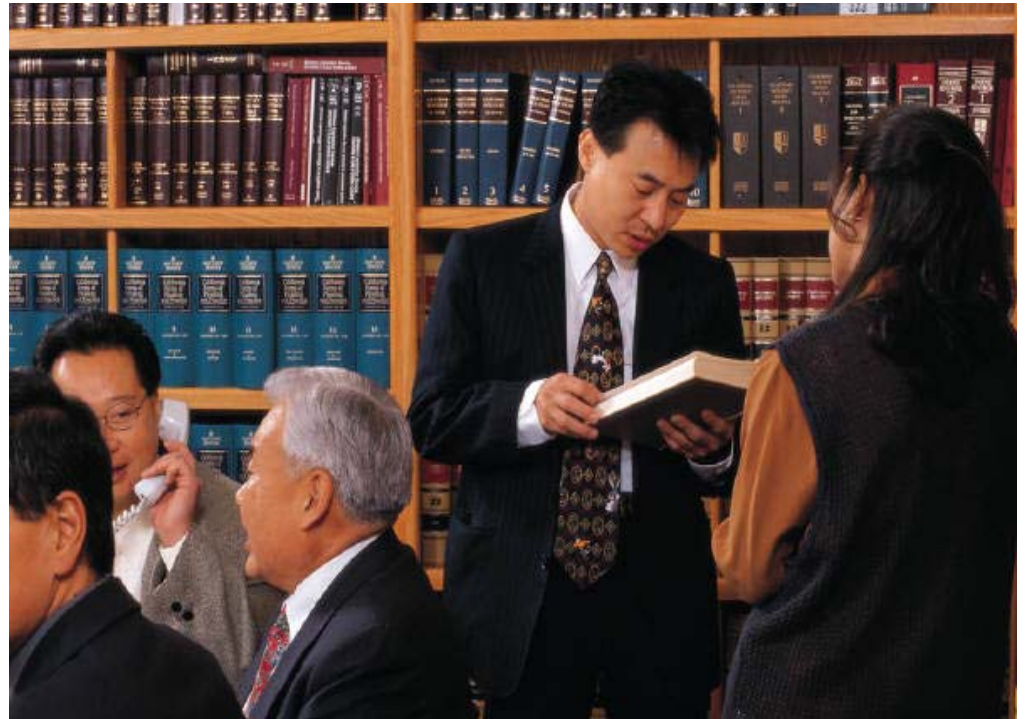
1. Reliability of information
2. Relevance of information
3. Fairness of social media searches
4. Discovery of “bad” information not otherwise known, *e.g.*, posts revealing age, disability or sexual orientation
5. GINA: Prohibits the intentional acquisition of “genetic information,” *i.e.*, the manifestation of a disease or disorder in a family member

Key Takeaways

1. Establish policies on when social media checks will be conducted, by whom, at which sites, for what information, and how will that information be evaluated
2. Include social checks by third-party vendors in your organization's FCRA compliance program
3. Wall off decision makers from unscreened search results
4. Provide applicants the opportunity to rebut or explain adverse information

What Can You Review

- Social media content on publicly available sites and pages is fair game
- Social media content volunteered by co-workers, customers, and others is fair game



Password Protection Laws

26 states have enacted laws to restrict employers' access to applicants' or employees' restricted social media content

- No requests for passwords
- No shoulder surfing
- No compelled "friending"

Key Exceptions:

- Workplace investigations
- Personal accounts used for work

Remedies: Private right of action and/or administrative enforcement

Federal Stored Communications Act

- **Prohibits unauthorized access to communications stored in online accounts maintained by a service provider**
 - Can apply to restricted social media pages
 - Criminal statute with civil remedies
- **Jury verdict against Houston's Restaurant after managers obtained a hostess' log-in credentials to view restricted social media page for complaints by employees about customers and management**

Pietrylo v. Hillstone Restaurant Group, 2009 WL 3128420 (D.N.J. 2009)



Firing Employees Based on Social Media Activities

Is It Real?

Real Jessica Rychly

- Teenager
- Broad smile/wavy hair
- From Minnesota
- Likes reading
- Listens to rapper Post Malone

Fake Jessica Rychly

- Teenager
- Broad smile/wavy hair
- From Minnesota
- Hawks Canadian real-estate investments
- Pitches a radio station in Ghana
- Follows Arabic and Indonesian accounts
- Frequently promotes graphic porn

- **60M:** Estimate of automated Facebook accounts
- **48M:** Twitter accounts estimated to be automated simulations of real people

New York Times (Jan. 28, 2018)



The National Labor Relations Act (NLRA) and Social Media

Why Worry About Labor Law?

- U.S. labor law prohibits employers from interfering with employees' "protected concerted activity"
- Social media provide a natural platform for employees to engage in "protected concerted activity"
- Interference can take the form of discipline of employees in response to protected concerted activity

Examples of “Protected” Activity

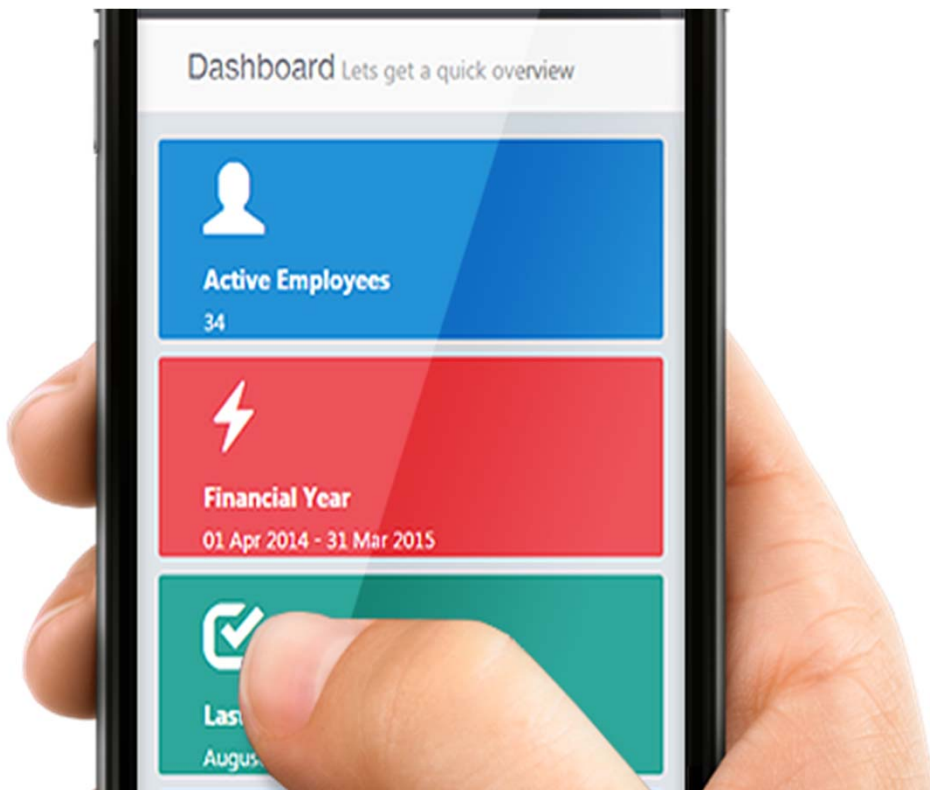
- “Protected” activity relates to the terms or conditions of employment
 - Wage rates, bonuses, and benefits
 - Vacation, leave, and overtime policies
 - Supervisors’ management style, favoritism, discipline
 - Unsafe working conditions and workplace hazards
 - Co-workers’ laziness
 - The CEO’s wasteful spending

Examples of “Concerted” Activity

- **Activity cannot be an “individual gripe”**
- **Must relate to a group complaint or action**
 - Group discussion about changes to policies
 - Soliciting co-workers to meet with management
 - Complaints about results of discussions with management
 - Photographing a workplace injury to bring unsafe working conditions to co-workers’ or management’s attention
- **Only non-management employees can engage in protected concerted activity**

Is This “Concerted” Activity?





Other Protections for Employee's Social Media Conduct

Other Protections for Lawful Off-Duty Conduct Laws

32 states protect employees against adverse action based on some form of lawful, off-duty conduct:

- Political Activity: CA, CO, IL, LA, MI, NY, SC, UT
- Consumption Of Lawful Products (including tobacco): IL, MN, MT, NC, NV, NY, TN, WI
- Smoking/Tobacco Use: CT, DC, IN, KY, LA, ME, MS, NH, NJ, NM, MO, OK, OR, RI, SC, SD, TN, WV, WY
- Lawful Off-Duty Conduct: CA, CO, ND, NY
- First Amendment: CT

Final Takeaways

Responding To Employees' Off-Duty Social Media Conduct:

1. Consider whether no response is the best response
2. Confirm the authenticity of the content before responding
3. Consider a response other than discipline
4. If discipline is necessary, consider whether termination would be disproportionate
5. Before imposing any discipline, make sure the social media content is not legally protected

Gathering and Using ESI in Legal Actions

- When considering the admissibility of ESI:
 - Is it Relevant Rule 401?
 - **Is it authentic under Rule 901?**
 - Is it hearsay under Rule 801? If so, is it covered by an applicable exception (such as Rule 803, 804 or 807)?

Authenticity

- Rule 901(b) spells out ten non-exclusive illustrations. Key illustrations for social media are:
 1. **Testimony of Witness With Knowledge.**
 2. **Distinctive Characteristics and the Like.**



Authenticity

- Websites Are More Difficult To Authenticate
 - Printout of website was not authenticated where plaintiff's witness attempting to authenticate documents lacked personal knowledge of who maintained the website or authored the documents
 - “Anyone can put anything on the Internet. No web-site is monitored for accuracy and nothing contained therein is under oath or even subject to independent verification absent underlying documentation.”
 - “[H]ackers can adulterate the content on any web-site from any location at any time.”

Authenticity

- Authentication of MySpace / Facebook:
 - In Griffin v. State, Griffin was on trial for murder
 - Griffin’s girlfriend was alleged to have threatened a witness on MySpace -- “snitches get stitches”
 - Lower courts found that MySpace page had been authenticated through officer’s testimony regarding MySpace profile, which included a photo of Griffin and his girlfriend, contained the girlfriend’s birthdate and identified Griffin by his nickname
 - Maryland Supreme Court found someone else could have created the MySpace page

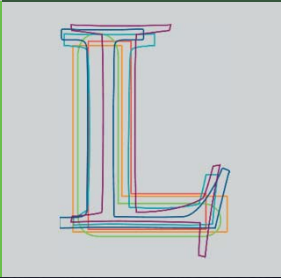
Authenticity

- If seeking to authenticate under 901(b)(1), ask your witness the following questions:
 - What is the electronic evidence?
 - Who created the file?
 - Where was the file stored?
 - How do you know the file is in its original form?
 - Who had access to the file?
 - Did anyone edit the file?
 - Is there password protection?



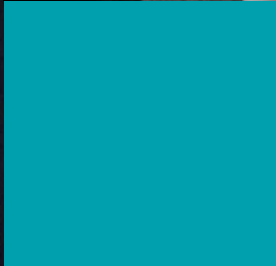
Authenticity

- Collecting Social Media Evidence:
 - Website archiving or social media “web crawl” collection by a forensic expert is best.
 - A printout + contemporaneous, signed statement is very risky for court practice, but *may* be accepted by agencies.
 - Always consider who you’re using to authenticate—do you want that person on the witness stand?



Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.





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