

# **SOCIAL MEDIA AND HUMAN RESOURCE STAFFING: LEGAL, POLICY AND PRACTICE ISSUES FOR EMPLOYERS**

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## **ABSTRACT**

*The use of social media by employers to find and select the right individuals to employ has increased dramatically in recent years. Bullhorn, an international recruitment software company, reported that 98% of respondents to its survey of recruiting agency professionals used social media for recruiting in 2012 (Bullhorn, 2013). With increased use of social media, employers are also discovering additional legal risk. The purpose of this paper is to examine how employers are utilizing social media to find and select the right individuals, the potential legal risk associated with the use of social media and human resource staffing, and the steps employers can take to reduce their exposure to litigation.*

## **INTRODUCTION**

What is social media? A recent Society for Human Resource Management (SHRM) research report titled “Social Media in Business Strategy and Operations” defined social media as:

Web-based tools and technologies used to share information and turn communication into interactive dialogues with internal or external audiences. Examples include LinkedIn, Facebook, Twitter (SHRM, 2013).

While social media websites existed before the 2002 launching of LinkedIn and the 2004 launching of Facebook, their use was limited. In the last three years their use by individuals and in turn employers has exploded dramatically. Facebook membership reportedly grew from 161 million registered worldwide users in January 2012 to more than a billion monthly active users in December of 2012 (Oracle, 2012 and Facebook, 2013). LinkedIn reported that it had grown

from 100 million members in March of 2011 to 200 million members in January of 2013 (LinkedIn, 2013).

As Facebook, LinkedIn, and other social networking sites have continued to attract users, employers have also ramped up their use of social media. Time and money – two key resources most organizations attempt to maximize – are at the top of the list of reasons driving organizations of all sizes and kind to find more ways to utilize social media. From a marketing prospective, for example, social media enables organizations to connect with a wide audience at the stroke of a key pad with minimal cost (Frost, 2013). Access and use of the most popular social media sites is free, and given the increasing number of people utilizing social media in their daily lives, utilizing social media as part of an organization's promotional plans can allow them to "stretch" their "advertising dollars further" (Frost, 2013). Organizations have also been utilizing social media to drive overall business operations and in turn results. At Unisys for example, the organization has been attempting to use "social media tools to become more agile, to share knowledge, and to increase the speed of innovations" with the goal of improving individual employee and organizational productivity (Meister, 2011).

## **HR STAFFING**

With respect to the use of social media to find and select the right individuals to employ, employers are attempting to take advantage of the same factors driving marketers and managers in general – money & time. With more and more individuals visiting social media sites than reading the Sunday want ads when looking for work, it is obvious why survey data reports as many as 95% of companies are using LinkedIn and other sites to find the right individuals to employ. A hrmreport.com article reported that Microsoft saved \$88,000 in recruitment fees using LinkedIn and that brewer SAB Miller saved \$1.7 million by employing people directly through LinkedIn (hrmreport.com, 2013). Using social media to recruit has also been reported to help employers reach job candidates that are no longer using traditional sources and in some cases reaching higher-quality candidates. According to an Oracle white paper on how to effectively use social networks in recruiting,

"Individuals who frequently use social networks tend to be early adopters of innovation and also tend to be more technically savvy (Sullivan, 2009). These are the traits many companies look for in potential candidates. Social networks offer a fast way to connect with these individuals" (Oracle, 2012).

Another potential reason for using social media in recruiting often cited in the literature is the ability of employers to establish relationships with potential employees over time. Following

individuals over time enables employers to more effectively “determine cultural fit” (hrmreport.com, 2013). Along those same lines, many employers are utilizing social media sites as a cost effective way to conduct background checks (hrmreport.com, 2013).

Building a positive “brand image” is another important marketing concept that social media can be part of an organization’s strategy to attract quality candidates. Social media sites can be utilized to present messages, photos and videos to profile an organization and build an organization’s image (Frost, 2013).

### **POTENTIAL LEGAL RISK**

A variety of potential legal risks have been identified in the literature, with discrimination allegations on all covered basis getting most of the attention. The focus on potential discrimination allegations is being driven in part by the U.S. Equal Employment Opportunity Commission’s (EEOC) Strategic Enforcement Plan for Fiscal Years 2013 – 2016 approved in December of 2012 (EEOC, 2012). In the plan, the EEOC identified six priorities for enforcement:

#### **EEOC Strategic Enforcement Priorities (SEP) 2013 - 2016**

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| <ol style="list-style-type: none"><li>1. Eliminating Barriers in Recruitment and Hiring</li><li>2. Protecting Immigrant, Migrant and Other Vulnerable Workers</li><li>3. Addressing Emerging and Developing Issues</li><li>4. Enforcing Equal Pay Laws</li><li>5. Preserving Access to the Legal System</li><li>6. Preventing Harassment Through Systemic Enforcement and Targeted Outreach (EEOC, 2012).</li></ol> |
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In an August 24, 2012 training workshop, EEOC trial lawyer Edward Loughlin was quoted as saying the use of social media in the employment context has “been on the radar screen for the commission for several years now”(Larson, 2012). Employers’ use of social media then, could come under EEOC scrutiny under three of the EEOC’s SEPs in coming years and employers using social media in staffing processes could be creating “an absolute legal mine field” for themselves (Larson, 2012).

The primary risk factor for employers that utilize social media in their recruitment and hiring processes is the information they observe from simply visiting an applicant’s Facebook or LinkedIn page. Today, any information related to an individual’s race, sex, religion, national origin, age, pregnancy status, marital status, disability, genetic information, and in some jurisdictions, sexual orientation, is considered to be potentially unlawful to use in making employment decisions. According to Mr. Loughlin, ‘merely accessing the information could

create an issue for a company down the road when someone files a charge” (Larson, 2012). The issue for the employer down the road is associated with a decision maker’s ability to claim that they lacked knowledge as to important impermissible characteristics of the applicant. For example, an applicant makes an allegation of race discrimination against an organization. If the individual can show that a hiring manager involved in the decision making process had visited the applicant’s Facebook page and viewed a picture of the applicant, a claim that they were not aware of the applicant’s race will be difficult to sustain.

Employers with Federal Government contracts that use social media as part of their staffing process have additional risks to consider. These contractors are subject to Office of Federal Contract Compliance Programs (OFCCP) regulations, and those regulations require contractors to maintain detailed records related to the recruiting and selection of employees. This includes maintaining records on the backgrounds of job applicants and details on the sources utilized to find employees (Bates, 2013).

The heightened risk of disparate impact allegations has also been identified in the literature as a potential risk for firms utilizing social media for recruiting purposes. Allegations of disparate impact under Title VII involve claims that an employer’s employment policy or practice causes a statically significant disproportionate impact based on a protected trait. Plaintiffs do not have to establish the existence of an unlawful motive or intent to discriminate but must establish that while the “practices are fair in form”, they operate as “built-in headwinds for [a protected class] and are unrelated to measuring job capability” (EEOC Compliance Manual, 2011). The EEOC’s guidelines go on to note that “Title VII is violated by recruiting persons only from largely homogeneous sources if the recruitment practice has a racial purpose, or if it has a significant racial impact and cannot be justified as job related and consistent with business necessity” (EEOC Compliance Manual, 2011).

The primary concern for employers utilizing social media for recruiting is that these sources may not be representative of the total labor pool available for jobs they are attempting to fill. For example, Facebook users have been reported to be “disproportionately under the age of 40” (Larson, 2012). Employers attempting to market to a younger age group may be unintentionally not reaching protected class individuals, those over 40 and protected from adverse impact discrimination by the Age Discrimination in Employment Act. Another published report noted that only 5 percent of LinkedIn’s members are African American (versus 12.8 percent of the total population) and again, increasing the potential that the employer is not reaching potential applicants with protected class status (Oracle, 2012). The inability to reach members with protected class status may thus result in underrepresentation in the applicant pool and lower selection rates for protected class individuals thus creating the type of statistical evidence utilized by plaintiff’s attorneys to establish claims of disparate impact discrimination. One final note from the EEOC guidelines that should heighten employers utilizing social media for recruitment is the following:

*Who* ultimately receives employment opportunities is highly dependent on how and where the employer looks for candidates. Accordingly, Title VII forbids not only recruitment practices that purposefully discriminate on the basis of race but also practices that disproportionately limit employment opportunities based on race and are not related to job requirements or business needs.<sup>(80)</sup> For example, recruiting from racially segregated sources, such as certain neighborhoods, schools, religious institutions, and social networks, leads to hiring that simply replicates societal patterns of racial segregation (EEOC Compliance Manual, 2011).

Another federal antidiscrimination statute, the Genetic Information Nondiscrimination Act (GINA), prohibits employers from requesting family medical history and discriminating against employees or applicants because of genetic information. For example, an individual soliciting donations on behalf of a close family member battling cancer on their Facebook page also happens to be in the job market. A prospective employer visits the individual's page and notes the solicitation for their close family member battling cancer in their evaluation of the potential applicant. The prospective employer is now aware of information that is unlawful to consider in the selection process and may have provided the applicant with enough evidence to launch a discrimination claim. The EEOC announced in May of 2013 the settlement of its first GINA discrimination lawsuit. While this litigation did not involve the use of social media, it is considered and "emerging and developing" issue that the EEOC's Strategic Enforcement Plan is designed to pursue (EEOC Press Release, 2013).

**Table 1.**

<b>States with Tobacco Only Statutes</b>	
Connecticut	District of Columbia
Indiana	Kentucky
Louisiana	Maine
Mississippi	New Hampshire
New Jersey	New Mexico
Oklahoma	Oregon
South Carolina	South Dakota
Virginia	West Virginia
Wyoming	
<b>States with Lawful products Statutes</b>	
Illinois	Minnesota
Missouri	Montana
Nevada	North Carolina
Tennessee	Wisconsin
<b>States with Engage in Lawful Activities Statutes</b>	
California	Colorado
New York	North Dakota

Source: National Conference of State Legislatures (NCSL), (NCSL, 2011).

A variety of state laws can also create legal problems for employers utilizing social media in recruiting. Many states have “lifestyle discrimination” laws which protect employees from discrimination in employment for consumption of legal products or engaging in lawful activities. As with the example above regarding potential problems with GINA, a prospective employer visiting an employee’s Facebook page after an individual has uploaded pictures of the employee smoking and or drinking at a private party. Cigarettes and alcoholic beverages are still considered legal products in the United States and a number of states have enacted legislation that protects employees from discrimination when they consume lawful products or participate in lawful conduct off-duty and off the employers’ premises (see Table 1).

The prospective employee who alleges that they may have been discriminated based on what the employer saw on the Facebook page may have enough to pursue a discrimination claim at the state level.

Another legal issue associated with employers using social media as part of their staffing effort has been the request by some employers that current and potential employees provide username and passwords to their private social media accounts. Employers “argue that access to personal accounts is needed to protect proprietary information or trade secrets, to comply with federal financial regulations, or to prevent the employer from being exposed to legal liabilities” (NCSL, 2013). Critics contend that employer request for access to personal accounts is “an invasion of employee privacy” (NCSL, 2013).

This issue came to the attention of state and federal legislators after a report of a Maryland employee being “mortified” after their “employer requested and received his Facebook username and password” (Poerio and Bain, 2012). Since the controversy surfaced, “legislation has been introduced or is pending in at least 36 states” with eight other states enacting legislation in 2013. Six states had previously enacted statutes in 2012 (See Table 2).

**Table 2**

States Enacting Username and Password Protection Statutes	
2013	2012
Arkansas	California
Colorado	Delaware
Nevada	Illinois
New Mexico	Maryland
Oregon	Michigan
Utah	New Jersey
Vermont	
Washington	

Source: NCSL (2013, A & B).

The coverage of these statutes may vary, for example the New Mexico law only applies to job applicants and the Utah and most other state statutes apply to both employees and job applicants (Deschenaux, 2013). In addition to the issue gaining the attention of state legislatures, Representative Eliot Engel, a member of U.S. House of Representatives, introduced H.R. 537: Social Networking Online Protection Act on February 6, 2013. The statute would prohibit employers from requesting or requiring that employees and other individuals provide a user name, password, or other means for accessing a personal account on any social networking website (H.R. 537, 2013).

### **WHAT SHOULD EMPLOYERS DO TO MINIMIZE LEGAL RISK AND MAKE EFFECTIVE USE OF SOCIAL MEDIA IN RECRUITING?**

Given the many potential benefits associated with the use of social media by organizations, the increased use of social media by decision makers in a variety of processes will also increase the potential legal risk. Policies and procedures should be developed by employers to minimize the potential legal risk and realize the benefits associated with the use of social media in their organizations. For example, an often mentioned recommendation in the literature for organizations attempting to minimize discrimination allegations is to utilize diverse recruiting methods. If an employer over emphasizes a social media network that does not have participation by certain protected groups it may create the appearance of discrimination. While simply creating the appearance of discrimination may not be enough to sustain an allegation of discrimination, in this day and age where an organization's "image" is so important for a variety of reasons, many organizations are very sensitive to even an unfounded allegation of discrimination. While targeting a particular market may be a sound marketing strategy it can be a risky approach to finding potential employees.

Another often made recommendation to minimize potential legal risk associated with human resource decision making in general is the development and implementation of policy to guide human resource management decision makers. The development side can be complicated at this stage of the life cycle for the use of social media in staffing primarily because of emerging legislation at the state and federal level and the limited number of court decisions to guide legal counsel. We do have some policy statements and warnings from some regulators, the EEOC in particular, but so far much of what we have is advice and not case law to guide policy makers.

There is some general advice on minimizing discrimination allegations. First, it is important to educate and train individuals involved in the staffing processes in organizations on basic non-discrimination concepts. Second, recruiters must avoid focusing on protected class characteristics of applicants, such as race, sex, religion, age, ethnicity, and disability. Third, decision makers should be trained to focus on job related concepts and the ability of applicants to perform the essential functions of the jobs they are being considered for. Fourth, to shield decision makers from utilizing information about applicants they should not have, one

suggestion is to utilize individuals who are not involved in the decision making process as information “filters” to screen out “information pertaining to protected characteristics before the search results are forwarded to those who are making the hiring decisions”(Recalde, 2012). Fifth, screeners should be properly trained to utilize job related criteria in evaluating applicants (Bates, 2013). This additional layer of review will add to the cost associated with the process, but it may insulate decision makers from the accusation that they used impermissible information in making their selection decisions. Firms that do not have the resources to employ another layer in their recruiting process may delay using social media in their screening process until after they have met the candidate in person. This way, the employer will not be exposed to basic demographic information about the applicant that they should not have (Bates, 2013).

Sixth, in attempting to minimize allegations of discrimination of any kind, consistency across the organization with respect to how applicants are evaluated is critical. If the organization believes that utilizing social media is relevant to its selection process it should be utilized when evaluating all applicants. As noted previously, employers subject to OFCCP regulations have an even greater burden to minimize discrimination allegations if they are using social media in their recruiting process. Employers are advised to use a “diversity of recruiting methods” to avoid excluding protected class individuals (Recalde, 2012). Bates reported that “recent survey show that social media sites have lower percentages of Latino and black users than are in the general population”, so employers overreliance on social media in recruiting could give rise to discrimination allegations and make defending their recruiting practices difficult (Bates, 2013).

Seventh, employers utilizing outside agencies to generate background reports on applicants should also keep in mind the Fair Credit Reporting Act (FCRA) if social media is utilized in generating those reports. Suggestions in the literature for FCRA compliance include requiring all job applicants to provide a signed authorization to perform the background check and to insist that your third party provider follow all relevant laws and regulations when gathering information about applicants (McHale, 2012).

One final note for employers relying on outside agencies and internet based sources of information, is the potential that information provided by outside agencies or found online may not be accurate or true (Wright, 2013). The notion that if it’s on the internet or came from a credit reporting agency it must be true or accurate, has been debunked on numerous occasions. In July of 2013, an Oregon woman won an \$18.6 million award regarding allegations that her credit-report contained errors that the credit reporting agency failed to correct for years (Snider, 2013). A recent survey also reported that “nearly a quarter of Americans have seen problems on their credit reports” (Snider, 2013).

While risk analysis associated with the myriad of laws and regulations associated with the use of social media in staffing is critical, “can you show how you saved money or drove value?” through its use (Oracle, 2012). Key for managers responsible for the organization’s staffing process is to identify measurable objectives, identify costs, and to assess outcomes.



Development of metrics associated with the objectives is essential. Common metrics recommended to assess any staffing process include candidates per source, cost per source, hires per source, cost per hire, and time to hire (Oracle, 2012).

## SUMMARY AND CONCLUSIONS

The use of technology in the management of organizations human resources has expanded at a break neck pace in recent years. Automated screening and testing technology have been adopted by cost conscious decision makers as a means to more efficiently attract and assess applicants (Robb, 2013). The use of social media in the staffing process is part of the effort by decision makers to more effectively and efficiently attract and assess applicants via technology. As the use of social media in the staffing process continues to come under the scrutiny of regulatory agencies like the EEOC, the OFCCP, and legislators, employers risk management of its use must be enhanced. Additionally, organizations should continue to assess the return on investment in technology associated with its staffing processes. This assessment should be driven by those managing those systems to make sure objectives are being achieved in a legal, efficient, and effective manner.

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