

Re: CLIENT ADVISORY 2014-04

Minimizing Risks from Screening Candidates Using Social Media and from Workplace Social Media Usage Policies

While employers are more widely using social media and internet searches to vet applicants, at the same time increasing restrictions are being placed on the conduct of these searches.

- The number of employers passing on job applicants because of the candidates' social media content continues to rise, from 34 percent in 2012 to more than half of 2,138 employers surveyed in February and March 2014.
- An increasing number of organizations use social networking sites to research candidates – 43 percent in 2014, up from 39 percent in 2013 and 36 percent in 2012. Almost half use search engines such as Google, and 20 percent do so frequently or always to check out a candidate.
- Additionally, 12 percent of employers plan to start researching candidates on social media, even though they don't currently.

Source: National online survey conducted by the *Harris Poll* for *CareerBuilder*.

Repeating a familiar theme – employers are being singled out for regulation. Employers' access to social media, just a few clicks away for anyone else, is being restricted. Various groups, including the ACLU, are urging even more stringent privacy protections.

For example, on August 1, 2014, New Hampshire became the 18th state in the country – the sixth this year – to bar employers from requesting access to the personal social media accounts of present or prospective employees. Similar legislation has either been introduced or is pending in at least 28 states, according to the National Conference of State Legislatures.

Employers may want to observe the following three tips for using social media in the hiring process:

1. **Defer any checking to later in the application process.** Although seemingly counterintuitive in this electronic and lean staffing era, consider interviewing first. That way the employer is sensitized to any protected class implications before any media screening.
2. **Outsource it.** Consider using a third party to do social media screening adding it as a component of your background check. This requires compliance with the federal Fair Credit Reporting Act, including securing the candidate's approval in advance, and providing a chance to explain or rebut any unfavorable information. The screening agency should have protocols for documenting what is discovered.
3. **Don't ask for passwords.** As noted above, there are ever increasing legislative limitations on asking for passwords. Even absent specific Maine legislation, asking for an applicant's (or employee's) password creates a risk of violating the federal Stored Communications Act.

On the other hand, employ a social media usage policy:

- An employer can regulate what its employees post about the company, right?
- An employer can restrict employees from engaging in inappropriate social media discussions about the company, can't we?

Not so fast. Be cautious here as well.

Our July 2012 guidance recapped the National Labor Relations Board's ("NLRB") Third Memorandum outlining six cases where the NLRB found that social media policies violated Section 7 of the National Labor Relations Act in non-union environments.

A recent NLRB decision reflects that the NLRB continues to insinuate itself into non-union environments using social media policies as the back door.

The NLRB just struck down the following social media policy:

The company supports the free exchange of information and supports camaraderie among its employees. However, when Internet blogging, chat room discussions, e-mail, text messages, or other forms of communication extend to employees revealing confidential and proprietary information about the company, or engaging in inappropriate discussions about the company, management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment. Please keep in mind that if you communicate regarding any aspect of the company, you must include a disclaimer that the views you share are yours, and not necessarily the views of the company. In the event state or federal law precludes this policy, then it is of no force or effect.

The NLRB, with one member dissenting, decided on August 22, 2014, that the above policy violated the NLRA when referenced to terminate two employees for Facebook activities.

One employee was terminated for participating in a Facebook discussion which was critical of the employer's practice which resulted in employees owing more in state income taxes than expected. A second employee was terminated because he had "liked" the postings.

The specific comments included the following:

- "Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money...wtf!!!!"
- "I owe too," and then referred to the restaurant's accountant as "such an asshole."

The NLRB held the above comments constituted "concerted activities" and were "for the purposes of...mutual aid or protection" and were therefore protected under Section 7 of the NLRA. *Three D. LLC d/b/a Triple Play Sports Bar and Grill*, 361 NLRB No.31 (2014).

The employer was ordered to reinstate the employees with back pay and remove any record of discipline.

Employers should consider the following five guidelines:

1. These policies are not static – they should be reviewed and updated annually as the law continues to evolve.
2. Social media guidance should be integrated with other policies, including, for example, those regarding harassment prevention.
3. Each social media policy should be tailored to the specific company and provide examples of what an employee can do rather than listing broad prohibitions.
4. While an employer may ban the disclosure of confidential information, employers should be specific about precisely what cannot be disclosed.
5. Make provision for company ownership of company-focused social media accounts. You don't want a departing employee to hold the only registered name and password.

Prepared by:

Robert W. Kline
Kline Law Offices LLC
P.O. Box 7859
Portland, ME 04112
(207) 772-4900
RKline@KlineLaw.ME