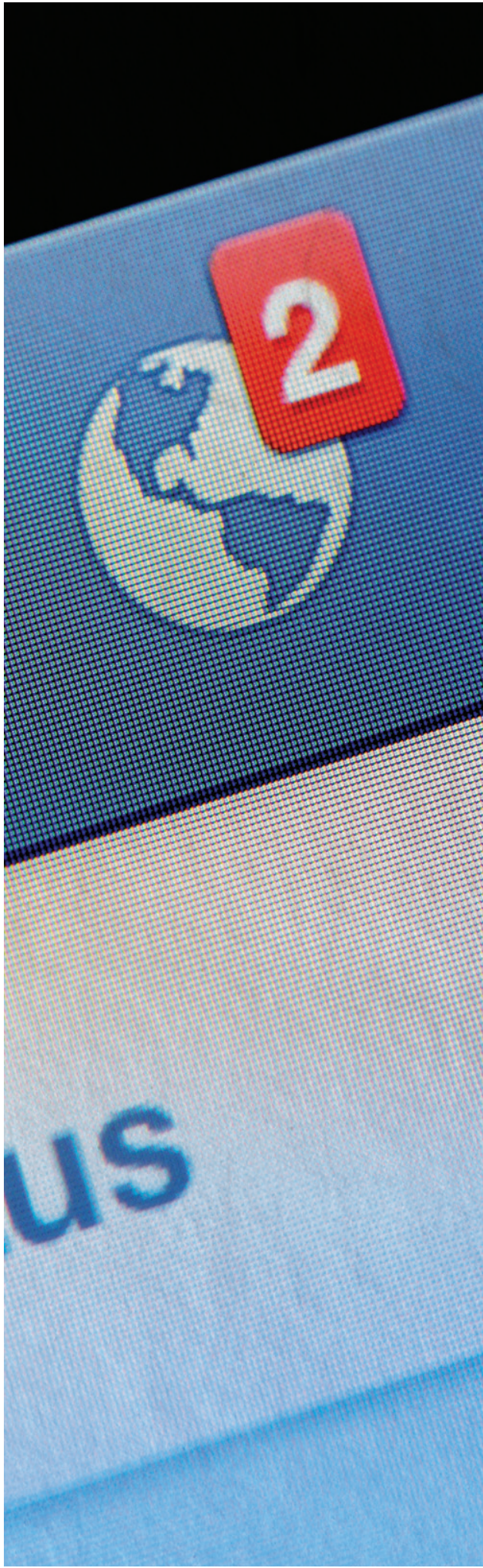


A Primer on Using Social Media During the Hiring Process

by Michael B. Berger, Esq.





This is my second in a series of columns that will focus on the legal issues employers may encounter when hiring and firing employees. My initial column ran in the October 2013 issue of *Cleaner Times* | IWA and addressed the use of criminal background checks. In this article, I discuss an employer's use of social media to investigate prospective employees.

Why Use Social Media

There are only so many hours in the day, and there is only so much that a business owner can do without assistance. As a result, businesses will eventually need to hire employees in order to grow. For a myriad of reasons (financial, legal, and otherwise), it is imperative that business owners make good hiring decisions. Poor hiring decisions can lead to customer dissatisfaction, loss of revenue, lawsuits, and, ultimately, business failure.

In order to make smart hiring decisions and to obtain a positive return on investment from employees, employers need to use as many resources as practical. With the advent of social media and the growth of popular, personal and business networking sites such as Facebook, Twitter, Instagram, and LinkedIn, many employers now use social media to learn more about potential candidates. Although it is beyond the scope of this article, prospective job applicants should keep this in mind and think twice about posting that "selfie" smoking a joint. As I have warned my college-age children, anything you post is permanent in the Digital Age.

Proper and Improper Uses of Social Media

Generally speaking, the laws that are applicable in other contexts of the hiring process are also applicable to an employer's use of social media to screen applicants. In order to help illustrate what is proper and what is not, I will use a hypothetical example involving "Main Street Distributors," which is looking to hire an outside sales person.

Main Street Distributors has advertised the position as follows: "Local pressure washer distributorship seeks a full-time, outside sales person. Candidates should be honest and cheerful; willing to apply himself/herself to learn distributorship's products and accessories and have good, interpersonal skills. Previous experience in outside sales for a pressure washer distributorship is a plus. Main Street Distributors is an equal opportunity employer." Main Street Distributors has narrowed its pool of prospective employees to 10 candidates and wishes to narrow the interview pool to five through social media screening.

Here are some examples of using social media properly:

1. John Smith's Facebook profile is open to the public. In his profile, Smith brags about how he got away with embezzling money at his last job. Main Street Distributors eliminates Smith from its list of candidates.
2. Karen Jones posts a picture on her Instagram account (open to the public) in which she is seen snorting cocaine at a party. Main Street Distributors no longer considers Jones a viable candidate.
3. Jack Johnson has posted on his LinkedIn account several endorsements from customers of his current employer complimenting Johnson on his integrity and customer service skills. In addition, his closing sales stats are impressive. Main Street Distributors takes this information into account and offers Johnson an interview.

Here are some examples of using social media in an improper or illegal way:

1. Jill Brown has posted on her Facebook account that her date of birth is June 1, 1950. Main Street Distributor's hiring coordinator decides to exclude Brown from further consideration because they want to hire "younger" candidates.
2. Pablo Sanchez has listed in his Twitter profile that he is from Mexico. Main Street Distributors

against the grain of the distributorships hiring or business philosophy? The answers to these questions are not clear and may depend on applicable local, state, and federal laws. As always, it is best to consult with your legal counsel in order to determine how you may proceed.

Can Main Street Distributors Require Candidates to Provide Passwords?

While it is generally appropriate for employers to review the social media accounts of job applicants, some

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excludes Sanchez from further consideration because it wants to hire only "Americans."

These examples are rather clear-cut and highlight that social media may be used to help make hiring decisions based on bona fide character and other traits that are directly related to the prospect's ability to perform the job. They also illustrate rather obvious examples of using social media in an illegal, discriminatory fashion. It follows that social media reviews should not be used by hiring personnel to exclude candidates or otherwise influence hiring decisions based on "protected-class" factors such as age, gender, nationality, religion, ethnicity, etc.

Other potential uses of social media are less straightforward. For example, would it be appropriate for Main Street Distributors to exclude obese or unattractive candidates based on photos posted on the candidates' social media accounts? Would it be proper for Main Street Distributors to exclude cigarette smokers or candidates that engage in other lawful conduct that might go

employers have taken the next step by requiring candidates to provide their social media account passwords so that the "private" (or "friends only") sections can be accessed. Is this legal or an inappropriate invasion of the privacy rights of candidates?

In late August, Governor Chris Christie signed into law a bill that prohibits New Jersey employers from requiring job candidates (or current employees) to turn over their user names and passwords to personal, social media accounts. At least twelve other states—Arkansas, California, Colorado, Illinois, Maryland, Michigan, Nevada, New Mexico, Oregon, Utah, Vermont, and Washington—have similar laws on the books. Many other states have bills pending that would outlaw this practice, including my home state of Florida.

While the practice may technically be legal in other states, I would highly recommend that employers avoid requiring prospective or current employees from divulging information needed to access the "private sections" of their personal social media accounts.

Recommendations for Employer Use of Social Media in the Hiring Process

For an employer who decides to use social media in the hiring process, I would make the following recommendations:

1. Do not use "protected" information (e.g., age, religion, nationality, etc.) learned through social media (or otherwise) when making hiring decisions;
2. Consider waiting to use social media searches until after you meet a candidate "face-to-face;"
3. Have someone other than the hiring person do the social media screening;
4. Provide the person doing the social media screening with specific (and legal criteria) on what they should be looking for on candidates' social media sites; and
5. The social media search process should be standardized and not vary from one prospect to another.

If you are unsure as to whether and how your company may use social media when hiring a new employee, please consult (in advance) with your company's attorney and weigh the pros and cons of using social media checks to establish consistent and legal policies and procedures.

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