

## Can employers still rely on social media for employee background checks?

**For many employers, using social media to screen job applicants has become an intrinsic part of the vetting process – and for good reason. In today's world, there is no better way to get a well-rounded sense of a job applicant's style and strengths than by reviewing his or her online presence.**

Yet this type of screening has become problematic – and for good reason as well. Laws regulating the practice are becoming more prevalent, and employers should consider themselves on high alert if their social-media policies don't conform to the rules of today – as well as those of tomorrow.

On October 12, 2012, Maryland became the first state in the nation to start implementing its new social media law, which prohibits employers from making applicants or employees disclose their personal social media user names or passwords – either as a condition for being hired or after they are on the job.

Since the Free State passed its law, five additional states (Delaware, Illinois, Michigan, New Jersey, and California) have passed similar legislation, and several other states are fine-tuning their own versions. The federal government has been weighing in, too: the Social Networking Online Protection Act was introduced into the U.S. House of Representatives three weeks after the Maryland law was passed in April 2012.

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Concurrent with these actions, the Equal Employment Opportunity Commission (EEOC) announced several anti-discrimination regulations of its own in 2012, many aimed at employers using social media as part of their background checks for job applicants. The EEOC explained that the use of social media for background screenings can result in unintentional bias against applicants based their gender, race, religion or other protected characteristics.

These new regulations, combined with the EEOC's more aggressive posture in general against all potential discrimination, should serve as a double warning to employers who may not have reviewed their social-media policies in a while.

The EEOC announcements followed a widely circulated 2011 letter from the

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## About the Firm

In 2012 Shapiro Sher Guinot & Sandler was named the top medium-size law firm in Maryland for "Business & Transactions" by Super Lawyers, a division of Thomson Reuters. Founded by renowned sports lawyer Ronald M. Shapiro in 1972, the firm represents clients in numerous practice areas, including employment law, litigation, corporate, real estate, tax, and banking.

Shapiro Sher Guinot & Sandler's **Employment Law Group** is co-chaired by **Eric R. Harlan** and **Renée Lane-Kunz**. They are prepared to assist organizations with a wide spectrum of employment law matters, including recruiting and hiring practices, employee handbooks, discrimination matters, executive compensation, wrongful termination claims, and issues involving Title VII of the Civil Rights Act, The Family and Medical Leave Act, and The Americans with Disabilities Act. The Employment Law Group also assists with employment, severance, non-disclosure and non-compete agreements, among other matters.

Renée Lane-Kunz offers ongoing employment counsel to small and mid-sized companies as well as schools and institutions. She works closely with clients to help them anticipate and avoid litigation and regulatory complications. From handbooks to employment agreements, to general HR policies, she is ready to provide employers the tools they need in today's legal environment. As she brings to her practice extensive HR management experience in the hospitality industry, she fully appreciates the concerns of business owners.

Eric R. Harlan is a trial lawyer dedicated to the vigorous representation of clients in litigation. He has achieved favorable results in employment-related matters including claims involving violations of federal and state anti-discrimination laws, actions to enforce non-compete and non-solicitation agreements, wrongful discharge, and wage-and-hour litigation.

Federal Trade Commission confirming its position that social-media screening is legal but that companies providing social-media-screening services – and the employers who hire these companies – are subject to the same regulations as other background-checking companies under the Fair Credit Reporting Act. That means, among other requirements, employers must get permission from job applicants before conducting an Internet search and must provide applicants the findings, if requested.

## Social Media Screening Policies

So, is it possible to actually use social media to find the right employees without running afoul of social-media-screening pitfalls? Yes, but only with the right social-media policies in place and strictly followed by all human-resource personnel. First, employers should take a close look at their social-media screening policies to ensure that they are in compliance with federal regulations as well as those of their state and local jurisdictions. Given that protocols and regulations involving social media are constantly changing, employers should stay abreast of the latest updates at all levels.

## Implementing Policies Consistently

Second, once a business has a social-media screening policy in place and is confident that this policy is well within all regulatory compliance, the next step is to carry it out consistently. In other words, any search conducted on one applicant should be conducted on all applicants. Or, if the decision is made that, say, the top five candidates (based on resume) will be screened further, the same search should be conducted on all five candidates.

Assume, for example, that something potentially troubling shows up in an Internet search on an otherwise qualified applicant – perhaps a lien from a prior business or other financial red flag -- and the screener wants to delve further. That extra step might put an employer into dangerous terrain. If the extra screening yields information on that applicant's chronic medical condition or unpopular religious belief or sexual preference, the employer may now find himself and his business in the position of knowing too much. Now, if he doesn't hire that candidate, he may find himself accused of rejecting that candidate based on that tangential information rather than the financial troubles that raised the concern in the first place.

## Building a “Fire Wall”

One way to minimize this threat is to implement a kind of “fire wall” between those who screen applicants and those who hire them. While this may not ensure that what is found online won't affect the hiring process altogether, it certainly helps mitigate the problem. It also shows the EEOC and other regulators that the employer is making a good faith effort to prevent inadvertent discrimination. Using this approach, screeners would be provided a list of criteria about which to screen -- focused exclusively on relevant job experience -- and the applicants who meet the criteria would have their resumes forwarded to the next level. Obviously, race, religion or other immaterial facts would not have a place in the list of qualifications.

## The Problem with Ignoring Social Media

With the new rules and regulations surrounding social-media screening, some employers -- particularly small businesses without large legal and hiring departments -- might be inclined to go off-line altogether and opt in most cases for the traditional route of applicant screening via resume and references. Tempting as that might be, it may not spare an employer from a run-in with the law. With the Internet so accessible and ubiquitous, the expectation is that employers will do at least some social-media-based due diligence on the people they hire. If an employer ever faces an allegation of negligent hiring, courts may expect to see that the employer has used all the resources available to weed out inexperienced or reckless candidates for the position.

Despite the pitfalls that must be navigated in the world of social-media screening, failure to vet the right candidates using the social-media resources available may no longer be an option. A safer bet is to make sure the process an employer uses is one that meets the challenges of today.

*For more information about the use of social media in the hiring process, please contact Ms. Renée Lane-Kunz at [rlk@shapirosher.com](mailto:rlk@shapirosher.com) or at 410-385-4207.*