



INFORMATION FOR CLIENTS OF TEXAS ATTORNEYS

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Should You Use Social Media to Hire?

By TRAVIS CRABTREE



Social media provides hiring personnel an inordinate amount of information about potential hires through sites like LinkedIn and Facebook. For better or worse, there have been no cases brought by someone not hired based on something researched on the web. What do you need to do to make sure you are not the first?

Should my company restrict certain websites when it comes to hiring?

Do not restrict using the web's resources. Make sure those resources are used responsibly. Obviously, you cannot make hiring decisions based on things like race, gender, age, religion, or marital

or family status. You cannot even ask questions that would solicit this type of information, which is not apparent on

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With the increased information comes increased responsibility to not misuse it.

most resumes. That kind of information is available through social media. Some Facebook profiles include family, reli-

gion, political, and other information you are not supposed to consider. Even LinkedIn profiles reveal race, gender, and age.

As long as the hiring decision is not based on one of the forbidden characteristics, there is nothing unlawful about simply knowing the information. After all, you will learn the person's race, gender, approximate age, and possibly religion or marital status when they come in for an interview.

Problems could arise, however, if you use social media to prescreen candidates before the interview. If you use a social media site to find information about a candidate's race, gender, age, or religious



affiliation and used that information to eliminate them from your candidate pool, you could face liability.

Can my company search an otherwise private profile through a “friend of a friend”?

Many social media profiles restrict access to the general public. There could be temptation to access these profiles through a friend of one of the candidates or through the creation of a fake profile. It is unlikely someone would sue because a prospective employer found some negative information through less than noble means. There have been cases, though, where employers and others have wrongfully accessed what was posted to otherwise private forums and profiles. For example, a manager of a Houston restaurant found out his employees created a closed MySpace forum complaining about the restaurant. The manager coerced a hostess to give him the password to her account. After reviewing the site, he fired a couple of the employees, who later sued. The jury ruled the company wrongfully terminated the employees, citing the unauthorized access to the forum.

You would also have to be concerned about the Federal Computer Fraud and Abuse Act (CFAA). The CFAA prohibits exceeding authorized access of databases to obtain information. Hackers are the target, but creative lawyers are applying it to violations of a website’s terms of service or obtaining information through fake profiles.

Is my company required to utilize the tools available on the web to research potential hires?

Although social media is ubiquitous, the law does not automatically require you to do Internet searches of every hire. In certain circumstances, a company could be considered negligent for not doing basic Internet research. For exam-

ple, a quick Internet search would reveal that a candidate is part of a hate group and has been violent to others. If he or she then hurt a fellow employee, the company may be negligent. If the new hire works with children and a simple search reveals the person has inappropriate pictures of him- or herself with young people, then a jury could hold you liable if that employee acts in an inappropriate manner.

What if my company actually uses the information to decline employment?

Nothing prevents you from using the information you find on the web, subject to discrimination rules. Even without overt discrimination, you should make sure you are not being discriminatory. You may decide not to hire a non-white candidate who has pictures on his or her social media page — such as photographs that reveal inappropriate behavior at a nightclub — because that is not the image that you want associated with your company. However, if you hire a white candidate who has the same kind of pictures on their profile, have you discriminated?

If you use an outside firm to find candidates for you, you need to make sure you don’t violate the Fair Credit Reporting Act. While usually applicable to credit reports, it also governs any employment background checks done by a third-party. Therefore, if a recruiting firm uses the web to perform a background check, the candidate must be notified if the report is used to make an adverse decision.

Unsurprisingly, not everything published on the Internet is true. If an employee researches a potential hire through the Internet and then forwards false disparaging information to others, there could be defamation liability for “republishing” the libelous information.

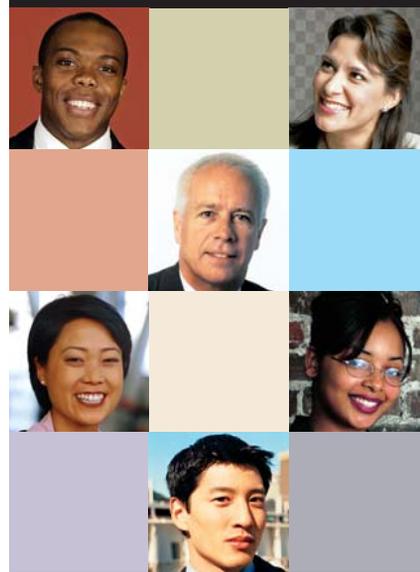
The web is both invaluable and a trap

for the unwary. More candidates are more willing to share personal information about themselves. As a result, the Internet is a goldmine of information to investigate potential hires. With the increased information comes increased responsibility to not misuse it. ✪



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