

# HAVE YOU SEEN HIS FACEBOOK!? Two Social Media Pitfalls Employers Must Avoid

Article By:

Jonathan E. Clark

---

**Facebook, YouTube, Instagram, Snapchat, Twitter**—now ubiquitous symbols of interpersonal communication -- mere years ago were fledgling ideas or unknowns. Today, social media is everywhere, and has brought countless new challenges for employers. However, businesses that successfully navigate two key areas of this electronic landscape will be at a distinct advantage.

**The Hiring Process.** Social media has had a tremendous impact on applicant screening. Recent studies have shown that over 40% of employers use one or more social media platforms to obtain information about prospective candidates during the hiring process. In addition, 43% of businesses report that social media searches resulted in information that led them not to hire an applicant. The benefit is clear: information about a potential employee can be gathered quickly and cheaply.

However, the ability to gather that much substantive information about a prospective employee also comes with risk. For example, applicants' social media profiles often display information concerning certain legally-protected characteristics on which hiring decisions cannot be based, such as an individual's religion, gender, disability, marital status, national origin, or race. Furthermore, some states prohibit decisions based information that can be found on social media sites, such as tobacco use, political activity, or gun ownership. An EEOC press release from 2014 crystalized the issue when stating, in part:

The use of sites such as LinkedIn and Facebook can provide a valuable tool for identifying good candidates by searching for specific qualifications...[b]ut the improper use of information obtained from such sites may be discriminatory since most individuals' race, gender, general age and possibly ethnicity can be discerned.

Consequently, employers should take care when using social media in the applicant screening process so as not to generate evidence of discrimination if a candidate is not hired. One practice is to provide a "buffer" layer between the individual responsible for hiring candidates and those charged with reviewing an applicant's social media presence for legitimate, non-discriminatory signs of concern. Given the trend of performing internet searches on potential employees, businesses without any safeguards should consult with counsel to implement strategies to effectively screen applicants while simultaneously minimizing the risk of litigation.

**Workplace Investigations.** Social media is equally relevant in the context of workplace investigations. Imagine this scenario: An employee is accused of making racially-charged comments to another co-worker after hours, out of the office, and via Facebook. The accused denies it. Is this a personal or a workplace dispute? As the employer, can you be responsible if you choose not to act? According to the EEOC, social media can become an ‘extension of the workplace.’ Indeed, the EEOC issued the following guidance in March 2014:

Even if employees post harassing or derogatory information about coworkers away from the workplace...an employer may be liable for a hostile work environment if it was aware of the postings or if the harassing employee was using employer-owned devices or accounts.

Accordingly, employers who wholly ignore the conduct of their employees on social media may increase their exposure to costly litigation. Thus, any employer engaging in a workplace investigation using social media must be cognizant of the following issues:

- **The Stored Communications Act (“SCA”).** The SCA prohibits the intentional and unauthorized access to a facility where electronic communication service is provided—and has been held to encompass individual’s social media accounts. A key exception to the SCA is employee consent. Accordingly, employers who get authorization from employees via, for example, a technology monitoring clause in an employment agreement, likely would not run afoul of the statute.
- **State Regulations.** State regulations can have dramatic and varying effects on employer investigations into employee misconduct, which presents a highly-confusing roadmap for employers to navigate. For example, some states prohibit employers from accessing an employee’s social media account **even** in the context of an investigation into workplace misconduct. Other states, such as Colorado and Maryland, contain an investigative exemption only in certain types of alleged misconduct (such as fraud and trade-secret theft).

Employers should not ignore social media as an investigative tool—especially if allegations of misconduct stem from social media activity. Indeed, doing so is likely to exacerbate the risk of litigation. Rather, businesses inexperienced or unfamiliar with workplace investigations involving social-media should seek guidance from experienced and well-qualified counsel familiar with both the myriad of issues presented by this process.

© Polsinelli PC, Polsinelli LLP in California

---

National Law Review, Volume VII, Number 66

Source URL: <https://natlawreview.com/article/have-you-seen-his-facebook-two-social-media-pitfalls-employers-must-avoid>