



EMPLOYMENT



*Using Social Media to Make Employment Decisions*



*By Clifford S. Anderson, Esq.*

With the advent of Facebook, LinkedIn, MySpace, Twitter, and other content on the internet, it is inevitable that most employers will make use of such information to screen job applicants, monitor existing employees, and ultimately make employment decisions. For employers, the question is whether such developments are a positive innovation or a new risk that is best eschewed by them rather than embraced.

The prudent employer probably should make the screening of social media part of their overall management of the human resources function even if doing so is fraught with its own set of challenges. There are several ways, however, that employers can obtain the benefits of social media without creating unnecessary risks for their company.

First, it is critical that employers do not lose site of the touchstone of virtually every employment decision they make – treat similarly situated employees similarly. Accordingly, when choosing to review social media sites for employment-related decisions, the employer should review the same sites for all individuals under scrutiny and collect the same information for them unless there is a legitimate business reason or set of factual circumstances justifying a more unique review.

Second, the focus of any internet searches should be job related. Inevitably, much of the information found on social media sites is not job related. The easiest way to separate the wheat from the chaff is to utilize a person not directly involved in the employment decision-making process to screen on line material and assemble only pertinent job related information (e.g., confirmation of educational background, work experience, and similar information) for those who are making the employment decision.


Third, certainly any research efforts by employers must be legal. Thus, employers should not engage in any deceptive conduct such as "false friending" an applicant on Facebook to gain access to private information that an individual may only wish to release to known persons with access to the individual's social media sites.

Failure to follow the above simple rules creates potential exposure for discrimination claims, invasion of privacy claims, and possibly violations of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 et seq. Such claims are probably remote from job applicants who are never hired because they may never learn of the improper use of social media to screen their candidacies, causation may be difficult to prove, and damages may be speculative. This may be less true, however, with regards to the use of social media to monitor the activity of existing company employees who are then subjected to discipline and learn that their employer's review of their social media sites led to their discipline.

The most practical solution to control the use and abuse of social media by existing employees, and to provide an

employer cover when it is necessary to monitor such use, is to draft an appropriate social media policy as part of the employer's overall computer and internet use policies. Among many considerations, such a policy should address any limitations on employee use of social media during working hours and using company equipment, make clear that there is no reasonable expectation of privacy regarding data that is retained on employer-owned electronic devices and computer equipment, and, importantly, set expectations for what is, and is not, appropriate content about the company that employees may post on the employee's own social media sites. Unsurprisingly, disgruntled employees often use their own social media sites to vent about their employment situations or engage in even more harmful conduct detrimental to their employer (e.g., disclosing proprietary information, engaging in defamation, etc.).

An emerging issue is the degree to which employers can regulate such content. For example, in a recent National Labor Relations Board case, in settlement of that action, a company agreed to revise its overly-broad social media policy to ensure that it did not improperly restrict employees from discussing their wages, hours, and working conditions with co-workers and others while not at work (something allowed by federal labor law), and that the employer would not discipline or discharge employees for engaging in such discussions.

So in the end, employers should design balanced social media policies that can be consistently applied and that serve the goals of employers to manage their workforces while not being too restrictive of employee rights to speak about workplace issues. 

### *The ABC's of Non-Compete Agreements in Tough Times*



*By John J. Steffenhagen, Esq.*

The economic downturn resulted in a collision course for non-compete agreements. On the one hand, companies—more than ever — seek to value, protect and safeguard client relationships, including those protected by non-compete agreements. On the other hand, many employees feel the pressure of economic security and remain willing to accept any greener pasture—even at the risk of violating a non-compete agreement.

The competing motives may be hard to resolve, but the law is not. Employers can ensure enforcement of their agreements by following the basic ABC's of enforcement.

**Step A: Keep in Mind that a Non-Compete is a Contract.** This step sounds simple, but is perhaps the biggest bone of contention when non-compete cases wind up in court. No one would expect to walk out of a big-box retailer without paying for the goods. There is no free lunch, as the saying goes; you get what you pay for. By the same token, no employer should expect to walk out of court without proving that it gave value in return for a non-compete. This value—called "consideration" by courts—can be a range of things, from granting the job in the first place, to cash or other benefits, or even (in some cases) the continuation of a job.

The key point is to think of the consideration before the non-compete is signed, rather than after the employer heads to the courtroom. With a little advance planning and some sound legal advice, employers can head off the most common challenge to non-compete agreements.


**Step B: Lessons in Not Being Greedy.** Employers are sometimes tempted to believe that "more is better" when it comes to non-compete agreements. Some figure that if a one-year non-compete is good, two must be better; if the seven county metro area is a reasonable restriction, than a nationwide restriction would provide even better protection.

These are the employers who take lumps in court because they forget a simple fact: at the end of the day (or case), a judge will determine what is necessary to protect the employer's interests. For example, the court will examine an employer's primary trade area to figure out the reasonable scope of a geographic restriction; the court may similarly examine the employer's client base and industry to determine the length of a restriction.

In other words, draft the non-compete with an eye toward enforcement by the court, rather than a "more is better" approach.

**Step C: The Value of Consistency.** Steps A and B are of little use unless employers consistently observe Step C: uniform enforcement of its agreements. In other words, courts are not apt to buy an argument that a non-compete is

necessary, if other employees hold the same position without a non-compete. Similarly, a court will scratch its head if an employer seeks enforcement against one employee, while looking the other way while a non-compete is violated elsewhere. Put simply, if an employer requires non-competes, it should be a given that the agreements are enforced.

None of these ABC's are complex; they are common sense. However, each step shares one similarity: the value of advance planning. Sound legal advice and careful consideration by an employer—before the agreement is handed to an employee—remain the keys to success. 

### *H&J News*

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