SOMEBODY’S WATCHING ME: DEFINING BORDERS IN THE AGE OF SOCIAL MEDIA

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DISCLAIMER

• The views presented in this presentation are my own
• I am not providing legal advice
• Consult an attorney before taking any action (I mean any action)
WHAT WILL BE COVERED

• The risk and “rewards” of reviewing job applicants’ social media accounts during the hiring process
• How and when it is appropriate to review employees’ social media accounts
• How has recent changes in global and domestic privacy laws impacted the use of information contained on social media platforms

I ALWAYS FEEL LIKE SOMEBODY'S WATCHIN' ME AND I HAVE NO PRIVACY
-KENNEDY "ROCKWELL" GORDY
THE FACTS

• Facebook
  • Total Number of Monthly Active Users: 2.23 billion (as of 9/18)

• Twitter
  • Total Number of Monthly Active Twitter Users: 326 million (as of 10/18)

• LinkedIn
  • Total Number of LinkedIn Users: 590 million (as of 12/18)

APPLICANT SCREENING

• According to Research by YouGov, up to 80% of Employers Check an Applicant’s Social Media Accounts as Part of their Recruitment and Onboarding Procedure

• Why do Some Employers not Check an Applicant’s Social Media Accounts
  • They were concerned with legal risks or discovering information about protected characteristics when perusing Applicants’ social media profiles
APPLICANTS SCREENING “REWARDS”

- Are There Any Red Flags (e.g., Posts Saying Electric Cars are Fatally Flawed, but is Applying for a Position at Tesla)
- See if Applicants are Engaging with your Brand on Social Media
- Writing Samples in Past Posts
- Assessing other Skills (e.g., Ability to Network –Applying for a Sales Position)

APPLICANTS SCREENING RISKS

- Discrimination Claims
  - Employers will normally uncover information about the Applicant’s protected characteristics on the user’s profile page through photos, wall posts and affiliations
    - Using this information can become fodder for a discrimination claim (the lawsuit writes itself)
- Consistency/Reliability of Information
- Can you Inadvertently Stumble into a Fair Credit Reporting Act Claim
  - Background checks and consent
MANAGING RISKS AND “REWARDS”

• Establish a Policy
  • Acceptable use of information
  • Consistent application
• DO NOT Request Applicants’ Usernames and Passwords
• Have One Organization (e.g., Human Resources) Responsible
• Document Decisions
• Review Social Media Profiles Later in the Process

... PRIVATE EYES
THEY'RE WATCHING YOU
THEY SEE YOUR EVERY MOVE
-DARYL HALL, SARA ALLEN, JANNA ALLEN AND WARREN PASH
REVIEWING EMPLOYEE’S SOCIAL MEDIA ACCOUNTS

DRIVERS

- Push for Continuous Monitoring
- Managing Risks
- Detection of Insider Threat
- Theft of IP
CAUTION

• National Labor Relations Act (“NLRA”): Section 7 of the NLRA prohibits employers from enacting policies that stifle or prevent employees from engaging in “concerted activity” for “mutual aid and protection.”

• National Labor Relations Board -two main points to consider:
  • Employer policies should not be so broad that they prohibit the kinds of activity protected by federal labor law, and
  • An employee’s comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees

CAUTION

• An Employer is Permitted to Monitor Emails When the Monitoring Serves a Legitimate Business Interest
  • Employers should be aware of privacy concerns when they monitor employees’ emails

• Key Legal Considerations:
  • The Wiretap Act: Permits an employer to intercept electronic communications where there is a legitimate business reason for the interception
  • Stored Communications Act: Congress passed the SCA to prevent communication providers from divulging private communications to certain entities and individuals

• Employers Could Violate the Wiretap Act or the Stored Communications Act by Accessing Private Communications
BROKEN RECORD

- Establish a Policy
  - Acceptable use of information
  - Consistent application
- Have One Organization (e.g., Human Resources) Responsible
- Document Decisions

MONITORING RISKS

- Errors
- Bad Publicity
- Violations of Law
  - Fair credit reporting statutes
  - Non-discrimination statutes
  - Privacy-related claims
  - Labor laws (including represented workforce related laws)
SOCIAL MEDIA USE POLICY

• A Policy Must be Careful not to Infringe on Employee Rights, Including the Right to:
  • Participate in legal off-duty and off-site conduct
  • Organize
  • Protest working conditions
  • Report illegal activity

• A Policy May Lawfully Restrict:
  • Unlawfully competing with their employer
  • Disclosing trade secrets and other confidential information
  • Disrupting employer relations

• The Policy May Also Include an Anti Harassment Provision

• Tread Carefully when Dealing with a Represented Workforce

PEOPLE ALWAYS TURN AWAY
FROM THE EYES OF A STRANGER
-CHRISt DEGARMO AND GEOFF TATe
SHIFTING LANDSCAPE

- Baseline on Privacy
- U.S. - U.S. Constitution and Sectorial Approach (HIPPA, FCRA, etc.)
  - Generally, no expectation of privacy at work
  - Can contract “away” privacy
- E.U. – Fundamental Right – General Data Protection Regulation (GDPR)
  - Generally, there is an expectation of privacy at work
  - Your personal data is always yours

GDPR AND SOCIAL MEDIA

- What “Changes” Under GDPR?
  - Recruitment (particularly the use of social media).
  - In-employment screening (particularly the use of social media).
  - Monitoring usage in the workplace
  - Monitoring usage outside the workplace (including home and remote working, bring your own device (BYOD) policies, mobile device management and wearable devices such as fitness trackers)
GDPR AND SOCIAL MEDIA

• Employers Should NOT Assume that they are Allowed to Inspect an Applicant’s Social Media Profile During the Recruitment Process
  • Even if the profile is publicly available
• A Legal Basis is Required Prior to Any Inspection
  • Legitimate Interests or Consent
  • Question to ask: Is the profile related to business activities?
    • Only data that is necessary and relevant to the job may be collected/viewed
• The Applicant Must be Notified in Advance
• Once an Individual Becomes an Employee, Screening of Social Media Profiles Should Not Take Place on a Generalized Basis (should be targeted and the should be a detailed policy – see prior policy slides)

CALIFORNIA CONSUMER PRIVACY ACT & OTHER U.S DEVELOPMENTS

• California Consumer Privacy Act
  • GDPR like approach
  • Applies in the employment context
  • Effective in 2020
• Federal Privacy Law
  • Several versions
  • Not clear what will be covered
QUESTIONS?