



# 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  
-CHRIS 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 Interest 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?