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# the staff management report

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## Social Media and Technology Issues Pervasive in the Workplace

The use or misuse of social media and technology in the workplace is pervasive. Employers face many challenges in this rapidly changing area, more challenges than we can address in this edition of the Staff Management Report.

We can only hope to highlight some of the most important concerns. We are hopeful that armed with this information, you will be in a better position to spot issues and address them before they turn into problems.

We will review -

- Should an employer use social media sites for applicant background checks?
- Do I need a social media policy, and if so, what should it contain?
- What restrictions are placed on an employer's use of technology to monitor employees?

If we can help with these or any of your other HR management and consulting needs, please don't hesitate to contact us.

STAFF MANAGEMENT, *Inc.*  
5919 Spring Creek Road  
Rockford, IL 61114  
815.282.3900  
815.282.0826 (fax)  
www.staffmgmt.com

## Social Media and Background Checks

By: Samuel J. Castree, Jr., Senior Vice President & General Counsel

I often hear the question, "should I use social media to conduct applicant background checks?" This may be the wrong question. The fact is many employers already research applicants and employees on line. The more relevant question today may be, "I am going to use social media to research job applicants, what should I do to protect my company?" Many argue that if it's on the web, then it's public information and they have a right to look at it. While there is some truth to such a statement, there are still risks involved. If you make the conscious decision to use social media and other internet sources in the hiring process, then you need to take steps to protect yourself against problems.

**First**, develop a policy to guide your organization. A well thought out policy will assist your organization in avoiding many of the pitfalls associated with social media sites, including those listed below. But, be consistent. Like any HR policy or procedure, the problem often is not the policy itself, but the inconsistent application of the policy. Don't single out a person and only check that person's Facebook® page. If you Google® one finalist for a position, Google® all of the finalists.

**Second**, don't do indirectly what would be improper or illegal to do directly. You wouldn't ask an applicant about his or her religion, age, national origin, or other protected status. Therefore, don't use social media to pre-screen applicants based on these illegal factors. To protect yourself against such allegations, if you decide to use social media, only check sites *after* you have interviewed the applicant. Waiting should help defeat an inference that you used a social media site to discover information, such as age or race, which would not be on a resume or application.

**Third**, don't go where you're not invited. If you need a password or an invitation to access an applicant's Facebook® page or other website, and you have neither, then the site is off limits. Also, don't try and get a password surreptitiously. If you have to cajole a password from a co-worker to get access, then you really don't have anyone's consent to enter the site.

**Fourth**, recognize the sometimes limited value of information you retrieve from the web. You want to make a decision based on the best available information, but are you confusing two different people with the same common name?

**Finally**, recognize that the use of social media sites involves numerous legal issues, and those issues are not always obvious. For example, if you use a third party to check social media sites, does that party comply with the Fair Credit Reporting Act notice and disclosure requirements?

Social media can be a powerful business tool, a tool an increasing number of employers are using to check applicant and employee backgrounds. Your responsibilities regarding this tool are evolving everyday. Plan carefully and thoroughly now to optimize your use of social media, while taking steps avoid problems later.

## Drafting the Social Media Policy

With the issuance of recent regulations by the Federal Trade Commission regarding the use of testimonials (see legal summary opposite column), most businesses likely need to develop a social media policy. If you Google® “drafting social media policy”, however, and you will get literally hundreds of thousands of web pages to review. There are obviously many issues to consider when preparing a policy. Here are a few sample ideas of where to start.

**Scope.** First, give consideration to the scope of your policy. How does your organization define “social media” (blogs, LinkedIn®, YouTube®)? Will it be part of a larger computer usage policy (e.g. email usage), or a stand alone policy? Will it incorporate intellectual property concerns (who has authority to start a Facebook® page featuring your company)? Will you need multiple policies for different groups of employees? (General employee concerns versus employees who have responsibility for the company’s marketing function or social media sites).

**Other Issues.** Once, you’ve worked through the scope issues, here are a few more important matters to consider.

- Will you encourage or discourage social media use?
- How or will the policy address behavior on and off the job?
- What is the impact on other employment policies, especially your sexual harassment policy?
- How do employment issues fit with other business goals, such as marketing and brand identification?

**Must Haves.** Finally, there are a handful of do’s and don’ts that probably should be considered for all policies:

- Obey the law when using social media.
- Do not allow employees to represent themselves as a company spokesperson unless authorized to do so.
- Ensure that confidential information remains confidential. Confidential information is off limits to social media.
- Avoid defamatory or scandalous statements.
- Make sure that employees disclose their connection to their employer any time they endorse their employer’s products services.
- Follow this simple social media “golden rule” - be professional at all times.

## HR/Legal Issues and Computer Usage

There are a great number of legal issues impacting HR and the use of technology. Here is a *brief* checklist of some of the more important issues to keep in mind. More detailed analysis is advised before preparing a policy.

☑ **Electronic Communications Privacy Act (ECPA).** This federal law prohibits the unauthorized interception of certain electronic communications, such as email or telephone calls. There is an exception when at least one of the parties to the communication has given prior consent (express or implied) to the interception.

☑ **Stored Communications Act.** This federal law prohibits an individual from intentionally accessing without authorization a facility through which an electronic communication service is provided; or intentionally exceeding an authorization to access that facility. In short, an employer may violate this statute if it accesses an external email or website without consent or authorization.

☑ **Guides Concerning the Use of Endorsements and Testimonials in Advertising.** These recent regulations published by the Federal Trade Commission (FTC) protect consumers from deceptive endorsements and testimonials. The regulations restrict employees’ use of social media to “endorse” products or services offered by their employers. Any time an employee endorses an employer’s product or service (e.g. on a blog, tweet, or Facebook® page), the employee must disclose the employment relationship.

☑ **Personnel Record Review Act.** This Illinois law prohibits an employer from gathering a record of an employee's associations, communications or non-employment activities. Though not yet addressed by the courts, could this law prohibit an employer from monitoring an employee’s Facebook® page? There are exceptions for activities occurring on the employer’s premises, those constituting criminal conduct, or conduct that “may reasonably be expected to harm the employer's property, operations or business.” Other states have similar laws.

☑ **State Eavesdropping Statutes.** Like the federal ECPA, many states have laws prohibiting the monitoring of electronic communications. In Illinois, for example, the Illinois Eavesdropping Statute prohibits the knowing and intentional use of “an eavesdropping device for the purpose of hearing or recording all or any part of any conversation or intercepts, retains or transcribes electronic communication.”

The decision of how or if an employer monitors email, social media, or other electronic communications must be made carefully. Make sure your company understands the restrictions placed on such activities by federal and state law.

The Staff Management Report offers information on human resource and related topics. Materials presented are for informational purposes only. We address topics in a general manner that may not apply to individual circumstances. Consult your human resource or legal advisors for advice pertaining to your specific situation.

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