

What you know can hurt you

Gleaning personal info from social media can lead to discrimination charges

By KRISTEN D'ANDREA

The number and complexity of issues related to social media in the workplace is escalating as sites like LinkedIn and Facebook increasingly become acceptable business tools.

To be sure, social media "has changed the whole ballgame in terms of headaches for employers," said Chris Gegwich, a partner in the labor and employment group at Nixon Peabody in Jericho. "Today, not only do employers have to be concerned with what's going on within the four walls of their workspace, but also what's going on online."

In fact, the Equal Employment Opportunity Commission recently held a public meeting on the impact of social media on employment discrimination. During the meeting, Jonathan Segal, representing the Society for Human Resource Management, noted 77 percent of companies were using social networking sites to recruit candidates for specific jobs, up from 34 percent in 2008.

Employers who utilize social media exclusively for recruitment can potentially open themselves to claims of disparate impact by certain groups, Gegwich cautioned. For instance, in the case of *Reese vs. the Department of the Interior* (National Park Service), a 61-year-old woman claimed the agency's recruitment of younger people through social media left older workers at a disadvantage because they may not be as computer-savvy as the younger generation. Although the EEOC found the claimant had not provided sufficient evidence, Gegwich advises employers not to limit their recruitment to Facebook or LinkedIn.

Another potential legal landmine involving social media relates to the screening of job applicants. In many situations, employers use social media during the pre-interview process.

"You can learn a lot of information that you don't need or want to know through the use of social media," said Kimberly Malerba, a partner at Ruskin Moscou Faltischek in Uniondale, who chairs the firm's employment law practice group.

Social media screening may reveal certain pro-

tected characteristics such as a candidate's age, sexuality, religion, race, gender or national origin.

"They have no place in the hiring practice and it's not a good idea for decision-makers to be seeing this information," Malerba said, as improper use of this type of information during hiring processes could violate discrimination laws.

"The biggest concern when screening applicants through the use of social media is the information you find may or may not impact the decision, but it will be hard to prove either way," said Dominique Camacho Moran, a partner at Farrell Fritz in Uniondale. "It's information you might not otherwise have," she said, adding, "The conundrum is that information could be really valuable in the decision-making process for whether a person is right for the job."

Many companies insulate themselves from a potential claim by using a two-tiered approach, in which one person does the initial screening of candidates and only filters through appropriate information to the person making the hiring decisions, Malerba said. Another option is for employers to hire a third-party company to perform social media background checks, which are then covered by the Fair Credit Reporting Act, Gegwich said.

Similar protections hold true for current employees, which is one reason supervisors shouldn't friend subordinates on Facebook or other sites. For instance, a supervisor may want to take disciplinary actions against an employee for a valid reason.

"Then you see their site and learn they have an illness or are affiliated with a certain religion," Malerba said. "These factors should not be used in part of your decision-making process."

Following subordinates on Twitter or Instagram or friending them on Facebook also opens the door for employers to witness online exchanges revealing harassment.

If, for example, one employee is being harassed by another on his or her private page and the employer does not know about it, he or she cannot be responsible for the conduct, Malerba said.

"But, if the supervisor is 'friends' with the sub-

ordinate, there's a risk," she said. In that situation, if a harassment claim is filed, an argument could be made that the employer had notice and the company had responsibility to take action, she said.

If and when these types of cases go to trial, judges will often break the situation down to an analogy from life before social media, according to Howard Miller, a partner at Bond, Schoenck & King in Garden City.

If, for example, an employer became aware of one employee harassing another while off traditional work grounds, such as at a conference, he or she could still be responsible, Miller said.

"When you break it down to an analogy before the Internet world, of course you would be liable" if you had information that an employee is being targeted, whether it happens in the supermarket or on Facebook, he added.

The most difficult cases to prove either way arise when there is social media evidence of bad behavior that doesn't rise to the level of legal harassment, Moran said. Flirty text messages among colleagues, for instance, don't meet the legal standard of sexual harassment in the workplace, she said.

"But before social media, that evidence wasn't so easily found," Moran said. Additionally, posted texts and one-dimensional messages can look different on paper than they may have sounded, she said.

Having appropriate Internet policies and workplace harassment and discrimination procedures is critical in today's world. The policies should incorporate Internet use as well as in-office conduct, Malerba said. The challenge, from an employer's perspective, is that the National Labor Relations Board continually revises its rules regarding what businesses can and cannot have as policy with respect to social media, Moran said.

"We want policies that are reasonable and fair but do not ignore the information that's available," she said.

Gegwich recommends employers institute stand-alone social media training and policies that are broad enough to encompass new technology and sites yet to exist. Policies created five years ago to address Facebook and LinkedIn would be missing Snapchat and Instagram today, for instance.

"What's hot this year may not necessarily be hot next year," he said.