Social Media, Disabilities, and Employment Protections

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Speakers

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What to expect from the presentation

• We will explore the interaction between the rights of people with disabilities in the workplace and the growing influence of social media.
  – how are employers currently using social media to hire and screen employees?
  – what information can employers use legally - and what information could lead to a disability rights violation?
  – what rights do employees have when using social media at work?
  – what are some best practices for employers and employees regarding social media?
Legal landscape

• The intersection of social media usage, disability, and employment protections is an area of law in its infancy.

• As social media usage by both employees and employers has increased, courts will increasingly face many issues about social media in employment.

• Trends are emerging.
HIRING AND SCREENING
Hiring and screening: Trends in social media usage

• 75% of U.S. recruiters are required by their companies to do online research of candidates.

• 70% of U.S. recruiters report they have rejected candidates because of information found online.
Hiring and screening:
May employers use social media information to screen applicants?

• Employers are prohibited from using information on an applicant’s protected status to discriminate against the applicant.

• Federally protected information includes information about a person’s disability and genetic information.

  – Our focus today will be protections found in:
    • Americans with Disabilities Act (ADA)
    • Genetic Information Nondiscrimination Act (GINA)
Hiring and screening:
ADA General Protections

- **ADA Language:** No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C.§12112 (a)
Hiring and screening: GINA General Protections

• **GINA language**: “It shall be an unlawful employment practice for an employer to fail or refuse to hire, or to discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee.” 42 U.S.C. § 2000ff-1(a).
Hiring and screening: Scenario 1

• An employer conducts a telephone interview with an applicant. Based on the interview, the employer determines that the applicant is the most qualified for the position.
• The employer then researches the applicant online before making a job offer.
• The employer sees that the applicant’s Facebook profile photo shows a person in a wheelchair.
• The employer worries about possible complications or expenses related to the applicant’s disability.
• Question: if the employer decides not to make the job offer, has an ADA violation occurred?
Hiring and screening: Explanation 1

- Probably yes.
- It is a violation of the ADA to discriminate against a qualified applicant with a disability on the basis of that disability, regardless of how the employer came to know of the disability.
- When an employer could reasonably believe that an applicant will not be able to perform an essential job function because of a known disability, the employer may ask that particular applicant to describe or demonstrate how he would perform the function.
Hiring and screening: Scenario: 2

• An employer visits an applicant’s Twitter page before making an offer of employment.

• Through Twitter, the employer learns that the applicant, a mother, has an adult child with disabilities who lives at home.

• The employer is concerned that the applicant may miss work often or be distracted by her obligations toward her child. The employer decides not to make the job offer.

• Question: Has the employer committed an ADA violation?
Hiring and screening: Explanation 2

• Probably yes.

• The ADA also prohibits discrimination in employment against **associates** of people with disabilities.

• An employer who learns through social media that an applicant or employee lives with or cares for a person with a disability may not use that information to discriminate against that applicant or employee.
Hiring and screening: Scenario 3

• An employer uses LinkedIn to perform general research about an applicant before making a job offer.

• Through LinkedIn, the employer inadvertently learns that the applicant has volunteered for Susan G. Komen for the Cure, a nonprofit organization supporting breast cancer research, because the applicant’s mother is a breast cancer survivor.

• The employer concludes that the applicant’s family history means that the applicant may develop breast cancer in the future.

• Question: has the employer committed a GINA violation?
Hiring and screening: Explanation 3

- Probably not.
- EEOC regulations implementing GINA provide that subject to specific exceptions, an employer may not “request, require, or purchase genetic information of an individual or family member of the individual.” 29 C.F.R. § 1635.8(a).
- “Request” includes conducting an Internet search on an individual in a way that is likely to result in an employer obtaining genetic information.
  - But there is an “Inadvertent Acquisition Exception.” The employer has not violated GINA if he learned of the applicant’s genetic information through authorized access on a social networking site.
Hiring and screening:
Scenario 4

• Same facts as previous scenario.
• After the employer learns that the applicant has a family history of breast cancer, he becomes concerned.
• The employer worries that if the applicant develops breast cancer in the future, she will require extra leave time and group health insurance premiums will go up.
• Question: if the employer uses this information to decide not to hire the applicant, has the employer violated GINA?
Hiring and screening: Explanation 4

• Probably yes.
• GINA prohibits an employer from using genetic information in making employment decisions.
• The prohibition on using the information is absolute. The fact that the employer acquired the information inadvertently will not protect him if he uses that information.
• The possibility that someone may develop a disease or disorder in the future has nothing to do with his or her current ability to perform a job.
Hiring and screening: Scenario 5

• Similar facts to the previous scenario.
• Once the employer learns of the applicant’s affiliation with Susan G. Komen for the Cure, he decides to do some further research about the applicant.
• The employer searches online for information about the applicant’s family health history.
• Question: has the employer committed a GINA violation just by seeking this information, even if he does not use it?
Hiring and screening: Scenario 5

• Probably yes.

• EEOC regulations implementing GINA provide that subject to specific exceptions, an employer may not “request, require, or purchase genetic information of an individual or family member of the individual.” 29 C.F.R. § 1635.8(a).

• “Request” includes conducting an Internet search on an individual in a way that is likely to result in a covered entity obtaining genetic information.
Hiring and screening: Scenario 6

- As part of a formal interview, an employer asks an applicant for her Facebook password.
- The applicant has high privacy settings on her Facebook page. She does not want a potential employer to see information on her page about her experiences with mental illness.
- The applicant refuses to provide the password.
- Question 1: if the employer chooses not to hire the applicant based on her refusal to provide a password, has employment discrimination occurred?
- Question 2: has the employer committed employment discrimination just by asking for the password even if he ultimately offers the applicant the job?
Hiring and scenario:
Explanation 6

- Trick questions!
- Whether employers can demand passwords is an unresolved issue in most states and at the federal level.
- More than a dozen states have passed legislation barring employers from asking for passwords.
- There is proposed legislation in around 20 other states.
- Two proposed federal laws:
  - The Social Networking Online Protection Act (SNOPA) would prohibit employers from requiring such information or denying employment or otherwise penalizing candidates or employees for refusing to give up such information
  - The Password Protection Act of 2012 would prohibit employers from forcing prospective or current employees to provide access to their own private, personal data systems as a condition of employment, but would allow employers to retain the right to govern access to social media sites within office hours
HIRING AND SCREENING: BEST PRACTICES
Hiring and screening: 
Best practices for employers

• Questions to ask when using social media:

• Is it legal...?
  – to search for this information?
  – to use the information if I find it?

• Is it valid?
  – Does the information predict job performance?
  – Is the information job-related?

• Is it worth it?
  – Have you opened your organization up to the perception of discrimination?
Hiring and screening: Best practices for employees

• Be careful.
  – Do not post anything on any site that you would not want a potential employer to see.

• Be discreet.
  – Set your profile to private and block inappropriate comments that others may make on your profile.

• Be prepared.
  – Regularly check your profile for inappropriate content. Make sure you have an answer ready to explain or counter any “digital dirt” employers may see.
SOCIAL MEDIA USAGE IN THE WORKPLACE
Social media usage: risks for employers

• Creates blurring of lines between “work” and “personal”
• No opportunity to “filter” or “edit”
• Reaches a vast audience
• Available for immediate public viewing
• Speed and informality make users less guarded and more careless
• Could be creating discoverable records
Social media usage:
Scenario 1

• An employee sends out a request for prayers and support through Facebook. The employee reveals that her mother, who lives with her, was recently diagnosed with cancer.

• The employer sees the Facebook request and learns that the employee’s mother has begun to undergo cancer treatment.

• The employer thinks that the employee may require a reasonable accommodation, such as a reduced work schedule, to allow her to spend time caring for her family member.

• Question: is the employer obligated to offer the employee a reasonable accommodation under the ADA based on the employer’s knowledge of the employee’s mother’s cancer?
Social media usage: Explanation 1

• The ADA does not require employers to offer reasonable accommodations based on an employee’s association with a person with a disability.

• This is a distinction: while the ADA prohibits an employer from discriminating against an employee based on the employee’s association with a person with a disability, the employer is not required under the ADA to provide a reasonable accommodation based on that association.

• Note: The employer may be obligated to provide leave time for the employee to care for her mother under the Family and Medical Leave Act (FMLA).
Social media usage: Scenario 2

• Same facts as the previous scenario.
• Scenario 2: Now that the employer knows of the employee’s family history of cancer, he is concerned that the employee may develop cancer down the road.
• Question: If the employer decides to terminate the employee based on her family history of cancer, has he committed a GINA violation?
Social media usage: Explanation 2

- Probably yes.
- The definition of genetic information under GINA contains family medical history.
- Even though the employer obtained the information inadvertently, he is prohibited from basing an employment decision on that information.
Social media usage: Scenario 3

• An employee sends out a request for prayers and support through Facebook for her own cancer treatments.

• The employer learns through the Facebook request that the employee has cancer and is currently undergoing treatment.

• Question: is the employer obligated to approach the employee about a reasonable accommodation under the ADA related to her cancer, even though the employee has not requested an accommodation?
Social media usage: Explanation 3

• Probably not.

• As a general rule, the individual with a disability, who has the most knowledge about the need for reasonable accommodation, must inform the employer that an accommodation is needed.

• The employer **may** ask an employee with a known disability whether she needs a reasonable accommodation when the employer reasonably believes that the employee may need an accommodation.
Social media usage: employee rights and responsibilities

• Question: may employees be disciplined by their employers for activity on social media?
• Answer: yes and no.
• Yes: case law is full of examples of employees who were disciplined or lost their jobs due to activity on social media
  – Many examples of sexual harassment occurring over social media;
  – both the ADA and GINA prohibit harassment; these cases could be next
Social media usage: employee rights and responsibilities, continued

• No: some social media activity will be legally protected, such as “concerted activity” under the National Labor Relations Act.

• National Labor Relations Board construes all of the following activities as protected when conducted over social media:
  – Bringing group complaints to the attention of management
  – Initiating a discussion with a group of employees about a term or condition of employment
  – Discussing shared employee concerns about the terms and conditions of employment
Social media usage:
disability discrimination

- **ADA language**: “It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of any rights granted or protected by [the ADA]. – 42 U.S.C.A. § 12203 (b).
Social media usage: GINA harassment

• GINA language: “It shall be an unlawful employment practice for an employer [..] to fail or refuse to hire, or to discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee”
SOCIAL MEDIA USAGE: BEST PRACTICES
Social media usage: best practices for employers

• Add “off-duty conduct” policy
• Check organization’s “cyber reputation”
• Check employees’ “cyber reputation”
• Create social networking policies for employees while at work, while using employer equipment/facilities, and while engaging in activity that will reflect directly on the employer
Employees may not:

- Post material that is abusive, offensive, insulting, humiliating, obscene, profane, or otherwise inappropriate regarding the organization, its employees, vendors, suppliers, business partners and competitors

- Engage in any conduct that may be construed as harassment based on race, ethnicity, color, national origin, religion, sex, sexual orientation, age, disability, or any other legally protected characteristic.
CONCLUSION
Summary

• Obligations. Disability protections apply at every stage of the employment process and the widespread use of social media is adding additional considerations.

• Evidence. Social media information is increasingly being used as evidence in litigation. Employers and employees should be aware that through social media, contemporaneous records of the incidents giving rise to the litigation are being created.
Questions?

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