

# **TMI: The Perils of Using Off-Duty Conduct Information in Your Screening Processes**

**N. Alexander Erlam, Esq.  
General Counsel  
Certiphi Screening, Inc.**

# Off-Duty Conduct

- Employers need to examine
  - Their right to control “off-duty conduct”
  - What actions may infringe on employee privacy
  - The extent to which employers may exercise control and impose their morals and values on employees’ work and private lives



# Why is Off-Duty Conduct TMI?

- Overarching concerns of off-duty conduct in employment
  - Individual rights vs. business interests
  - Employment-at-will – Not so much!
  - “Lifestyle discrimination”
  - Laws
    - State regulations
    - Federal law (anti-discrimination)
    - Using a Consumer Reporting Agency? Consider the Fair Credit Reporting Act
  - Legal liability – Defamation, discrimination and damages!
  - Is it true? The problem of unverifiable information
  - Federal Agencies: Federal Trade Commission, Consumer Finance Protection Board, National Labor Relations Board, Equal Employment Opportunity Commission

# Issue: Tobacco-Free Hiring Policies

- “Smoke-free” vs. “Smoker-free” workplace
  - Primarily hospitals and healthcare employers adopting such policies
- Why have policies banning smokers?
  - Promotes health and encourages healthier living
  - Smoking increases annual healthcare costs
  - Impact on lost productivity
  - Consistent with employer mission and purpose
  - The Centers for Disease Control and Prevention (CDC) notes that tobacco use results in nearly 5 million deaths per year.
    - According to the CDC “Policies establishing smoke-free environments are the most effective way to reduce exposure to secondhand smoke.”



# Issue: Tobacco-Free Hiring Policies

- What are the arguments against such policies?
  - Data hasn't shown effective in getting smokers to quit
  - Smoking cessation programs and healthy lifestyle choice incentives a better option
  - Intrusive into private lives and legal conduct
  - Consequences and impact on smokers as employees
  - Unemployment is bad for health too!



# Impact: Legality and Prevalence of Tobacco-Free Hiring Policies

- No federal “right to smoke” law
  - 21 states permit adverse employment decisions against smokers  
Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Maryland, Massachusetts, Michigan, Nebraska, Ohio, Pennsylvania, Texas, Utah, Vermont and Washington
- “Off-Duty Conduct” or “Lifestyle Protection” laws
  - 29 states and the District of Columbia have enacted such laws (see next slide)
- Legal protection varies by state – Some cover off-duty conduct in general
- Others expressly prohibit discrimination against tobacco users





# Impact: Exceptions to Off-Duty Conduct Laws

- Even in states that prohibit discrimination based on lawful, off-duty conduct, employers can still deny employment to smokers in certain circumstances
  - Non-profits with the primary purpose of promoting healthcare or discouraging tobacco use
  - Certain healthcare employers
  - Jobs where not smoking is a bona fide occupational requirement
  - Jobs where not smoking is rationally related to the employee's activities
  - Jobs where smoking is a conflict of interest with the employer

# Impact: Off-Duty Conduct Laws

## What is Legal?

- Other limits on off-duty conduct laws
  - *Coats v. Dish Network, LLC, COA62 (April 25, 2013)* – Colorado’s “Lawful Off-Duty Activities Statute” questioned
    - One of 20 states where medical marijuana use is legal. Colorado Court of Appeals held law did not protect off-duty medical marijuana use – Nothing illegal under federal law can be legal under the statute
  - States passing medical marijuana protection laws (AZ, CT, DE, ME, RI)
  - Proposed federal law “Respect States Marijuana Laws Act of 2013”



# Action: Best Practices

- KNOW YOUR STATE LAW – If in a state with off-duty conduct laws, look at exceptions
- Consider business reasons to regulate smoking and any less intrusive alternatives
  - Practical considerations to address in crafting a tobacco-free policy
    - Testing or honor system?
    - Monitoring once hired?
    - Enforcement?
    - Application to existing employees or only new?
    - Limitations on applicant pool?
- Be careful if company crosses state lines/has multiple facilities
- Consider the impact on all employees; know your workforce
- Consider discrimination and privacy concerns

# Issue: Social Media Searches

- What is “social media”?
  - Form of interactive, online communications in which users generate and share content through text messages, audio and/or video images
- Risks in using social media searches in hiring decisions
  - Social media searches can reveal protected characteristics and information about applicants’/employees’ private lives
    - Age, religion, sexual orientation, disability, national origin, race
  - Information cannot be “unseen” – Risk of discrimination claims
  - Information may not be reliable and is often difficult to verify
  - FCRA “compliance obligations apply equally” in social media context
    - “Maximum possible accuracy” difficult in this context
    - Information easily falsified/manipulated; accounts hacked
    - Pre-adverse and adverse action process?
  - Practical value of information?

# Issue: Social Media Searches

- The Federal Trade Commission: Staff Opinion (*Jackson, FTC Informal Staff Opinion Letter, May 9, 2011*)
  - “Compliance obligations apply equally in the social networking context, including the requirement that reasonable steps are taken to ensure the maximum possible accuracy of the information reported”
- While there are companies that purport to conduct social media background searches in compliance with the FCRA, they claim to provide reports based on employer pre-defined criteria, excluding all information not legally allowable for hiring
  - What is left is information that is inherently suspect, as it can be falsified and manipulated, and the mechanics of which call into question the actual use and practical value of the information sought

# Impact: Password Privacy Laws

- Why do employers seek access to social media accounts?
  - Existing employees — Legitimate business interests in monitoring
    - Protect trade secrets and proprietary data
    - Minimize exposure to risk/legal liabilities; duty to investigate
    - Comply with federal financial regulations/disclosure laws
  - Prospective employees
    - Learn as much as possible to avoid costly hires
- Employee/applicant concerns
  - Extreme form of background check
  - Invasion of privacy — Off-duty activities/protected characteristics revealed



# Impact: Password Privacy Laws

- States with Social Media Privacy Laws (as of 8.5.2014)
  - Arkansas
  - California
  - Colorado
  - Delaware\*
  - Illinois
  - Louisiana
  - Maryland
  - Michigan
  - Nevada
  - New Jersey
  - New Mexico
  - Oklahoma
  - Oregon
  - Rhode Island
  - Tennessee
  - Utah
  - Washington
  - Wisconsin



\*Student Social Media Privacy Law

# Action: Password Privacy Laws

- Best practices with respect to passwords and social media account access
  - Review policies to ensure compliance if business operates in any of the states with password protection and pending legislation
  - Obviously, strictly prohibit personnel from asking for access to employee and applicant social media accounts – Regardless of whether or not you operate in a state that has a law prohibiting employer access
  - Train human resource personnel/managers/decision-makers to understand the restrictions with respect to hiring, investigating and disciplining (including shoulder surfing)
  - Consider “Terms of Use” policies of social media websites
  - Bottom line: Don’t ask!

# Impact: Social Media Policies and the National Labor Relations Board (NLRB)

- Increasing number of employers enacting policies governing the on-and off-duty use of social media accounts
  - SHRM survey
    - 40 percent of employers have formal policy
    - 33 percent took disciplinary action in prior 12 months for violation
- NLRB rulings and memos: invalidated numerous corporate policies as “overbroad”
  - Violate employees’ right to engage in “protected and concerted activities” under §7 of National Labor Relations Act (NLRA)
  - NLRB cited a number of corporate policies as being overbroad and for “chilling” the free speech rights of employees
  - NLRA protections for union and non-union employees

# Impact: Social Media Policies and the National Labor Relations Board (NLRB)

- Rationales for deeming policies overbroad and unlawful
  - Discourage comments about employers, the discussion of company matters, release of confidential company information, disparaging of coworkers
- Examples of overbroad and unlawful policy language
  - Blanket confidentiality prohibition on releasing “confidential guest, team member or company information”
  - “[o]ffensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline”
  - Ban on posting of employer information that could be deemed “material non-public information” or “confidential or proprietary”
  - Savings clause not curative (e.g., “this policy will be administered in compliance with applicable laws and regulations, including the NLRA”)

# Impact: Social Media Policies and the National Labor Relations Board (NLRB)

- Provides specific examples of acceptable prohibited activity
  - Inappropriate postings that may include discriminatory remarks, harassment and threats of violence
  - Posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy
  - Posts that could be viewed as malicious, obscene, threatening or intimidating
  - Offensive posts meant to intentionally harm someone's reputation



# Action: Social Media Policies and the National Labor Relations Board (NLRB)

- Best Practices
  - Update NDAs to prohibit disclosure of confidential information, specifically in social media accounts
  - Clearly articulate business reasons for policy and explain employer's rights to monitor activity in social media
  - Provide specific examples of prohibited activities so employees understand that employer is not trying to reach protected and concerted activities
  - Remind employees that social media use on company systems is not necessarily private



# Action: Social Media Policies and the National Labor Relations Board (NLRB)

- Best Practices
  - Develop clear policy as to what off-duty social media conduct is prohibited and again, provide specific examples
  - Provide strong, specific savings clause (e.g., “Nothing in this policy is designed to interfere with, restrain or prevent employee communications regarding wages, hours or other terms and conditions of employment.”)
  - Examine carefully the NLRB guidance/May 2012 memo



# Issue: Moonlighting

- Generally speaking, working more than one job is lawful
- However, employer has the right to limit after-hours work that is in conflict with the employer's own business
  - E.g., going to work for the competition could provide grounds for discipline or discharge



© 2007 HEIDI YOUNGER

# Issue: Firearms

- While most employers may prefer that employees not bring firearms onto company property, some states have laws that protect an employee's right to do so:
  - Arizona, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maine, Minnesota, Mississippi, North Dakota, Oklahoma, Utah and Wisconsin



# Issue: Marital Status

- Many states make it illegal for employers to discriminate on the basis of marital status
- Employers may not keep track of whether their employees are single, married or divorced, except as may be necessary for providing certain benefits such as health insurance



# Issue: Political and Religious Activities and Beliefs



- An employee's off-the-job political and religious activities are off-limits to his or her employer
- Federal and state laws prohibit discrimination on the basis of religious or political affiliation
- An employee who brings politics or religion to work, by proselytizing or attempting to convert others, for example, may be subject to discipline by the employer

# Issue: Illegal Activities

- Employee arrests/convictions (while employed)
  - Post-employment background checks are permissible with the appropriate employee consent form
    - In California, a signed authorization is required each time a background check is ordered
- If an employer learns that a worker has engaged in illegal conduct off duty, can the employer ask the worker about it?
  - **Job-relatedness vs. business necessity:** In many states, and according to the EEOC, the answer is "no," unless the off-duty illegality has some concrete impact on the employee's work or the employer's business interests
    - E.g., An employer would be entitled to look into the drunk driving arrest or conviction of a bus driver or the embezzlement conviction of a bank employee

# QUESTIONS & ANSWERS



©2014 ASHHRA



©2014 ASHHRA