

Using Social Media in the Hiring Process: Navigating the Internet Applicant Rule

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LEARNING OBJECTIVES



To understand the Internet Applicant Rule

To examine how using social media in the hiring process may run afoul of non-discrimination requirements

To identify ways to successfully and legally implement Internet recruiting procedures

THE IMPORTANCE OF APPLICANT DATA

- **The Office of Federal Contract Compliance Programs’ (“OFCCP”) financial remedies largely stem from instances of discrimination in the hiring process**

- **Enforcement is top priority according to EEOC**

2017-2021 Strategic Enforcement Plan

- Will “focus on class-based recruitment and hiring practices that discriminate against racial, ethnic, and religious groups, older workers, women, and people with disabilities.”





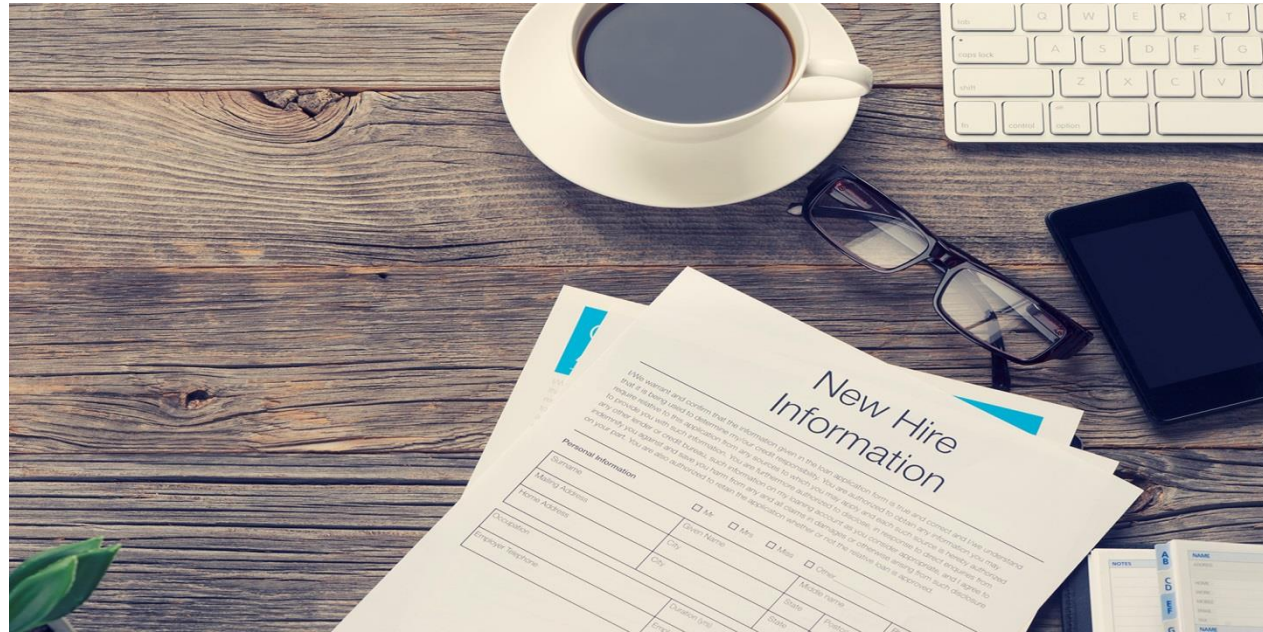
RECENT OFCCP SETTLEMENTS



- **Food Service Contractor—\$550k** to female applicants for entry level production jobs at processing plants; will make 53 job offers to original applicants as positions become open
- **Specialty Chemical Contractor- \$175k** to 600 African American applicants for entry level transition operator positions; Will make four job offers to original applicants; will discontinue use of hiring test for its entry-level positions; will revise hiring and recordkeeping practices



The Internet Applicant Rule



WHAT IS THE "INTERNET APPLICANT" RULE?



- **Recordkeeping rule used by OFCCP to:**
 - determine which online applicant records need to be maintained by federal contractors
 - provide guidelines for federal contractors to establish the basic qualifications for positions
- **Internet applicants must be:**
 - included on applicant logs
 - included in adverse impact analyses relating to race, gender, and ethnicity



Who is an Internet Applicant?

1. An individual who submits *an expression of interest* through the Internet or related electronic data technologies.
2. The contractor *considers* the individual for employment in a *particular* position.
3. The individual's expression of interest indicates that the *individual possesses the basic qualifications* for the position.
4. The individual at no point in the contractor's selection process prior to receiving an offer, removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in the position.



What is an “expression of interest”?

The individual applies for employment through the Internet or related electronic data technologies.

Examples include:

- E-mail
- Applicant Service Providers
- Resume databases
- Job banks





What does “considering” an applicant entail?

The contractor **evaluates** the individual for employment in a **particular** position.



- No requirement to consider candidates who do not follow company application procedures
- No requirement to consider when expression of interest is not submitted for a particular position
- No “consideration” where large number of expressions derive from data management techniques that do not depend on assessment of qualifications

Job Seeker must Meet “Basic Qualifications”

The individual’s application or expression of interest indicates that the individual possesses the basic qualifications for the position

- All basic qualifications must be:
 - Objective
 - Non-comparative
 - Job related



Common factors narrowing “Basic Qualifications”



Formal Education

Experience and Past Performance

Able to Perform the Essential Functions of the Job With or Without Accommodations

Company Values

Business Related Goals

Applicant Must Not Self-Remove

The individual at no point in the selection process prior to receiving an offer removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in the position.

- **Active withdrawal**

- Written or verbal statement
- Failure to appear for interview
- Failure to return calls/emails



- **Passive withdrawal**

- Lack of continued interest reasonably deduced based on information provided in job application, during telephone screens, or in-person interviews
- Expectations regarding salary requirement, job location, shift/schedule, type of work, etc.

BEST PRACTICES – COMPLYING WITH INTERNET APPLICANT RULE

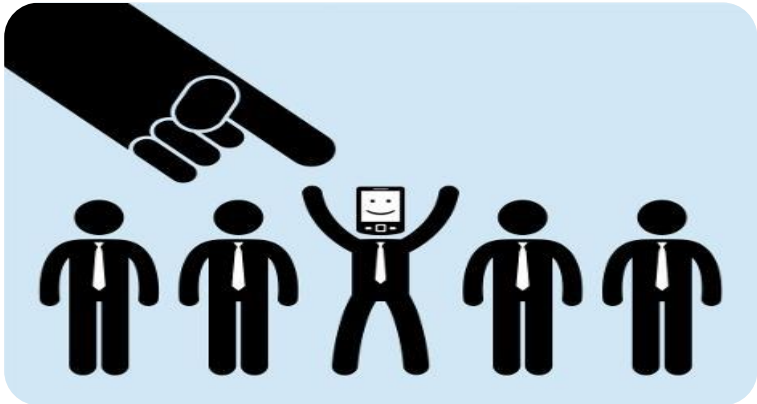
Periodically evaluate online application procedures

Monitor risk of adverse impact to protected classes

Maintain demographic information separately from the resume information reviewed during the selection process

Consult with counsel as needed

EMPLOYMENT LAW ISSUES IN SOCIAL MEDIA



SOCIAL MEDIA EXPLOSION



Over 1 billion active users



Over 238 million users



Over 8 billion photos shared



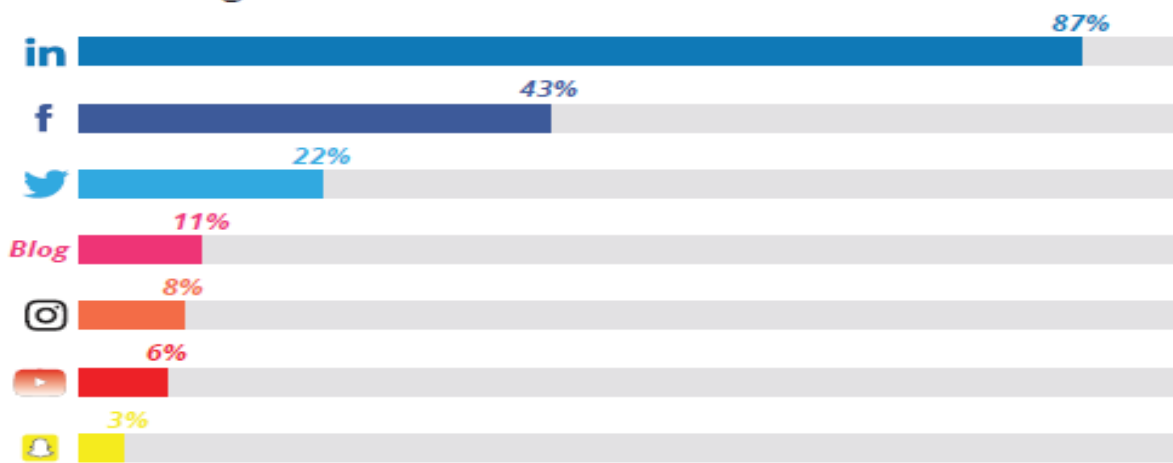
500 million followers, 40% only read tweets
58 million tweets are made daily



SOCIAL MEDIA'S PLACE IN THE JOB SEARCH

92% of recruiters
use social media for recruiting purposes

Recruiters use the following networks to evaluate candidates when hiring:



Jobvite, Inc. Social Recruiting Survey

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HIRING CONSIDERATIONS

PROS to using social media in hiring decisions:

- Inexpensive
- Fast
- Perspective into applicants not gained from resume/application
- Due diligence – guard against negligent hiring claims
- Protection against future reputational/business risks (inappropriate content, disparaging remarks about former employers)



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HIRING – LEGAL CONSIDERATIONS



- While employers know to avoid inquiring into protected categories during the formal application process, such information about an applicant is routinely available on the Internet
- Job applicants may claim that an employer obtained information about them and then relied on unlawful factors in not hiring them
- Difficult for employer to prove it did not view or consider personal information from social media site
- Employer may have to prove that information regarding protected class played no role in the hiring decision

ISSUES RAISED WHEN EMPLOYERS CONDUCT SEARCHES

- Which candidates are subject to social media searches?
- When do you conduct searches?
- Who conducts the searches?
- What sites do you search?
 - Personal, professional, social networking?
- What happens when you find a “concern?”
- What do you do with the results?



BACKGROUND CHECKS

- **Process for Conducting Background Checks**
- **Fair Credit Reporting Act (“FCRA”)**
 - Employers that retain the services of a third party to perform background checks using social media must comply with the FCRA



SCOPE OF FCRA & KEY DEFINITIONS



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15 U.S.C. § 1681:

“The term ‘***consumer reporting agency***’ means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purposes of furnishing consumer reports to third parties . . .”

15 U.S.C. § 1681:

“The term ‘***consumer report***’ means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness . . . character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected . . . [for] the purpose of serving as a factor in establishing the consumer’s eligibility for [employment.]”

FCRA – PROCEDURAL REQUIREMENTS FOR USING “CONSUMER REPORTS”



Must provide written notice and receive individual's consent **before** requesting a consumer report from a consumer reporting agency

Must provide notice to individual **before** taking any adverse action based on information contained in a consumer report.

Must give notice to an individual **after** taking any adverse action based on information in the consumer report



• THE NOTICE MUST INCLUDE:

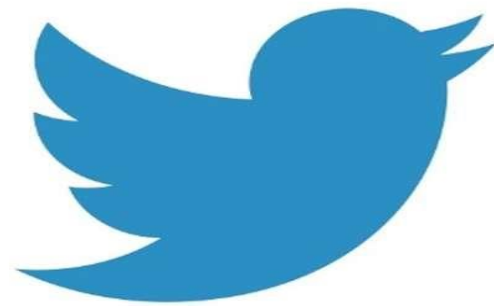
- A copy of the actual consumer report that has been relied upon; and
- The summary of consumer rights prescribed by the FTC (available on the FTC's website)

• THE NOTICE MUST INCLUDE:

- Contact information of the consumer reporting agency that supplied the report;
- Statement that the consumer reporting agency is not the decision-maker;
- Notice of the individual's right to dispute information in the report; and
- A statement of the consumer's right to obtain a free copy of the consumer report from the consumer reporting agency by making a request within sixty days



BEST PRACTICES



How Federal Contractors can Minimize Risk

BEST PRACTICES – USING SOCIAL MEDIA IN YOUR RECRUITMENT PROCESS

Create a Social Media Screening Policy

Wait to Screen Until After the Initial Interview

Leave the Screening to Human Resources

Inform Applicants if a Third-Party Will be Conducting the Screen or a Background Check

Keep in mind the Internet Applicant Rule definition of “applicant”

Do not request usernames and passwords

Wait to Screen Until After the Initial Interview



BEST PRACTICES – USING SOCIAL MEDIA IN YOUR RECRUITMENT PROCESS

Tip No. 1: Create a social media screening policy.

- Who will conduct the screening?
- When during the application process will the screening be conducted?
- Which positions will be screened?
- Which sites will be searched?
- How will the search be conducted?
- What happens when a search uncovers a “concern”?
- What happens with the search results?





BEST PRACTICES – USING SOCIAL MEDIA IN YOUR RECRUITMENT PROCESS



Tip No. 2: Wait to screen until after the initial interview.

- Reduces the risk of explicit or implicit bias
- Helps protect against discrimination claims because the applicant is selected for interview based only upon information in the application, on the resume, etc.



BEST PRACTICES – USING SOCIAL MEDIA IN YOUR RECRUITMENT PROCESS

Tip No. 3: Human Resources Should Manage the Screening

- Creates a “firewall” between the hiring manager and an applicant
- Helps insulate the employer from future discrimination claims
- The human resources professional or third-party should be instructed to look for any red flags or concerns that might affect the applicant’s qualification to perform the job.



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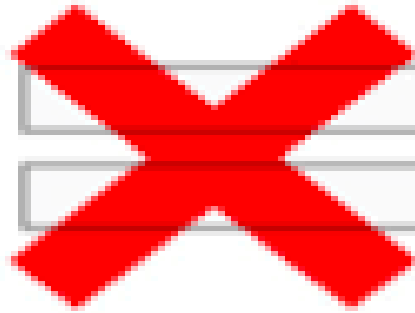


Tip No. 4: Do not request usernames and passwords.

- Legal risks exist when employers ask applicants (and employees) for their passwords to social media sites

Username

Password





BEST PRACTICES – USING SOCIAL MEDIA IN YOUR RECRUITMENT PROCESS



Tip No. 5: Inform applicants if a third-party will be conducting the screen or a background check.

- Keep in mind FRCA requirements
- Federal contractors must provide notice before and after taking any adverse employment action on information contained in a consumer report

BEST PRACTICES – USING SOCIAL MEDIA IN YOUR RECRUITMENT PROCESS



Tip No. 6: Retain relevant documents.

- **The person responsible for screening should document**
 - the search dates and when the screening took place during the hiring process
 - the steps taken during the process, including which social media sites were explored
 - the employment-related information gained and provided to the hiring manager
 - any employment decisions or actions that were made as a result of the search
 - Compliance with FCRA, if applicable
- **In the event a federal contractor discovers something disqualifying in an applicant’s social media profile, the federal contractor should document it by printing out the page (or screenshotting it), in case the page is later deleted or altered.**

LEARNING OBJECTIVES (revisited)



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To identify ways to successfully and legally implement Internet recruiting procedures

QUESTIONS?

THANK YOU



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