

## Employment Alert

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### Is Your Electronic Communications Policy Obsolete?

As the Internet explodes with more social-networking sites, and methods of communication expand beyond e-mail, many electronic communication policies are rapidly becoming outdated.

Although Facebook, MySpace, LinkedIn, and the like, provide quick and cost-free opportunities to confirm a job applicant's credentials or monitor an employee's activities, many workplace policies do not deal with use of these sites for employment-related purposes. This is true despite the fact that there are numerous legal hazards to accessing such information. Perhaps the most obvious risk is the discovery of previously unknown information about an applicant or employee's protected status. User profiles on Facebook, for example, commonly disclose an individual's age and religious orientation, and often contain personal information that might indicate a disability, national origin, or other protected status. If an applicant or employee asserts a discrimination claim, and there is evidence that the employer reviewed Facebook, etc., it will be difficult for the employer to prove that it never considered information about the person's protected status that is readily available on social-networking sites.

Workplace policies also do not consider that information obtained on the Internet could simply be wrong. Google and Facebook searches often result in multiple entries for the same name, and although identifiers such as age or city could narrow the search, there is no way to exclude pages created as pranks. Using social-networking sites without proper controls also has the potential for running afoul of existing laws. For example, the federal Fair Credit Reporting Act requires employees to consent to third-party background checks, including Internet investigations. Further, state laws like the California Consumer Credit Reporting Agency Act can even apply to Internet searches performed internally.

Another emerging legal risk concerns the unbridled use of text messages and instant messages in making employment decisions. Like e-mail, if these types of employee communications are used, they may be subject to retention requirements. Without policies limiting or controlling the use of such interactions, employers may find themselves in a new document retention minefield if harassment or discrimination charges are subsequently filed. Employees who blog, whether informally through quick posts on Facebook or longer commentary on a MySpace page or formal blog site, also can create issues if they appear to represent their employer's viewpoint.

In our technology driven society, employers do not want to miss out on valuable information sources. However, employers must recognize how electronic communication impacts them legally so that use of the Internet for legitimate employment purposes provides more benefits than risks. Put simply, all employers should consider carefully crafting electronic communications policies, covering topics like social-networking, Internet use, text messaging, instant messaging and blogging, to meet business needs and limit unintended side effects.

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For more information, please contact Paul Garry, Rachel Urquhart or any other MBT labor and employment lawyer at (312) 474-7900.

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