

#unplug?

Legal and Ethical Challenges for Employers in an Online World

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Items to Cover

Pre-Employment

During Employment

Post-Employment

Pre-Employment/ Hiring

Background Checks

What methods does your organization use to perform background checks on applicants?

Internal (Google, Public Records, LinkedIn, etc.)

External (Engage Investigator/Consumer Reporting Agency)

Both

Neither

IDK

Background Checks for Applicants

Who Performs the Background Check Matters

- In-house Searches – No problem
 - Google searches of applicants
 - Checking applicants' public social media profiles
 - Checking applicants' LinkedIn profile
 - Public Records searches
- Hiring Outside Company
 - Fair Credit Reporting Act requires notification and consent of applicant/employee

Background Checks for Applicants

Fair Credit Reporting Act Requirements

- Hiring Outside Company – “Consumer Reporting Agency”
 - Must get written authorization from applicant/employee before obtaining report
- Prior to Taking Adverse Employment Action
 - Provide notice to applicant/employee
 - Provide a copy of the report
 - Provide a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act”

Background Checks for Applicants

Fair Credit Reporting Act Requirements, Cont.

- If an adverse employment action is taken
 - Advise the applicant/employee, in writing, that they were rejected (at least in part) based on the information provided in the report
 - Provide contact information for the Consumer Reporting Agency used
 - Advise applicant/employee that the Consumer Reporting Agency did not make the hiring decision and cannot provide the reasoning for the decision
 - The applicant/employee has a right to dispute the accuracy of the report and can get an additional free report within 60 days

Limitations on Use of Background Checks

Criminal Background Checks

- EEOC – Generally Disfavors Use
 - *State of Texas v. EEOC* (N.D. Tex. 2018) – Court granted summary judgment in favor of the State of Texas regarding EEOC guidance that employers not use criminal background checks
 - Court stated that it agreed with EEOC, but guidance at issue was too broad
 - Applied to all employers for all positions
 - EEOC did not seek public comment prior to publishing guidance
 - Court ruled that while there are “many categories of employment” which prior criminal history would be disqualifying, there are many others which prior criminal history would “pose no objectively reasonable risk”

Limitations on Use of Background Checks

Criminal Background Checks

Arrest Records vs. Conviction Records

- Arrest Records
 - EEOC guidance – absent a specific law that requires asking – DO NOT
 - EEOC and courts – asking about arrest records could have a disparate impact on Title VII protected classes

Pre-Employment Limitations on Use of Background Checks

Criminal Background Checks

Arrest Records vs. Conviction Records

- Conviction Records
 - Varies by State
 - Texas Limitations – Consumer Reporting Agency **may not** provide a report that contains information related to an arrest **or conviction** which is **more than 7 years old**
 - Tex. Bus. & Comm. Code § 20.05(a)(4)
 - Exception – Such information may be provided if the employment of the consumer is at an annual salary that is (or reasonably may be expected to be) more than \$75,000
 - Tex. Bus. & Comm. Code § 20.05(b)(3)

Drug Testing

When does your organization conduct drug testing?

Pre-Employment **A**

During
Employment **B**

Combination **C**

None - We Do
Not Drug Test **D**

Pre-Employment Drug Testing

Drug Testing Risks

- Disparate Impact of Title VII Protected Classes
 - Regardless of the testing policy – be consistent!
- Losing Valued Employees for Legal Behavior
 - Approximately 30 states have legalized the use of marijuana
 - Medicinal – 19
 - Recreational – 9

Pre-Employment Drug Testing

Drug Testing Considerations

- Who should be drug tested?
- When should they be drug tested?
- What procedures should the employer have in place?

Pre-Employment Drug Testing

Who should be tested?

- General Rule – Texas law provides almost no limitations on the right of a private employer to require employees/applicants to submit to testing
- Applicants?
 - Employers should be thoughtful regarding Title VII protected classes
- Some, but not all employees?
 - Yes – But proceed with caution
 - Policy should be specific regarding who will be subject to testing
- Consistency is Key

Pre-Employment Drug Testing

When should they be tested?

- Pre-Employment
 - Yes, but be thoughtful of Title VII protected classes
- Random
 - Policy that any employee is subject to testing at any time
 - Ex. – Two employees are selected randomly each week for testing
 - May include a limit on the number of times per year an employee can be chosen randomly
- For “cause”
 - Testing only occurs when there is a “reasonable suspicion” that an employee is in violation of company policy

Pre-Employment Drug Testing

What procedures should the employer have in place?

- Drug Testing Policy
 - Should be provided to all employees
 - Should set out the parameters of the policy
 - Who will be tested?
 - When will they be tested?
 - What will be tested for?
 - What will be considered a violation?
 - What discipline will result from a violation?
 - Will the company allow for rehabilitation?

Social Media Searches

Does your organization do social media searches on applicants?

Yes

No

Social Media Searches

Group Discussion

What experiences (good and bad) have your organizations had with doing social media searches for employment candidates?

Does your organization do social media searches of applicants?

Who within the organization does them?

How and to whom is that information reported?

What if the applicant has little to no social media presence?

Has your organization ever used information obtained from a social media search as part of a decision to, or not to, hire a candidate?

Social Media Searches – Friend? Or Foe?

Are employers searching social media for candidates?

- 2017 Survey from Career Builder (polling by Harris Poll) of 2300 hiring managers and HR professionals
 - 30% of organizations have HR employee dedicated to “social recruiting”
 - 70% of organizations use social media to screen candidates before hiring
 - 57% are less likely to interview a candidate they cannot find online
 - 54% have decided not to hire someone based on social media presence
 - 69% also Google candidates

Social Media Searches – Friend? Or Foe?

Friend?

- Information on social media allows employer to learn valuable (job related) information about a candidate
 - Writing Style – personal blog shows they are excellent writer
 - Office trouble – may learn they bad-mouthed former colleagues and/or employers
- The information is publicly available

Social Media Searches – Friend? Or Foe?

Foe?

- Potential for discrimination claims
 - Information obtained on social media may give you insight into protected class status – age, sex, religion, national origin, marital status, children, and/or disability
- Photos on social media can be taken out of context
 - Causing the organization to miss out on a good employee
- Hiring managers and HR professionals may not be aware of the legal rights of applicants and other ethical considerations

During Employment

Documenting the Employment Relationship

- Offer Letter or Employment Agreement/Contract
 - Regardless of how you document the relationship, it should be clear and unequivocal regarding the nature of the employment
 - “At-will” relationship is default form of employment – but put it in writing to remove any doubt
 - Employee understands that his/her employment with the company is “at-will” and may be terminated at any time for any reason by either party
- Employment Agreement/Contract
 - Employment term?
 - Termination provisions?
 - Notice period?

Documenting the Employment Relationship

Restrictive Covenants

- Non-Competition/Non-Solicitation Agreements
 - Is this the type of employee that requires post-employment restrictions?
 - Tex. Bus. & Comm. Code § 15.50 – provides outline of requirements for such restrictions to be enforceable in Texas
 - If employee is employed outside of Texas – look to law of the state where they are located (regardless of where the employer is located)
 - Certain states consider any such provisions to be a per se unenforceable restraint on trade
 - Ex. California, Oklahoma



Employee Handbooks/Manuals

Employee Handbooks/Manuals

Necessary Components of a Good Handbook

- “At-will” employment provision
- Statement regarding Equal Opportunity Employment
- Anti-Discrimination and Harassment policies
- Reporting structure for harassment issues
- Device/Internet policies
- Company property policies
 - Confidential/Trade Secret information
 - Inventions and Creations
 - Use of company equipment and property
 - Return of company property

Employee Handbooks/Manuals

Other Policies to Consider

- Pay/time keeping policies
- Workers' compensation and injury reporting
- Drug and alcohol testing
- Disciplinary actions
- Employee fraternization

Employee Handbooks/Manuals

Other Policies to Consider (Cont.)

- Workplace violence and concealed handguns:
 - Tex. Gov't Code § 411.203 – Employer may prohibit employees who are licensed by the State of Texas from bringing firearms into workplace
 - Texas Workforce Commission – There is no Texas or federal law which prohibits a company from enforcing a firearm policy as a condition of employment – But **must** provide notice to employees
 - Tex. Lab. Code § 52.061 – Employer cannot prohibit an employee who is licensed to carry under Texas law from “transporting or storing a firearm or ammunition . . . in a locked, privately owned motor vehicle in a parking lot . . . the employer provides for employees.”

Remote Working



What type of employees does your organization allow to work remotely?

Telecommuters

Sales People

Employees Imbedded with Clients

Employees Making Site Visits

Combination of Above

None of the Above

Anyone Who Wants To!

Employment

Remote Workers

Concerns with Allowing Employees to Work Remotely

- Employers:
 - Are my remote employees being productive?
 - Are my remote employees devoting their time to my company?
 - Worker classification (employee vs. contractor)?
- Employees:
 - Can work from anywhere
 - Flexible work schedule
 - Work-life balance

Employee Monitoring

Does your organization monitor employees' productivity electronically?

Yes

No

Employee Monitoring

Group Discussion

What experiences has your organization had (good or bad) with monitoring employees?

What methods does your organization use to monitor employees (keystroke recorder, app and website tracking, file usage, chat and email monitoring, cameras, GPS, etc.)?

Do you use company issued devices (phones, computers, laptops, iPads, etc.)?

Does your organization have a policy regarding monitoring employees?

Any response from employees regarding monitoring?

Monitoring Employees

Are Employers Monitoring their Employees?

- 2001 survey – over 75% of corporations monitored employees
- 2007 survey – employers monitor
 - Employee internet use – 66%
 - Email – 43%
 - Time spent on phone and numbers called – 45%
 - Phone calls (recording) – 16%
 - Voicemails (recording) – 9%

Employment Monitoring Employees

Should Employers Monitoring their Employees?

- 2006 report – employees spend average of 1.86 hours per workday on something other than work
 - Internet surfing was biggest distraction named
 - Cost employers \$544 billion in lost productivity annually
- 2017 report – employees spend an average of 56 minutes each day using their cell phone for non-work related reasons
 - Millennials in the work place? For employees 18-34, the average goes up to 70 minutes per day

Monitoring Employees

Potential Liability for Employers

- Liability can arise where employees use company issued devices for non-business purposes:
 - Negligent supervision of employees
 - Hostile Work Environment – employees using company issued devices to harass other employees or customers

Employment Monitoring Employees

Potential Liability for Employers

- 2004 marketing research – popular search terms
 - Sex
 - Porn
 - Nude
 - “XXX”
- 70% of searches of these terms come Monday – Friday, 8 am – 5 pm
- As of 2017, “porn” was still one of the top five most searched terms

Monitoring Employees

Monitoring Company-Issued Devices

- Employers have wide latitude to monitor employees on employer provided systems
- Employers should have a written monitoring policy
- Employer provided computers
 - Employers may monitor keystrokes, email content, screen shots, etc.
 - Emails have minimal “reasonable expectation of privacy”
 - *Metzler v. XPO Logistics, Inc.*, No. 4:13-CV-278, 2014 U.S. Dist. LEXIS 134858, *20–21 (E.D. Tex. Sept. 25, 2014) (explaining that employees have “no reasonable expectation of privacy in the contents of materials sent or stored on a company computer system” or in emails transmitted over the company’s network)

Monitoring Employees

Employee Personal E-mail Accounts

- Employees have a greater expectation of privacy
 - *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650 (N.J. 2010) – denial of employer’s claim that it could review personal emails from password-protected, web-based email account simply because they were sent and received on an employer-issued laptop
 - *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC* (S.D.N.Y. 2008) – the court held employee had a reasonable expectation of privacy in personal e-mail messages stored on a third party’s service, although the employee had accessed that outside service while at work, using employer provided equipment

Monitoring Employees

Employer-Provided Cell Phones

- Employers have wide latitude to monitor
- But should do so pursuant to a policy
- *City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010) – SCOTUS – city government’s search of text messages (even personal messages) on city-provided pager was reasonable
- Private employers generally have more leeway than public employers
 - No Constitutional implications from monitoring

Monitoring Employees

Recording Telephone Conversations

- Employers may have a policy regarding personal phone calls
 - Even with policy, employer may only listen in on calls long enough to determine they are personal in nature
- However, there are statutory limits to such policies
 - Wiretap Act
 - Tex. Civ. Prac. & Rem. Code § 123.001 et seq.
 - Electronic Communications Storage Act (a/k/a the Stored Communications Act)

Employment

Monitoring Employees

Recording Telephone Conversations (Cont.)

- Wiretap Act
 - Federal law prohibiting intentional interception of wire, oral or electronic communications
 - Exceptions:
 - Consent – may be expressed or implied from the circumstances
 - The business extension exception – allows employer to monitor employee's calls and emails without consent if it is in the ordinary course of business
 - *Watkins v. L.M. Berry & Co.*, 704 F.2d 577 (11th Cir. 1983) – explaining supervisor could monitor telephone solicitation calls of sales employees by means of a standard telephone extension
 - *But see Sanders v. Robert Bosch Corp.*, 38 F.3d 736 (4th Cir. 1994) – rejecting employer's contention the business extension exemption applied to its 24-hour a day, 7-day a week recording of telephone calls concluding no business justification

Monitoring Employees

Recording Telephone Conversations (Cont.)

- Tex. Civ. Prac. & Rem. Code § 123.001 et seq.
 - Illegal to use information intercepted during a telephone conversation without consent of one party to the conversation
- Varies by State
 - Louisiana, Kentucky, and Arkansas require single-party consent
 - Massachusetts, New Hampshire, and Florida require consent of all parties

Monitoring Employees

The Stored Communications Act

- Prohibits employers from intentionally accessing “a facility through which an electronic communication service is provided”
- Does NOT apply to information contained on computers or electronic devices (text messages, e-mail, files, etc.)
- Only applies when accessing “facilities” operated by electronic communication service providers (apps, social media, email services, etc.)

Monitoring Employees

The Stored Communications Act (Cont.)

- The SCA often addressed when employers monitor employee social media content
 - Question becomes: how did employer gain access to the social media posts?
 - Googled? No problem.
 - *But see Pietrylo v. Hillstone Restaurant Group*, No. 06-5754 (FSH), 2008 U.S. Dist. LEXIS 108834 (D. N.J. July 24, 2008) – court denied employer’s summary judgment as to violations of the Stored Communications Act when two managers accessed a "chat group" on an employee's MySpace account without having received authorization from the MySpace member to join the group and, instead, by coercing another employee to give them her password
 - Only applies when accessing facilities operated by electronic communication service providers (apps, social media, email services, etc.)

Employment

Monitoring Employees

Monitoring Social Media – Labor Laws

- National Labor Relations Act
 - Section 7 of NLRA protects employees ability to discuss working conditions, hours, and to solicit members for unions
 - In recent years, the National Labor Relations Board has extended this right to social media
 - Ex.: Group of employees who worked for a retail store in San Francisco were concerned about their safety due to their store closing an hour later than other nearby stores. After unsuccessful discussions with the manager and later, the owner, the employees posted their frustrations on Facebook. An employee who saw the posts showed them to the owner and, subsequently, the other three employees were fired.
 - Ex.: Two employees at a sports bar complained about the bar's tax-withholding policies on Facebook. One of the employees said something obscene about the fact that she now owed back taxes for 2010. The employees were fired for not "being loyal enough." NLRB supports the complaint -- that's a valid criticism of their employer, and protected activity.



Texting and Driving

Does your organization's cellular phone usage policy cover the following?

- Employees in Company Vehicles **A**
- Employees in Personal Vehicles **B**
- Employees with Company-Issued Phones **C**
- Employees with Personal Phones **D**
- Employees Using Phone for Business Purposes **E**
- Employees Using Phone for Personal Purposes **F**
- Some of the Above **G**
- None of the Above **H**
- All of the Above **I**

During Employment

Texting and Driving

Texas House Bill 62

- It shall be an offense to read, write, or send an electronic message while operating a motor vehicle unless the vehicle is stopped
- Affirmative Defenses
 - Use in conjunction with hands-free device
 - Used in navigation GPS
 - Used to report illegal activity or summon emergency help
 - Used to read an electronic message that the person reasonably believed concerned an emergency
 - Used in connection with a permanently affixed device to relay information in the course of occupational duties between operator and a dispatcher
 - Used to play music

Texting and Driving

**More than \$24,000 per property damage
crash**

More than \$150,000 per injury crash

See Issac A. Hof, Wake-Up Call: Eliminating the Major Roadblock that Cell Phone Driving Creates for Employer Liability, 84 Temple L. Rev. 701 (2012).

Texting and Driving

Because employees on the road are talking to clients and coworkers, and perhaps sending emails and text messages and work-related documents, they are 23 times more likely to cause a motor vehicle accident than other drivers.

U.S. Department of Transportation, National Highway Traffic Safety Administration (2005, August); The Economic Burden of Traffic Crashes on Employers-Costs by State and Industry and by Alcohol and Restraint Use (Publication No. DOT HS 809 682).

During Employment

Texting and Driving

Fines to Individuals

- First Offense
 - \$25 - \$99
- Second
 - \$100 - \$200
- If death or serious bodily injury occurs
 - \$4,000 fine and confinement in jail for up to 1 year

During Employment

Texting and Driving

Concerns for Employers

- Employers have a duty to protect employees and others who they share the road with
- Opens employers to potential liability as a result of texting-related accidents involving employees
- On-the-job crashes are costly to employers
- Drivers often cite work-related communications as a reason to use phones while driving

During Employment

Texting and Driving

Concerns for Employers

- Employer liability – Numerous lawsuits resulting in large settlements (and award) payable by employers and insurers when employees involved in cell-phone-related accidents
 - Driving during work hours and outside typical work hours
 - Driving to or from work appointments and for personal reasons
 - Employer-provided and employee-owned vehicles
 - Employer-provided and employee-owned phones
 - Business and personal conversations

During Employment

Texting and Driving

Examples

- Company-Owned Vehicle
 - Driver was talking with her husband on a cell phone at the time of the fatal crash
 - \$21.6 million
- Off-Duty Police Officer
 - Texting moments before fatal accident in police cruiser
 - \$4 million
- Company-Issued Cellular Phone
 - Employee rear-ended vehicle in front of her requiring the victim's arm to be amputated
 - \$5.2 million

During Employment

Texting and Driving

Examples

- Off-Duty Construction Worker with Company-Issued Cellular Phone
 - Employee was off the clock
 - \$4.75 million
- Employee-Driver
 - Employee driver ran into 10 vehicles stopped in traffic while checking text message
 - \$24.7 million

During Employment

Texting and Driving

What to Do?

- Employers should implement a cellular phone policy – or update their current one – to ban use of phones altogether while driving
- Educate employees, monitor compliance, enforce the policy and address violations
- Many even want to extend policy to off-the-job hours if employee has a company-issued device or car
- Many employers require employees to move out of traffic lanes, stop the vehicle entirely, and then use the phone

During Employment

Texting and Driving

Productivity Concerns

- Most employers with total ban policies report that policies do not adversely impact productivity
- Some even report that productivity increases
- 2010 survey of *Fortune* 500 companies with a total ban – only 7% responded that productivity decreased

Post- Employment

Computer Forensics

Computer Forensics

Group Discussion

What are your organization's main goals when exiting an employee?

Protecting company information?

Return of devices and documents?

Exit interview – Learning new ways to make employee experience better?

Post-Employment Computer Forensics

What can you find in an electronic forensic examination?

- Files Accessed
- Deleted Files
- Where Files are Stored
- Websites Accessed
- Cookies
- Evidence of Sweeping Software
- Phone Calls
- Texts
- E-Mails
- Locations
- Pictures
- External Devices Connected

Post-Employment Computer Forensics

Top 5 Reasons to Perform a Forensic Examination

- Your organization has confidential information and/or trade secrets
- Separated employee went to work at competitor performing a similar role
- Separated employee had access to confidential and/or trade secret information
- Your business would be harmed if the separated employee used your information at their new employment
- You have the separated employee's work-issued device in your possession

So what? And furthermore, why?

Information is Power

- May be able to stop a rogue former employee from stealing your information before they even start at their new employer

Inexpensive

- Can cost less than \$3,000 to perform entire forensic evaluation

Post-Employment

(Hopefully) Helpful Tips

Bring Your Own Device Policy (“BYOD”)

Confidentiality and Trade Secret Agreements

Procedure for Off-Boarding

- Include collecting work-issued devices for forensic imaging shortly after notice is given

References for Former Employees

Post-Employment References for Former Employees

Former employers may have concerns regarding liability for “unfavorable” references

- Tortious Interference
- Defamation
- Breach of Contract

Post-Employment References for Former Employees

Best Practice

- Only provide “neutral” references
 - Dates of Employment
 - First Position Held
 - Last Position Held
 - Salary at Separation (Sometimes)

Misrepresentations on Social Media

Post-Employment Misrepresentations on Social Media

Former Employee LinkedIn Profile Reviews

- Can a former employer obligate a former employee to update their profile?
 - *Jefferson Audio Video Syn. Inc. v. Light*, (W.D.K.Y., 2013) (rejecting employer's fraudulent misrepresentations cause of action based on former employee's refusal to update LinkedIn profile)
 - *Create the Obligation – Put it in Writing:*
 - *Employee agrees to update his/her social media profiles and other public records, as necessary, within five (5) business days of their separation from the company.*
 - *Breach of Contract Action*

Has your organization ever had a former employee post negative feedback about your organization on social media?

Yes

No

Who
knows...

Has your organization ever had a current employee post negative feedback about your organization on social media?

Yes

No

Who
knows...

Misrepresentations on Social Media

Negative Comments on Glass Door (or Other Online Platforms)

- Ignoring critical comments has potential to harm your organizations' reputations
- If response is in order
 - Professional
 - Courteous
 - Thoughtful
 - Address the Issues Raised
 - Thank Former Employee for Comments
 - Wish Well on Future Endeavors

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