



Department of Management Services
Division of Human Resource Management

PROGRAM GUIDELINES

SUBJECT: Social Media - Use by Agencies in the Hiring Process and Personal Use by Employees	
STATUTORY/RULE REFERENCE: Chapter 110.211, Florida Statutes (F.S.), Recruitment Chapter 110.213, F.S., Selection Sections 110.217(1)(a), (2), and (3), F.S., Appointments and Promotion	EFFECTIVE DATE: <i>July 16, 2012</i>
FORMS:	ADDITIONAL REFERENCE MATERIAL:

I. SCOPE AND PURPOSE.

Employee use of Internet search engines, chat rooms, social networking sites, blogs and other online forums and gathering sites have become fertile ground for many work-related benefits and pitfalls. The Internet provides access to information regarding applicants and employees that was not previously readily available. The temptation can be great to use this information for many purposes across the agency; however, the type of information gathered and the implication of its use both intentional and unintentional can create legal issues if not properly administered and controlled. Therefore, caution is advised.

The Department of Management Services, in consultation with the former Agency for Enterprise Information Technology (AEIT), developed this guideline to address Social Media as it relates to recruitment and employee relations. This document answers frequently asked questions and may be used as a reference tool for state agencies, human resource staff, and hiring managers within the State Personnel System. It is intended to provide general guidance in administering the use of Social Media for purposes of State of Florida employment.

II. DEFINITIONS.

Applicant – an individual who applies for a position with an agency of the State Personnel System (this includes current employees who may be applying for a new position).

Confidentiality – The principle that assures that information is shared only among authorized persons or organizations. Breaches of confidentiality are more likely to occur when data is not handled properly.

Social Media – A set of technologies such as application software or Internet sites that enable people to communicate with one another to share information or ideas.

III. APPLICABLE STATUTORY PROVISIONS.

Section 110.211, F.S., Recruitment

- (1) Recruiting shall be planned and carried out in a manner that assures open competition based upon current and projected employing agency needs, taking into consideration the number and types of positions to be filled and the labor market conditions, with special emphasis placed on recruiting efforts to attract minorities, women, or other groups that are underrepresented in the workforce of the employing agency.
- (2) Recruiting efforts to fill current or projected vacancies shall be carried out in the sound discretion of the agency head.
- (3) Recruiting shall seek efficiency in advertising and may be assisted by a contracted vendor responsible for maintenance of the personnel data.
- (4) All recruitment literature involving state position vacancies shall contain the phrase "An Equal Opportunity Employer/Affirmative Action Employer."

Section 110.213, F.S., Selection

- (1) Selection for appointment from among the most qualified candidates shall be the sole responsibility of the employing agency. All new employees must successfully complete at least a 1-year probationary period before attainment of permanent status.
- (2) Selection shall reflect efficiency and simplicity in hiring procedures. The agency head or his or her designee shall be required to document the qualifications of the selected candidate to ensure that the candidate meets the minimum requirements as specified by the employing agency, meets the licensure, certification, or registration requirements, if any, as specified by statute, and possesses the requisite knowledge, skills, and abilities for the position. No other documentation or justification shall be required prior to selecting a candidate for a position.

Sections 110.217 (1)(a), (2), and (3), F.S., Appointments and Promotion

- (1)(a) The department, in consultation with agencies that must comply with these rules, shall develop uniform rules regarding appointment, promotion, demotion, reassignment, separation, and status which must be used by employing agencies. Such rules must be approved by the Administration Commission before their adoption by the department.
- (2) Each employing agency shall have the responsibility for the establishment and maintenance of rules and guidelines for determining eligibility of applicants for appointment to positions in the career service.
- (3) Eligibility shall be based on possession of required minimum qualifications for the job class and any required entry-level knowledge, skills, and abilities, and any certification and licensure required for a particular position.

IV. GUIDING PRINCIPLES.

A. Using Social Media as part of Recruitment Process

Many employers are using web sites such as Monster, Twitter, LinkedIn, Facebook, etc. to support recruitment efforts and our state agencies are no exception. Use of these web sites help to reach candidates who may not have ordinarily considered the state as an employment option. However, it is recommended that the recruitment announcement posted on these web sites either link or refer the applicant to People First for the application process to ensure consistency and equity throughout the recruitment process.

B. Use of Social Media Sites as part of Selection Process

While agencies have the latitude to construct their selection processes in a manner that meets agency needs, the current guidance from the Society for Human Resource Management (SHRM) recommends that screening of job applicants follow specific federal and state guidelines and that an “Internet screening/verification/decision-making process is not advisable because of the potential for litigation¹.”

The primary reason for not using social media as part of the selection process is that it gives employers access to information about applicants which cannot be legally considered in the recruitment and selection process and which raises the issue of illegal discrimination. Examples of such information include:

1. Race
2. Disability
3. Age
4. Ethnicity
5. Gender
6. Marital or family status
7. Religious or other group affiliations
8. Sexual orientation
9. Confidential genetic information protected by the Genetic Information Non-discrimination Act (GINA)

It can be potentially damaging for agencies to become aware of information that should not be considered as part of the selection process. The possession of such information may lead to the argument that it was the basis for an adverse employment action. Therefore, the applicant could view the hiring decision as discriminatory or biased because of the nature of the information the agency gathered through a social media website.

Using social media also makes it difficult to ensure that the screening process is applied consistently to all applicants. Inconsistency in the screening process may result in allegations of disparate treatment, discrimination, etc. Consistency is important not only in assuring that each applicant is screened in the same manner, but also in how the information obtained from social media websites is used in making an employment decision.

¹ “Using Internet Information To Screen Job Candidates Not Advised”, Robert Capwell, Chief Knowledge Officer, Employment Background Investigations, Inc., May 27, 2008.

In addition to the concern for consistency in the screening process and the possibility that a hiring decision may be discriminatory because of the type of information gathered from social media websites, there is also a concern about the reliability of social media content. Since most social media web sites are public and often do not have secure access, they are subject to hacking. The information posted on an individual's Facebook account, YouTube, or other media may not have been initiated by the applicant for whom you are performing the screening. Individuals other than the applicant may use these accounts to promote their own agenda and may cause you to make an adverse employment decision based on incorrect information. For example, postings on an applicant's account from a third party (friend, fan, etc.) that are deemed distasteful, inaccurate, unwarranted, or not in line with an agency's goals can link an applicant to content beyond their control and cause unfavorable consequences in the screening process.

In light of these concerns, the use of a social media review as part of the selection or screening process is not recommended. Any policy providing for use of social media as part of the selection or screening process should be adopted only after careful review by legal counsel. And, if the decision is made (in consultation with legal counsel) that use of social media sites for these purposes is warranted or justified, the agency's access to an applicant's social media account information should be limited to that which is available publicly or is visible based on the applicant's selected security settings. **At no time shall an agency request an applicant's or employee's password or security access information in order to obtain access to their social media accounts.** This includes pursuing viewership of what is not made available by the applicant (publicly and based on settings) via other means, such as viewing their account through a secondary connected account (e.g., viewing their profile from an account that is "friends" with the applicant on Facebook and thereby accessing the applicant's information from that established connection).

C. Personal Use of Social Media by Employees

Employees' use of social media, whether at the workplace or at home, can raise concerns for agencies. In developing policies for employees' use of social media, agencies should identify online conduct that may result in disciplinary action. In doing so, the agency should not restrict employee communication that is protected under the following categories:

Matters of Public Concern: Statements made by an employee regarding matters of public concern are protected speech under the provisions of the First Amendment of the U.S. Constitution. The content, form and context of the statement will determine whether it is protected as a matter of public concern. Statements that are the subject of general interest and are of value and concern to the public at large will be considered statements of public concern. Such statements may include matters of political or social concern, or those that apply to concerns of the community as a whole, even though the statements may relate to agency business or employees.

Concerted Activities: It is essential that employees' rights under state law to "engage in concerted activities ...for the purpose of collective bargaining or other mutual aid or protection" be preserved (section 447.301(3), F.S.). Such activity consists of discussions or communications among co-workers with the intent of improving working conditions, regardless of whether the behavior occurs in a unionized setting. The Florida Public Employees Relations Commission (PERC) has relied primarily on rulings of the National Labor Relations Board (NLRB) in determining the circumstances in which these rights apply to social media postings. Absent clear-cut directives, the NLRB generally considers whether:

Program Guidelines

1. the online postings must relate to terms and conditions of employment;
2. there is evidence of concert – i.e., there must be discussions among employees of the posts or coworker responses to the posts;
3. there is evidence the employee was seeking to induce or prepare for group action; and
4. the posts reflect an outgrowth of employee's collective concern.

NLRB cases involving concerted activities and use of social media have to date fallen into two categories: (1) employer policies restricting employee use of social media that are alleged to be overbroad, and (2) employer discharge or discipline based on an employee's comments posted through social media channels. With respect to employer policies, the NLRB has found the following policies to be overbroad:

- In external social networking situations, instructing employees that they should generally avoid identifying themselves as the employer's employees, unless there was a legitimate business need to do so or when discussing terms and conditions of employment in an "appropriate" manner.
- Making insubordination or "other disrespectful conduct and inappropriate conversation" while using social media technologies subject to disciplinary action.
- Prohibiting employees from using social media to engage in "unprofessional communication" that could negatively impact the employer's mission or "unprofessional/inappropriate communication" regarding members of the employer's community.

In a recent case, (*Orange County Professional Fire Fighters v. Orange County Board of County Commissioners*) PERC found that the following policy was overbroad: "Employees of the Department shall not criticize or ridicule or debase the reputation of the Department, its policies, its officers or other employees." PERC determined that the policy constrained employees' right to participate in protected concerted activity. 38 FPER § 131 (Sept. 26, 2011).

Conversely, the NLRB upheld the following policy as not overbroad, finding that it would not prevent employees from participating in protected concerted activity: "Employees are prohibited from the use of social media to post or display comments about coworkers or supervisors or the employer that are vulgar, obscene, threatening, intimidating, or harassing."

Despite the protection available to employee communication deemed to be concerted activity, employee discipline has been upheld in a number of cases in which an employee has used social media to comment negatively upon the workplace. Employees are not allowed to use threatening language, libelous speech, or language that constitutes extortion or bribery.

Given the above discussion, agencies should consider the following matters in developing policies addressing employees' use of social media:

1. Setting conditions to govern employee access to social media sites for personal purposes during the workday (consistent with the manner in which the agency addresses personal use of the Internet during the work day);
2. Using social media for agency purposes should be separately and specifically addressed and clearly outlined in position descriptions that require social media as an agency based work-related function;
3. Distinguishing between communications that are made as a private citizen, on matters of public concern, and those that are sent in a person's capacity as an employee and that are not of public concern;

Program Guidelines

4. Acknowledging that employees' personal communications through social media, although critical of agency operations or employee actions, may be protected as matters of public concern or "concerted activities";
5. Prohibiting employees from representing any opinion or statement as the policy or view of the agency, unless specifically authorized to do so;
6. Identifying prohibited activities that are actionable through the agency's discipline process, including examples of such activities. Such activities may include the following if they involve the workplace and adversely affect the job performance of the employee or fellow employees, or otherwise adversely affect the agency's legitimate business interest:
 - a. Accessing or transmitting threatening, obscene, intimidating, defamatory, harassing, discriminatory, or unlawful content;
 - b. Failing to take reasonable steps to ensure that information being disseminated is honest and accurate, and quickly correcting any mistakes;
 - c. Disseminating confidential, proprietary or other protected business information such as trade secrets, employee medical records, information from active investigations, and certain financial and procurement information and
 - d. Violating the agency's Internet, e-mail or media policies (excessive time, improper use of equipment, etc.).

The considerations discussed above regarding protections that may apply to employee social media communications make it imperative that the agency consult with legal counsel before implementing policies regarding employees' personal social media use or taking disciplinary action in response to such communications.

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