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Legal Issues Webinar Series**

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Webinar Features

- Please refrain from using the emoticons, hand-raising and polling features during this session unless directed to do so by the presenter.



Social Media, Disabilities, and Employment Protections

November 14, 2012
Presented by:
Joe Bontke and Erin Lawler

Speakers

<p>Joe Bontke Equal Employment Opportunity Commission (EEOC)</p> 	<p>Erin Lawler Texas Governor's Committee on People with Disabilities</p> 
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What to expect from the presentation

- We will explore the interaction between the rights of people with disabilities in the workplace and the growing influence of social media.
 - how are employers currently using social media to hire and screen employees?
 - what information can employers use legally - and what information could lead to a disability rights violation?
 - what rights do employees have when using social media at work?
 - what are some best practices for employers and employees regarding social media?

Legal landscape

- The intersection of social media usage, disability, and employment protections is an area of law in its infancy.
- As social media usage by both employees and employers has increased, courts will increasingly face many issues about social media in employment.
- Trends are emerging.

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Hiring and screening: Trends in social media usage

- 75% of U.S. recruiters are required by their companies to do online research of candidates.
- 70% of U.S. recruiters report they have rejected candidates because of information found online.

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**Hiring and screening:
May employers use social media
information to screen applicants?**

- Employers are prohibited from using information on an applicant’s protected status to discriminate against the applicant.
- Federally protected information includes information about a person’s disability and genetic information.
 - Our focus today will be protections found in:
 - Americans with Disabilities Act (ADA)
 - Genetic Information Nondiscrimination Act (GINA)

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**Hiring and screening:
ADA general protections**

- **ADA language:** “No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual **in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.**” 42 U.S.C. §12112 (a).

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**Hiring and screening:
GINA general protections**

- **GINA language:** “It shall be an unlawful employment practice for an employer **to fail or refuse to hire, or to discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee.**” 42 U.S.C. § 2000ff-1(a).

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Hiring and screening: Scenario 1

- An employer conducts a telephone interview with an applicant. Based on the interview, the employer determines that the applicant is the most qualified person for the position.
- The employer then researches the applicant online before making a job offer.
- The employer sees that the applicant's Facebook profile photo shows a person in a wheelchair.
- The employer worries about possible complications or expenses related to the applicant's disability.
- Question: if the employer decides not to make the job offer, has the employer committed an ADA violation?

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Hiring and screening: Explanation 1

- Probably yes.
- It is a violation of the ADA to discriminate against a qualified applicant with a disability on the basis of that disability, regardless of how the employer came to know of the disability.
- When an employer could reasonably believe that an applicant will not be able to perform an essential job function because of a known disability, the employer may ask that particular applicant to describe or demonstrate how he would perform the function.

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Hiring and screening: Scenario: 2

- An employer visits an applicant's Twitter page before making an offer of employment.
- Through Twitter, the employer learns that the applicant, a mother, has an adult child with disabilities who lives at home.
- The employer is concerned that the applicant may miss work often or be distracted by her obligations toward her child.
- Question: if the employer decides not to make the job offer based on this information, has the employer committed an ADA violation?

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Hiring and screening: Explanation 2

- Probably yes.
- The ADA also prohibits discrimination in employment against **associates** of people with disabilities.
- An employer who learns through social media that an applicant or employee lives with or cares for a person with a disability may not use that information to discriminate against that applicant or employee.

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Hiring and screening: Scenario 3

- An employer uses LinkedIn and Facebook to perform general research about an applicant before making a job offer.
- On the applicant's Facebook page, the employer sees a conversation between the applicant and a friend about an upcoming Susan G. Komen Race for the Cure event.
- The conversation reveals that the applicant is running in the race to support her mother, a breast cancer survivor.
- The employer has just inadvertently discovered that the applicant has a family history of breast cancer.
- Question: has the employer committed a GINA violation?

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Hiring and screening: Explanation 3

- Probably not.
- GINA prohibits employers from acquiring genetic information about applicants and employees outside of several narrow exceptions.
- "Genetic information" includes, among other things, information about an individual's genetic tests, information about the genetic tests of a family member, and **family medical history**.
- But there is an "Inadvertent Acquisition Exception." The employer has not violated GINA if he learned of the applicant's genetic information (in this case, family medical history) inadvertently.

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Hiring and screening: Scenario 4

- Now the employer is concerned that the applicant herself is carrying the marker for breast cancer.
- The employer worries that if he hires the applicant and she gets sick, it may cost the company in additional leave time and increased health insurance premiums.
- The employer types the applicant's name into Google, followed by the term "breast cancer marker."
- Question: has the employer committed a GINA violation?

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Hiring and screening: Explanation 4

- Probably yes.
- EEOC regulations implementing GINA provide that subject to specific exceptions, an employer may not "request, require, or purchase genetic information of an individual or family member of the individual." 29 C.F.R. § 1635.8(a).
- "Request" includes conducting an Internet search on an individual in a way that is likely to result in a covered entity obtaining genetic information.

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Hiring and screening: Scenario 5

- An employer is conducting general research on an applicant.
- He finds an online newspaper article that says that the applicant's father, a prominent man in the community, died recently of a sudden heart attack.
- The employer has just learned that the applicant has a family history of heart failure.
- Question: in acquiring this information about the applicant's family medical history, has the employer committed a GINA violation?

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Hiring and screening: Explanation 5

- Probably not.
- GINA contains an exception for “Commercially and Publicly Available Information.”
- An employer is not liable under GINA for acquiring genetic information from sources that are commercially and publicly available, such as newspapers, books, magazines, periodicals, television shows, movies, or the Internet.
- This exception does not apply to sources with limited access, such as social networking sites that cannot be accessed without an individual’s permission, unless the covered entity can show that access is routinely granted to all who request it.

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Hiring and screening: Scenario 6

- The employer who accidentally learned of the family history of breast cancer and the employer who learned of the family history of heart failure through the newspaper know a little bit about GINA.
- They know that they are “safe,” because their acquisitions of genetic information fall under relevant exceptions to the rule.
- They both decide not to hire the applicants based on what they learned of the applicants’ family medical histories.
- Question: are the employers right to feel “safe” or are they violating GINA after all?

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Hiring and screening: Explanation 6

- The employers are probably violating GINA.
- GINA prohibits an employer from using genetic information in making employment decisions.
- The prohibition on **using** the information is absolute.
- The fact that the employers acquired the information inadvertently or through a source that is commercially or publicly available will not protect the employers if they use that information.
- Rationale: the possibility that someone may develop a disease or disorder in the future has nothing to do with his or her current ability to perform a job.

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Hiring and screening: Scenario 7

- As part of a formal interview, an employer asks an applicant for her Facebook password.
- The applicant has high privacy settings on her Facebook page. She does not want a potential employer to see information on her page about her experiences with mental illness.
- The applicant refuses to provide the password.
- Question 1: if the employer chooses not to hire the applicant based on her refusal to provide a password, has employment discrimination occurred?
- Question 2: has the employer committed employment discrimination just by asking for the password even if he ultimately offers the applicant the job?

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Hiring and screening: Explanation 7

- Trick questions!
- Whether employers can demand passwords is an unresolved issue in most states and at the federal level.
- Three states have passed legislation barring employers from asking for passwords (Maryland, Illinois, and California).
- There is proposed legislation in at least nine other states (Delaware, Michigan, Minnesota, New Jersey, New York, South Carolina, Washington, Ohio).
- Two proposed federal laws:
 - The Social Networking Online Protection Act (SNOA) would prohibit employers from requiring such information or denying employment or otherwise penalizing candidates or employees for refusing to give up such information
 - The Password Protection Act of 2012 would prohibit employers from forcing prospective or current employees to provide access to their own private, personal data systems as a condition of employment, but would allow employers to retain the right to govern access to social media sites within office hours

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Hiring and screening: Scenario 8

- An employer decides to advertise a job opening on a social media website.
- After the posting has been up for several weeks, the employer receives a phone call from a prospective applicant.
- The applicant learned about the posting from a friend, but says that she cannot access the posting because this particular social media website is not navigable by someone with a visual disability using a screen reader.
- Question: has the employer commit an ADA violation? If so, what should the employer do to remedy the situation?

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Hiring and screening: Explanation 8

- ADA violation? It depends; case by case analysis.
- Information about job openings should be accessible to people with different disabilities.
- An employer is not obligated to provide written information in various formats (braille, large print) in advance, but should make it available in an accessible format on request.
- If the employer is conducting its recruiting only on that one social media website and the website is inaccessible to people with certain disabilities, the employer may be opening the company up to a discrimination claim under the theory of disparate impact.

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Hiring and Screening: Best Practices

Hiring and screening: Best practices for employers

- Questions to ask when using social media:
 - Is it legal...?
 - to search for this information?
 - to use the information if I find it?
 - Is it valid?
 - Does the information predict job performance?
 - Is the information job-related?
 - Is it worth it?
 - Have you opened your organization up to the perception of discrimination?

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Hiring and screening: Best practices for employees

- Be careful.
 - Do not post anything on any site that you would not want a potential employer to see.
- Be discreet.
 - Set your profile to private and block inappropriate comments that others may make on your profile.
- Be prepared.
 - Regularly check your profile for inappropriate content. Make sure you have an answer ready to explain or counter any "digital dirt" employers may see.

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Social media usage: risks for employers and employees

- Creates blurring of lines between "work" and "personal"
- No opportunity to "filter" or "edit"
- Reaches a vast audience
- Available for immediate public viewing
- Speed and informality make users less guarded and more careless
- Could be creating discoverable records

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**Social media usage:
Scenario 1**

- An employee sends out a request for prayers and support through Facebook. The employee reveals that her mother, who lives with her, was recently diagnosed with cancer.
- The employer sees the Facebook request and learns that the employee's mother has begun to undergo cancer treatment.
- The employer thinks that the employee may require a reasonable accommodation, such as a reduced work schedule, to allow her to spend time caring for her family member.
- Question: is the employer obligated to offer the employee a reasonable accommodation under the ADA based on the employer's knowledge of the employee's mother's cancer?

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**Social media usage:
Explanation 1**

- The ADA does not require employers to offer reasonable accommodations based on an employee's **association** with a person with a disability.
- This is a distinction: while the ADA prohibits an employer from discriminating against an employee based on the employee's association with a person with a disability, the employer is not required under the ADA to provide a reasonable accommodation based on that association.
- Note: the employer may be obligated to provide leave time for the employee to care for her mother under the Family and Medical Leave Act (FMLA).

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**Social media usage:
Scenario 2**

- Same facts as the previous scenario.
- Scenario 2: Now that the employer knows of the employee's family history of cancer, he is concerned that the employee may develop cancer down the road.
- Question: If the employer decides to terminate the employee based on her family history of cancer, has he commit a GINA violation?

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**Social media usage:
Explanation 2**

- Probably yes.
- The definition of genetic information under GINA contains family medical history.
- Even though the employer obtained the information inadvertently, he is prohibited from basing an employment decision on that information.

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**Social media usage:
Scenario 3**

- An employee sends out a request for prayers and support through Facebook for **her own** cancer treatments.
- The employer learns through the Facebook request that the employee has cancer and is currently undergoing treatment.
- Question: is the employer obligated to approach the employee about a reasonable accommodation under the ADA related to her cancer, even though the employee has not requested an accommodation?

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**Social media usage:
Explanation 3**

- Probably not.
- As a general rule, the individual with a disability, who has the most knowledge about the need for reasonable accommodation, must inform the employer that an accommodation is needed.
- The employer **may** ask an employee with a known disability whether she needs a reasonable accommodation when the employer reasonably believes that the employee may need an accommodation.

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Social media usage: Scenario 4

- An employer reads an employee's post to the employee's personal blog.
- Through the blog, the employer learns that the employee is unhappy with her position and believes that she has faced unlawful discrimination under the ADA.
- Further, the employee reveals in her blog that she has reported the alleged discrimination to the EEOC.
- The employer becomes concerned that this employee and her potential lawsuit could cause the company a lot of time and money. Plus, the employer is pretty sure that the employee doesn't even have a qualifying disability – she's just a complainer.
- Question: if the employer terminates the employee based on her reporting the alleged discrimination, has the employer violated the ADA?

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Social media usage: Explanation 4

- Probably yes.
- Title V of the ADA: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C.A. §12203(a)
- Most courts have found that retaliation protections are not limited to people with disabilities. An employee without a disability can bring a retaliation case if an adverse employment action was made against that employee for engaging in a protected activity.

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Social media usage: employee rights and responsibilities

- Question: may employees be disciplined by their employers for activity on social media?
- Answer: yes and no.
- Yes: case law is full of examples of employees who were disciplined or lost their jobs due to activity on social media
 - many examples of sexual harassment occurring over social media
 - both the ADA and GINA prohibit harassment; these cases could be next

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**Social media usage:
employee rights and responsibilities,
(con't)**

- No: some social media activity will be legally protected, such as “concerted activity” under the National Labor Relations Act.
- National Labor Relations Board construes all of the following activities as protected when conducted over social media:
 - bringing group complaints to the attention of management,
 - initiating a discussion with a group of employees about a term or condition of employment,
 - discussing shared employee concerns about the terms and conditions of employment.

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**Social media usage:
disability harassment**

- **ADA language:** “It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of any rights granted or protected by [the ADA]. – 42 U.S.C.A. § 12203 (b).

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**Social media usage:
GINA harassment**

- **GINA language:** “It shall be an unlawful employment practice for an employer [...] to fail or refuse to hire, or to discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, **terms, conditions, or privileges of employment** of the employee, because of genetic information with respect to the employee” 29 CFR 1635.4(a).

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**Social media usage:
best practices for employers**

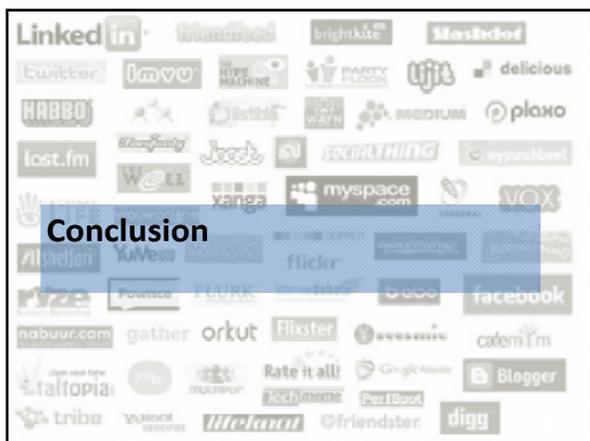
- Add “off-duty conduct” policy
- Check organization’s “cyber reputation”
- Check employees’ “cyber reputation”
- Create social networking policies for employees while at work, while using employer equipment/facilities, and while engaging in activity that will reflect directly on the employer

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**Social media usage:
best practices for employers, (con’t)**

- Employees may not:
 - Post material that is abusive, offensive, insulting, humiliating, obscene, profane, or otherwise inappropriate regarding the organization, its employees, vendors, suppliers, business partners and competitors
 - Engage in any conduct that may be construed as harassment based on race, ethnicity, color, national origin, religion, sex, sexual orientation, age, disability, or any other legally protected characteristic.

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Conclusion

Take A Ways

- **Obligations.** Disability protections apply at every stage of the employment process and the widespread use of social media is adding additional considerations.
- **Privacy.** Think before you “friend” someone and think before you post.
- **Evidence.** Social media information is increasingly being used as evidence in litigation. Employers and employees should be aware that through social media, contemporaneous records of the incidents giving rise to the litigation may be being created.

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Questions?

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