

Social Media Searches APA 46(4) 2013

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In perhaps one of the most underreported examples of recent bipartisan cooperation – in just the first four months of 2013 – 35 states have introduced or passed legislation restricting the use of social media searches (1). In nearly all cases, these restrictions apply to current and prospective employers as well as educational institutions but may also include landlords and others who include social media searches as part of a background investigation. Generally titled “Job and Education Privacy Acts” this legislation prohibits employers and others from “requesting or requiring” usernames and passwords to social media accounts. The stated need for such legislation is to prevent unlawful discrimination practices since social media might reveal information regarding race, gender, religion, age, disabilities and sexual orientation. This being the case, having a job applicant or current employee enter their own username or password, then conducting a social media search, has already been interpreted as a violation of the spirit of the legislation.

If the language of these bills and laws were universally consistent, social media “Privacy Acts” would be of little concern to polygraph examiners since they address a methodology (social media searches) not used in conducting examinations. Unfortunately, they do not, so examiners are strongly advised to review the specific legislation in their respective states. While federal employers are presumably exempt (these are state laws), there does not appear to be any general law enforcement exemption but examiners should check bills for late arriving amendments. The Maryland Department of Corrections was unsuccessful in persuading their legislature to allow them to search on-line for gang affiliations on applicants seeking employment as Corrections Officers (2). Kansas would prohibit employer requests to “divulge social media content” (3) but it is unclear if it would, by extension, be illegal for an interviewer or polygraph examiner to discuss the same content being unaware it was contained in some social media account. Anticipating objections from certain employers who currently search personal social media accounts for evidence of child pornography, Wisconsin – rather than exempting employers with a legitimate need to know – has instead statutorily limited liability in negligent hiring and detention litigation where employers comply with the Privacy Act and therefore do not conduct thorough social media background investigations (4). Whether such limits of liability will survive challenges is yet to be seen.

Some allowance appears to have been made in most “Privacy Act” states to exempt electronic equipment provided by employers. Likewise, while devices “used exclusively for personal communication” would be protected, devices used for both personal and “business” would not have to comply with the proposed access restrictions. Finally, most states allow employers and others to request

and require usernames and passwords to conduct social media searches when Just Cause has been established as part of an internal investigation, particularly with regard to issues involving financial, proprietary and confidential information.

Unlike recent legislation restricting the use of criminal and credit records, particularly when applied to pre-employment background investigations, Privacy Act legislation appears to focus on the issue of access to information rather than the use of information obtained. It is more analogous to the Employee Polygraph Protection Act (5) and therefore shouldn't directly effect polygraph examiners unless the examiner is also the background investigator or internal affairs investigator and desires to include social media searches as part of an investigation. As discussed in great detail in various APA instructional presentations(6), the primary issue in pre-employment background investigations should always be identifying pre-hire activities,- recent, performance related activities - that predict hiring disasters and using methods that obtain accurate information about these activities. In this regard, properly conducted pre-employment polygraph examinations, coupled with factual, admissions elicited in a non-accusatory manner, far exceed the capabilities of even the most ambitious social media search and criminal/credit record check combined.

1. National Conference of State Legislatures, www.ncsl.org/issues-research/telecom/employer-access-to-social-media-passwords-2013
2. "Maryland Corrections Agency Demanding All Social Media Passwords of Potential Hires", TechDirt, Mike Masnick, February 22, 2011
3. Kansas H.B. 2092, January 25, 2013
4. Jason Stein, Milwaukee Journal Sentinel, April 22, 2013
5. Employee Polygraph Protection Act, June 1988 (revised July, 2008), U.S. Department of Labor, www.wagehour.dol.gov
6. Eliciting Information In The Pre-test Interview, September 18, 2012, APA Seminar, San Diego, CA