

**OMG\*-- DO YOU NEED A SOCIAL NETWORKING POLICY?**

"Social networking" used to be a drawn out process. Dress up, head downtown, meet clients for drinks and dinner. The whole affair could take hours and cost hundreds of dollars.

Ask anyone under thirty what "social networking" means, and the answer won't involve high heels or a business suit. Today social networking is done by computer, on sites like Facebook, Twitter and LinkedIn. It's cheap, quick, and simple to communicate with people all over the world from any computer. You can wear your suit... or your pajamas. Chances are that many of your employees are already heavily involved in social media.

That raises an important issue for employers: how will you handle the prevalence of social media? If you're thinking, "IDK\*\*," read on.

Some companies encourage their employees to learn about networking sites and use them responsibly. Active Twitter accounts can give a corporation a human face and attract customers. Other employers entrust their employees with loads of confidential information. Allowing these workers to blog or tweet freely about their work could be detrimental to the company and its clients.

In both situations, it makes good business sense to have a policy governing the use of social media so that both the employer and employees are absolutely clear on what information can be disseminated and whether it may be done on company time or computers.

Some companies will require a restrictive policy that prevents employees from posting any information about the workplace or clients. Others will want a policy that encourages workers to reach out to potential customers, but they will need clear guidelines so that everyone knows how social media may be used and what is off limits.

Social media use grew by 82% in the last year, according to the Neilson Company. As social networking thrives, companies should pay attention to this new form of communication and consider formulating a policy that clarifies whether employees are allowed to LOL\*\*\* at their computers about work-related matters.

\* Oh My Gosh!

\*\* I Don't Know

\*\* Laugh Out Loud

*-- Ashley E. Watkins*

## EEOC'S E-RACE INITIATIVE TAKES AIM AT CRIMINAL BACKGROUND CHECKS

Three years after its launch, the EEOC's E-RACE Initiative (Eradicating Racism and Colorism from Employment) is in full swing. The E-RACE Initiative began in 2007 as an effort by the EEOC to identify issues, criteria and barriers that contribute to race and color discrimination, explore strategies to improve the administrative processing and the litigation of race and color discrimination claims, and enhance public awareness of race and color discrimination in employment. Over time, the EEOC has focused primarily on facially neutral employment policies and practices that may have a disparate impact on employees on the basis of race and color. Under a disparate impact theory, an employment policy or practice that is not discriminatory on its face may nonetheless be unlawful if the application of the policy or practice adversely affects a disproportionate number of people within a statutorily protected category, such as race.

One of the areas receiving the most scrutiny has been employers' use of criminal background checks during the hiring and selection process. The EEOC has made it clear that the automatic use of a criminal record without a showing of "business necessity" can have a discriminatory impact by disqualifying a disproportionate number of African-Americans and Hispanics. The EEOC's position is based on statistical evidence that African-Americans and Hispanics are convicted at a rate disproportionately greater than their representation in the population and thus, employment decisions based on criminal conviction records have an adverse impact on these minority groups. Consequently, the EEOC maintains that such a policy or practice is unlawful under Title VII in the absence of a showing by the employer that the policy or practice is job-related and consistent with business necessity.

According to the EEOC, in determining whether an employer's decision was justified by business necessity, the employer must show that it considered (1) the nature and gravity of the offense or offenses; (2) the time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought, when making employment decisions. In other words, an employer generally cannot state "Applicants with a criminal record need not apply" without finding themselves in the cross-hairs of the EEOC's E-RACE Initiative.

Given the E-RACE Initiative's increased focus on criminal conviction policies and the EEOC's aggressive investigation and prosecution of administrative charges of discrimination based on criminal background checks, employers should take a close look at their hiring policies and practices to make sure that they are achieving diversity objectives and have not created unintended barriers to individuals based upon race and color. The following suggestions can help employers avoid conflict with the E-RACE Initiative with regard to recruitment, hiring, and promotion:

- Review all existing criminal background check policies and modify those policies that impose an absolute ban on hiring applicants with criminal convictions, unless such a ban is job-related and justified by business necessity.
- Make sure that all criminal background check policies consider various factors when determining whether to hire an applicant with a criminal conviction, including the nature of the offense, the nature of the job for which the applicant has applied, and the length of time since the conviction.
- In addition to arrest and conviction records, the E-RACE Initiative has also identified selection decisions based on names, employment and personality tests, and credit scores as potentially impacting people of color in a disparate manner. As such, these tests and selection tools should be carefully examined to ensure they are consistent with business necessity and do not disproportionately impact protected groups of applicants.
- Conduct periodic self-audits to determine whether current employment practices have a disproportionate effect on individuals based upon a person's race or color.
- Analyze job descriptions and the relevant duties and functions, and scrutinize the objective, pertinent job-related qualifications standards. Employers should make sure they are consistently applying those requirements among candidates and remove any requirements that cannot demonstrably be tied to job performance or business necessity.
- Make sure promotion criteria are made known, and that job openings are communicated to all eligible employees.
- Finally, employers should consider working with experienced labor and employment counsel to evaluate whether their criminal background policies and practices are having an adverse impact on certain segments of the population and, if so, the proper method to modify these policies to bring them in compliance with the law and the EEOC's E-RACE Initiative.

*-- Allison Garton*

**CAN YOU BE SUED FOR HIRING AN EMPLOYEE  
WITH A NON-COMPETE AGREEMENT?**

Yes. The Alabama Court of Civil Appeals recently affirmed a verdict against an employer who hired a salesman in violation of his non-compete agreement with his previous employer. That employee had agreed not to solicit customers with whom he dealt for a period of time following his employment. After he got fired, he went to work for a competitor and, with his new employer's knowledge, began contacting and obtained business from his former customers. The former employer sued both its former employee and his new employer and obtained a verdict against both.

How can you protect yourself? When you hire an employee who used to work for one of your competitors, particularly in a sales or management position, you should ask that employee if he is under a non-compete agreement. If so, you need to get it and have your lawyer review it. If the agreement is enforceable and prohibits the individual from working for a competitor, your lawyer will probably advise you not to hire that person unless he or she obtains the consent of the competitor. If the agreement does not prohibit employment with a competitor, but only contains a restriction on contacting customers or employees, it is usually best to get that person's commitment in writing that he will abide by the agreement. Sometimes, applicants will deny having a non-compete agreement, either because they do not remember signing one or want to hide it from you. Nevertheless, you will be better off for having asked the question. If you hire an employee without any knowledge of a non-compete agreement and you have tried to determine if one exists, then you should have a good defense to any suit brought by your competitor. If an employee denied having a non-compete during the hiring process and you later learn otherwise, you should consider terminating the employee for providing false information.

Non-compete agreements are not just your employee's problem. If not handled properly, they can become the employer's problem too.

*- Trip Umbach*

**EMPLOYEES TURNING TO RICO TO CHALLENGE  
EMPLOYER'S USE OF ILLEGAL ALIENS**

Since 1970, the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961, *et seq.*, has been available as a tool to combat organized criminal activity and its effect on the nation's economy. It is commonly accepted that RICO was originally intended as a weapon against the Mafia; however, disgruntled employees (and their attorneys) have recently begun adding RICO claims to their civil challenges to employment practices. Specifically, RICO challenges have appeared in circumstances where employees have alleged that their employer has a systematic and deliberate plan to employ illegal aliens to the detriment of its other employees.

Under RICO, it is illegal for any person employed by or associated with an enterprise engaged in interstate commerce to conduct or participate in the conduct of the enterprise's affairs through a pattern of racketeering activity. To establish a civil RICO violation, a plaintiff must prove, among other elements, an act of racketeering (commonly referred to as a "predicate act"). Under RICO, the racketeering activity includes any violation of § 274 of the Immigration and Nationality Act ("INA"), if that violation was committed for financial gain. As an example, the INA precludes a person from knowingly hiring during a 12 month period at least 10 individuals with the actual knowledge that the individuals are illegal aliens. The INA also makes it a federal crime for any person to encourage or induce an alien to come to, enter, or reside in the United States in violation of law.

The 11<sup>th</sup> Circuit recently allowed a RICO claim to survive a Motion to Dismiss by a restaurant franchisee whose employees accused it of knowingly hiring, retaining and encouraging the recruitment of illegal aliens. Additionally, a flooring company facing RICO allegations for hiring illegal aliens recently agreed to settle a putative class action by establishing an \$18 million settlement fund.

Employers should be aware that employing undocumented workers could lead not only to scrutiny by federal and state law enforcement, but also civil claims by adversely affected and disgruntled employees.

*-- Alfred Perkins*

## OFFICE LOCATIONS

### Birmingham

Tele: (205) 868 • 6000  
100 Brookwood Place  
7th Floor  
Birmingham, AL 35209

### Mobile

Tele: (251) 433 • 6049  
RSA-Battle House Tower  
11 North Water Street  
20th Floor  
Mobile, AL 36602

[www.starneslaw.com](http://www.starneslaw.com)

The Alabama Rules of Professional Conduct require the following statement: *No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers.*

*This bulletin, and all the content it contains, was created by attorneys of Starnes Davis Florie LLP. The content of this bulletin does not convey legal advice, nor other professional advice of any kind. Your use of this bulletin does not create a lawyer-client relationship between you and the Firm.*

© June 2010, Starnes Davis Florie LLP