

MEDIA RELEASE

Social media sites present legal implications for employers and recruiters conducting candidate checks

Employers must realise legal obligations when gathering candidate information from sites like facebook, MySpace and twitter

20 July 2009 – As Australians continue to embrace social media in droves and upload more and more personal information on sites like Twitter, Facebook and MySpace, employers, managers and recruiters should consider the legal implications of gathering this personal information during the recruitment process, according to Harmers Workplace Lawyers.

Bronwyn Maynard, Senior Associate at Harmers Workplace Lawyers, said that many employers aren't fully aware of the legal obligations under the existing Privacy Act, let alone the additional employer legal obligations and employee rights introduced by the new "General Protections" section of the Fair Work Act, which commenced on 1 July 2009.

"Whenever an employer or recruiter collects personal background information on a candidate, that action triggers a raft of legal obligations under the Privacy Act. Those obligations include that an employer must inform the candidate that they have gathered personal information as well as explain the purpose for which the information was gathered and to whom it may be disclosed. On the flip side, candidates also have a right to request access to personal information that has been gathered about them," she said.

"The Privacy Act also dictates that companies must only collect personal information that is necessary for their business – a particularly relevant consideration for the type of information shared on social media sites, much of which is not relevant to a person's employment history or ability to do their job.

"Importantly, employers must remember that these privacy obligations apply even if the information gathered may have been obtained from a public source – as would be the case for many personal details included on an individual's blog, twitter, Facebook or MySpace page," she said.

Failure to comply with the legal obligations under the Privacy Act leaves an employer open to complaints against them being made to the Privacy Commissioner, and potential litigation.

For this reason, Ms Maynard said using social media as an information gathering tool raises serious legal issues for employers. "While I can understand that employers or managers might be tempted to find out about a candidate's social life and personal details online, responsible employers need to very carefully consider if this sort of personal information is truly relevant and necessary for the selection process.

“In fact, I am aware of some companies that have implemented formal policies that forbid the use of social media as a research tool for candidate information gathering - as they have deemed this type of personal information to be illegitimate and irrelevant to their business. In that way, they avoid many of the legal implications from potential misuse of this information,” said Ms Maynard.

Ms Maynard also said that the recently introduced “General Protections” section of the Rudd Government’s Fair Work Act, provides added protections for candidates.

“For example, if an employer was to discover via social media sites that a candidate had made a sexual harassment or unfair dismissal claim against a previous employer, and for that reason they decided not to employ that individual, the candidate could claim a breach of the General Protection section on the basis that adverse action was taken against them for exercising a ‘workplace right’,” she said.

Ms Maynard said that, due to such legal exposures, it was critical for employers to consider their policy on the gathering of personal information about candidates from social media sites.

“If the relevance of particular personal information is questionable, it is advisable for employers not to collect that information. Unless personal information is specifically relevant to that person’s ability to undertake that role, or work for that specific business, then the legitimacy of recording or using that information is seriously under question.

“I also always urge employers to remember the legal obligations that they trigger whenever they seek to gather personal information about a candidate. They need to make sure they properly inform candidates about the information gathered and its intended purpose and, when assessing applications, they must not use selection criteria that involve unlawful considerations,” concluded Ms Maynard.

Ends

Note to editors:

About Harmers Workplace Lawyers

Harmers Workplace Lawyers was established in 1996 as a boutique employment law firm. Since then it has become one of Australia’s leading employment and industrial law firms, with offices in Sydney, Melbourne and Brisbane. The firm has been awarded Australasian Legal Business’s ‘employment specialist firm of the year’ for the past three years running.

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