

Online Background Checks on Existing and Prospective Employees

Introduction

This Briefing Note considers the legal aspects of employers carrying out online searches and checks on their employees and prospective employees.

This Briefing Note should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

A growing number of people are posting information on social media such as LinkedIn, Facebook or Twitter, giving employers and prospective employers the ability to conduct online searches on job candidates and existing employees.

Searches on potential employees

As the law stands there is nothing to prevent a business from carrying out a search on an individual's name via a search engine or social media site such as LinkedIn, Facebook or Twitter. If the information – such as details of education, employment history, awards and achievements – helps the business decide whether to employ the individual, then arguably such tools are a huge advantage to the business as well as the successful job candidate.

However, as well as such useful information, the search may reveal personal information such as the individual's sexual orientation, religious beliefs, age or race. Whilst this information may not have been a reason or factor in rejecting a job applicant (the individual's employment record or qualifications may have been unsuitable), if the job applicant makes a data subject access request that shows the business undertook online searches on them, the business could be at risk of a discrimination claim. Protection from discrimination applies from the beginning of the recruitment process.

Searches on existing employees

A business can discipline or dismiss an employee for a fair reason, such as misconduct, which encompasses social media posts and other content an employee posts online.

Misconduct in an online context should be covered by the business's policies and procedures and/or its employees' contracts of employment.

Where the business believes that such online activity constitutes misconduct and wishes to take disciplinary action against an employee, the business must be able to demonstrate that:

- It has clear guidance on online conduct both during and outside work which was made available to the employee concerned;
- The employee's online conduct has a negative impact on their ability to perform their role or on the reputation of the business;
- The conduct, its effect and impact is serious enough to justify the relevant disciplinary sanction applied;

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Summary:

An overview of the legal aspects of employers carrying out online searches and checks on their employees and prospective employees.

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- The employee was made aware of the consequences of such misconduct.

Not only should the business take advice before using information obtained on its employees in the context of disciplinary action, but also in the context of promotion or salary reviews, as the risk of a claim for discrimination arises in relation to existing employees just as it does in relation to prospective employees.

ICO guidance on online checks

Guidance is available from the Information Commissioner's Office (ICO) – the Employment Practices Data Protection Code – and it recommends that:

- The prospective or existing employee is informed of the background searches and checks that the business proposes to undertake;
- The individual is given the opportunity to comment on the accuracy of the results of any such search;
- The business ensures that any such checks are proportionate in their intrusiveness to the nature of the risks the role entails at the time when the check is undertaken;
- Checks should be undertaken as late as possible in the recruitment process (if upon a prospective employee) and not performed on all candidates e.g. not on individuals who fail to make the short list;
- Where the check is performed during employment, the business should ensure that the monitoring is adequate, relevant, not excessive and proportionate to any risk identified.

Those responsible for recruitment or employee monitoring must exercise caution in the conduct of internet or social media searches and on the action prompted by the results of such searches. Both the searches and the reliance on their results should be reasonable, proportionate and justified as outlined in the ICO's code to minimise the risk of a claim by an employee or a prospective employee.

If you would like to know more about this topic or our other legal services, please contact Paul Maynard on 01323 435900 or by email pcm@gabyhardwicke.co.uk.

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