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**A Meltzer, Lippe, Goldstein &  
Breitstone, LLP White Paper:**

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# Social Media and the Hiring Process

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Legal and Non-Legal  
Considerations  
for Employer and  
Employee

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## **Emergence of the “Social Media Interview”:**

### *Legal and Non-Legal Considerations for Employers and Potential Employees Concerning Social Media Accounts and the Hiring Process*

#### **Introduction**

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Imagine landing a job interview. How do you prepare yourself? You might read about the company, prepare for questions, bring your resume and arrive on time. Then, the interviewer begins by asking for the username and password of all your social media accounts. Surprised? Don't be. Reports on emerging employment practices show your interview starts long before you arrive; it starts online with your social media accounts. Welcome to the age of the “social media interview.”

#### **Emerging Social Media Hiring Practices**

Companies increasingly rely on social media to support their business. From advertising to customer interaction social media is the future; however, social media has also entered business in ways that people have yet to understand. For instance, the hiring process has changed as [companies increasingly rely on social media](#) to search for potential employees. As a result, one employment practice has drawn the attention.

Specifically, some employers (and colleges) are asking applicants (and student athletes) to provide access to their social media accounts [as a condition of employment](#). MSNBC's Bob Sullivan reports, applicants to the Maryland Department of Corrections have been asked to log onto their social media accounts while the interviewer observes, a practice known as “shoulder surfing.”

As a result wall posts, friends and pictures – normally private – become viewable by a potential employer. Until recently, Maryland State agencies were requesting applicants turn over their personal social media account usernames and passwords; though Maryland State stopped this practice after complaints by the America Civil Liberties Union.

#### **The Employer Point-of-View and Public Push-Back**

Employers may argue the social media inspection process is voluntary, but many find this practice an egregious violation of First Amendment and privacy rights. [Rasmussen Reports](#) did a national telephone survey of American Adults and found that only 19% believe it would be appropriate for a potential employer to ask for access to their Facebook page as part of the hiring process, and most (69%) don't believe this is appropriate, while 12% are undecided.

Additionally, MSNBC's Sullivan reports that this type of monitoring by potential employers may be a violation of the Facebook user-agreement, and others. For example, [Facebook's Statement of Rights and Responsibilities](#) reads, “You will not share your password, let anyone else access your account, or do anything...that might jeopardize the security of your account.” According to

a Facebook spokesperson, employer policies that allow “shoulder surfing” appear to violate Facebook’s terms. As a social media attorney, I see a topic rife with conflict.

According to the same [MSNBC article](#), federal laws to prohibit social media password requests by perspective employers have even been suggested.

Conversely, some argue, social media is a tool for employers to gain a clearer understanding of potential employees and conventional wisdom holds that job-seekers take care that a Google search of their name isn’t showing negative results, so why not apply the same standard to your social media account?

So, while many assume that privacy settings on a social media profile will protect one from access by a potential employer, the recent trend of “shoulder surfing” and social media account passwords requests suggests otherwise. The burning question then becomes how employers and employees prepare for the age of the “social media interview?”

### **Emerging Legal Questions**

I spoke with Dawn Davidson Drantch, counsel for [Alcott HR Group](#), about whether an applicant’s social media presence plays a role in the hiring process, she responded, “If it does, applicants should be made aware that it does and how it does.”

Noting that employer’s must be cognizant of legal and regulatory issues when taking the social media interview to the next level, such as requesting log-in information: “Appropriate consents, notices and authorizations should be given to and obtained from the applicant (such as per the Fair Credit Reporting Act, Article 23(a) of the New York State Corrections Law, etc), and employers must not gain access to accounts surreptitiously or by coercion as they may violate the Electronic Communications Privacy act and/or the Stored Communications Act.”

Further, labor and employment questions arise when using social media to evaluate a prospective employee. According to Davidson Drantch, “Employers must be careful about obtaining information which may be unlawful to consider in employment decisions such as: lawful off-duty conduct (e.g., alcohol consumption); information on protected classes (race, gender, etc.); arrests and certain convictions, and more, because it will be difficult to prove that this information was not considered in the hiring process.”

Davidson Drantch underscored, “Objectivity is key. Have a non-decision-maker filter all information to the decision-maker, making sure to remove items that may be unlawful to consider during the hiring process. Be sure vetting for each candidate is standardized, objective and that a template is used to pass info to the decision-maker. Finally, consider limiting social media checks to the applicant’s LinkedIn site because that is a professional site, less likely to display information inappropriate to consider when hiring.”

She concluded, “The best suggestion is to leave background checks to a background-check vendor (making sure that the Fair Credit Reporting Act is complied with), and an employer must

be cognizant of federal and state record-keeping requirements which may require searches and documents be maintained for a period of time.”

### **Non-Legal Employer Considerations**

For a non-legal employer point-of-view, I spoke with Peter Xenakis, [Fuoco Technology](#), who provides IT expertise in the Long Island and NY-metro region.

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Xenakis noted that after seeing a promising resume he “hits the web” to do some social networking on websites like LinkedIn and Facebook, and uses LinkedIn to validate an applicant’s resume, “We also want to see who they are linked to and who we may know in common, while on Facebook we might check to see how they present themselves overall.”

Regarding the new trend of asking for an applicant’s social media account and password, Xenakis replied, “I think asking for an applicant’s username and password is going too far. If it’s private – I don’t want to intrude. It would set a bad expectation for potential hires to think we are ‘Big Brother’.” Xenakis cautioned that some level of social media review is helpful “An employer should be careful to find individuals who take their online presence seriously. Too many individuals have public facing photos of them at the bar doing something irresponsible.”

Xenakis concluded, “Recent applicants have used [social media] to demonstrate their knowledge,” and overall Xenakis believes the “social media interview” provides a valuable resource to all parties, “Time is my most valuable resource; with the flood of applicants we receive, the “social media interview” is a great tool to ‘set the table’ for actual interviews.”

### **What Recruiting Professionals are Seeing**

For yet another perspective I spoke to a recruiting professional, Linda Langer, Vice-President of [Access Staffing](#), who agrees with Xenakis that social media is playing a key role in today’s hiring process.

Langer stated, “Now more than ever social media is playing a big role in hiring. We look at a candidate’s LinkedIn profile and Facebook profile either before meeting them or after they come in for an in-person interview.” Adding, “It is also common practice for our clients to look at their profiles.”

She went on to note that, in most cases, an applicant’s social media presence *should* play a role in the hiring process because it is public information and individuals need to be responsible for the information they choose to share on the web.

“No matter if it is an experienced person seeking a new job or a student applying to college, the profile should reflect who they are and not include anything that might embarrass them. People need to be vigilant and monitor their profiles on the web,” said Langer.

## **Conclusion**

As companies continue to rely on social media for all aspects of their business employers and employees, alike, should be mindful of the ways social media is used. The “social media interview” is increasing in importance as part of the employment process. It presents employees, employers and HR an opportunity to gain a better understanding of each other, and allows job-seekers another way to showcase their expertise.

## **About the Author**

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Picture Attached:



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