KAUFMAN DOLOWICH VOLUCK

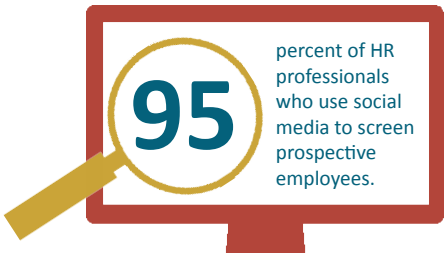
ATTORNEYS AT LAW

SOCIAL MEDIA in the WORKPLACE

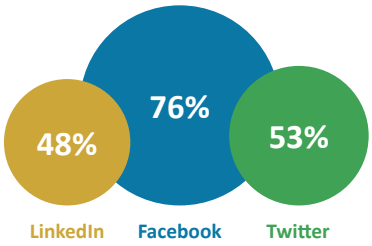
Screening and Hiring Applicants

An overwhelming majority of HR professionals use social media to screen job applicants, and have subsequently rejected candidates, but a small percentage still do not. When asked why they don't use social media, most cite legal reasons.

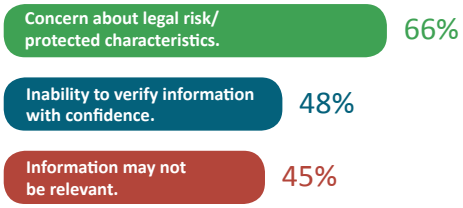
Use of social media for screening candidates:



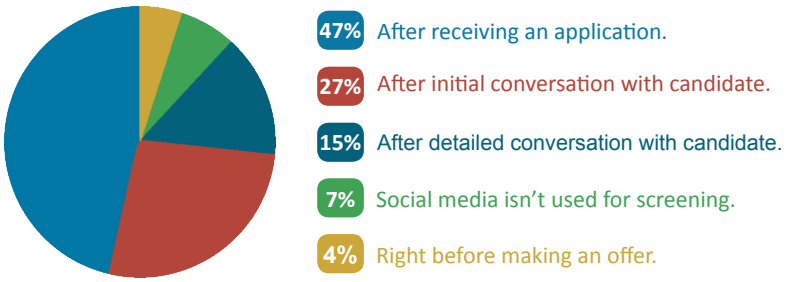
Sites most used to screen candidates:



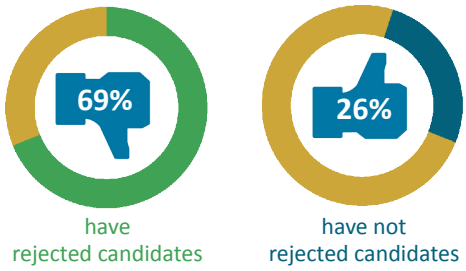
Most common reasons social media isn't used for screening:



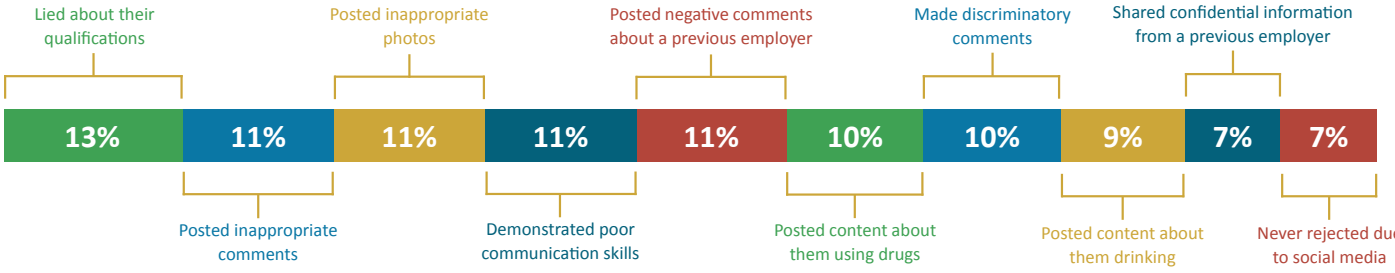
Phases of the hiring process when social media is used to screen candidates:



HR professionals who have rejected candidates because of what was on social media sites*:



Most common reasons for rejecting candidates after social media screening:



Using social media to vet applicants can lead to the acquisition of information that is protected by Title VII of the Civil Rights Act of 1964, as amended, and the Genetic Information Non-Discrimination Act ("GINA"). Adhering to the following practices can reduce the likelihood of claims arising and make employers a more insurable risk.

1. Disclosing to applicants that social media sites are being searched;
2. Maintaining records associated with hiring decisions, including print-outs of social media pages and the resulting form;
3. Having a non-decision maker screen candidates and pass along a form containing only appropriate information;
4. Treating all applicants consistently (specifically, do not conduct searches of only a certain applicant category).

*5% of HR professionals have not used social media to screen candidates.

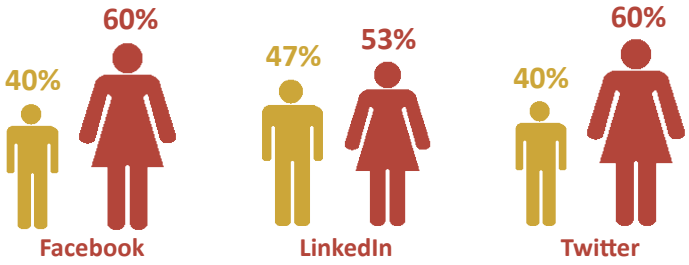
The Average Social Media User

Despite the fact that 96% of Generation Y has joined a social networking site, the average user is in their late 30's to mid 40's, and in regards to gender, females are consistently more active on social networking sites.

Average age of social media users per site:

- 40.5 years old
- 44.2 years old
- 37.3 years old

Gender demographics per social networking site:



User Behavior

Social media has become an integral part of the daily lives of many, and the top networking sites boast quicker adoption rates than even the Internet itself. Social status updates and "Tweets" are going out by the millions daily, and the total number of users on certain sites is greater than the number of people in some of the world's most populated countries.

Every 60 seconds on Facebook there are:

510,000 comments posted

293,000 status updates

136,000 photos uploaded

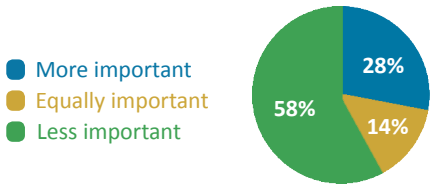
50%
of Facebook users log on every day, spending **700 minutes** per month on the site.

Smartphone users are **2x** as active on social media as non-smartphone users.

150 Million
Tweets per day

Privacy

Importance of privacy today compared to five years ago:

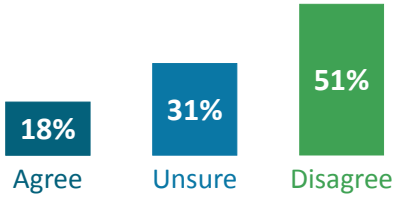


68% of users don't understand Facebook's privacy settings

69% of social media users feel they have less control over privacy settings

25% of Facebook users don't bother with any kind of privacy controls

Users who are confident they can protect personal information online:



Employee Use at Work

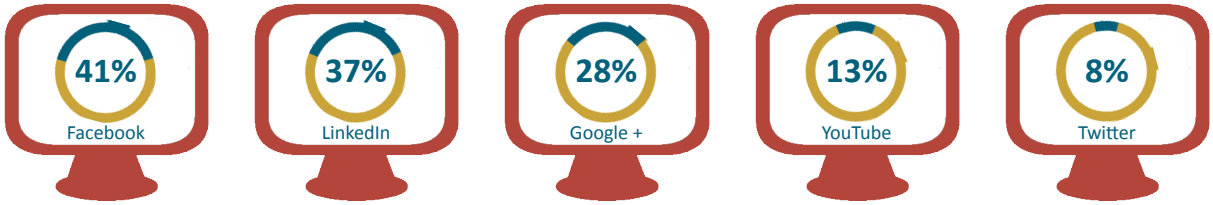
Employees in the United States were recently surveyed regarding the impact of mixing business and personal conduct through social media. While the majority of employees feel there is little impact, some statistics show that there is still a cause for concern.

Mixing personal and professional connections on social networking sites causes problems at work:

Employee use of social media at work has a negative impact on productivity:

15% of employees spend nearly **1/3** of their work day on social networking sites

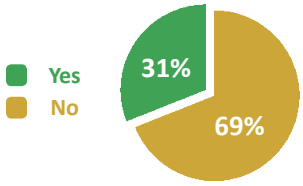
Most popular social networking sites on which time is wasted at work:*



**Percentages exceed 100% due to multiple responses from survey participants.*

Monitoring Employee Use

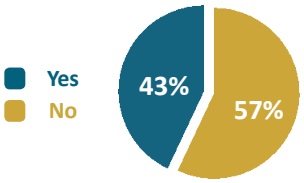
Organizations that track employee use of social media on company computers and handhelds:



By **2015** around **60%** of employers plan to implement monitoring programs.

If personal sites were blocked on work computers **60%** of employees would use their smartphones.

Organizations that block employee use of social media on company computers and handhelds:



Social Media Policies

Social media policies must be carefully crafted and there are several dos and don'ts to keep in mind to ensure policies are lawful and effective.

DO provide specific examples of prohibited conduct, such as posting comments that are vulgar, obscene, harassing or discriminatory on the basis of protected characteristics.

DO encourage employees to communicate workplace concerns internally or to use internal procedures and channels, as opposed to social media when possible.

DO include a disclaimer stating that the policy is not intended to interfere with the employees' rights to engage in protected activity.

DO conduct periodic reviews of the social media policy and update it as necessary to ensure it reflects the needs of the organization and complies with the governing laws.

DON'T use vague or undefined language such as "confidential information" or "disparaging the company." Such policies could be considered overbroad and declared unlawful.

DON'T threaten discipline for using social media to resolve concerns.

DON'T rely on such disclaimers, no matter how detailed. While disclaimers can be helpful, they become ineffective if the language in the policy is considered to be too vague or overbroad.

DON'T use generic social media policies which may not address the specific needs of the organization. Such policies need to be customized to contain the necessary language.

Legal Decisions

Equal Employment Opportunity Commission (EEOC)

E.E.O.C. v. Original Honeybaked Ham Co. of Georgia, Inc., No. 11-cv-02560, 2012 U.S. Dist. LEXIS 160285, at * 3-4 (D. Colo. Nov. 7, 2012).

The EEOC filed a complaint against an employer that allegedly subjected a class of female employees to sexual harassment and retaliation. The employer sought discovery of the contents of the class members' social media accounts and text messages. The court indicated that if there were relevant documents or information that could lead to the discovery of admissible evidence within this information, "the presumption is that it should be produced."

E.E.O.C. v. Simply Storage Management LLC, 270 F.R.D. 430, 434 (May 11, 2010).

The EEOC filed a sexual harassment complaint against the employer, which then served discovery on the agency seeking the identity of the complaining employees' social networking sites to obtain information about the employees' emotional health. The court rejected the argument that since the social media profiles were "locked" or "private," they were not discoverable due to privacy concerns as such concerns could be "addressed by an appropriate protective order."

Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA).

An employer does not violate the Genetic Non-Discrimination Act "GINA") when it unwittingly learns genetic information about an employee or an employee's family member through an employee's posting on a social media platform. Conversely, an employer is prohibited from searching social media platforms with the intent of discovering genetic information about an employee.

National Labor Relations Board (NLRB)

Dish Network Corp., CASES 16-CA-62433 (Nov. 14, 2012).

Dish Network's employee handbook fell under the scrutiny of the NLRB. An administrative law judge struck down several of the provisions in the handbook, including its social media provision. The judge found Dish Network's social media policy to be unlawful and in violation of Section 7 of the NLRA. The policy prohibited employees from making defamatory remarks about Dish Network, or from engaging in negative discussions on company time on social media sites.

Karl Knauz Motors, Inc., 358 NLRB No. 164 (Sept. 28, 2012).

An Illinois BMW dealership held a promotional event serving only hot dogs and chips. A salesperson, who felt the cheap eats would hurt commissions, posted photos of the event with sarcastic remarks about the dealership owner, Knauz. In addition to posting these photos, the salesperson posted a photo of a car accident that occurred at the Land Rover dealership next door, also owned by Knauz. The photo was accompanied by an inappropriate caption. The salesperson was fired as a result of the postings, and filed a complaint with the NLRB. The court ruled that the sales person could not be fired for the postings about the cheap eats, since it was "related to his and his co-workers' wages and working conditions." The court however ruled that the salesperson could be fired for the posting regarding the accident since it was unrelated to the conditions of his employment. The NLRB ruled against the dealership in regards to its "Courtesy" rule, which prohibited employees from using "language which injures the image or reputation of the Dealership."

EchoStar, Inc., Case No. 27-CA-066726 (Sept. 9, 2012).

An Administrative Law Judge struck down several of Echostar's policies regarding social media. The policies which the ALJ found unlawful included those restricting employees from making "disparaging or defamatory comments" about the company and/or its employees, use of social media during "company time," and contact with the media without prior authorization. The ALJ also found Echostar's "saving clause" to be ineffective due to it's ambiguous language.

Lee Enterprises, Case No. 28-CA-23267 (April 21, 2011).

Arizona newspaper reporter was encouraged to create a Twitter account for the purpose of driving readers to the newspaper's website. The reporter Tweeted sarcastic comments about crime in the city, co-workers, and reports of an affiliated TV station. The reporter was fired for misconduct, and filed a complaint with the NLRB accusing the newspaper of violating his right to "protected concerted activity." The NLRB rejected his claim, stating that his discharge did not violate the NLRA "because he was terminated for writing inappropriate and offensive Twitter postings that did not involve protected concerted activity."

Costco Wholesale Corp. and UFCW Local 371, Case No. 34-CA-012421 (Sept. 7, 2012).

Two years ago Local 371 of the United Food and Commercial Workers Union filed a complaint with the NLRB, accusing Costco of violating the NLRA due to a policy which prohibited employees from posting any electronic messages that damaged or defamed the company or any of its employees. The NLRB ruled that the policy was too broad, and could be interpreted as prohibiting Section 7 activity under the NRLA, which enables employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Wal-Mart, Advice Memorandum (July 19, 2011).

Employee filed a claim with the NLRB, after being suspended for inappropriate comments on Facebook regarding a dispute with the store's assistant manager. The NLRB ruled the employee's "mere griping" was not protected.

Courts

Romano v. Steelcase, Inc., 907 N.Y.S.2d 650 (2010).

Plaintiff filed a personal injury lawsuit claiming she could no longer participate in certain activities. The defendant filed a motion to access the plaintiff's Facebook and MySpace accounts. The court held that the information was material and necessary to the defense, and that the plaintiff did not have a reasonable expectation of privacy in information posted on social media sites.

McMillen v. Hummingbird Speedway, Inc., 2010 WL 4403285, PICS No. 10-3174 (Jefferson Co. September 9, 2010, Foradora, P.J.).

The EEOC filed a complaint against an employer that allegedly subjected a class of female employees to sexual harassment and retaliation. The employer sought discovery of the contents of the class members' social media accounts and text messages. The court indicated that if there were relevant documents or information that could lead to the discovery of admissible evidence within this information, "the presumption is that it should be produced."

SOURCES: Society for Human Resources Management; Pingdom; Kelley Solutions; Forbes; Chicago Tribune; Business Journal; LexisNexis; The Employer Handbook; American Consumer Institute for Citizen Research; VideoInfographics; Socialnomics; HR Professionals; Reppler; Gartner; Salary.com.

KAUFMAN DOLOWICH VOLUCK

New York | Pennsylvania | New Jersey | San Francisco | Los Angeles | Florida

KDVLAW.COM

For more information please contact:

Philip R. Voluck
Managing Partner, Pennsylvania
pvoluck@kdvglaw.com
215.461.1100

Keith J. Gutstein
Partner
kgutstein@kdvglaw.com
516.681.1100

Gregory S. Hyman
Partner
ghyman@kdvglaw.com
215.461.1100