

LOOK OUT FOR LINKEDIN: TOP QUESTIONS FOR EMPLOYERS ON HOW THE PLATFORM IMPACTS YOUR WORKPLACE

Insights
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LinkedIn has become a key part of the business world for workers and employers alike. The platform can aid your recruitment efforts, company branding, and business development. But the world's largest professional networking platform can pose difficult line-drawing questions for management. For example, you might be curious if you can require employees to be active on LinkedIn or share their private profiles with you. You might also wonder if you may pre-screen job applicants by checking out their online accounts. And how could an ex-employee's social networking impact your non-solicitation agreements or trade secrets? The key to navigating these and other LinkedIn questions is finding a balance between protecting company interests without violating workplace laws or damaging employee relations. We'll cover your top questions and explain your options for tackling these issues when it comes to current, former, and potential employees.

Current Employees

Can you require employees to create or update personal LinkedIn accounts?

When your employees have polished LinkedIn profiles and are active on the platform, your company can benefit in a variety of ways. A strong LinkedIn presence across your workforce can positively impact your company's branding, visibility, business development, recruitment efforts, and reputation for thought leadership.

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Given these potential benefits, you might wonder whether you can require your employees to create or update a personal LinkedIn profile. While you could possibly discipline someone for refusing to use the site (assuming that they are an at-will employee and your state does not have a law protecting off-duty conduct), this probably would not be a good idea from an employee morale standpoint. If you dictate what employees do with their personal accounts, they might feel that you are invading their privacy or asking them to perform duties outside of their job descriptions.

But certain situations might warrant you taking a different position. For example, if an employee is publicly posting false information about their current employment status that could create confusion or harm your company, you should feel free to require them to either correct that information or delete it entirely. And if social media is a core part of an employee's job (for example, in certain marketing positions), then you will likely be in a better position to mandate their LinkedIn use. Also note that industry-specific regulations may require you to supervise your employees' work-related social media postings.

Key takeaway: *Generally, the best approach is simply encourage incentivizing your employees to maintain an online presence or post about your company. But you could take a stance when employees misrepresent their employment status when social media is directly relevant to an employee's job. In practice would be to lay out exactly what is expected of an employee in their job description at their time of hire and cover LinkedIn your company's social media policy.*

Can you require employees to give you access to their private LinkedIn profiles?

Requesting to connect with a current employee on LinkedIn seems harmless enough. But a growing number of states have enacted laws that govern if or how you may inquire about your employees' private social media profiles. For example, [a New York law](#) that took effect earlier this year prohibits employers from:

- requesting or requiring that an employee or applicant disclose their username or password for social media accounts, blogs, messaging sites, and other similar electronic medium ("personal accounts"); or

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- requiring employees or applicants to access the personal accounts in the employer's presence or otherwise reproduce the content to the employer.

The New York law excludes personal accounts used for business purposes, provided the employee was given advance notice of the employer's right to require access to such information, and employers are not restricted from viewing information in the public domain that can be accessed without log-in information. Other states have similar laws in place (which vary in scope from state to state), including Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Louisiana, Maine, Michigan, Maryland, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Vermont, Washington, and Wisconsin.

Key takeaway: *Check the applicable laws in your jurisdiction you ask an employee for access to their private LinkedIn profile. make sure you educate your supervisors on the same.*

What can you do if your employee's LinkedIn post does not align with company values or is negative toward the company?

While some employees might believe they have a First Amendment right to free speech as it relates to their social media accounts, private employers (unlike public ones) generally can – from a constitutional standpoint – impose restrictions and take action based on employees' social media postings. Other laws, however, must be considered.

Federal labor law, for example, can limit your ability to restrict your employees' online speech and activity. The National Labor Relations Board (NLRB) makes it clear that social media use can be a form of protected concerted activity, and that employees have the right to "share information about pay, benefits, and working conditions with coworkers" on social media if it relates to group action. But the following online activity is not protected:

- individual griping about the workplace;
- statements about the employer that are egregiously offensive or knowingly and deliberately false; and

- public disparagement of the employer's products or services unrelated to any labor controversy complaint.

On the other hand, if your employee is posting harassing or discriminatory content, you might be obligated to take action. [EEOC guidance](#) states that social media conduct – even if it occurs outside of work – can contribute to a hostile work environment if it impacts the workplace.

Key takeaway: *Work with counsel before taking action against an employee for their social media conduct.*

What if you discover that your employee is using LinkedIn's #OpenToWork feature?

Any LinkedIn member can notify their network that they are open to new job opportunities by using the site's "Open to Work" feature. Users can share this job-hunting signal with all LinkedIn members or with recruiters only.

Presumably, most employees would be wise enough to choose the latter option, but you might learn about their #OpenToWork status through a colleague at another company or a third-party recruiter. What should you do if you discover that your employee is looking to leave?

If the individual is a valuable employee, you should consider having an open conversation with them, pinpointing why they aren't fully satisfied with their current role, and figuring out if you can make any changes to keep them around. This might include not only making changes to their pay or benefits but also finding new ways to support their personal and professional goals.

In any event, though, if you suspect that an employee is on their way out, you should take steps to ensure that they don't take your confidential business information with them. For example, consider monitoring the departing employee's work email activities to see if they are sending proprietary or sensitive information to their personal email address.

Key takeaway: *Given the [rise of nonlinear career paths](#), don't be surprised if employees are putting out their feelers for other opportunities. If an individual would be hard to replace, consider checking in with them and discussing if or how any adjustments could motivate them to stay. However, you should always be ready with a robust plan for safeguarding proprietary information from departing employees.*

Former Employees

What can you do if an ex-employee's profile misrepresents their work history with you?

Imagine it's been months since an employee has left your company and they are making problematic posts on LinkedIn while their profile reflects that they are still employed by you. Or imagine that an ex-employee's profile misrepresents their prior role at your company – for example, lies about how long they worked for you or what their job duties were. Of course, you'd like to set the record straight and make them update their account to reflect the truth.

As frustrating as this can be, your options might be limited. You can report inaccurate information on a LinkedIn member's page through [the site's reporting system](#), but that does not guarantee the account or information will be removed. In some circumstances, you might consider covering this issue in an employee's separation agreement. And sending a well-crafted letter to the employee with a request for them to correct the misrepresentation may achieve your goal.

Key takeaway: Report inaccurate information to LinkedIn and consider proactive approaches like addressing how departing employees will appropriately update their profiles – either informally during your off-ramping process or formally in your separation agreements.

How does a former employee's social media activity impact non-solicitation agreements?

Let's say that you hire a sales manager who signs an employment agreement that prohibits that individual, for up to two years after their contract ends, from attempting to induce any of your employees to leave your company. The sales manager leaves to work for your competitor and immediately begins sending LinkedIn requests to connect to your employees. When those employees accept those requests, they can see the sales manager's posts about open positions at the competitor company. Did the sales manager violate the agreement?

It depends. Some courts have held that generic invitations to connect do not amount to wrongful solicitation. But as an ex-employee's social media communications become more targeted toward your employees, clients, or customers, the

more likely a court would be to rule in your favor. And, of course, it will always come down to the specific terms of your agreement.

Key takeaway: Make sure to address social media activity in solicitation agreements.

Can an employee's LinkedIn contacts qualify as a protectable trade secret?

You might encourage your employees – especially sales personnel – to use LinkedIn to build relationships with existing and potential customers. This can be a great way for your employees to stay in touch with customers and remain on their radar, but that means departing employees are walking out with a de facto customer list.

Different courts have reached conflicting conclusions regarding whether an employee's LinkedIn contacts qualify as a trade secret. Generally, though, the more publicly viewable the contacts are, the less likely they will be treated as a trade secret. To protect your confidential information, you should make it clear that the company owns data on an employee's social media account if it is related to client relationships and obtained while they work for you.

Key takeaway: Use agreements or written policies signed by employees to require departing employees to delete any business contacts they established while working for you, including on LinkedIn account. You should also require employees to make contact lists private on any social media account they use for business so that they cannot later argue that you did not take reasonable means to protect that information as a trade secret.

Potential Employees

Can you vet job applicants by checking out their LinkedIn profile?

When considering a candidate for a position at your company, you might be inclined to peruse their LinkedIn page. But doing so can be risky. By viewing profile photos or personal details (such as birthdates), you could gather information about the candidate's protected class and characteristics, such as their race, age, or disability status. This opens the door for potential discrimination claims if you ultimately do not choose the individual for the position.

In addition, some of the state laws discussed above (see “Can you require employees to give you access to their private LinkedIn profiles?”) apply to applicants as well as employees.

Key takeaway: To avoid potential discrimination claims, don’t view an applicant’s LinkedIn page before you’ve interviewed them or offered them the job. And check the applicable laws in your jurisdiction before asking an applicant for access to their private profile during any stage of the hiring process.

Conclusion

If you’re looking for practical advice and guidance on how to develop robust policies and practices and appropriately address LinkedIn or other social media concerns, please consult your Fisher Phillips attorney, the authors of this Insight, any attorney in our [Privacy and Cyber Practice Group](#), or any attorney in our [Employee Defection and Trade Secrets Practice Group](#). We will continue to monitor the latest developments and provide updates as warranted, so make sure you are subscribed to [Fisher Phillips’ Insight System](#) to gather the most up-to-date information.