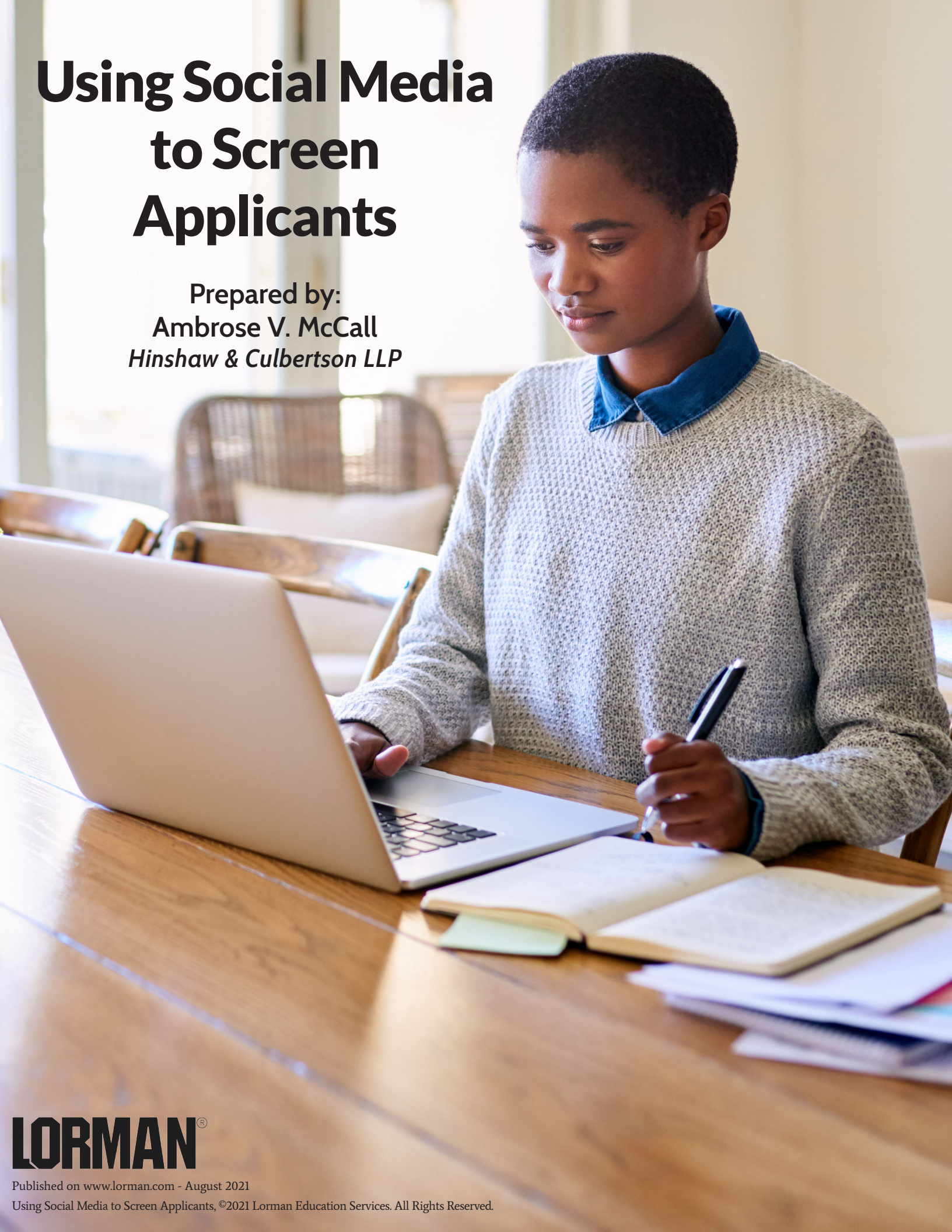


# Using Social Media to Screen Applicants

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## 1. Using Social Media to Screen Applicants

Many employers now use social media tools to screen and evaluate job applicants. Such efforts can spring from a positive intent to share mutual interests or devolve into efforts to pry into the personal lives of people. Nevertheless, by its very nature, people who use social media websites typically broadcast their feelings, opinions and thoughts to the wider world, or with the use of privacy tools, a preselected audience. Beyond the issue of whether employers have been accurately surveyed about their use of social media tools to screen applicants, many persons expect or suspect that potential employers may "Google" their names and then, at a minimum, search for publicly available social media website postings that contain text, pictures, and now even video of their own or posted about them by other persons. Any employer who undertakes such endeavors directly, or through third-party contractors, needs to remain mindful of the boundaries of existing labor and employment laws.

The U.S. Equal Employment Opportunity Commission jointly published with the Federal Trade Commission certain guidelines on running background checks. In the guidelines, the EEOC reminded all employers that they must treat all applicants equally. That means not running background checks based on the race, national origin, color, sex, religion, disability, genetic information or age of the applicant or employee. ("Background Checks What Employers Need to Know"). Concerns about discrimination become heightened in circumstances where employers only ask for criminal records or financial histories of persons who fall within the categories protected by the federal anti-discrimination laws that the EEOC enforces.

If discriminatory inquiries or conduct during the application process are not a concern, then employers might seek to review what they do with any social media data they harvest on job applicants. For example, the EEOC continuously advises that any personnel or employment record you make or keep must be preserved for one year after the records were made, or one year after a personnel action was taken, whichever event occurs later. Educational institutions and state and local governments have to satisfy the two-year rule for maintaining such records. Federal contractors under the purview of the U.S. Department of Labor also have a two-year requirement when they have at least 150 employees and a government contract of at least \$150,000. Furthermore, if the applicant or employee later files a charge of discrimination, the employer must maintain all such records until the case ends. Only when the employer confirms satisfying all applicable recordkeeping requirements, can it then receive reports from independent contractors who perform background checks and searches.

Before conducting the background searches, should employers obtain the consent of the applicants? Federal law under the Fair Credit Reporting Act directs as follows:

### (b) Conditions For Furnishing And Using Consumer Reports For Employment Purposes

- (1) A consumer reporting agency may furnish a consumer report for employment purposes only if –

(A) the person who obtains such report from the agency certifies to the agency that –

(i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable; and

(ii) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation; and

(B) the consumer reporting agency provides with the report, or has previously provided, a summary of the consumer's rights under this subchapter...."

## (2) Disclosure to Consumer

(A) In general except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless –

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

15 U.S.C. §1681b.(b)(1),(b)(2)(A). The law has been updated so as to provide for taking applications and providing the required notice both through electronic communications. 15 U.S.C. section 1681(b)(2)(B).

What is the prescribed course of conduct? Written consent, followed by transparency and notice. The applicant or employee needs to be told that the employer might use the information for decisions about his or her employment through a written document in a stand-alone format. Employers should avoid using tiny small print in a document that addresses other issues. For example, the notice cannot be contained in an employment application. Moreover, employers are directed not to add confusing or distracting data to the notice beyond a brief description of the nature of the consumer report. Moreover, if the report the employer obtains qualifies as an "investigative report", the applicant or employee must be informed of his or her right to a description of the type of report obtained, and the scope of the investigation. The key is to obtain the applicant or employee's written permission to conduct the background check. If you want the consent to obtain background

reports throughout the course of a person's employment, the employer must directly state that intent in a clear and direct fashion. Moreover, the employer must certify to the company obtaining the report that it notified the applicant and obtained the person's permission to procure a background report. The employer must also certify that it has complied with all the requirements of the cited federal law on credit reports and will not discriminate against the applicant or employee or otherwise misuse the obtained data in a manner that violates federal or state equal opportunity laws or regulations.

What if the employer decides to take adverse action against the applicant or the employee based upon the background data obtained? Before taking the adverse employment action, the applicant or employee must be provided with a copy of the consumer report relied upon for making the decision, along with a summary of the person's rights under the Fair Credit Reporting Act. The idea is to give the person notice in advance and an opportunity to review the report, explain any negative data, or to correct the data if it mistakenly refers to the applicant or employee or misconstrues a certain event. 15 U.S.C. Section 1681b.(b)(3).

A critical distinction is that the protections afforded by the Fair Credit Reporting Act are not available to independent contractors. For example, a person hired to conduct sales, and who was not required to work any specific hours, and whose income was conditioned solely on the amount of sales made, and who would not receive employee benefits and had no taxes withheld, and who generated their own leads for sales and relied on their own skill set, could not use the Fair Credit Reporting Act to complain about the procurement of a consumer report on him. *Lamson v. EMS Energy Marketing Service, Inc.*, 868 F.Supp.2d 804, 817-18 (E.D. Wis. 2012); *but see Ernest v. Dish Network, LLC*, 49 F.Supp.3d 377, 385 (S.D. N.Y. 2014) (disagreeing with *Lamson* based on "disjunctive nature of the statute.").

Conversely, employees who were designated as "noncompetitive" through background checks by the employer before sending the employees pre-adverse action letters about the use of such reports failed to comply with the FCRA. *Goode v. LexisNexis Risk & Information Analytics Group, Inc.*, 848 F.Supp.2d 532, 542 (E.D. Pa. 2012) ("For the above-stated reasons, the Court concludes that defendant took an adverse action against plaintiffs when it adjudicated them as noncompetitive. This occurred before defendant sent plaintiffs the required notice under §1681 b(b)(3)(A). Thus, plaintiff has pled facts sufficient to state a claim for relief."); *see also Burghy v. Dayton Racquet Club, Inc.*, 695 F.Supp.2d 689, 703 (S.D. Ohio 2010) ("Rather, an adverse action occurs when the decision is carried out, when it is communicated or actually takes effect, and an actor has until that time to take the necessary steps to comply with the FCRA's requirements. Though plausible, Dayton Racquet Club's reliance on this contention is unavailing, because Burghy's argument as to when adverse action was taken against her is decidedly less abstract. Here, the Plaintiff does not seek to hold her employer liable for an internal decision or preliminary discussion of her employment status. She contends, simply, that she was fired on January 16, in the meeting with her supervisors, and that this adverse action occurred before she received a copy of her credit report or statement of rights under the FCRA.").

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