Social Media and Defamation Law

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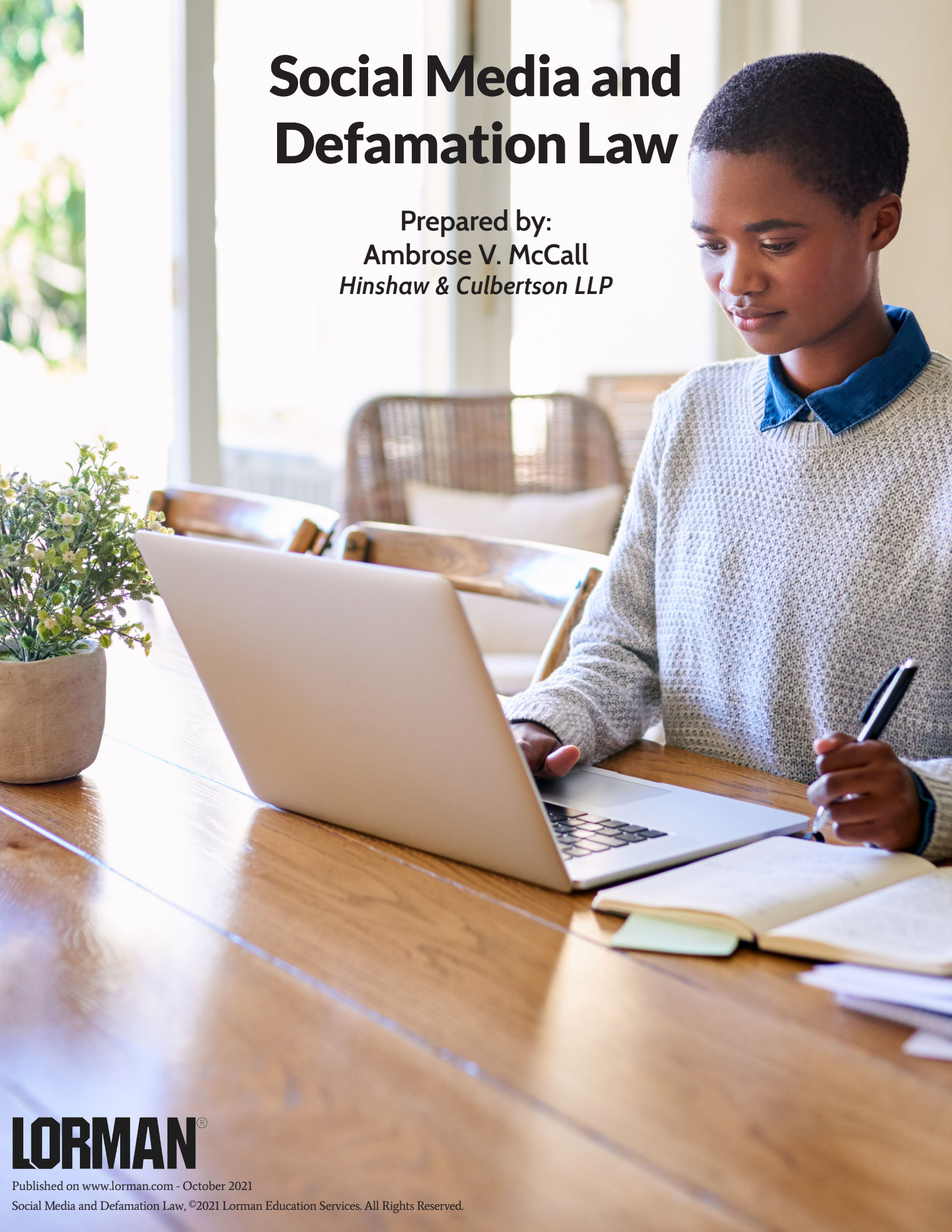

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Social Media and Defamation Law

An angle from which to examine the potential pre-employment screening use of social media site data is the law of defamation.

What if a prospective employer performs an internet search engine review of a prospective job applicant and finds apparent information indicating the applicant has possibly committed criminal conduct or undertakes activities generally viewed in an unfavorable manner by the majority of the public? Should the prospective employer check to verify if the information found on a website concerns the same individual who is the pending job applicant? What investigation, if any, should the employer conduct upon apparently obtaining such information? What if the HR professionals of the prospective employer tell other individuals in the firm that the candidate is linked to the unfavorable information found in response to a Google, Yahoo, MSN, or other search results?

The Illinois Supreme Court has asserted that a statement is defamatory if it "tends to cause such harm to the reputation of another that it lowers that person in the eyes of the community or deters third persons from associating with [him/her]. Bryson v. News America Publications, Inc., 174 Ill.2d 77, 87, 672 N.E.2d 1207, 1213-14 (Ill. 1996). "To state a defamation claim, a plaintiff must present facts [establishing] that defendant made a false statement about the plaintiff, that defendant made an unprivileged publication of that statement to a third party, and

that this publication caused damages." Solaia Technology, LLC v. Specialty Publishing Co., 221 Ill.2d 558, 579, 852 N.E.2d 825, 838 (Ill. 2006). Since publication is an essential element of the defamation cause of action, a claimant must show that the allegedly slanderous communications were made to someone other than plaintiff. Frank v. Kaminsky, 109 Ill.2d 26, 29 (1884); Restatement [Second] of Torts §577, C, n, at 206 (1977) ("[o]ne who communicates defamatory matter directly to the defamed person, who himself communicates it to a third person, has not published the matter to the third person"); W. Prosser, Torts §113, at 771 (4th ed. 1971) ("ordinarily, the defendant is not liable for any publication made to others by the plaintiff himself, even though it was to be expected that he might publish it"). As a result, the handling and use of any information obtained in unverified uses of search engines regarding social media site postings by job applicants raises a variety of issues.

In Illinois, the Illinois Supreme Court has not yet recognized the doctrine of compelled self-defamation. However, three of the five districts of the Illinois Appellate Court have considered and rejected the self-defamation doctrine under Illinois law. See, Emery v. Northeast Illinois Regional Commuter Railroad Corporation, 377 Ill.App.3d 1013, 880 N.E.2d 1002, 1010 (1st Dist. 2007), appeal denied, 227 Ill.2d 578, 888 N.E.2d 1183 (Ill. 2008); Harrell v. Dillards Department Stores, Inc., 268 Ill.App.3d 537, 548, 644 N.E.2d 448, 455 (5th Dist. 1994), appeal denied, 162 Ill.2d 567, 652 N.E.2d 341 (1995); Layne v.

Builders Plumbing Supply Co. Inc., 210 Ill.App.3d 966, 968, 569 N.E.2d 1104, 1106 (2nd Dist. 1991). Moreover, in the two states that continue to recognize the compelled self-defamation cause of action within the context of employment, one may note the factors involved in each decision as unique or atypical. See, Theisen v. Covenant Medical Center, Inc., 636 N.W.2d 74, 83 (Iowa 2001) (holding that liability attaches if the employer can foresee that an employee will be required to disclose reasons for termination when applying for a new job at another place of employment); Munsell v. Ideal Food Stores, 208 Kan. 909, 920, 494 P.2d 1063, 1072-73 (Kan. 1972) (holding that an employer who forwarded a coerced "confession" of theft by employee to the employee's union incurred liability for compelled self-defamation). However, even under these minority jurisdictions regarding the use and application of compelled self-defamation doctrine, employers could arguably avoid liability by not communicating any of the search engine results obtained on a prospective job applicant to anyone and not using any such data as the sole basis for any hiring or refusal to hire decision by the prospective employer.

Possible Options for Handling Job Applicant Postings on Social Media Sites

1. Not look for or use any social media site data a prospective employer could find on a job applicant's Facebook or other social media site page.
2. Perform as many searches as possible on all publicly regularly available search engine sites on job applicants

and not tell or inform anyone outside of HR or the decision maker of the use of any such data until required by regulations, statutory amendments, or legal proceedings. If so, consider requiring that the use of any such data or information will not constitute the sole grounds or basis for a decision regarding a job applicant.

3. Consider amending application documents and consents to include and notify the job applicant that the prospective employer will search all web-based data including social media sites available on the prospective job applicant or that the prospective employer has the consent by the prospective employee to perform any such searches of social media web sites at its own option or discretion, in a manner that complies with governing federal, state, and local laws.