

# Attention Employers: Tips for Using Social Media Sites as a Hiring Tool



More and more employers are turning to Facebook and LinkedIn to search for information about job applicants. In a June 2009 CareerBuilder survey of 2,600 hiring managers, 45 percent of employers reported using social networking sites to research potential hires, a 22 percent increase over the year before. Another 11 percent said they plan to do so in the future.

## NEW HIRING TREND

Using the web to investigate job seekers can help employers verify a candidate's experience and reputation, perhaps reducing the chances of making a poor hiring decision. In the survey, 35 percent of employers said that they decided against hiring a candidate based on information found on a social networking site.

Social networking sites have become a legitimate candidate screening and hiring tool. However, there are concerns that this could spark a new trend—where unsuccessful job applicants begin filing discrimination claims against employers, alleging that sensitive and protected information discovered through social media research was used against them.

## PRACTICAL TIPS FOR EMPLOYERS

If you're an employer who currently uses or plans to use social networking research as part of your hiring process, here are some tips to help protect you from a potential discrimination complaint.

- **Make sure you fully understand state and federal employment discrimination laws.** Federal law prohibits employers from discriminating against a job candidate based on certain "protected" characteristics.

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## CityNorth® Decision Alters Development Scene in Arizona

Public entities often strike deals with developers and other private interests to bring commercial projects to life. So, when the City of Phoenix partnered with some Chicago-based developers to build a large, mixed-use development in north Phoenix, neither party anticipated that it would spark a lawsuit that would change the face of development in Arizona. But that's exactly what happened with CityNorth, a 144-acre project featuring shopping, dining, luxury rentals, and upscale residences.

CityNorth's developers entered into a development agreement with the City of Phoenix specifying that each would receive certain benefits associated with the project. As a financial incentive, the City of Phoenix agreed that the developers would receive half of the sales

taxes generated by the project—not to exceed \$97.4 million over 11 years. For its benefit, the City of Phoenix would get 2,000 public parking spaces, 200 "exclusive use" parking spaces for commuters, and the other half of the sales tax proceeds. All parking spaces would be set aside for the city for 45 years.

## INVOKING THE ARIZONA GIFT CLAUSE

All seemed well—until a group of private taxpayers filed a challenge against the City of Phoenix that made it all the way to the Arizona Supreme Court. In *Turken v. Gordon*, the plaintiffs argued that the CityNorth agreement violated the state constitutional provision commonly referred to as the Gift Clause. In essence, this

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# NEW FACES§

## Trish A. Stuhan

Trish practices in the areas of public law and bankruptcy and creditors' rights. Before joining Gust Rosenfeld, she was the Assistant Director of Forensics at the University of Utah. She coached speech and debate, with her students advancing to final rounds at national tournaments.



TRISH A. STUHAN

Trish earned her J.D. in 2009 from Arizona State University Sandra Day O'Connor College of Law. She graduated cum laude with a certificate in Law, Science and Technology. In both 2008 and 2009, she advanced to the semi-final round in the ABA Representation in Mediation Competition.

## Adam L. Wilkes

Adam practices in the areas of real estate litigation and title insurance, primarily representing title insurance companies and their insureds, escrow companies, lenders, and developers. Before joining Gust Rosenfeld, he worked as a summer intern for the Honorable Stephen M. McNamee, U.S. District Judge for the District of Arizona.



ADAM L. WILKES

Adam received his J.D., cum laude, from the Louisville School of Law in 2009. He was a member of the Moot Court Board and participated on the International Moot Court team. He was also a member of the University of Louisville Law Review and Journal of Law and Education.

## CITY NORTH

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provision prohibits using public money to benefit private enterprise when the benefit to the private interest far exceeds the public benefit.

Before now, Arizona courts applied the Gift Clause by analyzing whether the public money spent was for a "public purpose." The court's interpretation of "public purpose" has focused in large measure on balancing the general public benefit received v. the public funds spent.



### CITYNORTH AGREEMENT STANDS, BUT MAJOR CHANGES TO LAW IMPOSED

The Arizona Supreme Court's decision allowed the CityNorth development agreement to stand; however, the court imposed a dramatically new analysis for all future deals. Now, Arizona law requires that a municipality involved in a development deal receive close to—if not equal—value for what it gives as an incentive to a private enterprise. In the CityNorth project, the court decided that the City of Phoenix's receipt of a few thousand parking spaces did not equal the \$97.4 million to be received by the private developers.

In addition, the court rejected the benefit of the City of Phoenix's new tax revenue, saying that under a Gift Clause analysis, it didn't qualify as a specific enough benefit to the public. Before this, it was largely left to the city or town to identify what served a "public purpose" or "public benefit" to satisfy the requirements of the Gift Clause. Now, such development deals must offer a more tangible, measurable benefit to the governmental entity equal to the incentive offered to any private entity.

In many ways, this ruling makes life easier for all parties in such deals. It's likely that all agreements will now explicitly identify the equality of the fair market value of the tangible benefits flowing to each party. The full impact of this case remains to be seen, but there is no doubt that it has altered how future development deals will be done in Arizona.

*Christopher A. Schmaltz 602.257.7480 cschmaltz@gustlaw.com*  
*Chris practices in the area of government law.*

## ET·Y·MOL·O·GY COR·NER

### WHEN A GIFT IS NOT A GIFT

From Old English to Middle Dutch to modern German, the word "gift," in its various spellings, has had similar meanings—payment for a wife, dowry, marriage (pl.)—ending with a gift as we now know it. Interestingly, there is an alternate meaning, running through German, Dutch and Swedish/Danish—"poison" or "to poison." Obviously, according to the Arizona Supreme Court, a private gift without equal payment to the public is not a gift. It's poison.



*Richard B. Hood 602.257.7470 rhood@gustlaw.com*  
*Rick, our etymologist, practices in the areas of commercial law and commercial litigation.*



# Build America Bonds Take Center Stage

*New financing option available to local governments and school districts*

## BACKGROUND

As part of the American Recovery and Reinvestment Act of 2009 ("ARRA"), Congress added Section 54AA of the Internal Revenue Code of 1986, as amended (the "Code"), permitting a state or local government, including school districts, to issue a new type of taxable obligation called Build America Bonds ("BABs") to finance governmental projects.

Unlike traditional governmental bonds, the interest on BABs is included in the income of the holders for federal income tax purposes. To qualify as a BAB, interest on the bond would need to be excludable from gross income under Section 103 of the Code (but for treatment as a BAB under Section 54AA of the Code), and the bond must not have more than a de minimus amount of premium.

Until December 31, 2010, ARRA permits two types of BABs to be issued: Direct Payment BABs and Tax Credit BABs.

## DIRECT PAYMENT BABs

For Direct Payment BABs, the federal government will pay to the issuer or its designee an amount equal to 35% of the coupon interest payable to the bondholders. This provides a direct subsidy of 35% of the issuer's taxable borrowing cost.

Sale proceeds of Direct Payment BABs may only be used for 1) capital expenditures,

2) costs of issuance not exceeding 2% of the proceeds, and 3) a reasonably required debt service reserve fund. Proceeds of Direct Payment BABs may not be used for refundings or working capital expenses.

At the time of issuance of Direct Payment BABs, the issuer must file Form 8038-B with the IRS. Additionally, Form 8038-CP must be filed by the issuer or its designee at least 45 days (but not more than 90 days) before each interest payment date.

The Form 8038-CP is a two-page document requiring: 1) the name and address of the entity to receive the payment, 2) general information about the issuer and the bonds, and 3) the calculation of the amount of the direct payment to be made.

## TAX CREDIT BABs

If an issuer elects to designate its BAB as a Tax Credit BAB, on each interest payment date the bondholders will be entitled to a tax credit equal to 35% of each interest payment payable on such date. The credit is non-refundable, but the unused portion may be carried forward to successive years. Because the 35% credit must be included in the bondholders' income, the amount of the federal subsidy is closer to 25% in the case of Tax Credit BABs.

Unlike Direct Payment BABs, the uses of Tax Credit BABs are not limited to capital expenditures and are not subject to the 2%

cost of issuance limitation. Tax Credit BABs may be issued for capital expenditures or working capital costs and may be issued for both new money and refunding purposes.

## OTHER CONSIDERATIONS

Although the provisions of ARRA authorizing BABs expire on December 31, 2010, there are proposals to extend the BABs program with a permanent 28% federal subsidy.

In addition, consideration is being given to allow Direct Payment BABs to finance certain current governmental refundings and working capital financings, as well as financings for certain 501(c)(3) organizations.

Although an issuer may contract with a trustee to handle the additional IRS filings associated with Direct Payment BABs, the issuer will still likely face additional paperwork. The IRS is in the process of conducting "compliance checks" of all existing BABs issues and it appears likely that BABs will continue to garner extra IRS scrutiny.

If you have any questions regarding Build America Bonds, please contact any Gust Rosenfeld Public Finance Attorney.

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**James T. Giel 602.257.7495**

**[jgiel@gustlaw.com](mailto:jgiel@gustlaw.com)**

***Jim practices in the area of public finance.***

# SOCIAL MEDIA

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These include race, sex, pregnancy, religion, national origin, disability, age, military status, and anything else that places the applicant in a “protected” class. State laws may identify other protected classes.

- **Recognize that discrimination concerns have some validity.**

In your social media research, you are likely to come across “protected” information about a job candidate that you would otherwise be prohibited from asking on a job application or during an interview. Do not use protected information in your evaluation process.

- **Be consistent in how you use social media as a candidate screening tool.** Perform research using social networking websites on all potential employees and do so in a uniform manner.

- **Think about developing specific criteria for how you conduct Internet-based research on job applicants.**

Your documented criteria could include:

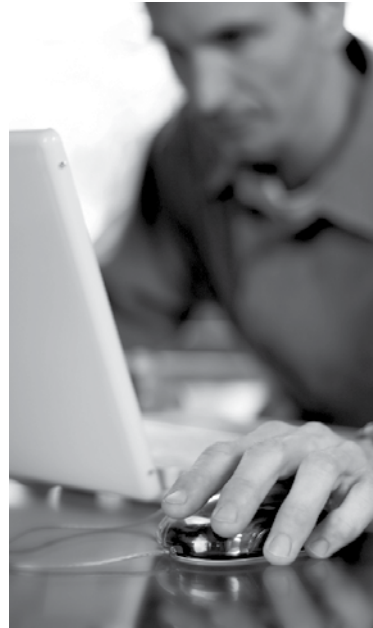
- o A list of the Internet searches you will perform.
- o The information you will examine and why.
- o How you will assess the information you find.
- o How you will use the information.
- o How you will document any information used in the hiring decision.

- **Obtain a candidate's written consent to search social media sites as part of the hiring process.** This is another way to put a potential employee on notice that you intend to conduct online research.

- **Think about having a non-decision-maker do the research.** Based on your established criteria, assign someone other than the decision-maker to conduct the applicant research. Instruct that person to move only relevant information into the potential employee's file. Better yet, consider hiring a neutral third-party to conduct all applicant research. This person could filter out any information that could lead to a discrimination allegation, thus protecting the employer from ever coming into contact with a candidate's protected personal data.

- **Remember that not everything you read, see or hear on the Internet is true.** It is very easy for a dubious source to create a “fake account” about somebody else. There are countless reported cases where high school and college students have set up false profiles portraying others in explicit and unflattering ways.

- **Bear in mind that social media sites can reveal many positive qualities about a job candidate.** In the CareerBuilder survey, 18 percent of hiring managers said what they found on social networking sites caused them to hire a particular applicant. These respondents reported that an applicant's social media profile provided a good feel for the candidate's personality and fit, supported the candidate's qualifications, and demonstrated the candidate's creativity/communication skills.



- **Consider cutting applicants some slack.** If information you found online leaves you with a negative impression, ask yourself how relevant it is to the candidate's potential job performance.
- **Don't be overly fearful.** When following these and other guidelines, take heart knowing you're acting responsibly. Yes, there's always a chance an applicant could file a complaint, but the burden of proof will be on the claimant to prove you acted in a discriminatory way.

## CONCLUSION

Social media is here to stay. It can be a valuable tool in the workplace. But employers are encouraged to consider these tips when using the Internet to look into a potential job candidate's background and personal information.

Be aware, however, that the tips provided here are not exhaustive. This is an emerging area of law. As such, the courts have not yet addressed many of the potential issues associated with using social media in the hiring process.

You may also wish to check with your professional liability carrier to see if coverage exists for this type of claim. If you have concerns about social media, please talk to your attorney.

## Top Reasons Why Candidates Didn't Make the Cut

In the CareerBuilder survey, hiring managers said their decision to disqualify a candidate from consideration after reviewing his/her social media profile was most influenced by:

- Provocative or inappropriate photographs or information – 53%
- Content about drinking or drug use – 44%
- Bad-mouthing a previous employer, co-worker or clients – 35%
- Demonstrating poor communication skills – 29%
- Making discriminatory comments – 26%
- Lying about qualifications – 24%
- Sharing confidential information about a previous employer – 20%



# PERSONAL NOTES

Gust Rosenfeld's softball team finished in second place in the annual Arizona Association of Defense Counsel tournament. Participating attorneys **Craig A. McCarthy, Scott A. Malm, Brandon J. Kavanagh, Chas W. Wirken, Andrew J. McGuire, Eric A. McGlothlin, Adam L. Wilkes, Tim J. Watson, Sarah C. Smith, and Melanie M. McBride** played seven games (in the rain!) to benefit the Devereaux Foundation.

**Timothy W. Barton** served as a faculty member at the Colorado Bar Association's National Continuing Legal Education Conference in Vail.

**Laura Sever Blanco** is a member of the Phoenix Advisory Board of the Salvation Army's Southwest Division.

**Tom Chauncey II** served as a Presenting Sponsor at Friendly House's annual Excellence Scholarship Awards Dinner, where he awarded 15 minority students with a \$1,000 scholarship.

**Robert D. Haws** gave his popular presentation on Employee Discipline at the Arizona School Boards Association's Annual School Law Conference. He also spoke on "Staying Alive Through A Due Process Hearing" for the Special Education Administrators Association.

In January, **John L. Hay, Christina M. Noyes** and **Chas W. Wirken** hosted our firm's 2010 Franchise Seminar. **Séan O'Brien** was a guest speaker on franchise bankruptcy issues.

**John L. Hay** gave a National Business Institute presentation called "Helping Your Client Select the Best Entity Option."

**Marty Jones** served as a keynote speaker at the 2010 Gatekeepers Regulatory Roundup. His presentation was titled "Can the Cost of Environmental Regulation Exceed the Benefits?"

**Ming Kang** is president of the Taiwanese American Association of Arizona.

**Scott A. Malm** was recognized in the *Phoenix Business Journal* as an "Innovator" for his creative client communications strategies. He spoke about mechanic's liens at the Arizona Escrow Association's conference and served as the report chair for the Governing Arizona town hall event.

**Melanie G. McBride** serves on the Golf Planning Committee for the St. Mary's Food Bank. She also is on the Special Project Committee for the Arizona Women's Education and Employment (AWEE) foundation.

**Craig A. McCarthy** spoke to members of the Arizona Association of Defense Counsel about recent appellate cases that have impacted public entities.

**Andrew J. McGuire** gave a presentation about recent legislation affecting Development Impact Fees at the Government Finance Officers Association of Arizona conference in Prescott.

**Christopher M. McNichol** spoke at a Law Seminars International comprehensive workshop on Effective Commercial Real Estate Workouts. He also gave a presentation on Arizona anti-deficiency law, guarantor liabilities and defenses, and potential successor-in-interest liabilities at the Arizona School of Real Estate & Business.

**Tom Murphy** is president of the DM-50, a group of Tucson business and civic leaders working to strengthen the relationship between Davis-Monthan Air Force Base personnel and the region's civilian population.

**Christina M. Noyes** gave a presentation on "Types of Business Structures and Trademarks 101" for the Kingdom Business Institute.

**Scott W. Ruby** and **Sarah C. Smith** attended the Government Finance Officers Association of Arizona conference in Prescott.

**Madeleine C. Wanslee** spoke about Lien Stripping at the Arizona District Conference in February and authored materials about Lien Stripping for the Ninth Circuit's Chief Bankruptcy Judges Conference.

## Gust Rosenfeld Attorney Helps With Hurricane Relief Efforts



Following the devastation left by Hurricane Jimena in September 2009, Tom Chauncey spent a week flying helicopter relief missions in Baja California, Mexico. Helicopters were the only way to deliver much-needed supplies and to evacuate needy patients from the rugged mountainous areas cut off from the rest of Mexico by the hurricane. Tom, two other Arizona helicopter pilots, and hundreds of volunteers were part of the 120-plane relief effort organized by Baja Bush Pilots. With support from the Wal-Mart Foundation, and in cooperation with the Mexican Red Cross, they delivered more than 30 tons of food, clothing and medicine to the storm-ravaged area.

# Courts Say Pets Are Property Like Your Car or Wristwatch

Pet owner David Kaufman sued veterinarian William Langhofer when Kaufman's red macaw "Salty" died after a second surgery to treat a cloacal prolapse condition. After owning Salty for nine years then losing him, Kaufman sought to recover emotional distress and loss of companionship damages. When the case came to trial, the court ruled in favor of the veterinarian.

On appeal, the appellate court affirmed that damages for emotional distress, pain and suffering, loss of companionship, loss of society, the costs of veterinary medical expenses, and other pecuniary loss and damage due to the loss of a pet are not recoverable under Arizona law.

Pets, the court agreed, are personal property—a classification that cannot qualify for emotional distress or other

special damages. Further, the court asserted that damages for negligence are limited to the pet's fair market value at the time of the loss.

On an amusing note, there were a number of high-profile organizations that rallied to support each side.

Kaufman (the pet owner) supporters included the Animal Defense League of Arizona, PETA Foundation, and the Animal Protection and Rescue League.

Langhofer (the vet) supporters included the Arizona Veterinary Medical Association, Animal Health Institute, American Animal Hospital Association, American Kennel Club, American Pet Products Association, American Veterinarian Medical Association, Cat Fanciers' Association, and Pet Industry Joint Advisory Council.

If pet owners want this to change, the issue will have to go before the Arizona legislature.

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**Richard H. Whitney 602.257.7424**

***rwhitney@gustlaw.com***

***Dick practices trusts and estates law.***



## PHOENIX OFFICE

201 E. Washington St., Ste. 800  
Phoenix, Arizona 85004-2327  
Telephone: 602.257.7422  
Facsimile: 602.254.4878

## TUCSON OFFICE

One S. Church Ave., Ste. 1900  
Tucson, Arizona 85701-1627  
Telephone: 520.628.7070  
Facsimile: 520.624.3849

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201 E. WASHINGTON ST., SUITE 800  
PHOENIX, ARIZONA 85004-2327

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