

EMPLOYMENT

Expert Analysis

Employers Accessing Digital Dirt: Some Things to Consider

*By Nichelle Levy, Esq., and Julian Wright, Esq.
Robinson, Bradshaw & Hinson*

Examples — and even bizarre stories — abound of employers firing employees for inappropriate social media content.

Workers are fired for offensive or harassing posts, posts that divulge confidential company or client information, posts of images of themselves in compromising situations, and posts that include negative comments about customers, superiors or their companies.

Relatively less explored are the ways in which employers may (or may not) use social media content to screen candidates during the hiring process. This article will discuss the state and federal laws, as well as recent court decisions, regarding employees' expectations of privacy in social media that employers should consider before using information gleaned from social media sites in the hiring process.

CHECKING SOCIAL MEDIA MAY BE COMPANY POLICY

As an initial matter, companies may be unsure about whether to seek publicly available information from the Internet and social media sites as part of their candidate screening process. A recent study by Microsoft found that 75 percent of U.S.-based recruiters and human resources professionals surveyed reported that their companies have formal policies in place that require hiring personnel to research applicants online.¹

Indeed, failure to review publicly available information could leave a company vulnerable to a charge of negligent hiring brought by an employee or client who may claim to have been harmed by the candidate.

The doctrine of negligent hiring provides that an employer owes a duty of reasonable care to third parties in the hiring and retention of employees whose aggressive or reckless characteristics or lack of competence in the performance of their employment duties may endanger such third parties.²

Under this doctrine, companies could be found liable if publicly available information easily revealed by a quick Internet search was not reviewed prior to hiring a candidate and if such information would have led the company to make a different hiring decision.

In fact, 70 percent of U.S.-based recruiters and HR professionals surveyed in the recent Microsoft study said they had rejected candidates based on information found online.³

Failure to review publicly available information could leave a company vulnerable to a negligent-hiring claim.

INITIATING THE SEARCH

The Internet and social media networks are vast and ever-expanding. About 200 major active social networking sites currently exist, 10 of which have at least 100 million registered users.⁴ Facebook, the largest of those sites, reports 500 million registered users.⁵

In addition to social networking sites, individuals may choose to write blogs or other stand-alone Web-based content.

During the recent economic downturn, many of the newly unemployed turned to social media to maintain ties to former colleagues and to raise their profiles among potential employers. As a result, many candidates now have a digital footprint.

SHOULD JOB CANDIDATES BE NOTIFIED?

Whether a company has to notify a candidate before an Internet or social media search is initiated will depend on who conducts the search. The Fair Credit Reporting Act⁶ generally requires notification and consent for both background searches conducted by consumer reporting agencies and disclosure of information such searches reveal that led to adverse hiring decisions. No such notification or consent is required, however, if the company conducts the search in-house.

It should be noted that some states are beginning to address the inclusion of Internet and social media searches in consumer reports in their fair-credit-reporting laws. For example, Washington recently revised its statute to restrict the scope of employers' background checks to information reasonably related to a candidate's job duties,⁷ which has led some commentators to speculate that social media searches would be so restricted.

The person conducting the Internet search should have as much information about the candidate as possible, including the candidate's picture, if one has been provided by the candidate, to ensure that any information gathered actually applies to the candidate. Once information has been identified that may be related to the candidate, the company should take reasonable steps to confirm its authenticity, which may include verifying the reliability of the source of the information.

For instance, it is possible for third parties to post inappropriate information or images or to edit posted content in a way that makes it inappropriate. Facebook has a feature called "tagging" that allows third parties to post images of others, in some instances without their consent. Such images may include photographs that have been edited in offensive or inappropriate ways. If a candidate has a Wikipedia or other wiki-type page, it is possible for third parties to insert inappropriate information or content about the candidate without the candidate's knowledge or consent.

In a recent unpublished decision by the Michigan Court of Appeals, *Land v. L'Anse Creuse Public School Board of Education*,⁸ a school district initially fired a teacher when a picture — of which the teacher was unaware — taken at a bachelorette party was posted on a social media website without her knowledge or consent. Once the teacher learned of the post, she requested that the website remove the picture. Unfortunately for the teacher, before the picture was removed, a number of students and parents accessed the site to view it. The court eventually concluded that the teacher should be reinstated.

PRIVACY CONSIDERATIONS

Facebook and other social media sites generally have publicly available profiles that provide a portion of the information included on privately available pages.

Before launching a social media search on job candidates or employees, consider:

- Stored Communications Act: Stored electronic communications protected.
- Anti-discrimination laws (national, state and local): Candidate's age, gender, race, religion, national origin protected.
- National Labor Relations Act: Bars discrimination for exercise of collective bargaining rights.
- Off-duty-conduct laws: Varying protection of workers to engage in legal off-duty activities.

Such information may include the candidate's picture, marital status, political affiliation, age and other types of descriptive information.

Candidates may assume that the content they have posted on social media sites or communications they have sent to others through such sites are private because of the privacy settings they have selected. Several courts, however, have recently reached contrary decisions with regard to the "private" portions of social media sites.

In recent civil litigation, judges in New York, in *Romano v. Steelcase Inc.*,⁹ and Pennsylvania, in *McMillen v. Hummingbird Speedway*,¹⁰ concluded that plaintiffs were required to provide defendants access to the private portions of their social media sites because the defendant's need for the information to mount its defense was outweighed by any privacy expectation the plaintiff may have had.

Moreover, any such expectation of privacy was misplaced for at least two reasons, the court said. First, the website privacy policies and terms of use provide that absolute privacy is not guaranteed. (Facebook's privacy policy states, "Although we allow you to set privacy options that limit access to your pages, please be aware that no security measures are perfect or impenetrable."¹¹)

Second, much like e-mail or a letter sent through the mail, once information is shared with others, the originator of the content cannot control the receiver's use.¹² (Facebook's privacy policy states: "We cannot control the actions of other users with whom you share your information. We cannot guarantee that only authorized persons will view your information. We cannot ensure that information you share on Facebook will not become publicly available."¹³)

Romano and *McMillen* were personal injury cases in which the plaintiffs claimed that their injuries affected their full enjoyment of life. In each case, the defendant argued that the publicly available portions of the plaintiff's social networking sites provided evidence contrary to the plaintiff's claim of lack of enjoyment of life, leading the defendants to believe that more such information was available on the private portions of the sites.

Further, the defendants argued, and the courts agreed, that the plaintiffs' attempts to shield potentially exculpatory information behind self-selected privacy settings was contrary to the liberal discovery rules of their states.

AN EXPECTATION OF PRIVACY?

These cases are instructive in the employment setting insofar as they illuminate the reasonableness — or really unreasonableness — of a candidate's or employee's expectation of privacy with regard to information potential employers may be able to glean from social media sites. As the *Romano* court said:

Unlike e-mail or “snail mail,” once social media information is shared with others, the originator of the content cannot control the receiver’s use.

[W]hen plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites, else they would cease to exist. Since plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy.¹⁴

This issue, however, is far from settled. A California federal court reached a contrary result in *Crispin v. Christian Audigier Inc.*,¹⁵ a contract and copyright dispute between an artist and several licensees. In *Crispin* the defendants sought from several social media sites the plaintiff’s basic subscriber information, as well as all communications between the plaintiff and several other parties that referred to the defendants or the subject matter of the lawsuit.

The magistrate judge initially rejected the plaintiff’s argument that the material sought was protected from disclosure under the Stored Communications Act,¹⁶ finding that the social media sites were not electronic communication services under the SCA.

The District Court, however, reversed the magistrate’s decision, finding that communications the plaintiff sent directly to another site member (not posted on the plaintiff’s wall or other such area viewable by multiple users simultaneously) were protected under the SCA as electronic communications, which are immune from civil discovery requests.

With regard to wall posts or other communications that were viewable by multiple users simultaneously, the court remanded to the magistrate judge for a factual determination of the plaintiff’s privacy settings.

The court reasoned that if the privacy settings were restricted, such a finding would result in restricted access to wall posts and comments under the SCA because the law was designed to protect electronic communications that are configured to be private.

Importantly, employers should not use deception to gain access to a candidate’s social media sites. Such deception could be through technological means (hacking), through pretextual means (such as a disguised “friend” request) or through third parties (asking “friends” to share information).

In a recent New Jersey case, *Pietrylo v. Hillstone Restaurant Group*,¹⁷ a jury ruled against an employer who coerced (apparently by threatening termination) an employee to divulge password information about a co-worker’s social media site. Armed with the password information, the employer accessed the co-worker’s site, found a variety of statements disparaging the employer and then fired the co-worker.¹⁸

A jury eventually found that the employer had violated the co-worker’s rights by viewing stored electronic communications without permission, in violation of the SCA.¹⁹

Before using information uncovered during Internet searches, companies should also consider the following state and federal laws.

ANTI-DISCRIMINATION LAWS

Although employers may be unable to ask a candidate about race, political affiliation, marital status, sexual orientation or any disabilities during the interview process, such information may also be revealed on the candidate’s social media site. If employers review a candidate’s social media sites and thus learn about the person’s protected

status in any category, the employer may become vulnerable to claims that such information was improperly used in an adverse hiring decision.

Federal anti-discrimination laws prohibit the consideration of certain protected characteristics during the hiring process, including a candidate's race, religion, age, gender, pregnancy status, national origin, disability or union membership.

For instance, the National Labor Relations Act of 1935²⁰ prohibits discrimination by employers for actions taken in pursuit of the right to collective negotiations by workers. Title VII of the Civil Rights Act of 1964,²¹ the Age Discrimination in Employment Act of 1967,²² the Pregnancy Discrimination Act of 1978²³ and the Americans with Disabilities Act of 1990²⁴ prohibit covered employers from discriminating "with respect to ... terms, conditions, or privileges of employment, because of [an] individual's race, color, religion, sex or national origin" in the case of Title VII, pregnancy in the PDA, age (40 years old or older) in the ADEA and qualified disability for the ADA.

Similar laws also exist (usually for smaller employers) on the state or local level, and other laws bar discrimination on such bases as marital status or sexual orientation.

Regardless of how an employer learns of a candidate's protected status, it should not use that knowledge inappropriately in any hiring decision.

Suppose, for example, an employer interviews a candidate without ascertaining that the candidate is pregnant (or belongs to a certain religion, or comes from a certain country, etc.). The employer then learns through access to a social networking site that the candidate is pregnant and planning to attend a baby shower (or worships at a particular house of worship and is inviting others to join him or her there, or marches in a particular parade to celebrate his or her country of origin).

The employer still should not base any hiring decisions concerning the candidate on her pregnancy, religion or country of origin because it is discriminatory and illegal to do so — regardless of how the employer learned the information.

LAWS ON OFF-DUTY CONDUCT

Employers should also consider whether they are located in a state with laws that protect a candidate's off-duty conduct. A majority of states have laws concerning workers' rights to involve themselves in politics and other legal off-duty activities and still retain (or obtain) employment, subject to some exceptions, which generally include a conflict of interest with the employer.

These statutes provide varying levels of protection, ranging from narrowly tailored statutes intended to protect a candidate's or an employee's use of tobacco products to those that offer broader protection for employees and candidates who engage in lawful activities (as in California, Colorado, New York and North Dakota).

The fairly broad "lawful activities" statutes should be considered before adverse decisions are made based upon information gleaned from Internet or social media searches.

Although Colorado's off-duty-conduct statute²⁵ applies only to termination of employment, the laws in California, New York and North Dakota also apply in the hiring context. For example, the California statute, which was enacted in 2000, provides in relevant part:

No person shall discharge an employee or in any manner discriminate against any employee or *applicant for employment* because the employee or *applicant* engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96 [that is, lawful conduct occurring during nonworking hours away from the employer's premises].²⁶

Even companies in states without off-duty-conduct laws should consider whether the objectionable behavior is relevant to the job.

The New York off-duty-conduct statute, enacted in 1992, provides in relevant part:

It shall be unlawful for any employer ... [to] discriminate against an individual ... because of ... an individual's legal recreational activities outside work hours, off of the employer's premises and without the use of the employer's equipment or other property.²⁷

And the North Dakota statute, which was enacted in 1991, provides in relevant part:

It is a discriminatory practice for an employer to *fail or refuse to hire a person*; to discharge an employee; or to accord adverse or unequal treatment to a person or employee with respect to [employment] because of ... participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer.²⁸

IS THE CONDUCT RELEVANT TO THE JOB?

Importantly, even companies located in states without general off-duty-conduct laws should consider whether the objectionable behavior revealed by an Internet or social media search is relevant to the job for which the candidate is applying.

In *Land v. L'Anse Creuse Public School Board*, discussed above, though primarily addressing issues related to the termination of a teacher with tenure rights, the court held that the behavior exhibited on the social media site, while lewd on its face, did not take place on school grounds, did not involve students, was not intended to be viewed by students and was not otherwise unlawful. As a result, the court agreed with a state administrative body that recommended the reinstatement of the teacher.

The *Land* case should be contrasted with a Pennsylvania case often referred to as the "drunken pirate" case. In *Snyder v. Millersville University*, a teacher in training posted to her MySpace page images of herself in a pirate's hat holding a plastic cup containing a mixed drink that said "drunken pirate."²⁹ Her page also contained disparaging comments about her immediate supervisor at the school.

The woman had been told during orientation at the school not to direct students or teachers to her personal webpage and had been warned that a student had been dismissed from the teaching program for putting information about his supervisor on his personal Web page.³⁰ The woman ignored this guidance, and the court upheld her dismissal based in part upon the materials she posted to her MySpace page.³¹

DEVELOPING SOCIAL MEDIA POLICIES

Companies should develop policies to govern the use of information revealed by Internet searches in the hiring process. Such policies may include a general disclosure to candidates that Internet-based information, including social media sites, may be reviewed as part of the company's general background search.

Such a disclosure would negate any expectation of privacy a candidate may have in such publicly available information and indicate that the company is exercising due care in its candidate review.

However, companies should be aware that such a disclosure may also increase their vulnerability to claims that protected class information or off-duty-conduct information gathered on the Internet was improperly used in the candidate evaluation process.

Nevertheless, for most employers, the benefits of having such policies probably outweigh the risks associated with them, particularly if employers adhere to the developing body of law addressing the “digging for electronic dirt” in the workplace.

NOTES

- ¹ See Press Release, Microsoft Corp., Research shows online reputations matter, available at <http://www.microsoft.com/privacy/dpd/research.aspx>.
- ² See Robert Sprague, Emerging Technology and Employee Privacy: Symposium: Rethinking Information Privacy in an Age of Online Transparency, 25 HOFSTRA LAB. & EMP. L.J. 395, 398-99 (2008).
- ³ See Microsoft, *supra* note 1.
- ⁴ See http://en.wikipedia.org/wiki/List_of_social_networking_websites.
- ⁵ See <http://www.facebook.com/press/info.php?statistics>.
- ⁶ 15 U.S.C. § 1681.
- ⁷ Wash. Rev. Code § 19.182.020(2)(c)(i) (2009).
- ⁸ *Land v. L'Anse Creuse Pub. Sch. Bd. of Educ.*, 2010 WL 2135356 (Mich. Ct. App. May 27, 2010).
- ⁹ *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650 (N.Y. Sup. Ct., Suffolk County Sept. 21, 2010).
- ¹⁰ *McMillen v. Hummingbird Speedway*, No. 113-2010 CD (Pa. Ct. Com. Pl. Sept. 9, 2010).
- ¹¹ See <http://www.facebook.com/policy.php>.
- ¹² See *McMillen*, *supra* note 10, at 656.
- ¹³ See *supra* note 11.
- ¹⁴ *Romano*, 907 N.Y.S.2d at 657.
- ¹⁵ *Crispin v. Christian Audigier Inc.*, 2010 WL 2293238 (C.D. Cal. May 26, 2010).
- ¹⁶ 18 U.S.C. §§ 2701-2712 (2000).
- ¹⁷ *Pietrylo v. Hillstone Rest. Group*, 2009 WL 3128420 (D.N.J. Sept. 25, 2009).
- ¹⁸ *Id.* at *1-3.
- ¹⁹ *Id.* at *1.
- ²⁰ 29 U.S.C. §§ 151-169 (2000).
- ²¹ 42 U.S.C. § 2000e (2000).
- ²² 29 U.S.C.A. §§ 621-634 (West 1999 & Supp. 2008).
- ²³ 42 U.S.C. § 2000e(k).
- ²⁴ *Id.* §§ 12101-12213.
- ²⁵ Colo. Rev. Stat Ann. § 24-34-402.5(1) (West 2000).
- ²⁶ Cal. Lab. Code §§ 98.6(a), 98.6(c)(2)(A) (West 2003); see also *id.* § 96(k).
- ²⁷ N.Y. Lab. Law §§ 201-d(2)(c), (3)(a) (McKinney 2002).
- ²⁸ N.D. Cent. Code § 14-02.4-03 (2004).
- ²⁹ *Snyder v. Millersville Univ.*, 2008 WL 5093140 (E.D. Pa. Dec. 3, 2008).
- ³⁰ *Id.* at *4-6.
- ³¹ *Id.* at *16.



Nichelle Levy (left) is an attorney with **Robinson, Bradshaw & Hinson** in Charlotte, N.C. Her practice includes corporate and commercial law, intellectual property, and sports and entertainment. **Julian Wright**, (right) an attorney with the firm, co-chairs its employment and labor practice group. His practice focuses on employment law, business litigation and securities disputes, including discrimination, harassment, noncompetition issues, trade secrets, wrongful termination and ERISA matters. The authors wish to thank Matthew Tilley for his contributions to this article.

©2010 Thomson Reuters. This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit www.West.Thomson.com.