Social Networking In the Hiring Process

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Picture this: you are the regional manager of a fast-food chain reviewing applications for a new management position at one of your restaurants. One candidate has several years of experience in the fast-food industry and presents as both responsible and someone with good judgment. Just before you make her an offer, you Google her name and discover she has a social networking site available for public viewing. Her profile picture shows her bathing in what is clearly a utility sink at the restaurant she listed on her resume. She is drinking a beer and the caption reads "birthday girl."

This is not fiction. In two separate instances, fast-food employees posted videos of themselves bathing in the utility sinks at their respective restaurants. By the time the employers learned of the behavior, the videos already reached local health departments, YouTube, and the evening news.

Given public relations disasters like this, it is not surprising that employers want to review their prospective employees' social networking sites. In a recent survey of 300 hiring managers and recruiters, the social networking monitoring service Reppler reported that 76% of hiring managers look at applicants' Facebook profiles. Over half review applicants' Twitter accounts and 48% view candidates' LinkedIn accounts. Overall, 91% of the respondents said they used applicants' social networking site or internet profile in their recruiting process.[1]

These employers, particularly those who do not have a human resources department, often do not consider the legal issues that accompany this new technology. The same regional manager in the above hypothetical could have, for example, discovered evidence the applicant was a member of a protected class. Even if the decision to pass on the applicant was motivated by something other than her membership in that class, the manager's discovery of the class membership raises the specter of unlawful discrimination.

As attorneys, we have an obligation to advise our clients on how to implement social networking sites into their hiring process in a way that minimizes the chance the technology will be misused. This article will give a summary of the current state of the law with regard to social networking sites' role in employment decisions. It will also offer a process which employers should put in place when using such sites in the hiring process.

THE LAW

Private Social Networking Pages

Both federal and state statutes prohibit unauthorized access to a person's password-protected internet sites, including social networking sites. On the federal level, both the Stored Communications Act[2] and the Computer Fraud and Abuse Act[3] prohibit access to electronic information without consent or intentionally exceeding the scope of that consent.

In California, Penal Code section 502 prohibits knowing access, followed by unauthorized taking, copying, or use of data. Furthermore, an employer who "hacks" into a prospective employee's account could face common law action for invasion of privacy by the employee. Moreover, the social networking sites' terms of use forbid unauthorized access into another's account.

The question now is whether an employer may ask prospective employees to provide their usernames and passwords.

On the federal level, Senate Democrats have tried to extend the provisions of the Stored Communications Act and the Computer Fraud and Abuse Act to prohibit such requests. In an unpublished 2009 decision, the United States District Court in New Jersey found that an employer's request that an employee divulge her username and password could be a violation of the Stored Communication Act if a jury finds the request amounted to coercion.[4] More recently, the House introduced the Social Networking Online Protection Act (H.R. 5050) which would ban employers from requiring or requesting access to an employee's e-mail account or social media account.

In September, California enacted a law (AB 1844) prohibiting employers from requesting that current or prospective employees disclose their usernames and passwords to their private social networking accounts. The law takes effect in January 2013.

Under the new law, an employer is forbidden from requiring or requesting

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that an employee or employment applicant disclose his username or password for any social media. The term "social media" means "an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, e-mail, online services or accounts, or internet web site profiles or locations." The law also prohibits an employer from requiring or requesting that an employee or applicant access a social media web site in the employer's presence or divulge any social media. In effect, the law forbids an employer from accessing any private social media of its employees or employment applicants. An employer can only request access to social media to investigate misconduct by an employee or investigate an employee's suspected legal violation. The law does not prohibit an employer from asking for usernames and passwords to electronic devices provided to an employee by the employer.

Public Internet Profile

While many social network users restrict access to their accounts, others permit public viewing of their entire online profile. Likewise, a person's Twitter postings are public. Currently, California has no law which explicitly restricts an employer from viewing an applicant's public internet presence. California's courts have found a person has no privacy interest in information publicly available on the internet.[5]

HOW TO INCORPORATE AN APPLICANT'S INTERNET PROFILE INTO THE HIRING PROCESS

The obvious danger of an employer reviewing and relying on social networking sites and an applicant's internet profile when making hiring decisions is that the prospective employee's profile will almost always include information – such as religion, age, ethnicity, and sexual preference – which the employer may not inquire into or consider in the hiring process.

A consensus is forming amongst HR departments and employment lawyers as to the proper manner in which an employer should incorporate the contents of an applicant's internet profile into its hiring decisions. First and foremost, the person charged with reviewing applications and making hiring decisions should not be reviewing the applicant's social networking site or internet profile. This task should be left to someone else in the company and that person should not discuss his review with the human resource manager who will ultimately make the hiring decision.

Instead, the individual charged with reviewing social media should be provided with a form which asks general questions regarding the applicant's account such as "Does the applicant's profile contradict statements made in his/her resume?" or "Does the applicant make any inappropriate or offensive comments?" The form need not be limited to questions aimed at disqualifying applicants. Questions might include: "Does the applicant's profile demonstrate that he/she is qualified for the employment position?"

Review of social networking pages should be limited to the final candidates. The person interacting with the applicant should explain that the person making the ultimate hiring decision will not be the person reviewing the profile. The applicant should also be given an opportunity to review the criteria by which her internet profile will be judged. The applicants not offered employment should be advised as to why they were not chosen.

Further safeguards a company may wish to implement would include limiting or prohibiting access to social networking sites on office computers.

CONCLUSION

While the hiring manager in the hypothetical above saved his employer from a possible public relations nightmare, his casual use of the internet to screen employment applicants will, in the long run, expose the employer to the nightmare that is modern employment discrimination litigation. A clear and concise policy studiously followed will enable an employer to reap the benefits of social networking websites while mitigating (not eliminating) its exposure to lawsuits.

ENDNOTES

1 The survey was published in September of 2011. It can be viewed along with its accompanying article at *http://blog.reppler.com.* (Reppler.com, *Job Screening with Social Networks; How Are Employers Screening Job Applicants* (September 2011) *http://blog.reppler.com/)*

2 18 U.S.C. § 2701

3 18 U.S.C. §1030(a)(2)(C)

4 See *Pietrylo v. Hillstone Rest. Group*, 2009 U.S. Dist. LEXIS 88702; 2009 WL 3128420 (D.N.J. Sept. 25, 2009)

5 *Moreno v. Hartford Sentinel, Inc.*, 172 Cal. App. 4th 1125 (2009)