LEGAL ISSUES

How Social Media Is Changing The Hiring Game

By Brian J. Lamoureux

It's no secret that the explosion of social media has made it easy for college students, recruiters, and employers to find each other and connect in the job market. This opportunity, however, comes with some significant legal risks relating to privacy, discrimination, and employment issues. This column discusses the most recent legal trends involving social media in recruiting and hiring, and provides some practical guidance for students and employers.

Usually, lawyers can research similar cases decided previously and then advise their employer clients about the likely outcomes in their particular situation. With respect to the legal rules relating to social media, however, there is no established body of "social media law." It often takes years for legal disputes to percolate through the court system and be decided by the highest courts. Social media simply changes too quickly compared to the pace that cases travel through the court system.

Therefore, recruiters and employers are often left to improvise and innovate their hiring strategies when using social media. They must survey the current legal landscape and then take a leap of faith that courts or regulators will deem their policies lawful. Sometimes, our instincts tell us the right answer. For example, it does not take much legal acumen for employers to understand the inherent risks associated with asking candidates for their social media login credentials. However,

some other issues are more nuanced and difficult to answer.

For example, the National Labor Relations Board (NLRB) recently advised several major companies that portions of their social media policies were unlawful for a variety of reasons.

Relying on LinkedIn Can Result in Trouble

Many college students have established LinkedIn accounts even though their profiles may not contain much professional information.

Imagine a scenario in which an employer is looking for 10 new salespeople. The employer solicits applications and receives hundreds. Rather than wading through all the applications and giving each of them a hard look, the HR manager decides to only consider those candidates who have a LinkedIn profile. Therefore, the stack of applications gets whittled down substantially.

This presents two potential problems. First, by weeding out candidates who do not have a LinkedIn presence, the human resources manager may be excluding qualified candidates who do not have a profile. Second, the HR manager may have unwittingly discriminated against certain people who have been historically underrepresented on LinkedIn. Statistics by Minimax Consulting show demographic (such as age, gender, race, and so on) disparities between what is considered the "typical" American worker and a "typical" LinkedIn user. For example, whites and Asians are *overrepresented* on LinkedIn compared to their representation in the civilian labor force. Conversely, African Americans and Latinos are *underrepresented* on LinkedIn compared to the labor force.

There are no easy approaches when diving into social media to vet candidates. So, what should employers and recruiters do? They should certainly have a consistently followed policy in place on how they will use social media to screen candidates, *if at all*. Some employers find that using information found on social media regarding candidates is unwise because the information may be unreliable, false, or outdated. Some use a third-party service to remove potentially discriminating information from social media profile information. Regardless of the chosen approach, employers and recruiters must think through how using social media to screen candidates may be more trouble than it is worth.

New Advice for Students Using Social Media

The *New York Times* recently reported that college students' behavior on spring break has become tamer because of social media. According to the article, students are becoming increasingly aware of the ability of everyone

around them to snap a picture and post it for the world to see.[1]

Until now, job seekers have been told to avoid posting embarrassing or questionable pictures or stories on Facebook and other sites, lest potential employers see them. This is simple and good advice. A recent study, however, suggests that this advice is inadequate, and users should be more careful about how their entire social media presence can affect their future job chances.

In a recent study published in the *Journal of Applied Social Psychology*, researchers looked at whether a job candidate's activities on Facebook correlated to those candidates' success on the job once employed. The researchers wondered whether personality-related information on Facebook profiles were sufficient to draw reasoned inferences regarding the so-called Big Five personality traits used to evaluate human behavior: openness, conscientiousness, extraversion, agreeableness, and neuroticism. These traits are often used to predict success within a work environment. Surprisingly, the researchers found that evaluators trained to look at Facebook profiles "can provide

reasonably reliable estimates" of how well employees will perform on the job.[2]

The researchers conducted their study by first enlisting hundreds of college students and obtaining their consent to monitor their Facebook activities. Three trained evaluators then analyzed the participants' Facebook profiles with an eye toward obtaining information relevant to assessing personality traits. Thereafter, the researchers contacted the participants' employers and asked them to fill out an online questionnaire regarding their satisfaction with the participants' job performance. Then, the researchers crunched the data to arrive at their conclusion that there is a correlation between the information posted on Facebook and future success within the workplace.

So, how do posts and other actions on Facebook correlate to job performance? The researchers suggested that if a job candidate failed to demonstrate self-discipline and cautiousness on Facebook, that person might not be conscientious (e.g. "hung over…AGAIN"). If a person posted content showing a tendency toward large swings of personal or emotional experiences, he or she may be seen as having low emotional stability (e.g. "Monday was the best of times…today is the worst of times…") On the other hand, if the job seeker posts a lot of positive and personal information, he or she may be highly agreeable and trusting of others, two critical factors in successful work relations (e.g. "Can't wait to honor my mom's legacy by running in this weekend's charity race!").

What does this mean for job seekers? This study reminds us that this advice remains the best advice: Job seekers should use their best judgment online. However, users now need to think one level deeper and keep in mind how their

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online activity may be construed by employers seeking the most agreeable, personable, trusting, and conscientious candidates. While it is indeed scary to think that potential employers could someday aggregate and analyze job seeker social media data when making hiring decisions, given the costs of high turnover rates within organizations, we should not be surprised if employers begin to look at this information.

What does this mean for employers and recruiters? First, employers and recruiters need to keep in mind that looking at Facebook or other social media information could provide information that could not legally be obtained in an interview (e.g. race, age, disability, and so on).
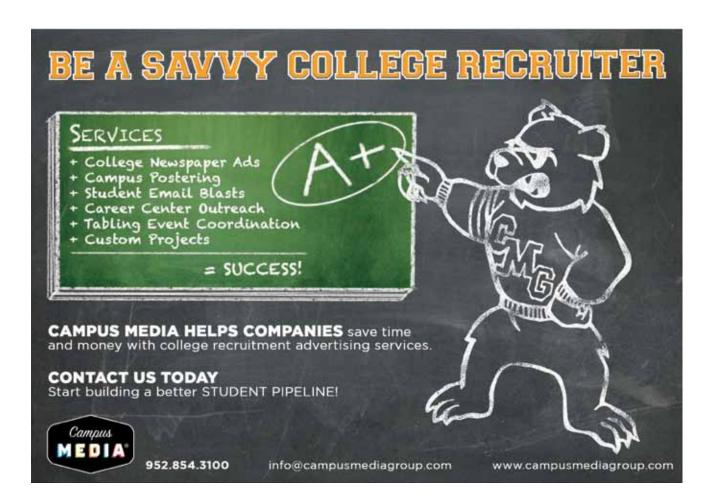
Second, employers and recruiters should understand that this research is in its infancy. It is too early to tell how reliable this information will be in the long run. For example, while the researchers found some correlations between Facebook activities of college-age students, would the same correlations exist between older Facebook users and employees? Would the same correlations hold long term, or do they just provide an insight into the early part of an employee's career? The researchers wisely note that much more analysis is needed.

It is too early to tell what the legal rules relating to social media will be, but the use of these sites in hiring is fraught with legal risks. For the time being, it is critical that employers and recruiters tread cautiously and thoughtfully about using information found online. ⏎

Note: This commentary is not legal advice, and is designed to provide general information only. If you have specific legal questions, consult your organization's legal counsel.

Endnotes

[1] Alvarez, Lizette. "Spring Break Gets Tamer as World Watches Online," *The New York Times,* March 16, 2012.
[2] Kluemper, Donald H.; Rosen, Peter A.; and Mossholder, Kevin N. "Social Networking Websites, Personality Ratings, and the Organizational Context: More Than Meets the Eye?" *Journal of Applied Social Psychology,* May 2012, Volume 42, issue 5, pp. 1143-1172.