

IN PRACTICE

## EMPLOYMENT LAW

### Best Practices for Employers Choosing To Google Job Applicants

BY PETER J. PIZZI

At first blush, using Google searches as part of an employee selection process appears to be a great idea. What could be easier than “Googling” an applicant’s name to see what the Internet yields about his/her prior employment and professional reputation? In 2009, Careerbuilder.com reported that about 45 percent of companies were turning to the Internet to screen candidates. The Personal Branding Blog predicts that, by 2012, close to 100 percent of companies will be doing so. Additionally, employers are wary of negligent hiring claims. Given that employers have a duty to hire “safe employees” and may face claims for failing to screen dangerous applicants, it is understandable that employers increasingly feel that Internet searches should

*Pizzi is a partner in the employment law and technology litigation practice groups of Connell Foley in Roseland. The author would like to thank Mariel Belanger, a summer associate at the firm, for her assistance with this article.*

have a role in the screening process.

Despite its attractions, using Internet search tools in hiring is fraught with danger for employers. While information found on the web is readily available and appears to be “public” in nature, employers risk violating various state and federal laws when considering web content in hiring.

The most significant hazard an employer faces when using search tools in hiring is increased exposure to discrimination claims. An Internet search may retrieve information which employers are legally prohibited from considering when evaluating a candidate, such as age, race, disability and medical history. Once obtained by a web search, this information cannot be “unlearned” and may potentially expose an employer to claims of discrimination. Therefore, in using Internet search in the hiring process, an employer must consider state laws against discrimination and federal statutes along with the EEOC Uniform Guidelines on Employee Selection Procedures.

Another risk employers face follows from the inherent unreliability of

the Internet itself. There is no guarantee that information found while conducting a Google search is accurate. An employer should critically assess the nature and source of web content obtained during an Internet search of a job candidate. Be aware, moreover, that applicants with common names can be potentially misidentified.

The Fair Credit Reporting Act also must be considered. FCRA ordinarily does not apply when an employer uses a Google search in the hiring process, but may have some application if the employer relies upon the investigative work of a third-party agency.

Circumventing access protections to view private content posted by job applicants can also result in increased exposure to various theories of legal liability. Claims involving employer access to private web content have been litigated in the employer/employee arena. See *Konop v. Hawaiian Airline, Inc.*, 302 F.3d 868, 879 (9th Cir. 2002), cert denied, 537 U.S. 1193 (2003); *Pietrylo v. Hillstone Restaurant Group, No. 06-5754* 2009 WL 3128420 (D.N.J. Sept. 25 2009). Using someone else’s account information (username/password) or similar techniques to access private information behind web “firewalls” may trigger claims under federal statutes, such as the Computer Fraud and Abuse Act, the Stored Communications Act, and analogous state statutes, and may also create exposure to common-law claims of invasion of privacy.

The bottom line is that by gaining

information that may or may not be directly tied to the candidate's ability to perform the essential functions of the position, the prospective employer runs the risk of creating an inference that it relied upon prohibited criteria in making the selection decision. Thus, the employer's resort to web search in hiring can create unwarranted exposure to failure-to-hire claims. In addition, even after a candidate is hired, the knowledge that the employer gains about the employee does not evaporate, but rather could play a role in an employment claim after an adverse decision (e.g., a demotion, firing) months or years later. If an employer, weighing the risks and rewards, decides to make a Google search part of its hiring process, the following precautions should be considered as part of a protocol aimed at reducing exposure to failure-to-hire, privacy, and other claims:

**Inform applicants that an Internet search will be conducted and obtain written consent.** Many employment law commentators have suggested the easiest way to avoid potential problems is for the employer to inform job applicants that an Internet search will be conducted. (*See John Hyman's Ohio Employment Law Blog.*) A consent form provided early in the hiring process advising that an Internet search may take place following a conditional offer affords the applicant the opportunity to remove, block or make private information that she does not want employers to see, and to prepare answers to questions that may be raised due to what publically available information about the candidate can be gleaned from a search.

Adopt uniform guidelines for Internet screening. If one applicant is to be screened in a certain manner, all applicants should be similarly, if not identically, screened. Employers should adopt clear policies that explain what conduct is, and is not, acceptable while screening candidates. Applicable personnel should be trained about the potential risks of stumbling across protected information about applicants so that they understand what is "off-limits."

**Designate a nondecision maker to perform the Internet screening.** To ensure that protected characteristics are not considered in the ultimate hiring decision, employers should designate a nondecision maker to perform the Internet search. The person conducting the web search should be instructed to filter out information related to protected characteristics before passing the search results on to the hiring decision maker. (*See Robert Sprague's Labor Law Journal article on this subject.*)

**Consider creating a search policy that designates certain social sites off limits.** Limiting the screening to information collected from a Google search, and excluding information found on social networking site profiles, may provide more useable results and limit an employer's exposure to the type of protected and deeply personal information that can often form the basis of invasion of privacy and failure-to-hire claims. Searches should be focused on professional and verifiable information, such as newspaper articles, magazine and trade publications.

**Keep records.** While much of the employment selection process is already required to be recorded, no such requirements currently apply to Internet screening. It is likely, however, that the EEOC will in the near future update its Uniform Guidelines on Employee Selection Procedures to require some level of record keeping for Internet screening. (*See the Sprague article mentioned above.*)

Creating a reasonable record-keeping system now could help avoid potential problems later. Records of Internet screening may also be helpful if the employer is later charged with negligent hiring as it could demonstrate a good-faith effort to investigate before hiring.

Independently verify harmful information. If extremely damaging information is uncovered about an otherwise worthy candidate, take the time to verify that information. In using the Internet as a screening tool, an employer must be forever mindful of the fact the information is not necessarily factually

accurate or may contain facts taken out of context. The Internet should never be an employer's only form of background checking.

**Job-Related Screening.** Although obvious, it should be noted that information gleaned from the Internet that is used to reject a candidate should pertain to the candidate's job-related qualifications. It may be helpful to create a list of certain characteristics or criteria to which the employee performing the screening may refer. At a minimum, the employer should review applicable job descriptions when considering the effect of Internet information on a candidate's overall qualifications for a position.

**Determine when during the hiring process to use a web search.** Some commentators suggest conducting a web search of a candidate only after a conditional job offer has been made. This allows the initial hiring decision to be based upon traditional information, such as a résumé and interview, with the web search serving only as a simple way of confirming opinions of the candidate and verifying certain facts learned.

Certainly, the Internet has transformed the modern world, enabling countless millions to live better and more fulfilling lives. It is, perhaps, impractical to suggest that hiring and screening job applicants is the lone sphere of modern life in which the resources of the Internet may never be utilized. As outlined above, however, conducting a web search of a job candidate is a risky proposition. The above practice points will enable employers to better manage those risks. ■