

Best Practices For Employers Choosing to Google Job Applicants

Peter J. Pizzi Connell Foley LLP

At first blush, using Google searches as part of an employee selection process appears to be a great idea. 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 recognize a duty to hire “safe employees” and

turn to Internet search to mitigate the risk of workplace violence.

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 “un-

learned” and may potentially expose an employer to claims of discrimination. Therefore, state and federal laws and regulations against discrimination must be considered in using search in hiring.

Another risk employers face follows from the inherent unreliability of the Internet itself. An employer should critically assess the nature and source of web content.

While the Fair Credit Reporting Act ordinarily does not apply when an employer uses a Google search in the hiring process, it 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 novel theories of legal liability. Claims involving employer access to private web content have been litigated in the employer/employee arena. See *Pietrylo v. Hillstone Restaurant Group* (U.S.D.C., D.N.J. 2009). Using someone else’s username and password 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 information from Internet searches may or may not be directly tied to the candidate’s ability to perform the essential functions of the position, placing the prospective employer at risk of creating an inference that it relied upon prohibited criteria in making the selection decision.

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*.)

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. Further, employers should adopt a clear policy that explains what is “off-limits” in an Internet search of candidate.

A non-decision maker should do the “search.” To ensure that protected characteristics are not considered in the ultimate hiring decision, employers should designate a non-decision 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.)

**INFORM
APPLICANTS
THAT AN
INTERNET
SEARCH WILL
BE CONDUCTED
AND OBTAIN
WRITTEN
CONSENT.**

Consider designating 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. Creating a reasonable record keeping system now could help avoid potential problems later.

Independently verify harmful information. If 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 resume 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 may enable employers to better manage those risks.



Peter J. Pizzi, a partner in Connell Foley in Roseland, represents clients in labor and employment law matters, unfair competition, technology and IP litigation, and securities and financial services litigation. He frequently writes and lectures on subjects relevant to these practice areas and can be reached at (973) 533-4221 or ppizzi@connellfoley.com.