Employer Liability for Using Social Media in Hiring Decisions

Margaret Vroman, Karin Stulz, Claudia Hart, Emily Stulz

Employer Liability for Using Social Media in Hiring Decisions

Margaret Vroman
Karin Stulz
Claudia Hart
Emily Stulz

ABSTRACT

With the availability of so much personal information about potential employees on social media sites, it is not surprising that businesses avail themselves of it when determining who to hire. Personal information that was confidential or unavailable to employers a short time ago is now easily accessed by anyone with a computer and an interest in checking out potential work colleagues. Human resource departments cannot prevent people from conducting a Google search on a prospective job candidate or accessing the candidate's Facebook page if it is publicly available. Companies therefore have a much more difficult time controlling the hiring process to ensure that only legitimate criteria are being used when making hiring decisions. Furthermore, many employers are unaware that if the information they gather from social media sites concerns a candidate's membership in a legally protected class (i.e. race, religion, gender identification) and is alleged to be the basis for disqualifying a job candidate, there is the potential for a costly lawsuit. The complex requirements and serious potential for loss imposed by state and federal legal systems demands that enterprises familiarize themselves with the rules and best practices concerning the use of social media in the hiring process. This paper reviews state and federal law dealing with the use of social media in the hiring process as well as the impact of the European Union's "right to be forgotten." It analyzes this information and formulates measures that enterprises should take to reduce the potential for legal liability under these laws.

KEYWORDS

Social media, hiring decisions, employer liability, personal information, privacy, protected class, right to be forgotten.

INTRODUCTION

Social media includes, but is not limited to, personal websites, email, blogs, chat rooms and bulletin boards. It also includes social networking sites such as Facebook, Flickr, Google Plus, LinkedIn, MySpace, Pinterest and Twitter as well as video sharing sites such as YouTube. However, Cavico, Mujitaba, Muffler and Samuel (2013) caution that "Given the popularity, prevalence, sophistication, and ever-growing use of social media, it is no surprise its use in an employment context raises many difficult, as well as novel, legal and practical issues" (p. 26). One area that results in significant risk of legal liability is the use of social media in determining who to hire. With the prevalence of publicly available information about people on the Internet, it is almost irresistible for some employees to look for information about a person they know will be interviewing for a job with their company or organization. If these employees are part of the decision making group or they share information they gather from such sources with persons who are in this group, a job candidate who is not hired may claim it was the sharing of inappropriate information that cost them the job. The use of information about a person's legally protected class status in hiring decisions is illegal. State and federal statutes also restrict the use of other information when making employment decisions (i.e. medical information or marital status). Due to the easy and constant use by most people of numerous forms of social media, preventing a lawsuit due to the access and misuse of this information has become an increasing challenge for professionals in the human resources field. By examining and synthesizing the legal rules pertaining to the use of social media in hiring, it is possible to assist enterprises in this effort by providing guidance and establishing best practices that can help reduce or even eliminate their legal liability in this regard.

COMMON SOCIAL MEDIA PLATFORMS

Social media are often described as electronic communication that occurs in online communities where users share ideas, information, personal messages, pictures and videos. Cavico et al., (2013) explain, "Social media, very generally, consists of web-based Internet networks where users can share information and communicate with others in a collective manner" (p. 26).

Widespread access to the Internet on computers and increasingly, mobile devices, has helped social media develop and grow. Although it was originally used as a form of personal connection and communication, its reach into the business world has expanded greatly. Now businesses of all types and sizes recognize the ability of social media not only to dispense information, but also to gather it. Information about an individual that was previously kept private and difficult to discover can now be easily obtained from profiles on numerous social media platforms.

Social media platforms can be distinguished by their predominate use. Facebook, Instagram and Google Plus are three sites that are considered personal sharing sites. These sites are most often used to share personal information with a closed network of "friends." Sites such as Twitter, Blogger and Wordpress are somewhat different as they co-exist between personal and professional use as the user has more control over the amount of content disseminated. Sites such as LinkedIn are predominately used for professional purposes because all profiles are public and contain information regarding the user's professional lives (work experience, education, awards, and/or volunteer experience). The difference between personal and professional sites is important as users base decisions on what information to post depending on the intended or perceived audience.

There is also blogging, podcasting and video, which are ways to create distinctive and original content targeted to audiences with specific interests. And although these forms of social media represent the opportunity to develop proprietary and more extensive content, they are typically a more expensive medium to maintain.

Regardless of the platform used, any organization can now take the vast amount of data generated from these social media sites and choose from a number of tools to aggregate it, sort it, integrate it and build relationships with it.

Facebook

Facebook, a social networking site, was founded in 2004. It was originally created to connect students at Harvard College, but it quickly expanded to include students at other universities. In 2006, it became open to anyone over the age of 13. A free platform, the main purpose of Facebook currently is to help individuals communicate instantly with friends and family, allowing people to hold conversations and share photos, stories and videos. As the most popular social media site, it has over one billion users and grows daily. Users often post personal information concerning their political beliefs, membership in social organizations and religious affiliation.

Connecting with others on the Facebook system or "friending" is an important part of the user experience. Users can also "like" community pages, which consist of company pages, brand pages, social groups, celebrity pages, and more. Anyone allowed to access someone's Facebook page can view their conversations, see their photographs and see what organizations they "like."

LinkedIn

LinkedIn is an online business network that was created in 2003 to connect professionals and to provide advertising, marketing and job search opportunities. Free to users, the site includes executives from every Fortune 500 company as well as university employees, aspiring professionals and others. With over 300 million members, it is the world's largest professional network and can be used to help strengthen existing business networks and grow new ones. Users generate a profile based on their job history, experiences, education, and interests. Once a profile has been created, users are invited to connect with people they know which, in turn, puts them in contact with other people they may know, thus allowing all users to be "linked in" to one another. LinkedIn users can search for jobs, follow professional organizations and follow businesses or individuals. All of this information feeds into their home page which allows users to find relevant information about their job field. It also allows potential employers to view all of the user's information.

Twitter

Twitter is a real-time information network that was founded in 2006. It is a free online information network that allows a user to broadcast 140-character messages. These messages are called "tweets." A user sends a "tweet" and all other Twitter users that have subscribed to that user (or "follows" the user) can see their messages. Twitter users can customize their profile picture, header, and link color. These customizations then transfer to their own individualized home feed. This feed filters tweets chronologically from all of the users a person "follows." When someone chooses to follow a user, their "tweets" appear in the user's newsfeed.

Twitter users also have the ability to interact and tweet at one another using their individual handles, which is shown as the name following the @ symbol (i.e. @DeepakChopra). When a follower uses someone's handle in a message, the person is notified through their Twitter account. Users have the ability to make their profile private or public. A private profile means only people the user approves can read their posts. A public profile means that all users can see a person's posts and interact with them. Business Twitter accounts are always public to encourage connections with individuals and communities outside of normal contacts. Although a "tweet" can be removed after it is posted, it cannot be deleted from the accounts of those who have already viewed it.

SOCIAL MEDIA'S USE IN BUSINESS

Social media helps businesses with their communication, both internally and externally. The collaborative nature of social media can be used to a company's advantage within the organization, to increase its efficiency and effectiveness, and externally to maximize its contacts and create specifically targeted advertisements. The most studied aspect of social media is how companies use it to connect with their customers and market their products (Leonardi, Huysman & Steinfield, 2013). Companies use pages and/or profiles on the different popular networking sites to share their generated and branded content with people who have formed relationships with them. This allows companies to connect with their consumers on a much more intimate level and create a more personal feel to their customer relationships. Social media sites also allow customers to easily voice their excitement about upcoming products or marketing campaigns. Just as important perhaps, these same customers may also voice their displeasure if the outcome of a product or service does not meet their expectation. This bilateral exchange of information, often in real time, has changed the way businesses operate.

Social media use can also have a great impact on a company's ability to enhance its reputation. For example, in a survey of over 3,000 customers and non-customers of an international airline, in which consumers' engagement in the airline's social media activities and perception of corporate reputation was examined, results showed that engagement in social media activities is positively related to corporate reputation, especially among non-customers. (Dijkmans, Kerkhof, & Beukeboom, 2015)

Social media is also often used for internal communication and social interaction within a company (Leonardi, Huysman & Steinfield, 2013). While internal platforms mimic the look and feel of the popular social networks, they may be embedded within company blogs, wikis and features for social tagging and document sharing. The purpose of these business specific enterprises is to help foster better team communication and collaboration (Cardon, Marshall, 2015). Companies may even use specific tools to mine the social media communications of employees to determine their honest perceptions of their employer (Shami et al 2014). Although not everyone is comfortable with the ever growing ubiquitous nature of social media, research shows that Gen X and Gen Y business professionals believe that social networking tools will be the primary tools for team communication in the future (Cardon, Marshall, 2015).

Interestingly, although all businesses seem to believe that using some form of social media is now an essential tool for business operation, a recent study by Margaret McCann and Alexis Barlow shows that 65 percent of small and medium-sized businesses do not even bother to measure their return on investment for social media use (McCann, Barlow, 2015).

When it comes to the difference between generations in their use of social media, research done by Martin and Van Beval shows that digital natives (people who have grown up with the Internet and have never experienced life without it) rarely use the Internet outside of social networking sites, whereas older generations tend to use the Internet outside of social networking sites and social networking sites in equal amounts. With digital natives

projected to make up roughly 40 percent of the U.S. workforce by 2014, it is imperative that businesses continue to conduct research on the use and impact of social media both internally and externally on their organizations.

As more and more personal information becomes available from social media sources, businesses increasingly are resorting to social media searches to learn information about job candidates instead of relying solely on what appears on a candidate's job application form or resume. Although the specific focus of this article concerns the legal liability that may arise from such searches, there is evidence that shows that legal liability should not be the only concern of businesses. A study conducted at North Carolina State University found that when job applicants realized an organization had viewed their social media profile, they were less likely to perceive the hiring process as fair, regardless of whether they were offered the position. The researchers concluded that the mere perception that a company had viewed a job applicant's social media profile without permission could have a damaging effect on the company's reputation (Jacobson, 2014).

SOCIAL MEDIA USE IN HIRING

Today, social media is a significant part of the marketing plan for both large and small businesses. Organizations use social media for public outreach and customer relations, consumer education, branding and engagement with consumers, promotion of their platforms and recruitment of employees.

Not only has social media transformed the way companies conduct their business, it has also transformed the way many of them conduct their hiring. In particular, LinkedIn is often used by individuals and businesses as a way to discover good job prospects. LinkedIn users often include information in their profiles about themselves that potential employers may not legally consider when hiring. Many employers know this and intentionally use LinkedIn to discover this information about job applicants that is not contained in the documentation that their human resource department provides them. Not only is it extremely difficult for human resource departments to control or prevent access to such information, the more troublesome aspect is they cannot control who employees communicate the information to or how it is used.

Most everyone will admit they have said something they regret or have engaged in foolish behavior at some point in their life. Unfortunately for a lot of people, the Internet and social media sites provides instantaneous transmission of these events. Even worse is the fact that it may be impossible to permanently retract evidence of these indiscretions. As soon as an offensive remark or incriminating photograph or video has been tweeted or posted, it can be seen by thousands of people and cause significant damage. Sometimes, the subject of an unflattering post is not even aware of it. Furthermore, damaging and incriminatory posts often remain online in some form long after the subject believes it has been removed. Once posted, a communication can be saved and/or reposted by someone else with the potential to resurface years later when a resourceful prospective employer uncovers it and uses the information as part of their hiring decision process. When this happens, serious and expensive consequences may result if the information used is determined to violate an individual's legal rights.

THE LEGAL REGIMES IN WHICH SOCIAL MEDIA OPERATES

Social media sites, by their very nature, are designed to allow people to share private information and to draw as much participation and information from people as possible. As such, the data mining industry and those who study online behavior do not care who the information comes from or whether they want it kept private; their goal is to make money from aggregating the information and selling it to companies who exploit it. As a result of this corporate lack of concern for privacy rights and personal data protection, the United States and the European Union, as well as other global entities, have passed legal rules designed to mandate privacy and data protection measures for enterprises soliciting and using social media content.

The legal approach to regulating the use of private information is markedly different between the United States and Europe. Europe, Canada, and many other countries believe that each citizen's private information is a human right and they protect this right by statute, which can be enforced by the government or by a private citizen. In the United States, however, the federal government only protects certain types of information—and the individual is not considered to be the owner of information about him or herself. Protected information consists of financial transactions, health care transactions, and information regarding children under the age of 13. Most other data about

an individual is considered collectable by any business or government agency that wants to collect, store, and use it (Claypoole, 2014).

Another difference that complicates the regulation of social media use in the United States is the country's dual system of federal and state laws. For example, whereas the federal government seems loath to follow the European Union's example of laws and policies that protect an individual's right to privacy and to control information about themselves, many states have been willing to pass laws that grant more rights in this regard. Furthermore, there are several federal agencies that exercise regulatory authority over specific aspects of social media operations. Specific examples involve the Federal Trade Commission, the Equal Employment Opportunity Commission and the National Labor Relations Board.

The Federal Trade Commission (FTC) is responsible for promoting fair competition among businesses by preventing unfair and deceptive trade practices and restraining the growth of monopolies. It targets deceptive advertising, regardless of the advertising medium and it has pursued several cases of deceptive advertising against social media sites. Most recently, it has produced specific guidelines for marketers who use online and social media tools.

The Equal Employment Opportunity Commission (EEOC) is the federal agency that enforces federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex, national origin, age or disability. The EEOC has investigated whether employer practices of demanding a job applicants' social media password violates federal law.

The National Labor Relations Board (NLRB) is the federal agency that protects employees' rights to organize. It also acts to prevent and remedy unfair labor practices committed by private sector employers and unions. It has looked into issues involving illegal retaliation by employers against employees who have criticized their employers on social media sites.

In Europe, the European Commission acts as the executive arm of the 28-member European Union and the European Parliament has issued numerous privacy and data directives that its member states are obligated to follow. However, just as in the United States where its system of federalism causes legal conflicts and problems for businesses, so does the EU's system which requires compliance with numerous national regulators. For example, Facebook found itself being investigated by five national privacy watchdogs due to its information gathering practices in Europe. France, Germany, Belgium, the Netherlands and Spain all began investigating whether Facebook broke EU data protection laws. In 2015 a Belgian court ruled that the company could not collect information from people in Belgium who did not use its services. Facebook is currently appealing this ruling, arguing that it is only subject to privacy rulings in Ireland where it has its International headquarters (Fioretti, 2015).

The difference in approach to privacy and the rules regarding the ownership of personal information between the U.S. and Europe is at the heart of the competing legal approaches to the regulation and use of personal information between the two continents. However, in the context of this article the discussion is limited to its application in the employer and employee relationship.

LEGAL IMPLICATIONS

Social media has significantly altered the way companies recruit employees. Sites such as LinkedIn are intentionally designed to provide a wealth of job recruitment opportunities. They bring employers to candidates and candidates to potential employers. The use of 'social media vetting' has become commonplace with recruiters and employers using it as a tool to determine the suitability of prospective job candidates. Many people willingly post personal information on a LinkedIn profile that a potential employer is not legally entitled to consider when making a hiring decision. Examples include membership in religious organizations, country of origin or race. Is it against the law for an employer to read such information? No. The liability results from what the employer does with the information after they read it. Unfortunately, the mere allegation of illegal discrimination in hiring based on social media access can prove to be disastrous. For example, what if a job applicant claims she was not hired because of her religious affiliation, and the employer claims that her religion was not a factor in its decision not to hire her? How can the employer prove its assertion? If evidence shows a company representative accessed the applicant's LinkedIn page which shows she practices Voodoo, how can it convince a jury this information was not a factor in its hiring decision? Disproving these types of allegations can be extremely difficult.

What if a prospective employer requests a job applicant's personal password so the employer can use it to log on to the job applicant's social media account to see if they're inclined to post disparaging comments about their current employer? Is that legal? The answer is, it depends on where you live. In the United States there is no federal law that bans the practice, although there is a federal law that criminalizes the unauthorized access to computerized data. However as discussed below, a majority of states have passed laws that ban the practice of forcing job applicants to divulge their social media passwords.

In 2011, 91 percent of U.S. recruiters surveyed admitted to using social networking sites to screen applicants. This screening practice has been taken even further by some employers who require candidates to befriend third parties on Facebook or demand that applicants provide their password to personal social media accounts (Eills, 2015).

Although most people are aware that the posting of party photos or a politically incorrect statement can hurt their job prospects, they are less aware that the law restricts the use of social media by employers and job recruiters. Most often, employers run afoul of anti-discrimination laws when their social media searches result in them not hiring someone from a protected classes of workers (Sunnucks, 2014).

The Chicago-based staffing firm Challenger, Gray & Christmas, Inc. ("Employers checking," 2014) found that 60 percent of human resource professionals looked at job seekers' Facebook, Instagram and Twitter pages. However, only 6 percent of those hiring managers were willing to admit that an applicant's social media activity significantly impacted their hiring decision; 40 percent, though, said it had some impact. If even a single, disgruntled job applicant from one of these companies sued, claiming they were not hired because of the illegal consideration of information obtained from a social media site, it could cost the company hundreds of thousands of dollars in legal fees. In addition, convincing a court that the information uncovered from their social media perusing was not used in the hiring process is often an uphill battle. After all, why was the information sought if it was not intended to be used?

Unfortunately, most businesses do not appreciate or understand the importance of controlling or limiting the use of social media in the hiring process. A review of federal and state litigation demonstrates that the use of social media in hiring has two major legal problems. The first involves the misuse of personal information to discriminate against individuals who are a member of a legally protected class. Both the federal Civil Rights Act and state statutes prohibit discriminating against a person in employment because of their race, religion, ethnic origin, disability and, increasingly, gender identification or sexual preference. For most jobs, this information is intentionally omitted from the employment application process in order to avoid legal problems. But if an employer or its agents want to find out such information about a prospective employee, it is often readily available from an applicant's Facebook page or LinkedIn profile. Yes, users may omit this personal information from their social media accounts or restrict access to it, but many do not—especially since they assume it will only be accessed by their friends or close associates. Even when the professionals in an organization's human resource department instruct search committee members or other employees to refrain from researching job candidates on social media sites, there is no way to ensure it doesn't happen.

The case of *Gaskell v. Univ. of Kentucky* (Bally, 2014), is a good example of what can happen when an employer uses information gathered from social media as part of the hiring process. Dr. Martin Gaskell was an astronomer who applied for a job as the director of the observatory at the University of Kentucky. During Dr. Gaskell's job interview, the chairman of the Physics and Astronomy Department stated that he had researched Dr. Gaskell's religious beliefs (online), and that they might be unacceptable to the dean of the department. The information he obtained showed that Gaskell was an outspoken critic of evolution and a believer of the intelligent design viewpoint. After someone who believed in evolution was hired for the position, Dr. Gaskell sued the university, claiming that its conduct violated his rights under the Civil Rights Act. Specifically, he alleged that the University discriminated against him based on his religious beliefs. During the ensuing investigation and discovery process it was learned that an employee within the department had sent an email to the chairman concerning an Internet search that she conducted on Dr. Gaskell. In her email she discussed the professor's anti-evolution religious beliefs and indicated it was not a positive attribute. The court agreed that this information provided Dr. Gaskell with enough evidence to pursue a lawsuit to determine whether his religious beliefs uncovered in the Internet search were, in fact, illegally used to deny him the position sought. The case was eventually settled before going to trial, but not before it cost the University a great deal of money and negative publicity.

FEDERAL EEOC, FTC AND NLRB RULINGS

In addition to potential lawsuits from individuals, the second area of legal concern to employers is the consequence of running afoul of the Equal Employment Opportunity Commission (EEOC) and other federal agencies. The EEOC in particular has become very active in scrutinizing employers' hiring practices and in filing cases against them when it determines an employer's hiring practices improperly include the use of social media. In a public workshop held by the Federal Trade Commission (2014), Carol Miaskoff, a representative of the EEOC, stated that the implications of employers' use of social media to screen potential employees put them in a very vulnerable position. She explained that even if employers just glance at applicants' profiles on social media, they are exposed to a "plethora of information about protected statuses," (p. 206) such as race, gender, sexual orientation, or disability. Because the use of social media in recruitment and hiring only violates the law in specific circumstances, however, she stressed the importance of detailed recordkeeping that can protect employers. She also stated that the EEOC is now pushing "the kind of recordkeeping that can facilitate verification" (p. 197).

Whereas the EEOC is tasked with examining companies' hiring practices, the National Labor Relations Board (NLRB) is the agency that enforces the National Labor Relations Act, which protects union related activities. Although the NLRB has interpreted the Act as allowing the researching of applicants through social media, it cautions employers that doing so may pose significant legal risk. It warns that if an unsuccessful job applicant can establish that a prospective employer had knowledge of their protected union activity through viewing their social media, the prospective employer may face liability if the applicant alleges they were denied employment because of it. An employer may be found legally liable unless it can show that it would not have hired the applicant regardless of its knowledge of the activity. This is a difficult position to prove, especially since the NLRB will impute a supervisor's knowledge about an applicant to the decision-maker (Morsilli, Ronen & Bloom, 2014).

Even when the individual making hiring decisions is not the one who reviewed an applicant's social media activity, the employer may still be subject to liability since the NLRB has "a pretty liberal" standard for "imputed knowledge." During a panel discussion held on November 27, 2014 (Nestor & Verma, 2014), EEOC Commissioner Chai Feldblum offered an example. The example involved an employer who learned protected medical information about a job candidate, and evidence exists that the person doing the hiring used that protected information to make their employment decision. In such a situation, she said "bingo, … you … have a violation" (para. 2).

The NLRB has also repeatedly struck down provisions of employers' social media policies and reversed employer discipline of employees where the discipline has been based on employees' personal social media activity. According to the Board, these employers violated Section 7 of the National Labor Relations Act (NLRA) by implementing policies that interfered with an employee's right to discuss the terms and conditions of their employment or by disciplining employees for exercising that right in social media. Other NLRB decisions have held that if employers allow employees to use corporate social media platforms for non-business purposes, it will impose the same restrictions on employers that it has applied to their employees' personal social media activity. This means that without carefully drafted policies or terms of use, employers run the risk that corporate-sponsored social media sites could be subverted for employees' complaints about the terms and conditions of their employment. A recent NLRB report illustrates the application of a well-established principle of labor law—that employers may not implement policies, including social media policies—that could reasonably be understood by employees to prohibit them from discussing their terms and conditions of employment for the purpose of their mutual aid and protection (Gordon, 2014).

STATE LAWS

In 2012, media reports about employers requiring access to a job applicant's social media site as a hiring condition created a frenzy of public outrage and threats of legal action by Facebook. In response to the uproar many states began enacting social media password protection laws ("Social media's impact," 2013). Currently, there are 28 states that have passed or are proposing laws that prohibit potential and current employers from demanding, and using someone's password to access their private social media accounts ("Employer access," 2014).

The states that prohibit this practice are: Arkansas, California, Colorado, Illinois, Maryland, Michigan, New Jersey, New Mexico, Nevada, Oregon, Tennessee, Utah, Washington, and Wisconsin. Although the content of these laws varies, each prohibits employers from asking potential or current employees for their passwords giving access to personal online content. There is an exception to this in most of these laws in instances if the employer can show a

strong business need such as when it is conducting a workplace investigation into illegal conduct or for conduct that violates company policy (Gordon & Hwang, 2014).

Although the practice of demanding online passwords is waning, it is still used by some who insist on accessing a job applicant's social media to see what kind of activities they participate in or what kind of things they "like." Increasingly, however, not only are employers legally prohibited from forcing an applicant to give them access to this personal information, even if they gain it legitimately, the potential for misuse and resulting lawsuits make taking proactive measures to reduce legal liability essential.

INTERNATIONAL CONSIDERATIONS – THE RIGHT TO BE FORGOTTEN

Although the decision applies only to search engines (data controllers) and not to social media sites, a 2014 ruling by the European Court of Justice (ECJ) may also impact an enterprise's hiring process and tangentially impact social media providers (Smyth, 2014). The ECJ ruling, which applies to the European Union (EU), requires internet search providers to remove links to "inadequate, irrelevant, or excessive" information about an individual when they request it. The case, *Google Spain SL v. Agencia Española de Protección de Datos,* was brought against Google but it applies to all internet search providers. The resulting EU Directive is often referred to as "the right to be forgotten" and its significance is not a new burden placed on hiring firms or employers recruiting in the EU, but rather the creation of a new potential defendant for plaintiffs suing for employment discrimination. Now, not only may plaintiffs sue the party that sought out and used legally prohibited information, they may also sue the search engine company that failed to remove links to this information if it failed to do so after a proper request for deleting the links was made.

The interesting and real debate this EU ruling brings to the fore concerns determining the proper balance between the public's right to know information about an individual versus an individual's right to a fresh start free from the stigma of past behaviors. In the United States, public sentiment seems to favor making public all available information about an individual whereas European sentiment weighs more heavily toward non-disclosure of past transgressions (Toobin, 2014). According to Professor Toobin, "In Europe, the right to privacy trumps freedom of speech; the reverse is true in the United States." As a result, the ECJ's ruling and rationale in the *Google* case may be determined by a United States court to violate U.S. law in instances where a party seeks to hold a search engine company liable in a U.S. court.

Europe's recognition of a "right to be forgotten" set off a significant debate at the national level in the United States, with many technology companies in strong opposition to it. In 2013, however, the state of California enacted a law that requires "the operator of an Internet Website, online service, online application, or mobile application" to allow registered users younger than eighteen to erase their own comments from any such site. Although enacted at the state level, this appears to be the first step in the United States toward acknowledging the "right to be forgotten." Teenagers who have posted embarrassing statements may now seek to remove those statements from social media sites—although the exact mechanism for enforcing this right has not as yet been determined. The statute has some other important limitations: it only covers the teenager's own posts and not posts made by others. Also, although the teen may delete their own statements, they may not delete comments, "like" buttons, or other posts surrounding their statements (Claypoole, 2014).

HOW EMPLOYERS LIMIT THEIR LEGAL LIABILITY

By now it should be clear that employers must be extremely careful with how they collect and use data about job applicants found on social media. Savvy employers not only need to have a policy regarding the use or non-use of social media in the hiring process, they must also make sure all their employees are trained on this issue and their policy, especially those employees participating in the hiring process (Federal Trade Commission, 2014).

If, despite the dangers, an employer still insists on reviewing a job applicant's social media profile, there are a number of ways to reduce the legal risks when doing so. Some are listed below:

- **Conduct an in-person interview before consulting social media**
  If an employer plans on consulting social media, it should also make sure that all in-person interviews are conducted before researching the candidate online. This ensures that those persons conducting the interview don't risk asking improper questions based on information learned through an online search.

- **Obtain written consent**
  One way to reduce legally liability is to obtain the written consent from the job applicant before conducting a social media search.

- **Have someone who is not a decision-maker conduct the social media search**
  Once the applicant's permission has been obtained to conduct a social media search, someone who is not the employment decision maker should conduct the search and review the information gathered. This creates a shield between the person conducting the social media search and the person making the employment-related decision. An employer may also reduce their risk of liability by hiring a third party to conduct background checks of potential employees. These third parties may conduct searches of publicly available information but beware that federal laws such as the Fair Credit Reporting Act (FCRA) may become relevant depending on the third party source used to conduct the social media search (D'Andrea, 2014).

- **Use a standardized form for all candidates when conducting the social media search**
  It is also a good idea to provide the non-decision making investigator with a form that contains only legal, pre-defined criteria for hiring decisions. The person conducting the investigation should be instructed that no additional information may be included on the form to insure that information regarding protected class status is not disclosed to the employer or decision maker.

- **Focus on candidate posts**
  When searching for information, whoever is conducting the search should focus on the candidate's own posts or tweets, not on what others have said about him or her. Remember, there are imposter social media accounts and a job applicant with negative information used to disqualify them from a position should be given the opportunity to respond to it before the decision is made.

- **Keep a detailed record of the social media search**
  After written permission to conduct a social media search has been obtained, only gather information from the social media site that is legally permissible to consider when hiring. Employers should keep a detailed written record of all information used in the recruitment process as well as the information obtained from social media sites. This record also demonstrates what information was *not* used in the hiring process.

- **Search all candidates or none at all**
  Also, once the decision has been made to use social media, employers should research every job candidate's online profile. Conducting a social media background check on some candidates and not on others may lead to discrimination claims. All records associated with hiring decisions, including computer printouts of social media sites reviewed, should always be retained. Remember, all email exchanges and notes concerning potential job candidates may be obtained in the discovery process of a lawsuit.

- **Draft narrowly defined, specific policies that give your employees good guidance and examples**
  Finally, when drafting employee workplace policies, employers should avoid using overbroad or vague language such as "inappropriate," "unprofessional," or "disparaging," unless specific examples of each are provided. Also, avoid terms such as "non-public" or "confidential" without the use of limiting language because employees may reasonably construe it to limit discussions about working conditions (which may offend the NLRB). Avoid broad prohibitions against the use of an employer's logo or trademark because it could be construed to prohibit non-commercial use under NLRA activities such as in leaflets or picket signs. Similarly, avoid broad prohibitions against photographing or videotaping the workplace as it could be interpreted to prevent employees from using social media to share information regarding employees engaging in protected concerted activity such as picketing. When implementing policies, carefully consider the reasons for disciplining or terminating an employee who has posted offensive statements online ("Social media's," 2013). Not only must the hiring process scrutinize its use of social media, all hiring decisions must be done in a way that avoids violating any federal, state or local law.

CHILLING EFFECT

Rita Kittle, a Senior Trial Attorney in the EEOC's Denver Field Office warned that the increased effort by employers to access private social media communications may have a chilling effect on persons seeking to exercise their rights under federal anti-discrimination laws (Equal Employment Opportunity Commission, 2014). She and her colleagues found that not only does the use of social media by employers subject them to the possibility of serious legal liability when used to screen potential employees, it also has a chilling effect on their ability to hire good employees. This was verified by researchers at North Carolina State University (NCSU) (Kashmira, 2014) who tested the activity of 175 Facebook users. In addition to surveying whether the Facebook users had desirable personality traits that employers want (such as conscientiousness, being agreeable, and being an extrovert), they also examined how these job seekers reacted to the screening practice of employers who examined social media for evidence of 'undesirable' habits such as drinking and taking drugs to help them reject candidates. According to NCSU professor Lori Foster Thompson, "…there is no significant correlation between conscientiousness and an individual's willingness to post content on Facebook about alcohol or drug use" (Kashmira, 2014, para. 6). The study's authors also concluded that "companies are eliminating some conscientious job applicants based on erroneous assumptions regarding what social media behavior tells us about the applicants" (para. 7). Professor Thompson said, "when you think about the fact that top talent usually has a lot of choices as to where they want to go to work, it begins to really matter" (para. 9).

CONCLUSION

The use of social media in the hiring process appears to be analogous to the opening of Pandora's box. Once opened, it cannot be contained and the potential for destruction is great. There is a wealth of valuable information that can be gleaned from social media sites that an employer can legitimately consider. Relevant volunteer work, foreign travel and language skills may be discovered. However, it is also possible that an employer may learn legally protected characteristics such as race, religion or medical conditions. So although there are many reasons for limiting or avoiding using social media when considering a job applicant, there are also some legitimate ones. For instance, is the information on a social media site consistent with the information submitted on the candidate's employment application and resume? The good news is, if an employer insists on checking social media sites, there are ways to limit the potential for legal liability when doing so. Every employer or job recruiter should have a policy for its use or non-use and once created, all employees within the organization should be made aware of the policy and the importance of complying with it. Employing neutral third parties who are not part of the decision-making process also provides insulation from liability. Additionally, obtaining the consent of the job applicant to a social media search is strongly advised. However, even if access to information on an applicant's social media site is legally obtained, an employer should not interpret that to mean it can use the information it has gained to illegally discriminate against an individual when making the hiring decision. Finally, all decision makers should be aware of the types of information the law prohibits them from considering in the hiring process and the reasons behind the policies they are implementing. An educated and informed employee is much less likely to engage in misconduct that results in legal liability.

REFERENCES

1. Bally, K. (2014, July). Top 10 considerations when using social media in the hiring process. Retrieved January 12, 2015 from https://info.legalsolutions.thomsonreuters.com/signup/newsletters/corporate-counsel-connect/2014-july/article8.aspx See also, Gaskell v University of Kentucky, 110 Fair Empl. Prac. Cas. (BNA) 1726, 93 Empl. Prac. Dec. P 44,047.

2. Cardon, P., Marshall, B., (2015, July). The hype and reality of social media use for work collaboration and team communication, *International Journal of Business Communication, 52* (3273-293). doi: 10.1177/23294884I4525446

3. Cavico, F. J., Mujtaba, B. G., Muffler, S. C., & Samuel, M. (2013). Social media and employment-at-will: Tort law and practical considerations for employees, managers and organizations. *New Media and Mass Communication, 11,* 25-41. Retrieved January 12, 2015 from http://www.iiste.org/Journals/index.php/NMMC/article/view/4605

4. Claypoole, T.F., (2014, January). Privacy and Social Media, *Business Law Today,* Retrieved 4/9/2016 from http://www.americanbar.org/publications/blt/2014/01/03a_claypoole.html

5. D'Andrea, K. (2014, June). What you know can hurt you. *Long Island Business News.* Retrieved January 12, 2015 from http://libn.com/2014/06/18/what-you-know-can-hurt-you/

6. Dijkmans, C. Kerkhof, P., Beukeboom, C., (2015, April). A Stage to Engage: Social Media Use and Corporate Reputation, *Tourism Management,47,* 58–67. doi:10.1016/j.tourman.2014.09.005

7. Eills, A. (2015). Social media and the workplace. *Surray Partners.* Retrieved February 7, 2015, from http://www.surrypartners.com.au/social-media-and-the-workplace/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original

8. Employer Access to Social Media Usernames and Passwords. (2014, November 18). Retrieved January 12, 2015 from http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords-2013.aspx

9. Pedderson, J., & Blumenfeld, C. (2014, May). Employers checking your social media, but will it hurt your chances? *Challenger, Gray & Christmas, Inc.* Retrieved February 10, 2015 from https://challengeratwork.wordpress.com/2014/05/13/employers-checking-your-social-media-but-will-it-hurt-your-chances/

10. Equal Employment Opportunity Commission Documents. (2014, March 12). Social media is part of today's workplace but its use may raise employment discrimination concerns. Retrieved January 12, 2015 from http://www.eeoc.gov/eeoc/newsroom/release/3-12-14.cfm

11. Federal Trade Commission. (2014, September). Big Data: A tool for inclusion or exclusion? [Workshop transcript]. Retrieved February 8, 2015 from http://www.ftc.gov/system/files/documents/public_events/313371/bigdata-transcript-9_15_14.pdf

12. Fioretti, J., (2015, November). Facebook to Appeal Belgian Ruling Ordering it to Stop Tracking Non-Users, *Reuters*, Retrieved April 9, 2016 from http://www.reuters.com/article/us-facebook-belgium-idUSKCN0SY27220151109

13. Gordon, P. (2014, January). Workplace privacy 2014: What's new and what employers may expect, *The Littler.* Retrieved January 12, 2015 from http://www.littler.com/publication-press/publication/workplace-privacy-2014-whats-new-and-what-employers-may-expect.

14. Gordon, P. and Hwang, J. (2014, May). Tennessee joins the growing list of states limiting employers' access to personal online content, *The Littler.* Retrieved January 12, 2015 from http://www.littler.com/publication-press/publication/tennessee-joins-growing-list-states-limiting-employers-access-person-0.

15. Jacobson, R. (2014, January 13). Facebook Snooping on Job Candidates May Backfire for Employers**,** *Scientific American.* Retrieved May 3, 2016 from http://www.scientificamerican.com/article/facebook-snooping-on-job/.

16. Kashmira, G. (2014). Employers who Facebook stalk could be missing out on the best employees. A new study has found that people who post photos of themselves partying could still be good employees*, The Independent.* Retrieved February 7, 2015 from http://www.independent.co.uk/life-style/employers-who-facebook-stalk-could-be-missing-out-on-the-best-employees-9099874.html

17. Leonardi, P., Huysman, M., & Steinfield, C., (2013). Enterprise Social Media: Definition, History and Prospects for the Study of Social Technologies in Organizations, *Journal of Computer-Mediated Communication, 19,* 1-19. doi: 10.1111/jcc4.12029.

18. Martin, A. & Van Bavel, R. (2013). *Assessing the benefits of social networks for organizations-report on the first phase of the SEA-SoNS Project* (No. JRC78641). Institute for Prospective and Technological Studies, Joint Research Centre. doi: 10.2791/89039.

19. McCann, M., Barlow, A., (2015). Use and Measurement of Social Media for SMEs, *Journal of Small Business and Enterprise Development, 22*(2), 273 – 287. doi: 10.1108/JSBED-08-2012-0096.

20. Morsilli, R., Ronen, P. & Bloom, H. (2014, November 24). NLRB's Johnson and Griffin review pitfalls associated with employer monitoring of social media [Web log post]. Retrieved February 7, 2015 from http://www.laborandcollectivebargaining.com/2014/11/articles/nlrb/nlrbs-johnson-and-griffin-review-pitfalls-associated-with-employer-monitoring-of-social-media/

21. Nestor, A., & Verma, N. (2014). EEOC and NLRB continue to focus on employers' use of social media, *The National Law Review.* Retrieved February 7, 2015, from http://www.natlawreview.com/article/eeoc-and-nlrb-continue-to-focus-employers-use-social-media

22. Shami, N., Jiang, Y., Panc, L., Dugan, C., Ratchford, T., Rassmussen, J., Assogba, Y., Steier, T., Soule, T., Lupushor, S., Geyer, W., Guy, I., & Ferrar, J. (2014, February). Understanding employee social media chatter

with enterprise social pulse. In *Proceedings of the 17th ACM conference on Computer supported cooperative work & social computing,* 379-392. doi: 10.1145/2531602.2531650

23. Smyth, E. (2014, July). Will the 'right to be forgotten' ruling affect candidate background checks? *The Guardian*, Retrieved July 10, 2015 from http://www.theguardian.com/media-network/media-network-blog/2014/jul/25/google-right-forgotten-job-prospects

24. Weiss, R. (2013). Social media's impact on hiring, management and discipline: what every employer needs to know, *Employment Practice Solutions.* Retrieved January 12, 2015 from http://www.epspros.com/NewsResources/Newsletters?find=50514

25. Sunnucks, M., (2014, May). Most hiring managers say they look at applicants' social media posts, *Business Journal (Phoenix),* Retrieved January 12, 2015 from http://www.bizjournals.com/phoenix/news/2014/05/13/most-hiring-managers-say-they-look-at-applicants.html.

26. Toobin, J. (2014, September). The Solace of Oblivion, *The New Yorker.* Retrieved July 10, 2015 from http://www.newyorker.com/magazine/2014/09/29/solace-oblivion