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Legal and Ethical Considerations for Social Media Hiring Practices in the Workplace

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In the modern world, social networking sites and specific social media avenues have allowed people to interact in ways not seen in previous generations. Students have the ability to work on group projects and share information in real time through synchronous mediums, whether that is a file uploaded for everyone to see or instant messaging systems to discuss key points. Faculty and staff at a university are able to disseminate information about upcoming events, deadlines, or opportunities for their colleagues and followers to participate in. The entire university community can communicate with one other, without ever needing a physical presence.

Social media can be defined as technology that facilitates shared information, user created matter, and collaboration (Elefant, 2011). Examples of social media can include Facebook, Twitter, LinkedIn, Myspace, YouTube, and Wikipedia among other sites that facilitate interactions on a virtual basis (Broughton, Higgins, Hicks, & Cox, 2010). Paul and Chung (2008) add their own broader examples including blogs, forums, social networking sites, wikis, and virtual communities.

Social media has undoubtedly evolved and continues to do so with each day. Social media in its infancy was not as widespread in the personal lives of people, let alone in the workplace. Recently, social media has captured a significant amount of time of individuals and exists in every aspect of their lives. Facebook is the most popular social media site and has over 1.3 billion monthly users as of March, 2014 (Lönqvist & Itkonen, 2014). This technological phenomenon does not only affect the academic realm, but extends to every single workplace in existence.

Current Usage of Social Media in Hiring Practices

Because social media sites have been growing more and more popular, employers are taking advantage and using these sites in their hiring processes. Companies and organizations looking to hire applicants have seen an increasing value in utilizing social media to check the background of individuals. According to Davison, Maraist, Hamilton, and Bing (2012), a 2008 survey of United States human resources departments found 84% of employers utilized online search engines to find applicants, an increase from 77% back in 2006. The sample size in this study was not provided in the article. Furthermore, this survey also found that an additional 9% of those sampled planned to implement this feature into their human resources departments and hiring processes in the future. Nguyen (2014) writes, "According to the 2013 CareerBuilder survey conducted online within the U.S. and Canada, which polled 5,518 job seekers and 2,775 hiring managers, 44% of the hiring managers stated that they would research the job applicants on Facebook, 27% would monitor the candidate's Twitter accounts" (p. 1). The candidate and employer relationship during background checks has changed from researching criminal convictions to looking over the moral and ethical character of an online persona.

There has been significant discussion on how the usage of social media in hiring practices can be both a benefit and a hazard for job seekers of today's world. According to Vicknair, Elkersh, Yancey, and Budden (2010), a positive aspect of this practice is the additional information and skills that can be demonstrated by a candidate that simply cannot be

replicated through paper and pen. Candidates have been offered jobs due to their social networking profiles reflecting well-roundedness, creativity, displays of awards, and just looking like the correct fit (Vicknair et al., 2010). Individuals can post their past projects and examples of work to highlight qualities, showing how they can fulfill a void in a company or organizational structure. Some candidates have even taken to including their social networking personal sites in their cover letter or resume to entice employers to look online and view their posted material. Paul and Chung (2008) identify many advantages of online content for employers. This includes the ability to recognize conflicts between an employee's application and online profiles. In addition, the online content connects employees through projects and personality similarities, and it also helps create employee based applications using latest technological research of employee behaviors. According to the authors Clark and Roberts (2010), "SNSs (social networking sites) are also serving as an inexpensive and quick source of background information on job applicants and current employees for employers" and will continue to do so into the future (p. 507). Because this process is extremely convenient and fast, it is not surprising that so many companies are turning to social networking sites. However, not everyone feels as if this is an ethical process. Clark and Roberts (2010) continue to write, "Even though employers may have a legal right to use SNSs in this way, it is wrong for employers to do this unless the information obtained in this manner is essential to the job" (p. 508). In essence, is screening a social networking site of a candidate necessary and will possible information seen be relevant in determining the "fit" for a new employee in a workplace?

There is no law in place that restricts employers from considering information on an individual's Facebook profile when making a recruitment decision, but there are other issues involved with using social networks in this process (Broughton et al., 2009). It has been noted that candidates can create a hazard for themselves if their virtual personality is viewed as demonstrating poor communication skills, harshly criticizing previous employers, indicating drug use or excessive drinking, and even posting perceived provocative and inappropriate photographs. The applicants who have material posted to their social networking sites that is deemed inappropriate or offensive by a human resources agent could be rejected for a potential job. Sprague (2011) states, "70% of hiring and recruiting professionals in the United States have rejected a candidate based on data found online" (p. 5). The reasons these candidates were not chosen were mostly due to lifestyle concerns, in the form of inappropriate comments and text. Other concerns involved were unsuitable photos, videos, and information (Sprague, 2011). In addition, Davison, Marast, Hamilton, and Bing (2012) note that human resources departments are also using social networking sites of applicants to detect any differences between their resume and cover letter as compared to their virtual postings. Public profiles allow information that would not be seen on a standard paper application, which causes legal issues to flourish. Such information could include one's nationality, marital status, age, gender, and other protected classes under federal or state employment anti-discrimination laws and statutes (Moore, 2011). Screening of social networking sites is expected to continue affecting job recruitment, hiring, promotion, training, performance management, and termination and it is necessary to understand these issues (Nguyen, 2014). Therefore, not only are potential employees at risk for not getting a job due to social media content, but they are also at risk for losing a job because of it.

What does this mean for job seekers in today's world? Applicants are being screened beyond the physical papers handed in, like a cover letter or resume, and instead can be scrutinized through their virtual life. Applicants need to understand that their current actions via social media can lead to future problems. Individuals that have material posted to their social networking sites that is deemed inappropriate or offensive by a human resources agent could be rejected for a potential job. In this day and age, it is often said to be "safe rather than sorry" when considering posting any information online. With the increasing usage of social

networking sites as a screening tool for human resources management and other departments, these words would be wise to consider even more strongly than before.

Legal Considerations

The leading legal issue in conflict with companies' and organizations' social media screening of applicants involves the public profiles of candidates. Discrimination claims can be brought up against an employer if an applicant feels that an employer did not interview them due to knowing the applicant's race, gender, nationality, religion, sexual preference, disability, marital status, or other information not afforded by a face-to-face interview (Moore, 2011). By looking at one's social media profile, employers would be able to determine a lot of these traits, whether voluntarily offered through an online persona or not. Due to LinkedIn having a limited number of African-American (5% of the LinkedIn population) and Hispanic (2% of the LinkedIn population) participants, companies relying heavily on this social media site for recruiting principles may be accused of unlawfully trying to keep job offerings off-limits to these populations (Elefant, 2011). In further research Sprague (2011) states, "Social network searches should be conducted by someone who will not be making the hiring decision so that protected class characteristics that may be discovered can be removed from any information considered by the decision maker" (p. 32). Also, receiving an applicant's consent prevents the idea that employers are imposing on an individual's privacy (Elefant, 2011). Although many employers do not obtain applicants' consent prior to the hiring process, it is a suggestion to be considered. Even courtroom attorneys and judges have been criticized or punished through the legal system for similar activity. An example includes individuals posting information that inadvertently reveals confidential information about a case (Lackey & Minta, 2012). With the increasing amount of employers looking to social media to screen applicants for open jobs, employers must be careful of how the information they see is interpreted and used.

According to Paul and Chung (2008), there are five personal or civil rights of the employee, including: (1) right of free speech, (2) right of privacy, (3) right to be free of defamation or attack, (4) right to protest employer action, and (5) implied right to be judged based on accurate information. With this idea in mind, each part can be used to help explain potential legal considerations. First, the right to free speech can be seen through the first amendment a person brings up when an employer looks to silence an employee's protesting remarks about a company. If the employee disseminates information about a company that includes violent remarks, threats, or intimidation, or that reveals confidential information, this content may not fall under the right to free speech argument (Paul & Chung, 2008). Second, the right to privacy in regards to social networking sites continues to be a spot of conflict between employee and employer. In a general sense, courts do not consider individuals to have a reasonable expectation of privacy if the individual fails to use privacy settings or restrict access to content that others can find (Vinson, 2010). Third, the right to be free of defamation or attack can relate to the employer's responsibility to provide a hostile-free environment in which an employee can work. This responsibility can include a number of considerations, such as not allowing sexual harassment or discrimination due to political views, but also simply not repeating the discriminatory views of others (Balkin, 1999). Employees should be able to protest employer action that creates a hostile environment but should make sure all information utilized is accurate, or else the employee can be liable for defamation claims (Raysman, 2012). Being judged on accurate information is something most applicants would like; thus the employer must be careful when seeking information from social networking sites to ensure a truthful representation of a person. As Davison, Maraist, Hamilton, and Bing (2012) report, social networking sites can reveal a snapshot view of a person's state of mind at the time of the post, but do not give a full picture of the individual by any means.

One concern related to privacy protection includes an individual's right to their own "place." Sprague (2011) says, "In cyberspace, there are no physical spaces or clear boundaries delineating behavior and property" (p. 15). This lack of boundaries leaves very little protection for potential employees who utilize social media sites. Clark and Roberts (2010) state, "Online communities are a new way for people to interact, and this evolution of communication should be protected" (p. 514). It is important for companies to have their own regulations in place in order to protect themselves and employees as well. Elefant (2011) states, "Employers can monitor employees' use of social media on work-issued equipment without concern about invasion of privacy when employees are made aware that their online communications are subject to oversight" (p. 17). One can omit some of the blurred lines by having open communication. In addition, ensuring employees understand the company's standpoint on social media use is also helpful.

Another issue with online communication is that it is permanent, and even if a user omits information, it can still remain part of the SNS's property and be recalled later on (Clark & Roberts, 2010). Cain (2008) writes, "Pictures or comments may remain linked with an individual long after the user's attitudes and behaviors have matured" (p. 2). Having the appropriate privacy settings in place on social media sites can help prevent these pictures and comments from reaching those they were not intended for. However, many Facebook and other social media users are unaware of the privacy options and merely use the default settings. Facebook automatically defaults to the lowest possible privacy settings, assuming users want everything to be publicly available (Vinson, 2010). It is of great importance for candidates to understand the privacy options and to take full advantage of them.

One major argument regarding social media and the workplace is that there needs to be clear boundaries established between work and personal life (Clark & Roberts, 2010). It is important for applicants to differentiate the various contexts for situations. One thing they may say to a close friend could mean something completely different to an employer (Cain, 2008). When boundaries between personal and professional lives are blurred, it creates legal and ethical minefields (Vinson, 2010).

Ethical Considerations

Through public profiles, employers may see protected class information or sensitive and private activities that are not job-relevant but that may influence the employer's view of a candidate, which brings in both legal and ethical questions (Moore, 2011). Not being able to independently verify information relating to a public profile means the credibility of what is found concerning the background of a candidate is at risk. Candidates who are the victims of identity theft may have no idea that a different virtual profile exists to which their name is attached and under which they are scrutinized. Additionally, employers may want to consider how searching candidates' backgrounds online can affect the overall morale of current employees, who may feel discontent in their workplace due to fear arising from their own social networking profiles (Broughton, Higgins, Hicks, & Cox, 2010).

Another ethical question arises from whether candidates should have the right to know if employers are using social networking sites to screen or verify information they provided. In a 2009 survey, 49.3% of respondents were aware their social networking profiles could be viewed by employers, leaving a little over 50% believing otherwise (Vicknair, Elkersh, Yancey, & Budden, 2010). Furthermore, candidates and current employees may feel as if information exchanged between public profiles has an expectation of privacy from employers, but the open nature of the internet means this content can be accessed by anyone at any time (Cain, 2007). Most important for higher education employers, there is a push to understand the implications of searching candidates online. In the same 2009 survey above, 55% of the 289 respondents believed employers did not have access to view their social networking sites,

and yet 69.4% of the same population felt employers had the right to check their social networking profiles (Vicknair, Elkersh, Yancey, & Budden, 2010). This discrepancy can be explained if the on-campus respondents felt that employers could only research their profile and the information shared publicly, rather than those in which privacy settings have been utilized.

An additional ethical concern is related to who should be posting on behalf of the company. Raysman (2012) says, "Some businesses want their employees to contribute to the online public discourse within the company's particular industry and enhance the company's brand with meaningful interactions" (p. 11). However, in order for employers to avoid confusion and mishap in the workplace, a company should determine whether to encourage or discourage the use of social media by their employees (Raysman, 2012). If they decide to incorporate social media into the workplace, it is important to determine who has these rights. Having a designated person or group of people who are allowed to post on the company's behalf ensures consistency, trustworthiness, and validity. A social media policy can help keep these policies in place. According to a description by Raysman (2012), "A social media policy is a written document that describes the dos and don'ts of employee behavior when communicating within the various new media platforms" (p. 11). This information is relevant to prospective employees because they could one day be designated to post on behalf of the company. It is extremely crucial for candidates to understand the multiple ethical concerns involved with their future employers, as they will have a great impact on these individuals when their time comes.

Higher Education Focus in Academic Departments

Higher education staff and faculty functioning within an academic department should take special note to understand the underlying issues possible with researching future employees online.

One of the easiest ways to help spread knowledge about social networking sites and potential screening processes by hiring departments is to educate upcoming university students about their postings and the lasting image they can have. In terms of academic departments, employers should understand the prevalence of social media on university campuses. As Lackey and Minta (2012) state, "the information often cannot be 'unseen' once someone who has hiring authority has viewed it [protected class information]" (p. 180). Vinson (2010) states, "Students, faculty, and administrators of law schools are using social networking in numerous ways and for various reasons, such as education, communication, marketing, fundraising, information, and socialization" (p. 375). If faculty or staff are in the habit of "friending" students who then apply for positions where they work, these higher authority figures may have access to information that others would not know over the time the social networking connection was active (Vinson, 2010). If this information interferes with a person's ability to view a potential candidate unbiasedly, then they should remove themselves from the selection process. The responsibility lies with faculty and staff to educate students about their social media sites as they prepare for their job searches. Understanding the implications related to the content of one's social media site will be beneficial as individuals are considered by future employers.

Best Practices Moving Forward

With social networking sites evolving and continuing to permeate the workplace in multiple facets, it is important to understand, develop, and implement expectations for employees and employers alike to ensure a fair and positive environment. Davison, Maraist, Hamilton, and Bing (2012) had recommendations from their article, including (p. 15-17):

1. Develop policies regarding appropriate and inappropriate uses of internet searching
2. Base the use of internet screening media for selection purposes on recommendations from a job analysis
3. Conduct a risk-benefit analysis to determine if the legal risks of using internet screening media to assess applicants outweigh the potential benefits
4. Standardize assessments of internet screening media and use multiple raters
5. Verify the accuracy of information obtained from internet screening media
6. Disclose the potential use of internet screening media for selection decisions to applicants

According to Sprague (2011), "Employers need to be aware of what their employees post online, particularly if those publications relate to the employers' products or services" (p. 33). Many individuals believe a right to privacy needs to be clearly established, in order to protect both the employer and employee (Clark & Roberts, 2010). Some guidelines for employers to consider when performing background checks via SNSs are: to not conduct a check unless it is directly related to the job, to provide notice to the employee prior to the check, to ensure the information collected is accurate, to not violate confidentiality, and to avoid intrusive data collection (Clark & Roberts, 2010).

One practice for moving forward to consider is designating specific individuals to represent the company in online posts, or having procedures in place for those wanting approval to speak on behalf of the company (Raysman, 2012). By having the proper policies and procedures established in regards to social media interactions, it helps prevent legal risks. Another practice for moving forward for employers to contemplate is rather than completely prohibiting social media at work, they can develop clear social media policies to guide employees regarding proper use during work hours (Elefant, 2011). Vinson (2010) also recommends a proactive approach in "Educating members of the legal field about the implications of using social networking, rather than prohibiting it," (p. 405). In order to assist employees in understanding and following the implemented policies, employers should consider developing a social networking policy. This policy should clearly describe its purpose. In addition, a social networking policy should highlight the benefits, as well as the risks, involved. Lastly, it would be beneficial for the policy to explain the laws, social norms, and professional practices of communicating via social networking sites, while explaining ways to evade any harmful consequences (Vinson, 2010). It is highly recommended that companies create strict monitoring policies, and more importantly, ensure all employees are aware of these restraints (Elefant, 2011).

What does this mean for students and potential job seekers? Students need to be more aware of their online presence and how their posts, shares, "likes," tweets, and other modes of communication can affect the outcome of their future with an employer. First, students should take a look at what has already been discussed on social networking sites regarding their behaviors offline. This would include looking for information posted not only by themselves but also by others about them. This will help students to understand how employers may view their behaviors or online presence through the eyes of someone else. Additionally, students need to be more informed about privacy settings and other options relating to their public profiles. Past research, as discussed above, demonstrates that students are growing in their online presence and it is easier than ever to find someone digitally through a simple Google search. By seeking privacy settings, students can help limit what information is available to those that seek it. However, it is ultimately on the student to understand how privacy settings work and whether utilizing the services will help or hinder their job prospects. Some employers may view restricted profiles with disdain as they ask the question, "What do they have to hide?" As a result, students will need to look beyond their current profiles and reconcile problems that may be hidden in the past of their social networking sites.

As we move forward, it is crucial for both employers and employees to be on the same page with social networking policies and procedures. Educating employees regarding the established guidelines will help prevent any mishaps in the workplace. Becoming informed on the best practices, and then applying them, will have a tremendous impact on the work environment.

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