Despite Legal Risks, Companies Still Use Social Media to Screen Employees

By Greg Wright 5/19/2015

Just 5 percent of organizations in a recent survey said they use information gleaned from social media sites such as Facebook, Twitter and LinkedIn to make hiring decisions, but experts say this practice will likely grow and could pose legal risks for companies.

"I think it is naïve to think that in this day and age, with the technology and self-uploaded content available, that human resources and hiring managers do not check social media sites for information," said Dave Dickerson, president, founder and CEO of Accurate Background Inc., a background checking provider in Irvine, Calif.

SterlingBackcheck surveyed more than 1,400 organizations in September 2014 for its *Background Screening Trends & Best Practices Report 2015*. According to the survey results, 95 percent of respondents conduct a criminal background check on potential employees, while 65 percent perform Social Security or identity checks and 65 percent verify whether candidates are eligible to work in the United States.

Of the 5 percent of respondents who said they use social media to check backgrounds, most use in-house staff to perform the task. Facebook and LinkedIn are the social media sites employers are most likely to visit. More than half said they use Facebook for every social media background check.

Some experts were surprised by SterlingBackcheck's finding that few organizations conduct background checks with social media. Experts said more organizations are probably using social media but won't own up to it.

"I think 5 percent sounds surprisingly low," said Matthew Campobasso, an attorney at Freeborn and Peters LLP in Chicago who has written about the legal ramifications of social media. "With social media becoming more and more a part of our lives, I think employers are using social media in one way or the other."

Half of the organizations that responded to the survey said they are "only somewhat comfortable" with using social media for background checks. Their caution is well-grounded because checking social media can get them into legal trouble, experts said. Any potential trouble likely won't involve the Fair Credit Reporting Act, however: On April 14, 2015, a federal court decided that organizations using LinkedIn's reference search are not obligated to conform with the act's conditions because using the site doesn't violate the law.

As for using social media in general to screen candidates, "it is not illegal, but there are legal risks," said Julie Reid, an employment and labor law attorney at Blank Rome LLP in Philadelphia. For instance, an employer could be sued if a member of its staff hacks into a person's social media account to troll for information or creates a fictitious social media account to "friend" or connect with a potential employee, Reid said.

Some states have enacted laws that bar employers from asking job candidates for access to their social media accounts, said David Rapuano, a labor and employment law attorney at Archer and Greiner P.C.'s Haddonfield, N.J., office.

And although it is not unlawful to look at a job candidate's social media presence, it is illegal to use personal information collected from social media, such as religion, race or health condition, to discriminate against a potential employee, said Jennifer Yelen, a partner at Posternak Blankstein and Lund LLP in Boston.

Some companies have already run into legal minefields over social media. The University of Kentucky reportedly paid astronomy professor Martin Gaskell a $125,000 settlement in 2011 when it took him out of the running for a position because Gaskell posted his beliefs about creationism on social media.

Some companies that use social media to weigh candidates may think no one will know they do it, but that is a false assumption, legal experts said.

A staff member who knows the job applicant could alert the candidate that the company looked at her Facebook page or read her tweets, experts said. And in some cases, candidates can file Freedom of Information Act requests to learn why they were not hired.

Most experts advise that companies not use social media in the hiring process. However, for those who choose to do so, they offer this advice:

• Hire a third party or enlist a nondecision-making, in-house person to conduct the social media check, Yelen said. This designated person should alert the decision maker only about issues that can legally be considered during the hiring process.

- Create and maintain an internal written social media screening policy that indicates what information is being sought and by whom, Yelen said. This can help minimize legal risks and be helpful in defending a claim by an applicant or employee, she said.

- Take into account the position you're hiring for. Checking a candidate's social media presence may actually be advisable if you're hiring for a leadership position or a job that requires a high level of discretion, Rapuano said.

Social Media's Growth
There were about 1.4 billion active Facebook users as of January 2015, and every minute 293,000 Facebook statuses are updated and 136,000 photos are uploaded, according to the Zephoria Internet Marketing Solutions website.

LinkedIn, with more than 364 million members in more than 200 countries and territories, is the world's largest professional social network. It's also the most profitable, earning $638 million in the first quarter of 2015, an increase of 35 percent compared with $473 million in the first quarter of 2014, according to its site.

Erik Qualman, best-selling author of *What Happens on Campus Stays on YouTube* (Equalman Studios, 2015), says LinkedIn "plans to scale the entire working class—some 3 billion people worldwide. … It [may have started off with] white-collar workers, but their goal is to get to 3 billion," he told *SHRM Online*, "and they'll get there." Qualman was nominated for a Pulitzer for his last book, *What Happens in Vegas Stays on YouTube* (Equalman Studios, 2013).

With social media now so widespread, Reid said, potential job seekers need to be more careful with what they post on Facebook, Twitter, Instagram, Snapchat or other social media.

"I know a lot of people like to post pictures of themselves going out with friends and drinking," she said. "Not to say they shouldn't post a picture with a glass of wine or beer. But people should be cognizant that what they post is public and accessible and it could be viewed in a negative light."