Legal Matters®

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Can companies use social media to screen job applicants?

Social networking sites such as Facebook and Twitter, and Internet search engines such as Google, can provide a lot of information about someone you don't know well. For that reason, many employers are using them to screen job applicants, hoping to learn more about a person than what they can see on a resume.

But this can pose legal problems – because these sites can easily give an employer information that is supposed to be off-limits when making hiring decisions.

For example, an employer might discover:

- A Facebook post where an applicant discusses his religion.
- A picture of an applicant wearing a "gay pride" t-shirt.
- An applicant's announcement that she's pregnant.

If a business denies someone a job based on such information, it could be sued for discrimination.

Even if a business denies someone a job for other reasons, the fact that it knew about these things could make it hard to prove that it acted for those other reasons and not for illegal reasons.

Take the case of an astronomy professor who applied for a job at the University of Kentucky. The school found articles he wrote online suggesting that he might believe in creationism.

After the university denied him a position, he sued, claiming the school failed to hire him because of religious discrimination. The university settled the case.

Of course, if you're a job applicant, it's always a good idea to "Google" yourself and review your Facebook page to see if there's

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Beliveau Law Group, LLC

Massachusetts offices: Waltham, MA; Danvers, MA; and Quincy, MA
New Hampshire offices: Manchester, NH and Salem, NH
Florida offices: Boca Raton, FL and Naples, FL
Main Telephone Number: (781) 890-8600 • Email: firm@beliveaulaw.com • Website: www.beliveaulaw.com

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information about you online that you wouldn't want an employer to see.

If you're an employer, there *are* ways to use social media to research a job candidate. But you need to be careful. In general, it's much better to use social media late in the hiring process as a kind of background check – to make sure a top candidate isn't hiding anything damaging – than to idly look up a wide range of applicants early on.

Here are some specific suggestions to help you comply with the law:

- Don't do Internet research until after an in-person interview. You don't want it to appear that you decided whether or not to interview a person because you found out in advance about the person's age, race, or ethnicity.
- If possible, have the online research performed by someone else – ideally a human-resources professional – rather than the person making the hiring decision. Human resources people are more likely to understand what specific information a company can and can't legally consider. Also, they can filter things out, so the person making the hiring decision doesn't see any impermissible information.
- Come up with a list of specific things for the person conducting the search to look for (and run the list by an attorney). Ideally, the list should be tailored to the requirements of the job. But it could also include items such as whether the applicant has discussed confidential information about other employers online, posted about illegal drug use, made threats or committed violence against others, or used racist or sexist language.
- It's a good idea to tell job seekers that you will be conducting an Internet search about them – or at least warn them that you reserve the right to do so. You might even consider having applicants sign a document agreeing to an Internet search.
- Never "friend" an applicant under false pretenses to gain access to private information, and never try to gain access to private information through a current employee who recommended a candidate. These actions could be a federal crime under the Stored Communications Act.
- Never ask an applicant to show you his or her Facebook account during an in-person interview. Some employers make a practice of this, but it's legally very risky.
- Finally, if you have a strong candidate but you decide not to hire him or her based on something you saw on an Internet or social media site, you should consider telling the applicant what you found and giving them an opportunity to respond. The applicant could have a perfectly innocent explanation. In some cases, it's turned out that the offending information was posted by a completely different person with the same name.

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Employer sued for retaliating against former employee

Employers can face serious legal consequences if they retaliate against an employee for calling attention to discriminatory practices. But in some cases, the same is true if a company retaliates against a *former* employee.

Take the case of a magazine editor in Massachusetts who was a part owner of the company that published the magazine. The editor lost both his job and his shares in the company after an ownership dispute.

As part of his termination agreement, the company agreed to pay him $14,000 each quarter for four years.

Sometime after he left, another former employee sued the company for disability discrimination. The editor filed a court document supporting her claim.

When the company found out, it stopped making his quarterly payments.

The editor sued under a state law that prohibits retaliating against a worker for participating in a discrimination case.

The highest court in Massachusetts allowed the lawsuit, saying the law didn't require a retaliation victim to be a *current* employee in order to sue.

Feds crack down on companies that call employees 'contractors'

The federal government is cracking down on businesses that call people "independent contractors" when they're really entitled to be treated as employees.

In particular, the U.S. Department of Labor and the IRS are stepping up their auditing and enforcement efforts. The IRS has begun a three-year auditing initiative to investigate as many as 6,000 employers, large and small, and nail those who are misclassifying their workers.

Many state governments are also beefing up their enforcement efforts.

If you're an employer and there's a possibility that you've been misclassifying your workers – or if you're a worker who's considered a contractor, but you function more like an employee – you should speak to an attorney.

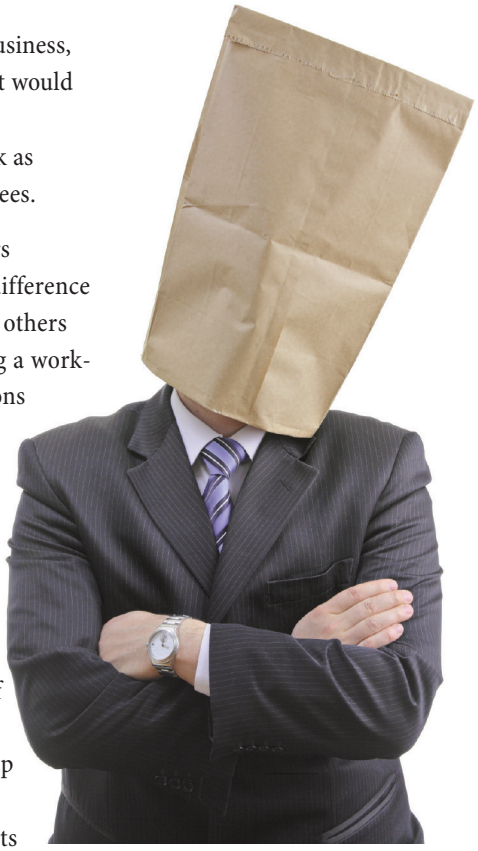
It's not always precisely clear what the difference is between a contractor and an employee. The IRS uses a 20-part test that focuses primarily on how much control the employer has over various aspects of how the work is performed and compensated.

But there are some "red flags" that will make the government suspicious. For instance, the IRS might think workers are entitled to be treated as employees if:

- They have worked for the business steadily for a long period of time;
- They have full-time workloads for the business;
- They don't take on any work for any other employer;
- They perform a core function for the business, as opposed to a secondary function that would typically be outsourced; or
- They perform essentially the same work as other people who are treated as employees.

Some employers misclassify their workers because they simply don't understand the difference between an employee and a contractor. But others do so in order to save money: By classifying a worker as a contractor, they avoid their obligations regarding wage and overtime laws, payroll taxes, Social Security, unemployment and workers' compensation – not to mention health and retirement benefits and time off under the Family and Medical Leave Act.

The penalties for misclassifying workers can be significant. The IRS can issue fines of up to $5,000 per worker, and state governments can impose additional penalties on top of that. Plus, misclassified workers can seek reimbursement for unpaid wages and benefits they would otherwise have received.



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Smartphone app helps workers prove they weren't paid properly

The U.S. Department of Labor has launched a smartphone application that makes it easier for employees to track the hours they've worked and figure out the wages they're owed.

The free app, which is available in both English and Spanish at the agency's website, provides a timesheet for workers to track hours independently of their employer. They can also add comments related to their timesheet; view a summary in daily, weekly and monthly formats; and e-mail the summary as an attachment.

The app is compatible with the iPhone and the iPod Touch. The government plans to make it compatible with other smartphones, such as the Android and the BlackBerry, and to add new features to track tips, commissions, bonuses, deductions, holiday pay, weekend pay and shift differentials.

Federal officials say the app will be highly useful during wage-and-hour investigations where employers haven't kept accurate records.

Tip policy gets Applebee's restaurant chain in trouble

If workers spend more than 20% of their time on non-tipped duties, they must be paid minimum wage for that time.

Under federal law, workers can be paid as little as $2.13 an hour as long as they're earning enough in tips to make up the difference between that amount and the federal minimum wage.

However, if employees spend more than 20 percent of their time performing non-tipped duties, they're supposed to be paid the full minimum wage for that time.

Recently, the Applebee's restaurant chain was sued by more than 5,000 current and former servers and bartenders, who claimed they were required to spend more than 20 percent of their time doing cleaning and maintenance, for which they received no tips.

A federal appeals court in St. Louis allowed the lawsuit to go forward, which means Applebee's could have to pay back wages to the employees as well as government fines.

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BELIVEAU LAW GROUP, LLC

Massachusetts offices: Waltham, MA; Danvers, MA; and Quincy, MA
New Hampshire offices: Manchester, NH and Salem, NH
Florida offices: Boca Raton, FL and Naples, FL
Main Telephone Number: (781) 890-8600
Email: firm@beliveaulaw.com • Website: www.beliveaulaw.com