

e2r Alert!

BACKGROUND CHECKS: ARE YOU RELYING ON FACEBOOK AND TWITTER?

Background checks are a critical component of the recruitment process. They are particularly useful to employers in verifying applicants' history and credentials, and assessing their suitability for employment. Has your organization ever contemplated using social media websites to conduct background checks? Despite the known benefits of performing background checks, the specific use of social media websites to perform these background checks is not without some potential legal risks that employers must be aware of.

General Concerns

Information found on the internet has a propensity to have errors and cannot be relied upon as 100% accurate. For instance, employers have no ability to confirm whether the applicant is responsible for the content found on the social media website or whether the information on the website is correct. Moreover, when browsing the internet, an employer can easily lose control of the focus, quantity and quality of the information that is collected. In other words, you may find out more than you want to find, and certainly more than you should find.

Privacy Concerns

Given that individuals often post personal information online with the intent that the information will be seen by others, the concept of privacy in the context of social media would seem misplaced. Despite this, using social media websites to conduct background checks on applicants may run contrary to the privacy protections afforded to prospective employees by federal and provincial privacy legislation.

For instance, Canada's federal privacy legislation, the *Personal Information Protection and Electronic Document Act* ("PIPEDA"), prevents federally regulated employers from collecting information about an applicant without their knowledge and consent, subject to numerous exceptions. One of these exceptions is where the information is deemed "publicly available". There is no definitive answer to the question of whether information posted on blogs, Facebook, Twitter and other similar websites is considered to be public or private. As such, it is unclear whether the collection of such information would be in contravention of *PIPEDA*. In other words, it may be better to be "safe rather than sorry" and abstain from such searches.

Although Ontario does not currently have any privacy legislation, the spirit of *PIPEDA* applies to this jurisdiction. Various other provinces such as Alberta, Quebec and British Columbia do have privacy legislation in force. Similar to *PIPEDA*, provincial legislation restricts an organizations ability to collect personal information to the extent that it is reasonable for meeting the purposes for which the information was collected. Further, provincial privacy legislation requires an organization to notify an individual that it will be collecting personal information.

Human Rights Concerns

Employers generally know that certain information cannot be taken into consideration when deciding which prospective applicant to hire. While employers know not to ask job applicants about protected characteristics such as their marital status, race, religion, age, etc., this information will often come up in an online search and can be difficult for employers to avoid. Again, you may find out more than you want or should know.

An employer who comes across this type of information, even if doing so was accidental, is vulnerable to the possibility of having a human rights application filed against them by the unsuccessful job applicant. In doing so, the unsuccessful job applicant would allege that the decision not to hire them was based, at least in part, on a discriminatory ground derived from information which was inadvertently acquired by the employer through a social media background check. Where the evidence is clear that an employer had access to inappropriate information about the potential employee, it may be difficult for an employer to rebut the applicants case and show that the information did not play a part, even unconsciously, in the hiring decision.

Conclusion

Employers should not ignore the value of conducting applicant background checks, but in doing so, should always be cautious. At first glance, the internet appears to provide employers with a cost effective, efficient tool to conduct background checks. Despite its appeal, employers need to be cognizant of the potential privacy and human rights risks outlined, in part, above. As such, management training with respect to appropriate background check procedures may be beneficial to your organization. Be sure that the organization's position on this potential risky practice is clear not only within the Human Resources Department, but to all hiring managers and any other employees involved in the hiring decision.

If you have any questions about the use of social media background checks by your organization, we encourage you to contact an e2r Solutions® Service Provider.

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70 The Esplanade, Suite 401 | Toronto, ON M5E 1R2 | 1.866.327.7657 | tel 416.867.3093 | fax 416.867.1434

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