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Employers using Internet to learn about employees face risks

By Jerry Crimmins
Law Bulletin staff writer

In a case of the Internet strikes again, lawyers are warning employers about the risks they run in the new fad of probing potential and current employees through such social networking sites as Facebook, MySpace and LinkedIn.

The primary risk of investigating through social networking sites, "is learning information that you would prefer not knowing," said Laura B. Friedel, a partner at Levenfeld, Pearlstein LLC.

Friedel pointed to a 2009 survey by CareerBuilder that found that 45 percent of employers reported using social network sites to screen potential employees. The percentage had doubled compared to 2008.

As an example, Friedel said, "What if a woman comes in and interviews and is one of your two top candidates?" Then the employer does a search on Facebook and MySpace and finds out the woman told her friends she's pregnant.

"If that person isn't hired and chooses to bring a claim about her failure to be hired, knowing that piece of information puts the employer in a defensive position," Friedel stated.

The federal Pregnancy Discrimination Act prohibits employer discrimination against pregnant women, she said. Friedel advises companies on labor and employment issues.

Race, religion, disability, union work and other matters are also protected, lawyers said.

Another danger, according to attorney Rachel Shaskos Urquhart, is "How do you know you're looking at the right person's Facebook page? They may not have a picture loaded."

"If you do a search for Rachel Urquhart, you come up with multiple pages on Facebook for different people," she said.

Urquhart counsels clients on labor and

employment law for Meckler, Bulger, Tilson, Marick & Pearson LLP.

Sometimes for employers, "You're damned if you do and damned if you don't" search social network sites, said Daliah Saper of Saper Law Offices LLC.

"In some contexts, you may be found to be negligent if you didn't do a search that is so cheap and efficient," Saper said.

"If you're hiring a school teacher, you could be liable for not doing due diligence."

"On the other hand," Saper said, "if you base hiring decisions on somebody's lifestyle that was privately posted, there's a whole other subset of whether or not posting to social media is private. It depends on privacy restrictions, password protections.

"If you have a million friends on Facebook, it's harder to say your privacy was invaded if a prospective employer finds out information about you. But if you have only 20 friends" and one is coerced into giving an employer private access to that account, "that may be unlawful," Saper said.

Saper advises employers on Internet law and lectures on the legal implications of social media.

Friedel pointed to the case of Robert Konop v. Hawaiian Airlines Inc.

An airline vice president who was not allowed access to an employee's private Web site gained access through a second employee who had private access.

The 9th Circuit said the plaintiff had triable claims that unauthorized access and review of the contents of a password-protected Web site can constitute violations the Stored Communications Act, and in this case claims under the Railway Labor Act for interference with union organizing activities.

Robert Konop v. Hawaiian Airlines Inc., (No. 99-55106, 236 F.3d 1035 (9th Cir., Jan. 8, 2001) withdrawn, 262 F.3d 972 (9th Cir., Aug. 28, 2001), filed Aug. 23, 2002).

"Part of what is most exciting about this

area is it's really is evolving," Friedel said.

Another law that can be involved in pre-employment screening or screening of current employees, according to Urquhart, is the federal Fair Credit Reporting Act.

"If you use a service to do a background search and records search, before taking any adverse employment action, to hire or fire, you have to disclose that to the employee," Urquhart said.

"Doing your own search on Facebook" and other such sites, Urquhart added, might not cross the FRCA. It may be governed by a state statute in some states, for instance in California, she said.

In recent weeks, Friedel said, Facebook changed its default privacy settings so that individuals' Facebook pages are now searchable on Internet browsers such as Google.

A Facebook user can change the settings to block this, but "the practical effect is that employers will now have much greater access to candidates' Facebook pages, including information they would be better off not seeing," Friedel said.

Friedel tells employers to have a policy.

"A company doesn't want to be in a position where they only screen female candidates that way, or only screen some other group that way," through social network sites, she said.

Also, "what employers need to do is balance what they think they are going to benefit from doing that sort of research against the negatives of it."

In pre-employment screening, "You would have to be searching every applicant for that position," Urquhart said.

She said more employers now search on LinkedIn. "LinkedIn is less likely to have posted things like age and religious affiliation."

"It has to be balanced by what the job is and what the type of work is," Urquhart said. "It's a developing area."