

# Finding The Right Fit: The Latest Tool For Employers

Thomas F. Holt, Jr. and  
Mark D. Pomfret

KIRKPATRICK & LOCKHART  
NICHOLSON GRAHAM LLP

Remember that letter you wrote to your college newspaper ten years ago? What about that online dating service you joined three years ago? Are you prepared to share with other people the website you created for your friends to see pictures from your latest vacation? You may not even remember what you placed on the Internet yesterday, but chances are that if you are applying for a job or are currently employed, someone else, including your present or future employer, will see and evaluate you based on this type of information.

With the exponential growth in social networking sites like MySpace and Facebook, an ever increasing number of individuals are posting personal information on the Internet. Others are expressing themselves through the use of web blogs or "blogs" which can be simply described as sites providing "ongoing, information communications about topics of interest."<sup>1</sup> However, the majority of these social networking sites and blogs do not contain security measures to prevent posted information or communications from being downloaded by unintended recipients.<sup>2</sup>

At the same time, employers are facing increasing pressures to hire applicants who "fit" their corporate culture, and to protect the company from claims of negligent hiring or incidents of workplace violence. To accomplish these objectives in a competitively fierce environment, employers are increasingly utilizing the Internet, specifically, free search engines, to learn more about potential hires or current employees. For example, in a recent study, the Society for Human Resource Management reported that approximately 82 percent of employers sought information about job applicants from the Internet. This is not surprising given the ease by which Google, Yahoo and other search engines can be used to obtain background information on individuals including their personal blogs.<sup>3</sup>

This expanded reliance by organizations on applicant and employee screening through the Internet presents both legal and practical challenges. On one hand, the Internet provides employers with a valuable tool to further ensure that

*Thomas F. Holt, Jr. is a Partner and member of the Kirkpatrick & Lockhart Nicholson Graham LLP Litigation Practice, where he represents clients in a wide variety of matters including business disputes, the protection of intellectual property assets, and environmental and land use litigation. Mark D. Pomfret is a Partner and member of the Kirkpatrick & Lockhart Nicholson Graham LLP Labor & Employment Practice, where he regularly counsels, advises and litigates on behalf of clients across a broad spectrum of industries including high technology, manufacturing, pharmaceuticals, printing, telecommunications, financial services and real estate on employment and labor issues.*



Thomas F. Holt, Jr.

they hire and retain the best and brightest employees. On the other hand, this type of informal background check can expose employers to liability for, among other things, relying upon false information or illegally discriminating against candidates or current employees. Understanding this dichotomy and implementing the appropriate measures to ensure that an employer has the necessary safeguards in place when evaluating a candidate or employee on the web can mean the difference between making an informed personnel decision or facing a lawsuit.

## The Trap Of Relying Upon False Information

A relatively straightforward Internet search using someone's name can result in hundreds of hits. The primary risk that an employer faces in using this approach is that the information disclosed might relate to a person other than the actual applicant or employee about whom information is being sought. This might result in the employer taking some adverse action based on information that does not pertain to the individual in question, or otherwise relying on bogus information obtained on the web. In either case, this could spell trouble for the employer.

Ensuring that the Internet search relates to the proper person can be as simple as adding additional known criteria about the individual. For example, if the person's birthdate or address is supplied, that data could be added to the search criteria. Likewise, if the search of an applicant's name reveals that the applicant maintains a blog in which she disparages her current employer, a company might appropriately use this information to crosscheck whether the individual writing the blog is actually the candidate. Similarly, if a candidate discusses unique interests or hobbies on an Internet site, the prospective employer may be able to deduce that the candidate's revelations are consistent with his past work experiences. In short, the prudent employer will always take reasonable steps to verify whether the information discovered on the Web relates to the proper person.

Assuming the information is accurate and pertains to the right person, prospective hires and current employees may not, as a general matter, object to these types of searches. Virtually every court that has been presented with the issue has



Mark D. Pomfret

determined that information on the Internet is in the public domain. Nevertheless, employers should be mindful that some states protect the rights of job applicants and current employees outside the workplace. In New York, for example, an employer is prohibited from taking adverse action against an employee for off-duty political activities, union activities, legal use of consumable products or recreational activities. Given that the term "recreational activities" has been broadly interpreted to include hobbies, blogging might be deemed a hobby, thereby restricting an employer's use of information obtained from the blog. In addition, companies should avoid any illicit means of gathering information on the Internet, such as hacking or undertaking false pretenses to gain access to protected websites. Recent events have shown that employers must take care to avoid "pretexting," and the potential adverse consequences of this type of activity. Indeed, pretexting, and, certainly hacking, can result in not only civil litigation, but also potential criminal penalties, as well.

## The Danger Of Using Information For A Discriminatory Purpose

Perhaps the most perilous situation resulting from the use of information gleaned from the web is its potential for misuse in relation to a protected class in hiring or retention decisions. Consider the situation where an employer obtains information on the Internet that a candidate or employee was allegedly arrested for driving under the influence. As a consequence, the employer may want to reject the candidate or terminate the employee. Such action might be warranted depending on the circumstances. However, if the employer has also learned that the candidate or employee has entered a substance abuse rehabilitation facility, that individual might now be viewed as disabled for purposes of the Americans with Disabilities Act ("ADA") or a state law equivalent. Taking adverse action based on, or despite this, additional information could result in liability under the ADA or analogous state law.

Alternatively, an employer might discover through an Internet search that an individual is a member of another protected category. If the employer declines to offer that applicant a position, the employer must be able to provide a legit-

imate business reason that its rejection of the individual is not based upon the applicant's protected status. Absent such a justification, the applicant might allege discrimination and demonstrate through discovery that the adverse decision revolved around an Internet search.

## How To Use The Internet Successfully As An Employment Tool

There are several steps that an employer can take to effectively and prudently use the Internet when conducting an informal background check. First, the employer should have a non-decision maker conduct the Internet search and filter the potentially relevant information before forwarding it to the appropriate person. Therefore, if this individual sees information relating to a protected characteristic or blatantly inaccurate information, he can discard the information before it is passed on to a decision maker. Even in small organizations, an administrative employee can perform this function as the skill required to conduct the searches is generally not specialized or advanced. This will require, of course, that screeners are properly trained and instructed to employ the proper protocols.

Second, the employer should use the acquired information only as a preliminary step in the hiring or verification process. Whether the employer pursues the initial information through subsequent interviews with the applicant or employee, or conducts more formal background checks through such means as the Fair Credit Reporting Act, the employer should make a reasonably diligent effort to resolve any questionable information that may impair the individual's ability to perform the job requirements or that may affect the safety of the workplace.

Third, the employer should ensure that all decisions are based upon non-discriminatory reasons and are well documented. Any search terms and results that are shown to a decision maker should be printed and maintained in the individual's file. Additionally, any follow up investigation as a result of the Internet search should also be documented and included in the individual's file. Therefore, if any questions or claims are later raised in connection with an employment decision, the appropriate documentation will be readily available to the employer in defending its actions.

The Internet is a ready means for employers to gather pertinent information about their potential hires or current employees. However, businesses must recognize that various challenges exist when pursuing this type of informal background check. Inaccurate information and/or misuse of protected class information are only a few of the risks that can result in inefficiency or even litigation. Accordingly, it is imperative that employers take the necessary steps to make sure that they are both obtaining and utilizing information about an applicant or employee in the right way.

<sup>1</sup> Bill Ives and Amanda Watlington, *Business Blogs: A Practical Guide* (2005).

<sup>2</sup> Even Facebook, which has several entrance barriers, can be easily accessed. One requirement is that a user has an email address ending in ".edu," which most alumni can obtain from their university.

<sup>3</sup> Approximately one billion searches are submitted to Google each day, the most popular of all Internet site engines.

Please email the authors at [tholt@kling.com](mailto:tholt@kling.com) or [mpomfret@kling.com](mailto:mpomfret@kling.com) with questions about this article.