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The Legal and Ethical Considerations of Using Social Media in the Recruiting and Hiring Stages of Employment

Legal, Ethical, and Social Issues

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The use of social media in the recruiting and hiring process raises both legal and ethical considerations for employers. The obvious potential for abuse has generated legislative action, ethical debate, and an extensive search for best practices.

This paper will examine the current legal parameters of the use of social media at the recruitment and selection process stages of employment. The ethics and appropriate ethical considerations of social media as a component of the hiring process will be examined using the DB Weighted Scoring Model. Finally, recommendations for best practices will be recommended.

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Abstract

The use of social media in the recruiting and hiring process raises both legal and ethical considerations for employers. According to a 2018 survey, 70% of employers use social media to screen candidates during the employment process and 48% use social media to check on current employees (CareerBuilder, 2018). The obvious potential for abuse has generated legislative action, ethical debate, and an extensive search for best practices.

This paper will examine the current legal parameters of the use of social media at the recruitment and selection process stages of employment. The ethics and appropriate ethical considerations of social media as a component of the hiring process will be examined using a new model that evaluates the Total Utilitarian Ethical Analysis Impact Value. Finally, recommendations for best practices will be analyzed and suggested for the use of social media at the recruiting and selection stages of employment.

Key Words

Social Media, Discrimination, Ethics

Current Landscape of Social Media Use in Employment

In 2014, the EEOC acknowledged the use of sites such as LinkedIn and Facebook may reveal information about a candidate's race, ethnicity, disability, and other information the use of which in making an employment decision would be illegal (Release, 2014).

State legislatures have been more proactive than their federal counterpart. To date, according to the National Conference of State Legislatures, (State Social Media Privacy laws, 2019) 25 states have passed laws prohibiting employers from requiring job applicants to provide prospective employers with access to their social media. Additionally, some laws prohibit employers from demanding prospective employees to bring up their social media in the employer's presence or to change their privacy settings to make the site available to the employer. Indirect access to social media accounts by mandating accepting an agent of the employer as a friend is also prohibited in some cases.

Some of these laws apply specifically to social media accounts, such as a Facebook or Twitter account. However, other laws apply more broadly to "online accounts," which might include email, banking, financial or even commercial accounts.

In New Jersey, N.J. Stat. Ann. §§ 34:6B-5 to 34:6B-10 limits employer action regarding an applicant or current employee's personal social media account. Employers are not permitted to require or request that an applicant or a current employee provide any user name or password, or in any way provide the employer access to a personal account through an electronic communications device. The law does not restrict an employer from inquiring into whether an

applicant or an employee has a social media account or from viewing any social media sites or personal accounts that are in the public domain.

Whether LinkedIn profiles are personal accounts or for business purposes and therefore not subject to the statute's prohibition has been the subject of legal debate in New Jersey (NJBIA, 2016).

In Connecticut, Conn. Gen. Stat. Ann. § 31-40x prohibits an employer from requiring employees or applicants to disclose user names, passwords, or other login information to a personal online account or authenticate or access an online account in the presence of the employer. Employers may not require employees or applicants to invite, or accept an invitation from, an employer to join a group affiliated with a personal online account. An online account is one that is used exclusively for personal purposes, including email accounts, social media accounts, and retail website accounts.

If an employer does use an applicant's background information to make an employment decision federal antidiscrimination laws must be adhered to. These laws related to discrimination based on race, color, national origin, sex, religion, disability, genetic information, and age are administered by the Equal Employment Opportunity Commission (EEOC, 2019). In all cases treat all applicants or prospective applicants equally.

When background checks are done by a third party in the business of compiling background checks, the Fair Credit Reporting Act, administered by the Federal Trade Commission may require additional procedures be followed (Commission, 2019).

The Age Discrimination in Employment Act, 29 U.S.C. § 631(a), makes it illegal to discriminate against workers over the age of 40 when advertising, recruiting and hiring. A provision of the ADEA involving job postings generally makes it unlawful to "print or publish" notices or advertisements "indicating any preference, limitation, specification or discrimination, based on age." (Labor, 2020)

Preferences based on age are only appropriate when age is established as a legitimate qualification that is necessary for the normal operation of the business (*Hodgson v Greyhound Lines, Inc.*, 1973).

The use of social media as a recruiting and vetting tool has increased dramatically. Employers are both formally and informally turning to social media sites such as Facebook, LinkedIn, Instagram, and YouTube for employee recruitment and vetting. As this approach has become the norm, legal issues have emerged related to discrimination and exclusion of protected class members.

In 2017, suit was brought in federal court based on some large employers' use of social media in hiring practices. A class action lawsuit was filed, alleging that Facebook-provided target marketing tools allowed employers to direct employment ads to younger applicants, thereby discriminating against older applicants.

The Communication Workers of America filed suit in the United States District Court for the Northern District of California (17-cv-07232, filed 12/20/17) alleging age discrimination in employment by T-Mobile US, Inc., Amazon.com, Inc., Cox Communication, and Cox Media Group. The complaint alleged the companies' use of Facebook (not a named defendant) to post employment ads was in violation of California age discrimination laws. Facebook permitted the employers to place upper age limits on the Facebook users eligible to receive the ads. Facebook advertisers were permitted to choose groups such as "Young and Hip" and "Millennials" to target the ads (CWA, 2017).

The plaintiffs cited several job advertisements posted to Facebook in 2018 or earlier. They appeared on users' news feeds as "sponsored" posts. The information allegedly obtained from Facebook indicates that the ads were targeted to users in specific age ranges, including "18 to 38" and "21 to 55."

In September 2019, the labor union Communications Workers of America released letters from the Equal Employment Opportunity Commission stating it found "reasonable cause" that the employer violated federal laws by excluding women, older workers or both from seeing their job ads on Facebook. The social network offers advertisers various tools for targeting their desired audience.

The ads are from 2018 and earlier. Facebook has pledged changes since then. (One of the authors found ads on his Facebook page today, January 8, 2020 targeting him based on age).

In March 2019, Facebook said it would pay nearly \$5 million to settle several lawsuits that alleged its advertising platform allowed for discrimination in housing, employment and credit ads. As part of multiple settlements, it also announced major changes, including a separate advertising portal for housing, employment and credit ads that will offer significantly fewer targeting options (Yurieff, 2019).

While Title VII of the Civil Rights Act of 1964 is considered to be the primary federal antidiscrimination law, the Age Discrimination in Employment Act (ADEA) of 1967 also provides important protections for workers nationwide.

The ADEA and various state statutes prohibit employers from advertising job openings in ways that restrict eligibility on the basis of age. Federal Law prohibits discrimination for those 40 and older while many states such as New York protect applicants and employees 18 years of age and older.

A pending federal class action against several major companies addresses the use of social media, specifically Facebook to advertise employment opportunities. The lawsuit alleges that the defendants restricted the dissemination of job advertisements to users in certain age ranges. Several recent decisions by the Equal Employment Opportunity Commission (EEOC) support the plaintiffs' position that this violates the ADEA's advertising restrictions.

In July 2019, the EEOC issued determination letters to seven companies based on charges filed under the ADEA. All of the charges alleged unlawful posting of job advertisements on the social

media platform Facebook, which allows companies to target advertisements to certain audiences. The EEOC reported that it found evidence that the companies “used language to limit the age of individuals who were able to view the advertisement.” It notified the companies that it had found “reasonable cause to believe that [they] violated the ADEA.” (Group, 2019)

This is a novel theory for the EEOC. Concluding age discrimination based on social media target marketing. In 2018, fifteen employers had allegedly used Facebook to target male users with job advertisements, excluding women. No litigation has been initiated specifically.

The Ethics of Social Media Recruiting

No universal formula exists to guide us ethically through the decision making process. Immanuel Kant advocated a duty-based ethics analysis. Regardless of an actions consequences, the ethics of a behavior was evaluated in relation to a guiding set of principles or beliefs. Whether the beliefs originated from religious beliefs or a secular foundation of guiding values the action is deemed right or wrong based on the action itself not the consequences of the action (Moore, 2016).

A different approach to ethical analysis is utilitarianism (Mill, 1863). The ethics of the action is determined by the consequences of the action. The greatest good for the most people is the appropriate consideration. It is with this consideration that a new model was developed by modifying the weighted scoring model to evaluate the ethical analysis of “Should employers use social media in the hiring process?” (Ball, 2019).

The hiring process is procedurally divided into recruiting candidates and evaluating candidates. These two stages of the hiring process raise different issues at each stage. Using social media to recruit candidates is significantly impacted by demographic variations in social media use. The use of social media in the candidate vetting process allows the gathering of both legally permissible and discriminatory information related to the applicants. The legality of such inquiries is separate and distinct from the ethics of the process

As an illustration, the following is an analysis of the use of social media in the new employee recruitment process. The proposed model allows variables to be weighted in the quantitative analysis of a set of considered criteria. The two possible decisions are to use social media or not use social media as part of the recruitment process.

For each of these two decision options, the following criteria were used to assess the greater good in utilitarian ethical analysis:

- 1) Invasion of nonemployee privacy
- 2) Locating best applicants (social media users)
- 3) Locating best applicants (non - social media users)
- 4) Impact on employer brand reputation
- 5) Cost effective hiring process

The utilitarian ethical analysis is valued based in the decision's impact for the overall good based on the expected outcome. In this model, each decision alternative and expected outcome is scored using a Utilitarian Ethical Analysis Impact Value (*UEAIV*) using the following scale:

- *UEAIV* = 1: strongly negative
- *UEAIV* = 2: negative
- *UEAIV* = 3: neutral
- *UEAIV* = 4: positive
- *UEAIV* = 5: strongly positive

Each criteria is assigned a weight and a Total Utilitarian Ethical Analysis Impact Value (*TUEAIV*) is evaluated for the decision. The objective is to determine the best decision alternative that will lead to an employer hiring strategy that hires the best people to do the job and best serves the stakeholders.

The first criteria considered was the possible invasion of non-employee privacy. Prospective employees need to be aware that their social media accounts may be researched by potential employers. As a result, it is proposed that, although the privacy of these prospective employees may be at risk, the utilitarian ethical impact is expected to be positive as candidates are more responsible with their social media accounts (e.g., *UEAIV* = 4). The opposite result may occur if it is known that potential employers will not review the social media accounts, thus resulting in a negative utilitarian impact value (e.g., *UEAIV* = 2). For this sample analysis, the weight of this criteria was 25%.

The second criteria addressed the need for organizations to locate the best possible applicants, and was viewed from both the perspective of prospective employees that are active social media users and those that do not regularly maintain social media accounts. For active social media users, it is beneficial for employers to research social media accounts during the hiring process. These candidates have a greater chance of being identified for the job, while also providing the company more targeted access to qualified candidates, especially when using professional-oriented accounts such as LinkedIn. Therefore, using social media in the hiring process suggests a strongly positive outcome (e.g., *UEAIV* = 4.8). Conversely, employees that do not use social media during the hiring process may miss out on these qualified candidates, thus providing a negative consequence for the organization and prospective candidates (e.g., *UEAIV* = 2). This criteria was also analyzed for non-social media users. In this case, employers that used social media in the hiring process yield a low score when compared to non-social media users because these candidates may not be identified by the potential employer (e.g., *UEAIV* = 2). This pool of candidates would benefit by potential employers not using social media during the hiring process because they are more active in the traditional job seeking approaches than social media users (e.g., *UEAIV* = 4.5). This overall criteria was awarded a total weight of 25% and split equally between the social media and non-social media user perspectives.

The next criteria considered the impact on the employer brand reputation from the perspectives of stakeholders such as the employer owners, competitors, vendors, and the general public. In this case, employers that use social media in the hiring process may be awarded an overall score of mildly negative (e.g., *UEAIV* = 2.5). Although the overall company product may be strong due to the increased quality of new hires, the potential invasion of privacy reputation may be

viewed as a net negative for the brand reputation. Conversely, the respect for prospective privacy may yield a net positive outcome for employers that do not use social media in their hiring process (e.g., $UEAIV = 2.5$). This criteria was assessed using a weight of 25%.

The final criteria factored into this analysis was the cost effectiveness of the hiring process from the collective perspectives of stakeholders such as the employer owners, employees, and consumers. When companies use social media during the hiring process, the overall utilitarian ethical analysis outcome score is expected to be mildly positive (e.g., $UEAIV = 3.8$). In this case, there may be initial costs associated with the search for qualified candidates, but the organization is more likely to hire a good candidate. Companies that do not use social media during the hiring process may save expenses initially, but have a reduced likelihood of hiring the best candidate. As a result, these organizations may incur costs such as additional training or even repeating the search process, thus leading to a mildly negative overall score (e.g., $UEAIV = 2.5$). The weight of this criteria for the model was assumed to be 25%.

The new model proposed in this paper uses the following criteria to calculate the total ethical analysis impact value ($TUEAIV$) for a decision:

$$TUEAIV_j = \sum_{i=1}^n w_i \cdot UEAIV_{i,j}$$

Where:

$TUEAIV_j$ = Total Utilitarian Ethical Analysis Impact Value for decision j ($j = 1 \rightarrow m$)

w_i = weight for criteria i ($i = 1 \rightarrow n$)

$UEAIV_{i,j}$ = Utilitarian Ethical Analysis Impact Value for criteria i and decision j ($i = 1 \rightarrow n$; $j = 1 \rightarrow m$)

m = number of decision alternatives

n = number of criteria

The results of this analysis are shown in Table 1.

Table 1: Total Utilitarian Ethical Analysis Impact Value Model

Criteria (i)	Weight (w_i)	Option #1 Employers Use Social Media in the Hiring Process	Option #2 Employers Do Not Use Social Media in the Hiring Process
Invasion of non-employee privacy	0.25	4.0	2.0
Locating best applicants (social media users)	0.125	4.8	2.0
Locating best applicants (non – social media users)	0.125	2.0	4.5

Impact on employer brand reputation	0.25	2.5	3.8
Cost effectiveness of hiring process	0.25	3.8	2.5
Total =	1.00	3.43	2.89

Based on the analysis shown in Table 1, the *TUEAIV* for Option #1 (employers use social media in the hiring process) is 3.43 and greater than the *TUEAIV* for Option #2 (employers do not use social media in the hiring process) of 2.89. This analysis suggests that, using the criteria, weights, and projected utilitarian ethical analysis impact values proposed in this paper, employers would maximize the *TUEAIV* if they used social media during the hiring process.

Best Practices for Social Media Use

The authors' best practices for using social media in the hiring process include the following:

1. Do not ask for social media user names or passwords. While this approach may be with good intentions and ultimately arguably voluntary, the disparity of bargaining power is problematic. Job applicants have successfully contended any "voluntary" consent given was in actuality coerced. In addition, nearly half the states have specifically prohibited the practice. Having an agent "friend" or "follow" any candidate or potential candidate is equally ill advised.
2. Use a third party to perform social media searches. Third party delegation will likely trigger Fair Credit Reporting Act limitations. Contractually agreeing to comply with all legal requirements may provide some insulation from liability. It remains unclear how courts will view the liability of employers if it is found discrimination by the third party provider had a disparate impact on the applicant pool or employee demography.
3. If social media is used, only search public sites later in the hiring process and only by trained employees not involved in the decision-making process. Even public sites will reveal protected class status. Information, which would never be permissible nor apparent during a job interview such as marital status, religious affiliation, parental status, political affiliation, and many others, may be revealed on social media. Is the social media search then more probative or problematic?
4. The two strongest arguments for social media use may be fact checking and negligent hiring prevention. Using LinkedIn, profiles as a basis for resume or job application comparison may be a prudent best practice. LinkedIn profiles are generally considered professional outreach. If the profile data does not match a submitted resume or job application, does this rise the level of actionable fraud? Alternatively, could the candidate argue minor discrepancies amount to puffery on LinkedIn and the business profile is contractually analogous to an invitation to negotiate?

The negligent hiring argument is something to consider, but is undecided in the courts. If almost 80% of employers report using social media in the employment process, does that then create a best practice duty to use social media in the employment process?

Conclusion

The use of social media in employment is ubiquitous while the legal and ethical parameters continue to evolve and be debated. Both employers and potential employees should be cognizant of the environment in which numerous stakeholders are impacted directly and indirectly. This paper also presented a decision model that employers can use that incorporates utilitarian ethical impact into the hiring process. Future research is recommended to improve the criteria selection and corresponding weights and utility values.

Using social media to recruit or be recruited is fraught with legal and ethical risks and opportunities. All social media users and non-users should remain vigilant and purposeful to achieve their respective goals.

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