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**Pre-Employment Social Network Screening  
LEGAL CONSIDERATIONS**

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### **Introduction**

Employers, colleges, recruiters and background checkers have a duty to “bring in the best” and not make wrong hires. Wrong hires are costly! Social network reviews are in demand in companies and institutions to ensure potential applicants demonstrate social behavior that is consistent with their resumes and the character for the intended position.

### **Problem Statement**

Conducting a social network review, “Let me see your Facebook account” is awkward, difficult to execute with privacy settings and has significant legal implications in terms of state laws and discriminatory lawsuit risk.

### **Legal Considerations**

There are several intersecting laws and considerations reviewed in this paper. The foundational aspect is the emergence of specific recent laws outlawing the practice of an employer or college from requiring social network login credentials or information. In addition, the real risk of inadvertently being exposed to “Protected Class” information (age, health sexual preference etc) that is contained in social network information, highlights the risk and rise of discriminatory lawsuits.

### **CrewRevu Option**

An automated in the cloud applicant driven process that is **compliant and effortless**. The **patent pending technology** securely gathers the popular social networks (Facebook, LinkedIn & Twitter) in minutes with full privacy settings and prepares a full report which excludes risky discriminatory information for the Applicant who provides the information.

## *Market Wants and Needs:*

A recent survey found that **70 %** of HR professionals have rejected a job candidate because of information they found about that person by doing an online search. The top online factors for rejecting a job applicant were **unsuitable photos/videos, concerns about a candidate's lifestyle and inappropriate comments** written by the candidate. <sup>1</sup>

## *Laws, Risks and Reality:*

Emerging state laws include views such as in Delaware that "Makes it unlawful for employers to mandate that an employee or applicant disclose password or account information that would grant the employer access the employee's or applicant's social networking profile or account. Prohibits employers from requesting that employees or applicants log onto their respective social networking site profiles."<sup>2</sup>

*"So you see I "like" Susan Komen, does that mean you think I have cancer and you are discriminating on the basis of my health?"*

vs.

*"His continual deep racist postings he has made on his social network makes him a real risk - seeing this early was the best information ever!"*

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## *Limitation of Liability*

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Consider making a wrong hire and afterwards it is found that they were patently and completely unsuitable and this is obvious to any person who looks at how they have conducted themselves in their social network - yet this key information was not looked at before they were invited to join.

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Social Network information has opened up an unprecedented tool and window to screen a person for who they really are!

## Legal Considerations

### General Concepts

I Existing law imposes various duties on employers. Under existing common law, an employer has a duty to exercise reasonable care in employing a person and is required to use reasonable care to discover whether a potential employee is unfit or incompetent.<sup>3</sup>

II There is no violation of the Stored Communications Act, nor are there privacy concerns, when investigations are performed with information available to the public. Therefore, if an employee's privacy settings allow open access to material, the company can review it.<sup>4</sup> However even public information is dangerous if used in an actual or alleged discriminatory manner!

### So what are the issues

#### In Summary:

1. **Just seeing information, whether used or not, that a potential applicant could allege contributed to being discriminated against.**
2. **Falling foul of labor and privacy laws.**
3. **Being able to include as much information possible to make the best hiring decision possible.**

#### Categories

The legality of employers and colleges using social media private or semi-private information is still emerging in varying State laws and most of the guidelines are developing from ongoing cases. That said, laws to consider include :

##### Labor Laws

- Social media privacy laws
- Discriminatory lawsuits
- National Labor Relations Board (NLRB)

##### Privacy

- Fair Credit Reporting Act
- Stored Communications Act of 1986

**What To Do – one cannot make a negligent hiring decision by ignoring very relevant information as to the character of the applicant, yet one cannot fall foul of laws and guidelines?**

## Snapshot

### Social media privacy laws for pre-employment

A total of 14 states considered legislation in 2012 that would restrict employers from requesting access to social networking usernames and passwords of applicants, students or employees.<sup>2</sup> These are in various stages of approval yet the theme is established. These generally focus on not accessing the login credentials: for example Illinois proposed amendments to the Right to Privacy in the Workplace Act that *“provides that it is unlawful for any employer to ask any prospective employee to provide any username, password, or other related account information in order to gain access to a social networking website where that prospective employee maintains an account or profile”*. California is progressive in this regard where *“this bill would prohibit a postsecondary educational institution and an employer, whether public or private, from requiring, or formally requesting in writing, a student or an employee, or a prospective student or employee, to disclose the user name or account password for a personal social media account, or to otherwise provide the institution or employer with access to any content of that account.”*<sup>5</sup> [update – the CA bill was signed into law on 27 September 2012].

A federal bill Social Online Protection Act<sup>5</sup> has been tabled at the time of writing that follows the lead set by California above, although forecast of having less than 1% chance of being passed<sup>5</sup>, it is a conservative reason why CrewRevu reports to the applicant and not the employer in the first instance. With a slightly different approach, a bill The Password Protection Act of 2012<sup>12</sup> attempts to block employer access to ‘protected computers’ where information online stores private information not generally accessible to the public are not to be accessed. These bills and the CA law also do not allow employer retribution on those not providing social network information

### The Lesson

Do not ask for social network login credentials or ‘shoulder surf’ when the applicant is logged in. Just don’t do it!

## Snapshot

### Discriminatory lawsuits

EEO, or equal employment opportunity law, makes it illegal to discriminate based on ‘protected class’ information, according to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, and the Age Discrimination in Employment Act. A number of classes are protected including age, sex, religion, disability, genetic information, race/color, national origin, familial status, veteran and pregnancy status.<sup>6,7</sup>

There are two considerations: (i) being sure that you are not exposed to information pertaining to these areas (directly or indirectly, public or private) and (ii) ensuring no decision is discriminatory in nature, ‘job relevant’ criteria aside.

### The Lesson

Social network profiles and information (or just public Google information) are full of potentially discriminatory biased information (illnesses, age, marital status, sexual preferences etc) that is not job relevant and by just being exposed to this creates real discriminatory lawsuit risk - you need a way to filter this information!

## Snapshot

### National Labor Relations Board

The National Labor Relations Board (NLRB) has also entered the social media fray according to a report in 2011. Though the NLRB typically addresses union organizing issues, its rulings apply to all employees, unionized or not, to the extent that the rulings relate to the rights of all workers to engage in “concerted protected activity.”<sup>4</sup> In a broad brush stroke, an employee’s posting may not be protected from employer sanctions if they acted alone and not with other employees.

This likely has more relevance to existing rather than pre-employment screening but the NLRB position is interesting. This in essence follows previous positions that employees are not simply protected by the Constitutional right of Freedom of Speech to say what they wish in a private employer relationship.<sup>8</sup>

## Snapshot

### Fair Credit Reporting Act

Employers want more social based information. To this end they often contract this task out to a third party supplier. These are mainly manual in nature and limited to publicly available information (ie “Google”) – this being of limited value for the majority of us not being newsworthy yet privacy settings have hidden much of this “character based” information (posts, language patterns, pictures, activities, scope of influence etc) behind walls.

The FCRA protects consumers and employees by providing rights when a third party gathers information on them and sells this as input in an employment decision.<sup>10</sup>

By using a third party, the employer is required to ensure the provider who gathers this public social information is adhering to the requirements of the FCRA, another unwanted burden for employers and recruiters.<sup>9</sup>

## Snapshot

### Stored Communications Act of 1986

The federal Stored Communications Act of 1986 and similar state laws protect electronic records that are in storage rather than in transit. Though the act predates **social media** by almost two decades, courts still look to it for guidance. Courts have ruled that messages stored on a person’s social media site that are not readily accessible to the public at large are in storage and therefore subject to certain privacy protections—including the right to safeguard the messages from compelled disclosure to an employer.<sup>4</sup>



## CrewRevu Option

An automated in the cloud applicant driven permission based process that is **compliant and effortless**.

The **patent pending technology** securely gathers the popular social networks (Facebook, LinkedIn & Twitter) in minutes with full privacy settings and prepares a full report, excluding and filtering risky discriminatory information out, for the Applicant who voluntarily includes the information with their resume or application.

This is all done effortlessly, with no risk or cost to you. We automate your process and engage the applicant in a simple but full solution in order to engage the only Applicant Booster product available, all in the interests of the prospective employer who wants to make the best hiring decision possible.

Employers, recruiters, background checkers and others are welcome to contact us at :

**[www.CrewRevu.com](http://www.CrewRevu.com)**



### **Innovative Technology**

Maximizes HR screening capability

### **Socially Smart**

Bring in the right people every time

### **Efficient Solution**

Streamline the pre-employment process

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