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## Beware of vetting new hires through social media

There has recently been a debate in the United States about the practice of some employers asking job applicants for their Facebook password details and reviewing their personal Facebook profiles as part of the interview process.

This trend has led to two American senators asking the US Attorney General to investigate whether such a practice violates federal laws. Meanwhile, the state of Maryland has already banned employers from asking for social media passwords.

In the UK, there are several risks associated with employers vetting staff through social media. Employers potentially face discrimination, unfair dismissal, wrongful dismissal and/or whistleblowing claims by job applicants, as well as by current and former employees.

### Job applicants

Reviewing a job applicant's Facebook page could expose an employer to an uncapped discrimination claim. Unlike most statutory employment laws in the UK, our discrimination laws apply even before employment has commenced.

While an applicant's sex will normally be apparent from the application form, less obvious protected characteristics may not be. For instance, by searching an applicant's Facebook profile, an employer could learn of the applicant's sexuality, race, age, religion, disability and/or pregnancy. Refusing to hire on the basis of one or more of these protected characteristics would be discriminatory.

Even if an applicant's protected characteristic(s) did not in any way influence the decision not to hire, the employer would be wide open to a speculative discrimination claim, and it could be difficult to prove that the hiring decision was not influenced by the discovery in Facebook of protected characteristics.

### Employees

The risk of a discrimination claim could also increase if an employer searches an employee's Facebook profile and, as a result of the information discovered, treats the employee in a detrimental way, for instance by dismissing, demoting or withholding pay.

If an employer is informed by a third party that an employee's Facebook profile contains derogatory statements about a fellow employee and referred to the employer, it may be possible to fairly dismiss for gross misconduct, notwithstanding that the comments were posted on Facebook outside of working hours (see *Teggart v TeleTech UK Limited NIIT 00704/11*). However, this case provides no comfort for employers that engage in social media vetting for recruitment.

Relying upon information found in a Facebook profile to an employee's detriment (for instance, by withholding a bonus or retracting a promotion opportunity) could lead to a constructive dismissal claim, most likely on grounds of a fundamental breach of implied trust and confidence.

If the employee is eligible to claim unfair dismissal (i.e. he had one year's continuous employment, or two years' continuous employment if employment started on or after 6 April 2012), he could resign and bring a constructive unfair dismissal claim and seek a compensatory and basic award, which are currently capped at £72,300 and £12,900, respectively, in standard unfair dismissal claims.

If the employee is not eligible to claim unfair dismissal, he could resign constructively and bring a wrongful dismissal claim. He could seek the salary and any other contractual pay/benefits that he would have received during the notice period but for the constructive dismissal.

This could be particularly damaging if the employment contract contains contractual post-termination restrictive

covenants and/or confidentiality provisions, which would fall away if the employer was in repudiatory breach.

Even worse for an employer would be if the employee complained to the employer, in good faith, that such conduct was unlawful and he had suffered retaliation as a result of the complaint. That could give the employee a valid whistleblowing claim, which is another type of uncapped statutory claim.

### Broader risks

The practice of an employer searching a job applicant's or employee's Facebook profile gives rise to various other risks, including potentially breaching the UK's data protection laws.

Quite apart from the legal and financial risks, law firms seeking to hire and retain the best talent should also consider the wider employee relations dynamic. Merely requesting Facebook password details could be extremely off-putting to job applicants and employees alike, and seriously undermine efforts to hire and retain the best talent.

As evidenced by the recent debate in the US, there is also a reputational risk of disgruntled applicants or employees reporting such practices in social media sites and to sympathetic journalists.

If that is not enough to dissuade inquisitive firms, Facebook has issued a veiled threat to sue employers who engage in this practice, highlighting that it is a violation of its statement of rights and responsibilities to share or solicit a Facebook password.

As the use of Facebook, LinkedIn and other social media and networking websites continues unabated, employers are best advised to proceed with extreme caution, especially while the law and lawmakers catch up with the social media phenomenon. mp

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