Employer Access to Your Social Media Life

Peter Bowal and Joshua Beckie

Facebook helps you connect and share with the people in your life.

– Facebook corporate motto

Introduction

Over the last month, the legality of requests by prospective employers to access applicants' Facebook and other social media accounts has arisen. These accounts may reveal a more complete picture of the employee, especially what the employee really thinks, says and does outside of the workplace.[1]

The present economic market still allows employers to be choosy. Employers view the practice as a risk management strategy. They select the best employees for their companies to invest in, and accordingly, seek to obtain and use all relevant information on applicants, particularly since it may be increasingly difficult to differentiate applicants who carefully control their own images and references. The request could equally be made any time to *current* employees, in which case notice, cause and other legal complexities appear.

Essentially, the issue of employer access to one's social media life relates to human rights and privacy. Prospective and current employees are both surprised by the possibility of this intrusion into their personal lives. It is an emotionally charged matter and they are legitimately concerned about it.

Can employers legally do that?

Business Judgment Distinct from Legality

Facebook, a company which claims to respect user's privacy, warns employers against the practice, but it has little control over it. Subject to their ethical imperatives, employers are free to do anything they wish when recruiting employees, so long as they do not violate any laws. The default position, therefore, is legality.

In this issue, as most, the fact that employees are shocked or outraged at a practice does not itself render that practice *illegal*. Emotions, wishful thinking and legions of protesters will not suffice. Unreasonable or unfair employment practices may be legal. One must identify a law – manifested in legislation or common law doctrine – that deems the practice illegal in order for a corresponding remedy to be conferred.

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Human Rights Legislation

Employers seeking to access social media accounts of their prospective or current employees will take the position that there is no clear law prohibiting such requests and access. They will acknowledge that human rights legislation compels them to refrain from asking applicants for personal information relating to a prohibited ground of discrimination, such as gender, race, religion, sexual orientation, age and disability.

The mere fact of requiring a basic application form to be completed or interviewing an applicant in person without a screen *can disclose* some of that prohibited information in the process. Incidental or collateral disclosures at an interview – such as whether the applicant is female or elderly or is of a certain race – have not yet made interviews illegal. The possibility of disclosure is not the same as requested disclosure. The same argument might be made about access to one's life on social media: it is not a direct inquiry about legally-protected personal attributes.

Employers may further argue that the law imposes few other restrictions on the employee recruitment and selection process. They may lawfully administer all kinds of tests, subject them to expenses, time and effort, and ask a range of impersonal questions of the candidate. The employer will say the marketplace regulates the recruitment process. If the best employees spurn intrusive employers, these employers will eventually abandon the practice.

However, in a shot across the bow, the Ontario Human Rights Commission recently warned employers to avoid the practice. In a Facebook posting of its own, the Commission wrote: "employers should not ask job applicants for access to information stored on social media or other online sites and that doing so could leave an employer open to a claim of discrimination under the Code."[2] This is advisory only, *not* a binding legal conclusion.

An employer accessing an employee's social media sites may face a practical problem of having to deny that irrelevant or illegal information was used in an employment-related decision. Having access to too much information may force the employer to deny that it had that information or acted upon it. For example, assume a seriously under-performing employee poised for termination announces that she is pregnant on social media and the employer discovers that fact from that source. Any dismissal from the job after that point may prove awkward as the employer will be expected to prove the dismissal was completely unrelated to the pregnancy.

Privacy Legislation

The federal *Privacy Act* mandates federal government agencies to respect individual privacy when collecting and using personal information. These obligations are extended to private sector employers through the federal *Personal Information Protection and Electronic Documents Act* or equivalent provincial privacy legislation. None of this legislation specifically prohibits employers from collecting social media information. Employers must generally obtain prior notice and consent to collect personal information, "only for purposes that a reasonable person would consider appropriate in the circumstances." They may have to justify, in job-specific terms, why they need to know an applicant's personal acquaintances and off-work activities.

The employer will say the applicant "consented" to share this personal information. The privacy officer may disagree, considering the obvious imbalance of relational power between the employer and applicant. The outcome will depend on each case. Applicants have no right to a particular job and consent to their social media life may be as voluntary as other information and participation in the hiring process.

Political parties seek to know everything potentially embarrassing about their candidates before details or photographs surface during an election in the hands of political opponents. The British Columbia NDP was chastened by this experience in 2009 when compromising photographs appeared and its candidate had to withdraw from the election campaign. One would think that history would justify the party checking out such social media sites for prospective candidates. When it sought to do so in 2011, the British Columbia Information and Privacy Commissioner investigated and ruled against this practice:

> … the BC NDP collected a large amount of personal information, including information that may be outdated, irrelevant or inaccurate. … the BC NDP collected personal information from third parties that it did not have consent to collect. There were also reasonable alternatives that could have been used to meet the purposes of vetting candidates. These factors all weighed against the collection being considered to be what a reasonable person would consider appropriate in the circumstances.[3]

This is an illustrative administrative ruling binding only in British Columbia that stands untested by judicial review. Similar rigorous background investigations take place for judges, military conscripts, personal care workers, public transit drivers, airline pilots, and security and law enforcement officials. Employers should be prepared to demonstrate their requests for social networking information is connected to the job; that the information obtained is accurate; that it does not transgress against third parties; and cannot be reasonably obtained by use of other methods and sources.

Conclusion

Employers often receive hundreds of applications for each advertised job. To streamline the final vetting stage, they seek to readily obtain candid personal information to help compare the suitability of the shortlisted candidates. Few employers have the time or resources to sift through social media accounts at length. Rather, the employer's purpose in requesting access may be to simply and summarily screen out applicants who appear to have something to hide in their personal social networking lives.

The line separating private and public information continues to be blurred by social media, which is also a platform to which companies increasingly turn in the course of their business. In a flexible, "always on" informal work culture, the bright lines dividing personal and work time and space are gone. We are in an era where We are in an era where we voluntarily place more and more of our personal information and our social interactions online for very wide, largely uncontrolled circulation. When we do so, we are aware of the inherent difficulty of permanently deleting social media entries and that our expectations of privacy are minimal. To what extent then can we realistically assert rights and control over this information in more sensitive contexts?

For years employers have investigated and monitored employees without their consent and knowledge by conducting basic internet searches and asking around the industry. The difference with social media is that the employer usually must obtain the co-operation of the employee.

We do not have any definitive law on this social media issue yet. There are arguments on both sides – worst case scenarios, opinions, wishful thinking and warnings of outlandishly improbable torts and crimes abound. It makes for tantalizing headlines but the problem probably remains overstated as a true practical concern to most employees. Only a tiny number of companies are serious about seeing your social media accounts.

A more interesting prospect to ponder is what employers would think of an employee who has never opened a social media account at all.

Notes

1. Requiring a release of actual passwords seems to be overkill as it also violates online protocol and security. Employers asking for Friend status should suffice.
2. www.facebook.com/the.ohrc/posts/320570581329371
3. P11-01-MS *Summary of the Office of the Information and Privacy Commissioner's Investigation of the BC NDP's use of social media and passwords to evaluate candidates*, available at: www.oipc.bc.ca/Mediation_Cases/pdfs/2011/P11-01-MS.pdf

Peter Bowal is a Professor of Law and Joshua Beckie is a student at the Haskayne School of Business, University of Calgary in Calgary, Alberta.