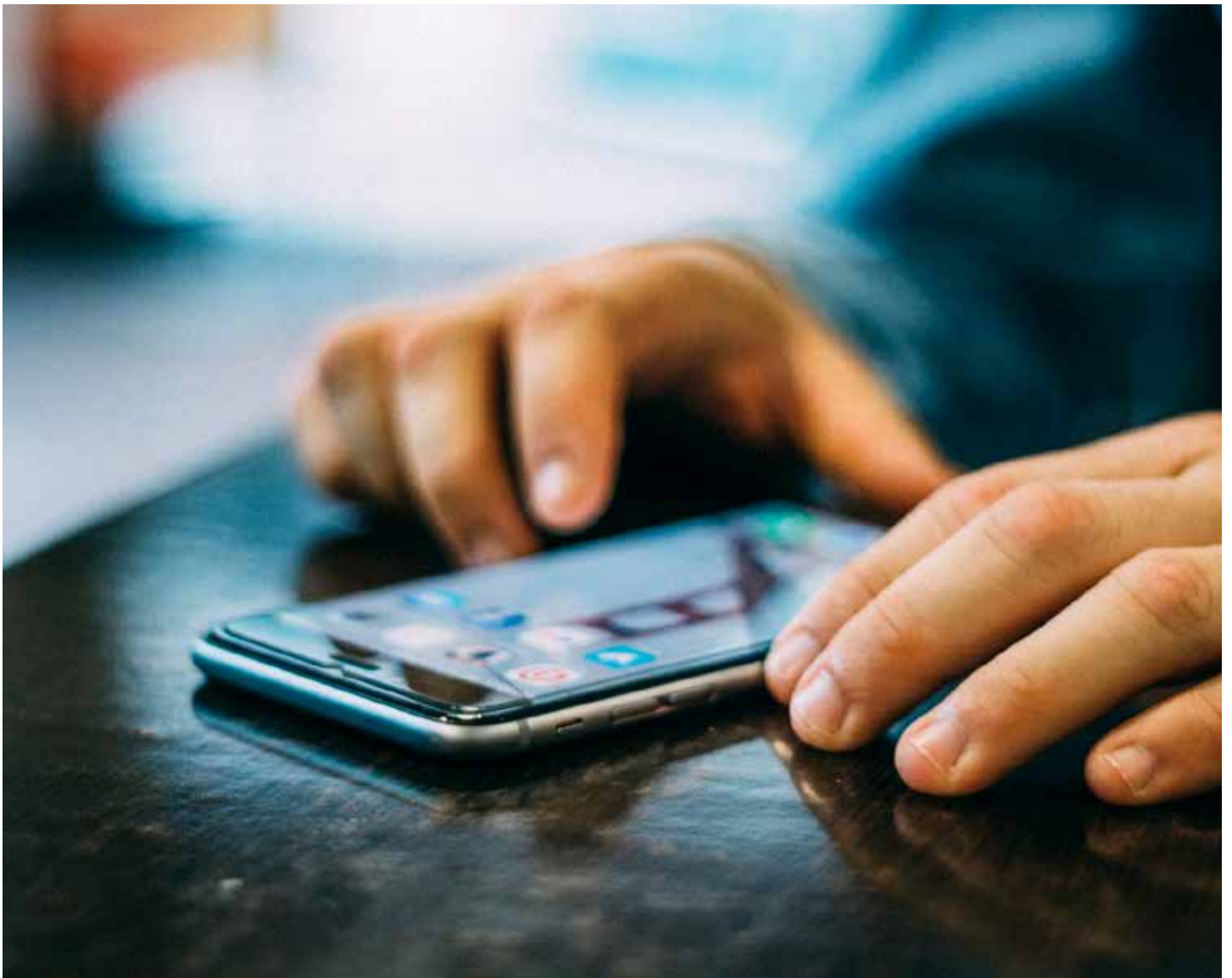


iGlobal Strategic Guidance Series 1: Recruitment

(2) Social media recruitment risks



Social media has become a major tool in employee recruitment. Most employers use social media as part of their hiring strategy, ranging from promoting the job vacancy through to using it as part of the selection process.

Promotion: Use of social media to attract job applicants is widespread. Companies sometimes even ask existing employees to post 'we are hiring' messages on their social media feeds. Meanwhile recruitment managers may browse LinkedIn pages to identify targets for a direct approach.

Selection: Use of social media also takes the form of 'vetting'. Many companies (possibly most) now admit

to deciding not to hire someone they were interested in because of what they found on their social media sites.

HR managers will be aware of the limitations of relying too heavily on social media to recruit. For instance, not reaching age groups who may be less active on a particular medium or employees telling friends of vacancies leading to carbon copy recruitment.

But what are the legal risks of using social media for recruitment, how do they vary globally and how should Global HR and In-House Counsel navigate the shoals? We present an overview with a checklist and high level country guide.

The main legal risks are:

On selection vetting : **discrimination** and **breach of privacy rules**.

On vacancy promotion : **discrimination** and **misrepresentation**.

Discrimination

In the majority of the world's jurisdictions, anti-discrimination legislation protects candidates as well as hired employees. Litigation awards can be significant in some countries and bad publicity is damaging for business.

This risk of **selection** discrimination is not new but the wealth of information employers can get from social media has increased the risk. On-line profiles can reveal information that would never show up in a traditional resumé or interview.

Can too much information be a bad thing? Controlling what does and does not influence decision making – overtly or subconsciously – is harder than most people think. Knowing in advance that a candidate is pregnant or has childcare responsibilities, or is of the 'wrong age', would, for most people, exercise at least some influence despite best intentions. An employer who backs out of a hire they might otherwise have made after accessing that information risks a discrimination claim.

Even if the social media platform does not reveal who has looked at a user's profile, the employee may still make the allegation. In those countries with 'discovery', or 'subject access requests' rules, such as most of Europe, an employer may be forced to hand over internet browser records or email discussions about a candidate. These would go on public record and could be extremely damaging.

A key distinction should be made between 'vetting' and 'verification'. Verifying a candidate's work history or qualification for instance is clearly relevant and valid. Vetting a candidate's personal life to see if they are a good 'fit' presents a much higher risk.

Therefore the timing of the social media review may be critical. Checking social media before a selection has been made may look like 'vetting' and is more vulnerable to a discrimination claim. Doing your checking after you have selected your candidate looks more like a valid 'verification' process, similar to getting references.

On **vacancy promotions**, the risk of discrimination comes from the language or the images used to promote the role. If, for example, the language implies a preference for a certain age, gender or ethnic group there is an immediate risk of discrimination. The language may be inadvertent, for instance referring to a 'salesman'. The risk of the use of inappropriate wording increases significantly if you have asked existing staff members to promote the vacancies on their Twitter or Facebook accounts and cannot control how they do this.

iGlobal's view is that you should put in place a global recruitment process (with adjustments for relevant local variations) that clearly demonstrates you have understood the social media discrimination risk and taken reasonable steps to ensure that roles are not promoted and the candidates are not selected on traits that could be discriminatory.

Breach of Privacy Rules

Even where information is not related to protected discrimination characteristics, there could still be data privacy risks.

The level of acceptable ‘snooping’ on potential hires varies by jurisdiction. The information you obtain could breach data protection law. Under European rules, and those in many other jurisdictions, downloading, printing or sharing an individual’s social media page amounts to ‘data processing’. If you have not notified candidates at the outset that their personal data could be processed in this way then you might breach local privacy regulations, even if the individual made the information publicly accessible on social media.

US employers should pay particular attention when investigating candidates in Europe: viewing social media pages from a computer in the US counts as processing personal data in the US. Unless the US employer has validly signed up to the EU-US Privacy Shield, the US is not considered a ‘safe’ country for data protection. Under EU rules the company could find itself in breach of international data transfer obligations. Fines can be levied which, in 2018 under the EU General Data Protection Regulation (GDPR), will increase substantially (up to €20 million or 4% of annual worldwide turnover, whichever is greater). The fines apply no matter where in the world the organisation is based.

iGlobal’s view is that, as with discrimination, the best route is to have a global recruitment process (adjusted for relevant local variations) which guides HR around the risks of data protection breaches and demonstrates that you have understood the need to take increasing care with local data privacy rules when using social media as part of candidate selection.

This is particularly true in the EU with the arrival, on May 25, 2018, of the GDPR. However, it is also true in many non-EU jurisdictions. The direction of travel worldwide is for more comprehensive data protection and more vigorous enforcement. Countries operating in the EU should already have their GDPR compliance plans well underway.

Misrepresentation

This occurs when the role has been materially misrepresented to the selected candidate (perhaps by over enthusiastic social media promotion) such that, had they known the true position, they would not have taken the job.

This carries a much lower risk than either discrimination or privacy breaches as it is a contractual not a regulatory matter. Also, in most cases the employee will have suffered no material loss unless perhaps they had turned down another valuable job to take the misrepresented one.

Nevertheless, it will not enhance your reputation as an employer and will waste your time.

iGlobal’s view is that you should keep tight control of the language used to promote particular vacancies, especially if social media is involved.

Risk management HR checklist

- Decide if you will use social media vetting at all – is it really necessary for the role?
- If you do use it decide when in the process you will use it. After the offer is accepted?
- Use it fairly and perhaps keep a record – avoid vetting that looks like discrimination.
- Have a global recruitment policy that recognises the discrimination, privacy and misrepresentation risks of using social media for recruitment.
- Have a recruitment process that demonstrates that you have followed your social media recruitment policy – it will not be enough just to state that it is your intention not to discriminate. Since discrimination is widespread you should be able to show that, in each recruitment decision, you did not discriminate.
- Control the language used to promote vacancies on social media.
- Inform candidates at the outset that social media verification will be used and when (as stated above, ideally after selection).
- Protect the confidentiality of the social media information obtained and use it only for the stated verification purpose.
- Do not retain the information beyond its stated usage.
- Understand and comply with the international data transfer rules that apply where the candidate is located. If social media information is viewed in another jurisdiction, that might count as an international data transfer. Take particular care if you are a US employer checking social media from the US as part of an EU recruitment process. Compliance with the Privacy Shield will be required and breaches of the GDPR will, from 2018, lead to heavy fines.

Country	Risk level	Comments
Australia	Higher	Growing emphasis on 'blind' recruitment techniques particularly in relation to age and ethnicity. Employers must always be able to show a 'fair' approach
Belgium	Higher	EU discrimination and privacy rules apply
Brazil	Higher	Strong anti-discrimination rules and developing privacy protection rules
China	Lower	Developing anti-discrimination and privacy rules but low enforcement
France	Higher	EU discrimination and privacy rules apply
Germany	Higher	EU discrimination and privacy rules apply
Hong Kong	Medium	Interest in strengthening existing discrimination and privacy rules
India	Lower	Limited anti-discrimination and privacy protection at present
Italy	Higher	EU discrimination and privacy rules apply
Japan	Higher	Strong anti-discrimination and privacy obligations
Mexico	Higher	Strong anti-discrimination and privacy obligations
Netherlands	Higher	EU discrimination and privacy rules apply
Singapore	Lower	Developing anti-discrimination enforcement
South Africa	Medium	Clear anti-discrimination rules and privacy rules but limited enforcement
Spain	Higher	EU discrimination and privacy rules apply
Russia	Lower	Under-developed anti-discrimination and privacy rules
UK	Higher	EU discrimination and privacy rules apply

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