

# Negligent Hiring and the Information Age: How State Legislatures Can Save Employers From Inevitable Liability

Katherine A. Peebles

---

## Repository Citation

Katherine A. Peebles, *Negligent Hiring and the Information Age: How State Legislatures Can Save Employers From Inevitable Liability*, 53 Wm. & Mary L. Rev. 1397 (2012), <http://scholarship.law.wm.edu/wmlr/vol53/iss4/7>

NEGLIGENT HIRING AND THE INFORMATION AGE: HOW  
STATE LEGISLATURES CAN SAVE EMPLOYERS FROM  
INEVITABLE LIABILITY

TABLE OF CONTENTS

INTRODUCTION .....	1398
I. THE LEGAL NECESSITY OF PRE-EMPLOYMENT	
INTERNET SCREENING .....	1401
<i>A. Defamation</i> .....	1402
<i>B. Negligent Hiring</i> .....	1404
II. THE LEGAL HAZARDS OF PRE-EMPLOYMENT	
INTERNET SCREENING .....	1409
<i>A. Discrimination</i> .....	1409
1. <i>Federal Antidiscrimination Laws</i> .....	1411
2. <i>State and Local Antidiscrimination Laws</i> .....	1413
<i>B. State Statutory Protection for Off-Duty Conduct</i> .....	1414
<i>C. Invasion of Privacy Torts</i> .....	1416
III. THE SOLUTION: PRESUMPTIONS, GUIDELINES, AND THE	
APPLICANT'S ROLE .....	1418
<i>A. Statutory Presumptions Against</i>	
<i>Negligent Hiring</i> .....	1419
1. <i>Proposed Statute</i> .....	1419
2. <i>The Shortfalls of Existing Law</i> .....	1424
3. <i>Employers' Concerns</i> .....	1427
<i>B. Employee Selection Guidelines</i> .....	1428
<i>C. The Applicant's Role</i> .....	1429
CONCLUSION .....	1430
APPENDIX .....	1432

## INTRODUCTION

A cursory review of job advice websites reveals a common theme: applicants should be wary of their Internet usage because employers routinely “Google” their prospective employees.<sup>1</sup> Stories about job seekers who lose employment opportunities due to unflattering online information may sound like urban legends, but recent studies indicate that employers are conducting online searches as part of their pre-employment screening processes,<sup>2</sup> and they are taking the information that they discover very seriously. One 2010 study commissioned by Microsoft found that 78 percent of recruiting and human resources personnel use search engines to evaluate potential employees, and 63 percent visit social networking sites as part of the screening process.<sup>3</sup> The same study found that 70 percent of these hiring officials had rejected candidates in light of the information that they gleaned from Internet searches.<sup>4</sup> In contrast, a 2009 study conducted by CareerBuilder.com found that only 45 percent of hiring officials had accessed job applicants’ social networking profiles, suggesting that the number of employers that

---

1. See Peter Vogt, *Keep Your E-Image Clean*, MONSTER, <http://career-advice.monster.com/job-search/Getting-Started/Keep-Your-E-Image-Clean/article.aspx> (last visited Jan. 13, 2012); see also Press Release, CareerBuilder.com, *Forty-Five Percent of Employers Use Social Networking Sites to Research Job Candidates, CareerBuilder Survey Finds* (Aug. 19, 2009), available at <http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr519&sd=8%2f19%2f2009&ed=12%2f31%2f2009>.

2. In some cases, employers delegate the task of scouring the Internet to companies such as Social Intelligence, which combs the web on employers’ behalfs. Jennifer Waters, *Facebook Is Fun for Recruiters, Too*, WALL ST. J., July 24, 2011, <http://online.wsj.com/article/SB10001424053111903461104576464823762727188.html>. In mid-2011, the Federal Trade Commission declined to rule that engaging these companies to conduct Internet searches violated the Fair Credit Reporting Act (FCRA), which regulates third parties that conduct pre-employment screening. See Letter from Maneesha Mithal, Assoc. Dir., Div. of Privacy & Identity Prot., Bureau of Consumer Prot., Fed. Trade Comm’n, to Renee Jackson, Nixon Peabody LLP (May 9, 2011), available at <http://www.ftc.gov/os/closings/110509socialintelligenceletter.pdf>. For an overview of the FCRA’s application to the employment screening process, see BUREAU OF CONSUMER PROT., *USING CONSUMER REPORTS: WHAT EMPLOYERS NEED TO KNOW* (Mar. 1999), available at <http://business.ftc.gov/documents/bus08-using-consumer-reports-what-employers-need-know>.

3. CROSS-TAB, *ONLINE REPUTATION IN A CONNECTED WORLD 8* (2010), available at <http://go.microsoft.com/?linkid=9709510>.

4. *Id.* at 3.

utilize this facet of the Internet as a pre-employment screening tool is growing.<sup>5</sup>

From one perspective, an employer that opts not to conduct pre-employment Internet screening is downright foolish. The Internet offers employers immediate access to a stockpile of information regarding job seekers.<sup>6</sup> Furthermore, in many cases, the job applicants themselves have prepared and disseminated this online material.<sup>7</sup> A simple Google search can help an employer ascertain whether a candidate would be a good fit for the position by revealing whether the applicant is lazy, is antisocial, or has lied in his or her application materials.<sup>8</sup> In essence, the Internet allows employers to overcome the sterilized nature of the application and interview process by revealing the real person behind the resume.

The Internet may sound like a godsend for hiring officials, but it also forces employers to confront a new realm of complicated legal issues. In addition to risking unwise hiring choices, employers that opt not to perform online screening may be flirting with liability. An analysis of negligent hiring—a tort that allows third parties to hold employers responsible for the harmful acts of their employees—suggests that employers may actually have a *duty* to search the Internet.<sup>9</sup> Case law indicates that if an employer fails to conduct an Internet search prior to hiring a job candidate and doing the search would have revealed that the applicant had dangerous

---

5. Press Release, CareerBuilder.com, *supra* note 1. Additionally, the percentage of hiring officials who made use of social networking sites during the hiring process increased between 2008 and 2009, which further suggests an upward trend. *See id.*

6. *See* Vogt, *supra* note 1.

7. More than 500 million individuals have created Facebook profiles. Kristin McGrath, *Status Update: Facebook Logs 500 Million Members*, USA TODAY, July 22, 2010, at 3D. In 2010, Facebook surpassed Google as the Internet's most visited website. Press Release, Experian Hitwise, Facebook Was the Top Search Term in 2010 for the Second Straight Year (Dec. 29, 2010), available at <http://www.hitwise.com/us/about-us/press-center/press-releases/facebook-was-the-top-search-term-in-2010-for-sec/>. Furthermore, Twitter—a website that allows its users to share 140-character missives with other individuals—has amassed nearly 160 million members over the past two years. Claire Cain Miller & Tanzina Vega, *After Building a Huge Audience, Twitter Turns to Ads to Cash In*, N.Y. TIMES, Oct. 11, 2010, at B1.

8. Daniel E. Mooney, Comment, *Employer on the Web Wire: Balancing the Legal Pros and Cons of Online Employee Screening*, 46 IDAHO L. REV. 733, 758 (2010).

9. *See infra* Part I.B.

proclivities, the employer could be held liable if the employee later injures someone.<sup>10</sup>

This potential liability naturally incentivizes conducting pre-employment Internet screening. After all, these searches benefit the employer and the public by weeding out unfit applicants. However, employers that do conduct pre-employment Internet screening—either to satisfy the duty to search or to learn more about prospective employees—expose themselves to additional liability if they discover and utilize certain online information. For example, federal antidiscrimination laws prohibit employers from making employment decisions based on myriad facts that individuals regularly share online, such as their religion, age, and medical information.<sup>11</sup> Pre-employment Internet screening thus presents a Catch-22 for diligent employers: a hiring official who fails to conduct these investigations breaches the duty to search, but an employer that makes use of online information increases the likelihood that a snubbed prospective employee can successfully bring a host of other lawsuits.

This Note analyzes this dilemma and suggests a way for states to help employers navigate the fine line between the duty to search and the hazards of pre-employment Internet screening. To date, relatively few scholars have explored this problem,<sup>12</sup> and many commentators frame it as a managerial issue rather than as a legal quandary.<sup>13</sup> Furthermore, whereas this Note focuses exclusively on the risks that private employers face when they conduct pre-employment Internet screening, some of the most in depth prior treatment of this subject deals exclusively with public employers.<sup>14</sup>

---

10. See discussion *infra* Part I.B.

11. See *infra* Part II.

12. See Jonathan Bick, *Lawful Mining of Social Networks*, 195 N.J. L.J. 443 (2009); Robert Sprague, *Googling Job Applicants: Incorporating Personal Information into Hiring Decisions*, 23 LAB. LAW. 19 (2007) [hereinafter Sprague, *Googling Job Applicants*]; Robert Sprague, *Rethinking Information Privacy in an Age of Online Transparency*, 25 HOFSTRA LAB. & EMP. L.J. 395 (2008) [hereinafter Sprague, *Rethinking Information Privacy*]; Mooney, *supra* note 8.

13. See, e.g., sources cited *infra* note 53.

14. See Mooney, *supra* note 8. In addition to the causes of action that this Note discusses, public employers that investigate job applicants via the Internet may face liability under various constitutional causes of action. See *id.* at 742-52.

Part I of this Note explains why two legal doctrines—defamation and negligent hiring—have made online screening a necessity for modern employers. Part II enumerates the legal hazards of these online investigations, including federal, state, and local antidiscrimination laws, state statutory protections for off-duty conduct, and common law invasion of privacy torts. Finally, Part III proposes a three-pronged solution to the online-screening conundrum. First, states should create statutory presumptions that employers that satisfy certain prerequisites—such as conducting criminal background checks and interviewing applicants—are not liable for negligent hiring. Second, employers that want to investigate potential employees on the Internet should adopt policies for conducting these searches. And third, job seekers should keep in mind that tales about applicants who lose job offers due to employers' online discoveries are not urban legends; they are the byproduct of the legal and practical realities of the information age.

#### I. THE LEGAL NECESSITY OF PRE-EMPLOYMENT INTERNET SCREENING

The interplay between two causes of action may drive employers' increasing reliance on pre-employment Internet screening. First, the prospect of defamation lawsuits encourages employers to withhold information about their past employees.<sup>15</sup> As a result, when a prospective employer requests an employment reference, it learns little more than the applicant's prior job title. Second, negligent hiring demands that employers investigate candidates' backgrounds.<sup>16</sup> Because the possibility of defamation litigation has silenced the applicants' previous employers, hiring officials are forced to replace this source of information by using online pre-employment screening techniques.

---

15. *See infra* Part I.A.

16. *See infra* Part I.B.

### A. Defamation

Employers may turn to the Internet to learn more about job seekers because they cannot obtain this information from its most credible source: the applicants' former employers. At least one court has held that employers have no duty to respond to potential employers' requests for job references,<sup>17</sup> and studies demonstrate that, over the past two decades, employers have become increasingly unwilling to share information about their past employees with prospective employers for fear of litigation.<sup>18</sup> The prospect of legal action has driven many companies to adopt "name, rank, and serial number" rules that prohibit managers from divulging substantive information to the hiring officials at other organizations.<sup>19</sup> Under these policies, employers will not reveal anything that an employer could not glean from a prospective employee's truthful resume and cover letter.<sup>20</sup> Rather than augmenting a hiring official's knowledge of the applicant's background, seeking a reference from a cautious former employer has become a fruitless formality.

Although employees have successfully used defamation lawsuits to hold their former employers liable for sharing unfavorable information with potential employers,<sup>21</sup> employers' response to this threat far outweighs the potential for an unfavorable verdict.<sup>22</sup> To bring a viable cause of action, the plaintiff must demonstrate that

---

17. See *Nichols v. Pray, Walker, Jackman, Williamson & Marler, P.C.*, 144 P.3d 907, 912 (Okla. Civ. App. 2006).

18. See Deborah A. Ballam, *Employment References—Speak No Evil, Hear No Evil: A Proposal for Meaningful Reform*, 39 AM. BUS. L.J. 445, 447 (2002); Christopher Graham, Legislative Review, *H.B. 2274: Encouraging Employment References*, 30 ARIZ. ST. L.J. 221, 224 (1998).

19. Ballam, *supra* note 18, at 448.

20. See Thomas A. Jacobson, *Avoiding Claims of Defamation in the Workplace*, 72 N.D. L. REV. 247, 265 (1996) (advising employers seeking to avoid defamation lawsuits to "[d]isclose only dates of employment, positions held, and wage/salary information, or keep discussions with prospective employers limited to other verifiable and objective facts").

21. See, e.g., *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255-56 (Minn. 1980) (upholding the jury's verdict in favor of the plaintiff salesperson when his previous employer falsely told an employment agency that he was "not industrious and that he was fired because he sold on friendship, would not get products out, was hard to motivate and could not sell").

22. See Terry Ann Halbert & Lewis Maltby, *Reference Check Gridlock: A Proposal For Escape*, 2 EMP. RTS. & EMP. POL'Y J. 395, 404 (1998).

the allegedly defamatory statement was false.<sup>23</sup> Therefore, a court will not hold an employer that gave a truthful employment reference liable for defamation. Courts have also recognized that a qualified privilege can pertain to employers that share information about their former employees with the hiring officials at other organizations.<sup>24</sup> If the employer asserts that the privilege applies, the employee bringing the defamation claim bears the burden of demonstrating that the employer shared too much information with too many people or shared the information with a malicious motive.<sup>25</sup> In addition to benefitting from these common law buffers, many employers that provide truthful references also enjoy the protection of state statutes that grant immunity to organizations that give employment references.<sup>26</sup> Despite these safeguards, the prospect of being sued—and the expenses associated with the legal process—still renders previous employers an unreliable source of information for hiring officials.<sup>27</sup> It is therefore unsurprising that employers are flocking to the Internet in order to research potential employees: as job applicants share more and more information about themselves on the Internet,<sup>28</sup> Google searches have become an increasingly viable way for employers to fill the informational gaps that employment references used to occupy.

---

23. *Stuempges*, 297 N.W.2d at 255 (“In order for a statement to be considered defamatory it must be communicated to someone other than the plaintiff, it must be false, and it must tend to harm the plaintiff’s reputation and to lower him in the estimation of the community.”); RESTATEMENT (SECOND) OF TORTS §§ 558(a), 581A (1977).

24. See Pamela G. Posey, Note, *Employer Defamation: The Role of Qualified Privilege*, 30 WM. & MARY L. REV. 469, 471 (1989) (“Employers enjoy a qualified privilege when discussing most matters related to employment with individuals having a corresponding interest or duty.”); see also RESTATEMENT (SECOND) OF TORTS § 595(1). For a discussion of the differing ways in which courts have approached the issue of qualified privilege in the employment reference context, see Posey, *supra*, at 484-87.

25. Posey, *supra* note 24, at 487.

26. Ballam, *supra* note 18, at 446-47 (“Lawmakers in over half of the states have provided some sort of statutory immunity for employers giving references and such legislation is pending in most of the remaining states.”).

27. *Id.* at 447-48.

28. See *supra* note 7 and accompanying text.



### *B. Negligent Hiring*

Although defamation's ramifications have turned pre-employment Internet screening into a practical necessity, employers may also search online to protect themselves from tort liability. The doctrine of respondeat superior—which “enjoys an unquestioned acceptance in all common law jurisdictions”<sup>29</sup>—allows third parties to hold employers liable for the harmful acts of their employees.<sup>30</sup> In order to bring a successful cause of action, the plaintiff must demonstrate that the employee in question acted within the scope of his or her employment.<sup>31</sup> In general, employees act outside the scope of their employment if they act without authorization, exceed the employment's space and time constraints, or do not act with the purpose of serving their employer.<sup>32</sup> Although the doctrine of respondeat superior does not impose an affirmative duty to investigate an employee's background, an employer that hopes to avoid vicarious liability may scour the Internet for evidence that a job applicant can follow instructions without endangering others.<sup>33</sup>

Third parties who seek to hold employers liable for the harmful acts of their employees can also make use of negligent hiring,<sup>34</sup> a cause of action that may saddle prospective employers with an affirmative duty to search the Internet. Every state recognizes the tort of negligent hiring.<sup>35</sup> Significantly, unlike a claim brought

---

29. RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 432 (9th ed. 2008).

30. *Bagent v. Blessing Care Corp.*, 862 N.E.2d 985, 991 (Ill. 2007) (“Indeed, the employer's vicarious liability extends to the negligent, willful, malicious, or even criminal acts of its employees when such acts are committed within the scope of the employment.”).

31. RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).

32. *Id.* § 228(2).

33. See Mooney, *supra* note 8, at 738.

34. Third parties can also bring other causes of action—such as negligent retention, negligent supervision, and negligent training—to hold employers accountable for their employees' behavior. However, these torts also examine employers' post-hiring actions and consequently fall outside the scope of this Note. For more information about employer negligence, see generally RONALD M. GREEN & RICHARD J. REIBSTEIN, *EMPLOYER'S GUIDE TO WORKPLACE TORTS* 3-36 (1992).

35. Courts in every state and the District of Columbia have acknowledged the existence of a negligent hiring cause of action, although negligent hiring remains underdeveloped in North Dakota, South Dakota, and Vermont due to the dearth of cases brought under that theory in those states. See Lex K. Larson, *State-by-State Analysis, Employment Screening* (MB) pt. 1, ch. 11 (2010).

under the doctrine of respondeat superior, a plaintiff can prevail in a negligent hiring suit even if the employee in question exceeded the scope of his or her employment.<sup>36</sup> Negligent hiring stems from a basic negligence concept: if someone undertakes an action, such as employing an individual, he or she has a duty to use reasonable care in carrying out that action.<sup>37</sup> In the employment context, exercising reasonable care requires employers to evaluate potential employees in light of the risks that they may pose to third parties and the public.<sup>38</sup> If an employer breaches this duty, and the breach causes the plaintiff's injuries, the employer can be liable for negligent hiring.<sup>39</sup>

The criteria for determining whether an applicant poses a threat of injury to third parties vary based on the type of employment in question. As the Georgia Supreme Court explained in *Munroe v. Universal Health Services, Inc.*, "An employer may be liable for hiring or retaining an employee the employer knows or in the course of ordinary care should have known was not suited for the particular employment."<sup>40</sup> One case provides an interesting example of a situation in which discovering that an employee had a history of violent conduct would not render an employer liable for negligent hiring. The Eleventh Circuit held that an employee who may have committed a violent crime in the past was suitable for quarry work due to his experience using heavy machinery.<sup>41</sup> However, in light of *Munroe's* reasoning, hiring the same employee may have been

---

36. See *Schechter v. Merchants Home Delivery, Inc.*, 892 A.2d 415, 432 (D.C. 2006) (holding that the employees' actions fell outside the scope of their employment but allowing the case to go before a jury on the issue of negligent hiring).

37. See Monique C. Lillard, *Their Servants' Keepers: Examining Employer Liability for the Crimes and Bad Acts of Employees*, 43 IDAHO L. REV. 709, 725 (2007); see also RESTATEMENT (SECOND) OF TORTS § 317 (1965).

38. See *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 911 (Minn. 1983) ("[A]n employer has the duty to exercise reasonable care in view of all the circumstances in hiring individuals who, because of the employment, may pose a threat of injury to members of the public."); RESTATEMENT (SECOND) OF AGENCY § 213 (1958) ("A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless ... in the employment of improper persons or instrumentalities in work involving risk of harm to others.").

39. See *Ponticas*, 331 N.W.2d at 911-12.

40. 596 S.E.2d 604, 605 (Ga. 2004) (emphasis added).

41. See *CSX Transp., Inc. v. Pyramid Stone Indus., Inc.*, No. 08-12694, 2008 WL 4239373, at \*2 (11th Cir. Sept. 17, 2008).

inappropriate if the job at issue had exposed him to the general public and did not invoke his specialized experience.<sup>42</sup>

As the above excerpt from *Munroe* suggests, foreseeability plays a pivotal role in negligent hiring cases, although jurisdictions vary in how they characterize this facet of the tort.<sup>43</sup> In the seminal case on negligent hiring, *Ponticas v. K.M.S. Investments*, the Supreme Court of Minnesota insisted that “negligence is not to be determined by whether the particular injury was foreseeable.”<sup>44</sup> However, the same court held that an employee’s dangerous tendencies must have been foreseeable in order for his or her employer to be held liable for negligent hiring:

Liability is predicated on the negligence of an employer in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it *should have been foreseeable* that the hired individual posed a threat of injury to others.<sup>45</sup>

This “should have been foreseeable” standard strongly implies that employers can be held liable for negligent hiring if they fail to conduct a reasonable level of pre-employment screening and consequently overlook evidence of an employee’s dangerous tendencies.

Although the *Ponticas* court downplayed the importance of foreseeability, it openly emphasized the significance of reasonable investigation. The court explained that “[a]lthough an employer will not be held liable for failure to discover information about the employee’s incompetence that could not have been discovered by reasonable investigation, the issue is whether the employer did make a reasonable investigation.”<sup>46</sup> The employer can take the nature of the position into account when conducting the background investigation; if the applicant will have little opportunity to harm

---

42. See *supra* text accompanying note 40.

43. See, e.g., Nancy B. Sasser, Comment, “Don’t Ask, Don’t Tell”: Negligent Hiring Law in Virginia and the Necessity of Legislation to Protect Ex-Convicts from Employment Discrimination, 41 U. RICH. L. REV. 1063, 1077-78 (2007) (explaining that, unlike Virginia, Minnesota does not explicitly “condition the employer’s liability on strict foreseeability”).

44. 331 N.W.2d at 912.

45. *Id.* at 911 (emphasis added).

46. *Id.* at 912-13.

third parties, the investigation need not be as extensive as it would be for a more high-stakes position.<sup>47</sup> In sum, a court will hold an employer liable for negligent hiring only if a reasonable background investigation would have revealed that the employee was likely to commit the dangerous acts that gave rise to the lawsuit, and what constitutes a “reasonable investigation” varies depending on the position for which the job seeker applies.

The facts from *Ponticas* provide a useful illustration of the functions that foreseeability and reasonable investigation serve in negligent hiring. In that case, a tenant sued the owner of an apartment complex for negligent hiring after the apartment manager used his keys to enter the tenant’s apartment and sexually assaulted her at knifepoint.<sup>48</sup> Because the apartment manager had access to tenants’ homes, his employer had a duty to conduct a reasonable investigation to explore whether the manager posed a high risk of injury to the apartment complex’s residents.<sup>49</sup> The employee in question had a criminal history of armed robbery and other felonies that a cursory criminal background check would have revealed.<sup>50</sup> Additionally, the employee had listed his mother and sister as his employment references.<sup>51</sup> Due to the ease with which the employer could have discovered that the employee had committed violent crimes and had provided sham employment references, the court upheld the jury’s finding that the employer was liable for negligent hiring.<sup>52</sup>

In light of the role that foreseeability and reasonable investigation play in negligent hiring, some commentators and attorneys have warned hiring officials that failing to screen potential employees via the Internet may expose them to negligent hiring liability.<sup>53</sup>

---

47. *Id.* at 913.

48. *Id.* at 909.

49. *Id.* at 913.

50. *Id.* at 909, 914. The *Ponticas* court emphasized that the employee’s criminal history alone did not lead it to conclude that the employee’s dangerous actions were foreseeable. *Id.* at 913 (“Liability of an employer is not to be predicated solely on failure to investigate criminal history of an applicant, but rather, in the totality of the circumstances surrounding the hiring, whether the employer exercised reasonable care.”).

51. *Id.* at 914-15.

52. *Id.*

53. See, e.g., Brian Elzweig & Donna K. Peebles, *Using Social Networking Web Sites in Hiring and Retention Decisions*, SAM ADVANCED MGMT. J., Autumn 2009, at 27, 27; Peter J. Tanella, *Should Your Company Implement a Social Networking Policy?*, VIEW FROM BAR (Mandelbaum Salsburg, West Orange, N.J.), Fall 2010, at 4, 6 (on file with author); see also

This particular issue has yet to be litigated,<sup>54</sup> but negligent hiring cases indicate that this advice may not be off base. Courts have repeatedly held that employers have a duty to investigate potential employees' backgrounds through criminal history searches and other means.<sup>55</sup> In some cases, even when the employer failed to conduct a background check, the court used the information that the employer could have gleaned from such an investigation as the benchmark for determining whether the employer should have known about the employee's dangerous tendencies.<sup>56</sup> The Internet now provides an easily accessible source of information regarding potential employees. Because running a Google search is even simpler than conducting a traditional background investigation, courts will almost certainly rule that employers should have known about any Internet-based information that speaks to an applicant's dangerous proclivities.<sup>57</sup> An employer that opts against investigat-

---

sources cited *infra* note 58.

54. Although a case involving negligent hiring and pre-employment Internet screening has not been litigated, plaintiffs have brought other causes of action based on online screening. For example, the Court of Appeals for the Federal Circuit held that a federal employer could terminate an employee based on what it discovered via a Google search. *See Mullins v. Dep't of Commerce*, No. 06-3284, 2007 WL 1302152, at \*2-3 (Fed. Cir. May 4, 2007).

55. *See, e.g., Saine v. Comcast Cablevision of Ark., Inc.*, 126 S.W.3d 339, 345 (Ark. 2003) (holding that the employer was not negligent because it had conducted an "adequate background check"—including screening for drug use and contacting the employee's previous employers—and nothing in the employee's background suggested that he was predisposed to commit sexual assault); *Munroe v. Universal Health Servs., Inc.*, 596 S.E.2d 604, 608 (Ga. 2004) (finding that an employer did not breach its duty of care because it hired an outside agency to investigate an employee's criminal history and the background check did not indicate that the employee was dangerous); *Burnett v. C.B.A. Sec. Serv., Inc.*, 820 P.2d 750, 752 (Nev. 1991) ("The tort of negligent hiring imposes a general duty on the employer to conduct a reasonable background check on a potential employee to ensure that the employee is fit for the position.").

56. *See Se. Apts. Mgmt. Inc. v. Jackman*, 513 S.E.2d 395, 397-98 (Va. 1999) (holding that the employer was not liable for an employee's actions when running a criminal background check would not have uncovered any relevant criminal history and the employee did not disclose any pertinent crimes on an application that requested a detailed conviction history).

57. Courts have taken the ease of completing elements of a background investigation into account when determining whether an employer's failure to perform these steps constituted negligence. *See, e.g., Cramer v. Hous. Opportunities Comm'n*, 501 A.2d 35, 41 (Md. 1985) ("[E]vidence of the ready availability of criminal record information was relevant to the initial consideration of negligence."); *supra* text accompanying note 52.

ing potential employees via the Internet would likely be liable if a reasonable search would have uncovered relevant information.<sup>58</sup>

## II. THE LEGAL HAZARDS OF PRE-EMPLOYMENT INTERNET SCREENING

Conscientious employers that regularly conduct pre-employment Internet screening may satisfy their duty to search, but they simultaneously enter another universe of liability when they begin investigating an applicant's online presence. Although the Internet may reveal information that pertains to an individual's suitability for employment—such as his or her dangerous tendencies—a Google search can also provide a problematic window into an employee's personal life. For example, an employer that glances at the photos or information provided on an applicant's Facebook profile could learn many facts that a job seeker would probably never include on his or her resume or reveal during an interview, such as his or her religion, age, national origin, marital status, medical information, tendency to consume alcoholic beverages or smoke cigarettes, and political affiliation. A private employer that takes any of this information into account when making a final hiring decision could face liability under many federal, state, and local laws.<sup>59</sup> Furthermore, the simple act of searching the Internet for information regarding applicants could expose a diligent employer to tort litigation.<sup>60</sup> The duty to search therefore translates into a duty for employers to risk enormous liability.

### A. *Discrimination*

Some major sources of liability for employers that perform online screening are antidiscrimination laws from the federal, state, and

---

58. Other commentators have reached similar conclusions regarding negligent hiring and the duty to search the Internet. *See, e.g.*, Bick, *supra* note 12; Sprague, *Googling Job Applicants*, *supra* note 12, at 27; Sprague, *Rethinking Information Privacy*, *supra* note 12, at 398-99; Mooney, *supra* note 8, at 737 (“The law is undeveloped in this area, but the easy access and low cost of Internet screening an applicant and the salient information it can reveal supports the argument that the employer not only benefits from such a search but may even have a legal duty to perform such a search.”); *see also* sources cited *supra* note 53.

59. *See infra* Part II.A-B.

60. *See infra* Part II.C.

local levels. These statutes and ordinances prohibit employers from making hiring decisions based on factors ranging from an applicant's religion to his or her genetic information.<sup>61</sup> Although some commentators and attorneys urge employers to conduct pre-employment Internet screening to avoid negligent hiring liability,<sup>62</sup> others counsel employers to avoid these online investigations because they increase the likelihood that a job candidate will be able to allege employment discrimination.<sup>63</sup> The results of the Microsoft study discussed in the Introduction indicate that an employee who makes a screening-related discrimination accusation may have a legitimate claim. The study found that 35 percent of the employers surveyed had rejected applicants based on their membership in certain social networking groups and networks.<sup>64</sup> To illustrate the potential dangers inherent in this statistic, one newspaper article explains that an employer that wants to minimize its health insurance premiums may decline to hire a candidate after noticing that he or she belongs to a diabetes group,<sup>65</sup> thereby violating the Americans with Disabilities Act (ADA).<sup>66</sup> Other employers could make similar hiring decisions based on an applicant's membership in online groups related to religion, race, sexual orientation, or numerous other protected bases. In addition to implicating the ADA, employers' online screening may subject them to liability under the Genetic Information Nondiscrimination Act (GINA), Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), and various state and local provisions that define discrimination more broadly than these federal statutes.

---

61. See *infra* Part II.A.1-2.

62. See *supra* text accompanying note 53; see also *supra* note 58 and accompanying text.

63. See Dave Marcus & Patricia Kitchen, *In Job Search, Online Image Counts*, NEWSDAY, July 23, 2010, at A42, available at 2010 WLNR 14690452.

64. CROSS-TAB, *supra* note 3, at 9.

65. Marcus & Kitchen, *supra* note 63.

66. See *infra* text accompanying note 67. Diabetes can qualify as a disability under the ADA. See *Questions and Answers About Diabetes in the Workplace and the Americans with Disabilities Act (ADA)*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/facts/diabetes.html> (last updated Feb. 2, 2011).

### 1. Federal Antidiscrimination Laws

As mentioned above, the ADA prohibits discrimination on the basis of a job seeker's disability or association with a person with a disability as long as the employer in question employs at least fifteen individuals.<sup>67</sup> The ADA Amendments Act of 2008 has amended the ADA to define "disability" very broadly.<sup>68</sup> Although some of the disabilities that qualify for ADA protection would be obvious to an employer conducting a job interview, many covered disabilities would be invisible to a typical observer. For example, the ADA prohibits discrimination against individuals with medical conditions that impair "major life activities," such as reproduction or sleeping.<sup>69</sup> To understand how disability discrimination via on-line screening may play out in the real world, consider popular blogger Heather Armstrong of Dooce.com.<sup>70</sup> Armstrong has written at length about her battle with serious depression and anxiety.<sup>71</sup> If she applied for a job and her potential employer performed a Google search to learn more about her background, it would almost certainly discover these blog entries. The employer may violate the ADA if it opted to hire another candidate after baselessly deciding, for example, that Armstrong's depression would impede her productivity.<sup>72</sup>

Pre-employment Internet screening could also allow an employer to learn about an applicant's relationship to someone with a disability or medical condition, which could open the door to further discrimination-related liability. For instance, a job seeker may keep a blog about his child's medical condition or may mention his elderly parent's disability on Twitter. As mentioned above, the ADA prohibits employers from discriminating against job seekers based

---

67. 42 U.S.C. §§ 12111(5)(A), 12112 (2006).

68. See 42 U.S.C. § 12102 (Supp. III 2010).

69. See *id.* § 12102(1)(A), (2)(A).

70. Coincidentally, after she published unflattering comments about her then-employer, Armstrong became one of the first bloggers to lose her job due to her website. The incident spawned the slang term "dooiced," a verb that refers to being fired because of online information. See Amy Joyce, *Free Expression Can Be Costly when Bloggers Bad-Mouth Jobs*, WASH. POST, Feb. 11, 2005, at A1.

71. See, e.g., Heather Armstrong, *Heather, Interrupted*, DOOCE.COM (Aug. 26, 2004), [http://www.dooce.com/archives/daily/08\\_26\\_2004.html](http://www.dooce.com/archives/daily/08_26_2004.html).

72. See *Calero-Cerezo v. Dep't of Justice*, 355 F.3d 6, 22 (1st Cir. 2004) (holding that major depression can qualify as a disability).



on their association with individuals with disabilities.<sup>73</sup> This provision indicates that an employer could be liable if it discovers via the Internet that a job applicant has a disabled family member and refuses to hire the applicant on that basis.<sup>74</sup>

GINA presents similar liability hazards for employers that conduct online screening. GINA prohibits organizations that employ at least fifteen individuals from taking applicants' genetic information into account when making hiring decisions.<sup>75</sup> Because GINA concerns an applicant's genetic information, the statute necessarily prohibits employers from making adverse hiring decisions because a candidate's biological family member suffers from a genetic disorder—such as breast cancer or heart disease—to which the potential employee may be susceptible. Therefore, like the ADA, GINA poses two layers of possible liability for employers that perform online screening: liability based on what the employer learns about candidates themselves and liability stemming from what the employer discovers about candidates' family members. GINA went into effect in November 2009 and has only recently begun to generate complaints, so it is unclear how a court would approach a case in which an employer learned about a job seeker's genetic information via the Internet.<sup>76</sup> Nevertheless, as GINA's case law develops, the law is poised to become a source of liability for employers that conduct pre-employment Internet screening.

The ADEA and Title VII create additional liability risks for employers that investigate job applicants online. Under the ADEA,

---

73. See *supra* text accompanying note 67.

74. See *Padilla v. Buffalo State Coll. Found., Inc.*, 958 F. Supp. 124, 128 (W.D.N.Y. 1997) (finding that a job applicant raised issues of material fact precluding the employer's motion for summary judgment when the employer allegedly withdrew a job offer because the applicant's child was disabled).

75. 42 U.S.C. §§ 2000e(b) (2006); 2000ff-1 (Supp. III 2010).

76. See Stephanie Reitz, *Conn. Woman Alleges Genetic Discrimination at Work*, ASSOCIATED PRESS FIN. WIRE, Apr. 28, 2010, available at [http://seattletimes.nwsource.com/html/business/technology/2011723744\\_apusgeneticdiscriminationclaim.html](http://seattletimes.nwsource.com/html/business/technology/2011723744_apusgeneticdiscriminationclaim.html). The Equal Employment Opportunity Commission's (EEOC) GINA regulations indicate that employers would not violate the law if they came across genetic information while conducting a routine Internet search, as long as they did not intend to uncover genetic information and did not require special permission to view the website in question. See Genetic Information Nondiscrimination Act of 2008, 29 C.F.R. pt. 1635 (2011). The regulations are likely an instructive guide for determining how courts will approach GINA in the online screening context.

employers that employ at least twenty individuals cannot discriminate against job applicants on the basis of age when the applicant is over the age of forty.<sup>77</sup> Title VII forbids employers that employ fifteen or more people from discriminating on the basis of a candidate's race, sex, national origin, color, or religion.<sup>78</sup> The statute's prohibition of sex-based discrimination encompasses discrimination on the basis of pregnancy.<sup>79</sup> The Supreme Court has also held that Title VII bans discrimination stemming from sex stereotypes.<sup>80</sup> Although federal law does not prohibit employers from discriminating against job applicants on the basis of their sexual orientation or gender identity, some courts have found that the Supreme Court's decision regarding sex stereotypes implicates these bases, making sexual orientation and gender identity discrimination indirectly actionable under Title VII.<sup>81</sup> Satisfying the duty to search could give hiring officials access to information regarding applicants' personal lives—such as their sexual orientation, age, pregnancy, religion, or national origin—that may not be apparent during a job interview. An employer that takes any of these details into account while making a hiring decision risks liability under Title VII or the ADEA.

## 2. State and Local Antidiscrimination Laws

Many states and the District of Columbia prohibit discrimination on bases that federal law does not explicitly recognize, such as sexual orientation, marital status, parental status, and family

---

77. 29 U.S.C. §§ 623, 630(b), 631 (2006).

78. 42 U.S.C. §§ 2000e(b), 2000e-2. The Immigration Reform and Control Act (IRCA) protects additional employees from national origin discrimination by prohibiting businesses that employ between three and fourteen individuals from discriminating on that basis. See 8 U.S.C. § 1324b(a). The IRCA also forbids employers from discriminating against certain applicants due to their citizenship status. *Id.*

79. 42 U.S.C. § 2000e.

80. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989).

81. These so-called "bootstrapping" causes of action have enjoyed mixed success. Compare *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (holding that the transsexual plaintiff had stated a claim of sex discrimination when he alleged that his employer had discriminated against him because he did not behave like a stereotypical man), with *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006) ("[T]he harassment of which Vickers complains is more properly viewed as harassment based on Vickers' perceived homosexuality, rather than based on gender non-conformity.").

responsibilities.<sup>82</sup> The District of Columbia's antidiscrimination law is especially broad; in addition to prohibiting employers from considering an applicant's sexual orientation and gender identity, it forbids discrimination based on family responsibilities, personal appearance, marital status, political affiliation, and college enrollment status.<sup>83</sup> Some municipalities have also passed ordinances that enumerate even more protected bases than state and federal statutes.<sup>84</sup> In addition to broadening the substantive scope of antidiscrimination law, many state and local laws protect more job seekers from discrimination on the same bases as federal law by lowering the threshold for employer inclusion. As explained above, federal antidiscrimination statutes generally do not apply to employers that employ fewer than fifteen individuals,<sup>85</sup> but state and local laws often reduce this requirement.<sup>86</sup> These state and local provisions combine to create a veritable minefield of liability risks for employers that attempt to fulfill their duty to search.

### *B. State Statutory Protection for Off-Duty Conduct*

When employers investigate potential employees via the Internet, a growing number also risk violating state statutes that prohibit employers from making employment decisions based on applicants' off-duty conduct.<sup>87</sup> Although some of these statutes apply exclusively to current employees,<sup>88</sup> many off-duty conduct laws explicitly protect job seekers as well.<sup>89</sup> Off-duty conduct statutes range from

---

82. See, e.g., *Statewide Employment Laws & Policies*, HUMAN RIGHTS CAMPAIGN, [http://www.hrc.org/files/assets/resources/Employment\\_Laws\\_and\\_Policies.pdf](http://www.hrc.org/files/assets/resources/Employment_Laws_and_Policies.pdf) (last updated Jan. 6, 2012) (explaining that twenty-one states and the District of Columbia forbid employment discrimination on the basis of sexual orientation, and nine states ban gender identity discrimination).

83. See D.C. CODE § 2-1402.11 (2010).

84. See, e.g., Stephanie Bornstein & Robert J. Rathmell, *Caregivers as a Protected Class?: The Growth of State and Local Laws Prohibiting Family Responsibilities Discrimination*, CTR. FOR WORKLIFE L. (2009), <http://www.worklifelaw.org/pubs/LocalFRDLawsReport.pdf>.

85. See *supra* text accompanying notes 67, 75, 77-78.

86. See, e.g., CAL. GOV'T CODE §§ 12926, 12940 (West 2010) (prohibiting organizations that employ *at least five* individuals from discriminating against applicants due to their race, religion, color, national origin, ancestry, disability, age, or sexual orientation).

87. See TIMOTHY P. GLYNN ET AL., *EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS* 325 (2007).

88. See, e.g., S.D. CODIFIED LAWS § 60-4-11 (2010).

89. See, e.g., MINN. STAT. § 181.938 (2010).

extremely broad laws that prohibit hiring officials from considering any nonwork activities to narrower laws that forbid employers from considering only certain types of off-duty conduct. The text of California's statute offers the most sweeping protection to job applicants: it prohibits employers from refusing to hire applicants based on *any* of their outside activities.<sup>90</sup> Furthermore, unlike similar laws from other states,<sup>91</sup> California's law does not contain any exceptions, such as provisions that safeguard employers' business needs.<sup>92</sup> California's courts have attempted to narrow the statute's sweeping scope, especially in the private employment context,<sup>93</sup> but the law, like other states' more narrowly drawn statutes, remains a potential source of liability for employers that learn about applicants' off-duty activities via the Internet.

One particularly relevant group of off-duty conduct statutes prohibits employers from considering candidates' off-duty use of lawful products, such as cigarettes and alcoholic beverages.<sup>94</sup> As of May 2008, seventeen states had enacted statutes forbidding employers from making employment decisions based on tobacco use, and eight states protected the use of all lawful products.<sup>95</sup> Although these statutes arose in the 1990s as a way to protect smokers from employment discrimination,<sup>96</sup> their applicability to alcohol use may be especially pertinent to employers that conduct pre-employment Internet screening. Career advice websites warn job seekers that evidence of alcohol use may drive employers to ignore their

---

90. See CAL. LAB. CODE §§ 96(k), 98.6 (West 2010).

91. See, e.g., N.Y. LAB. LAW § 201-d(3)(a) (McKinney 2010) (providing an exception when the off-duty conduct "creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest"); N.D. CENT. CODES §§ 14-02.4-03 (2010) (prohibiting employers from discriminating against candidates due to their "participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer").

92. See Marisa Anne Pagnattaro, *What Do You Do When You Are Not at Work?: Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625, 647 (2004).

93. See TIMOTHY A. GUDAS, STATE LAWFUL PRODUCTS STATUTES 33 (2005).

94. See, e.g., 820 ILL. COMP. STAT. ANN. 55/5 (West 2010); MINN. STAT. § 181.938 (2010); MO. ANN. STAT. § 290.145 (West 2010).

95. *Off-Duty Conduct*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=13369> (last updated May 30, 2008).

96. Pagnattaro, *supra* note 92, at 641.

applications.<sup>97</sup> Furthermore, one survey found that 58 percent of hiring officials had rejected an applicant because an Internet search prompted “[c]oncerns about the candidate’s lifestyle,” which presumably encompasses the applicant’s lawful alcohol consumption.<sup>98</sup> Another study discovered that, of the employers that had rejected a candidate because of his or her social networking content, 44 percent made their decision because they learned that the applicant drank alcohol or used other drugs.<sup>99</sup> Employers whose Internet screening leads them to eliminate applicants based on their alcohol use could face liability under an off-duty conduct statute that forbids hiring officials from considering this factor.

### *C. Invasion of Privacy Torts*

Pre-employment Internet screening also exposes employers to nonstatutory liability risks. The common law offers four tort actions to redress invasions of privacy: intrusion upon seclusion, appropriation of name or likeness, publicity given to private life, and false light.<sup>100</sup> Unlike the statutory causes of action discussed in Part II.A.1, invasion of privacy torts do not limit potential plaintiffs by excluding certain employers from liability. Therefore, these torts ensure that no employer is truly insulated from screening-related litigation. Although job applicants typically enjoy fewer privacy protections than current employees,<sup>101</sup> at least one court has held that employees and applicants are entitled to equal privacy rights.<sup>102</sup> Employers should not expect that a job seeker’s nonemployee status will shield the organization from privacy tort litigation.

Of the four common law invasion of privacy torts, most plaintiffs turn to intrusion upon seclusion to redress privacy violations in the employment context.<sup>103</sup> The *Restatement (Second) of Torts* provides

---

97. See, e.g., Vogt, *supra* note 1 (“A student at a school in the Southeastern US was being courted by a small business owner for a key position—that was until the owner saw the student’s Facebook profile, which featured explicit photos and stories about the student’s drinking.”).

98. CROSS-TAB, *supra* note 3, at 9.

99. Press Release, CareerBuilder.com, *supra* note 1.

100. See RESTATEMENT (SECOND) OF TORTS § 652A (1977).

101. Sprague, *Googling Job Applicants*, *supra* note 12, at 31.

102. See *Sokora v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77, 83 (Ct. App. 1991).

103. See Sprague, *Googling Job Applicants*, *supra* note 12, at 31.

the following standard definition of intrusion upon seclusion: “One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”<sup>104</sup> For a potential plaintiff bringing a cause of action based on pre-employment Internet screening, the most difficult element of this analysis is demonstrating that the intrusion is “highly offensive to a reasonable person,” especially in light of the fact that the information that employers discover via the Internet is often self-published and publicly available.<sup>105</sup> Consequently, there are at least two situations in which an Internet search could give rise to a viable intrusion upon seclusion claim. First, the employer could circumvent a password or some other restriction intended to limit individuals’ access to the online information. Courts have held that entering an employee’s password-protected account without permission could be highly offensive to a reasonable person, and there is no reason to suspect that courts would not make the same finding when the plaintiff is a job applicant.<sup>106</sup> Second, the employer could “friend” the applicant via a social networking site, thereby gaining access to the applicant’s profile information via a modicum of deception.<sup>107</sup> Recognizing this liability risk, some commentators have counseled employers aiming to protect themselves from litigation to eschew “friending” job seekers.<sup>108</sup> Employers could make a

---

104. RESTATEMENT (SECOND) OF TORTS § 652B.

105. See *supra* note 7 and accompanying text.

106. See, e.g., *Fisher v. Mt. Olive Lutheran Church*, 207 F. Supp. 2d 914, 920, 928 (W.D. Wis. 2002) (denying the employer’s motion for summary judgment because accessing the plaintiff’s personal e-mail account by guessing its password could be highly offensive to a reasonable person).

107. Professor Robert Sprague draws an interesting analogy between overly intrusive pre-employment investigations and *Johnson v. K-Mart Corp.* See Sprague, *Googling Job Applicants*, *supra* note 12, at 31-32. In *Johnson*, K-Mart hired private investigators to pose as employees and gather information regarding theft and drug use. The investigators also learned about employees’ personal lives. See 723 N.E.2d 1192, 1194 (Ill. App. Ct. 2000). The court held that the lower court should not have granted K-Mart’s motion for summary judgment in an invasion of privacy action. *Id.* at 1197. A hiring official who “friends” an applicant may engage in a similar stunt; he or she could take advantage of the fact that the candidate may mistake him or her for an acquaintance and thereby learn information that the candidate would not otherwise reveal to an employer.

108. See, e.g., *Proceed with Caution: Social Networking Websites and Blogs*, Lab. L. Rep. (CCH), at 2, (May 27, 2009), available at <http://www.felhaber.com/pdf/articles/090622->

colorable argument that potential employees consent to any intrusion when they accept the “friend” request, and consent is an absolute defense to intrusion upon seclusion.<sup>109</sup> However, even though this loophole may provide a way for some employers to avoid liability, invasion of privacy torts remain a potential source of litigation for employers that attempt to fulfill their duty to search.

### III. THE SOLUTION: PRESUMPTIONS, GUIDELINES, AND THE APPLICANT’S ROLE

Negligent hiring serves the important public policy goal of protecting individuals from workplace violence and other ills.<sup>110</sup> However, as the above discussion illustrates, the current state of the law creates a conundrum for diligent employers. On one hand, negligent hiring provides employers with a duty to investigate applicants’ backgrounds, which includes a duty to search the Internet.<sup>111</sup> This duty to search is compounded by the unavailability of employment references, which previous employers are hesitant to provide due to concerns about defamation lawsuits.<sup>112</sup> On the other hand, performing these required online searches exposes employers to litigation alleging discrimination, violation of off-duty conduct statutes, and invasion of privacy.<sup>113</sup> Eliminating this Catch-22 requires a three-pronged attack: state legislatures should pass statutory presumptions against negligent hiring, employers that want to perform pre-employment Internet screening should institute policies for carrying out these searches, and job seekers should carefully monitor their online personas so that they have no reason to fear an employer that conducts Internet screening.

---

INSIGHT\_992\_09.pdf.

109. See *Jennings v. Micro Tech. Labs, Inc.*, 765 S.W.2d 497, 500 (Tex. Ct. App. 1989) (“[C]onsent amounts to an absolute defense in any tort action based upon the invasion.”).

110. Megan Oswald, Comment, *Private Employers or Private Investigators? A Comment on Negligently Hiring Applicants with Criminal Records in Ohio*, 72 U. CIN. L. REV. 1771, 1771 (2004).

111. See *supra* Part I.B.

112. See *supra* Part I.A.

113. See *supra* Part II.

### A. *Statutory Presumptions Against Negligent Hiring*

State legislatures can resolve the conflict between negligent hiring and the sources of liability outlined in Part II by enacting statutory presumptions against negligent hiring.<sup>114</sup> Courts have repeatedly viewed a clean background check as an indicator that the conduct that gave rise to a negligent hiring lawsuit was not reasonably foreseeable.<sup>115</sup> By codifying this standard, states can ensure that employers will not feel pressured to engage in preventative measures—such as Internet screening—that expose them to additional litigation. Two states have created statutory presumptions in favor of employers that perform minimal due diligence.<sup>116</sup> Rather than providing a simple way to circumvent negligent hiring liability, future statutes should outline a series of required screening measures. By going through the motions necessary to insulate themselves from negligent hiring lawsuits, hiring officials will ultimately learn whether applicants are hazardous to others and will avoid unwise hiring choices. The proposed statute—which has been included as the Appendix of this Note—will consequently benefit employers, many job seekers and existing employees,<sup>117</sup> and any third parties who come into contact with new employees.

#### 1. *Proposed Statute*

Foreseeability and reasonable investigation are the cornerstones of negligent hiring law.<sup>118</sup> However, the negligent hiring doctrine currently provides no clear guide for determining whether an

114. One proposed German law takes the idea of a statutory solution to its extreme by prohibiting employers from viewing applicants' social networking profiles. See David Jolly, *German Law Would Limit the Use of Facebook in Hiring*, N.Y. TIMES, Aug. 26, 2010, at B8.

115. See *supra* notes 55-56 and accompanying text.

116. See *infra* Part III.A.2.

117. Some courts have held that workers' compensation prevents employees from bringing successful negligent hiring causes of action against their employers. See, e.g., *Chrzanowski v. Lichtman*, 884 F. Supp. 751, 756 (W.D.N.Y. 1995). For this defense to apply, the employees must have been injured in the course of their employment. *Id.*

118. See *supra* text accompanying notes 45-46; see also *Malieki v. Doe*, 814 So. 2d 347, 362 (Fla. 2002) ("The core predicate for imposing liability is one of reasonable foreseeability—the cornerstone of our tort law. With regard to the claim for negligent hiring, the inquiry is focused on whether the specific danger that ultimately manifested itself (e.g., sexual assault and battery) reasonably could have been foreseen at the time of hiring." (citations omitted)).



employee's dangerous behavior is foreseeable and what level of investigation is reasonable.<sup>119</sup> This ambiguity may encourage employers to over-investigate job applicants' backgrounds, which includes conducting pre-employment Internet screening.<sup>120</sup> The online-screening dilemma therefore stems from an easily correctable problem: employers do not know how much due diligence is sufficient. By clearly delineating the steps that employers need to complete in order to meet their screening obligations, states can nullify the troublesome duty to search.

Case law provides hints regarding which pre-employment measures an employer must complete in order to ensure that a candidate has no foreseeable dangerous propensities. The first of these measures is conducting a criminal background check to the extent that state law allows<sup>121</sup> or requires.<sup>122</sup> As discussed above, some courts have held that investigating an applicant's criminal history is one element of the due diligence that negligent hiring doctrine requires.<sup>123</sup> However, courts have also emphasized that a clean criminal background check alone is not sufficient to render an

---

119. See Seth B. Barnett, Note, *Negligent Retention: Does the Imposition of Liability on Employers for Employee Violence Contradict the Public Policy of Providing Ex-Felons with Employment Opportunities?*, 37 SUFFOLK U. L. REV. 1067, 1082 (2004) ("There is also a need for a uniform standard governing what types of workplace violence are foreseeable.").

120. See *supra* text accompanying note 53; see also *supra* text accompanying notes 3-5.

121. See, e.g., 18 PA. CONS. STAT. ANN. § 9125 (West 2010) ("Felony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied."). At least one jurisdiction places heavy restrictions on the admissibility of employees' criminal histories in negligent hiring cases, indicating that it does not view a criminal background check as a necessary element of pre-employment screening. See MINN. STAT. § 181.981 (2010). States such as this one could remove the criminal history component—subsection (A)(1)—from the proposed statute. See *infra* Appendix.

122. Some jurisdictions have adopted laws that mandate criminal background checks for certain types of employees, such as child care and hospital workers. See, e.g., MD. CODE ANN., FAM. LAW § 5-561 (West 2010); N.M. STAT. ANN. § 29-17-5(C) (West 2010).

123. See *supra* note 55 and accompanying text; see also *Cramer v. Hous. Opportunities Comm'n*, 501 A.2d 35, 41 (Md. 1985). But see *Foster v. Loft, Inc.*, 526 N.E.2d 1309, 1313 n.8 (Mass. App. Ct. 1988) ("[T]here is no requirement, as matter of law, that the employer make an inquiry with law enforcement agencies about an employee's possible criminal record."). Subsections (A)(1) and (B) of the proposed statute straddle the line between these competing views: these provisions require a criminal background check but mandate that employers consider applicants' criminal histories in a very limited way. See *infra* Appendix. Of course, jurisdictions that do not view a criminal history check as a necessary part of a reasonable background investigation are free to delete these provisions from the statute.

employee's dangerous tendencies unforeseeable.<sup>124</sup> The Virginia Supreme Court highlighted two additional pre-employment screening measures when it ruled in favor of the employer in *Southeast Apartments Management v. Jackman*: requiring the candidate to fill out a detailed job application that inquires about his or her prior convictions and making a reasonable effort to contact the prospective employee's references and previous employers.<sup>125</sup> The employer in that case had also interviewed the employee in question two times before hiring him.<sup>126</sup> Other courts have mentioned these four steps as well, suggesting that they are the key indicators of foreseeability and reasonable investigation.<sup>127</sup> Consequently, in order for employers to enjoy the statutory presumption in their favor, the proposed statute requires that they investigate the applicant's criminal history, have the applicant complete a detailed employment application, make a good faith effort to contact the applicant's references and previous employers, and interview the applicant.<sup>128</sup>

Of course, not all positions warrant the same degree of due diligence. For example, an employer should exercise more care

---

124. See *supra* note 50.

125. 513 S.E.2d 395, 397 (Va. 1999). The employer also administered a behavioral test, which did not indicate that the employee was hazardous. *Id.* at 396. However, the court did not stress this factor when announcing its holding. See *id.* at 397-98 (focusing on the job application, the reference check, and the applicant's lack of a relevant criminal history). Like pre-employment Internet screening, behavioral tests present a host of challenges and potential liabilities. See generally Kimberli R. Black, *Personality Screening in Employment*, 32 AM. BUS. L.J. 69, 90-121 (1994). Pre-employment drug screening raises similar issues. See Stephen M. Fogel et al., *Survey of the Law on Employee Drug Testing*, 42 U. MIAMI L. REV. 553, 634-50, 658-80 (1988). In light of these concerns, the proposed statute does not require employers to administer drug or behavioral tests. See *infra* Appendix.

126. *Se. Apts. Mgmt.*, 513 S.E.2d at 396.

127. See *Saine v. Comcast Cablevision of Ark., Inc.*, 126 S.W.3d 339, 345 (Ark. 2003) (emphasizing that the defendant had contacted the employee's previous employers, which did not indicate that he was dangerous); *TGM Ashley Lakes, Inc. v. Jennings*, 590 S.E.2d 807, 812 (Ga. Ct. App. 2003) (noting that the employer did not run a criminal history check, did not inquire about prior convictions on its application form, and did not adhere to a company policy requiring letters of reference); *Foster*, 526 N.E.2d at 1312 (pointing out the employer did not require the employee to fill out a job application and did not check the employee's references when upholding a verdict in favor of the plaintiff); *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 914-15 (Minn. 1983) (discussing the employer's failure to contact all of the applicant's references, scrutinize his application, investigate his criminal history, and conduct an adequate interview).

128. See *infra* Appendix.

when hiring an employee who will regularly interact with the public than when hiring an employee for a position that involves minimal human contact.<sup>129</sup> Therefore, although the ideal statute should encourage all employers to conduct these baseline steps, it should demand more of employers that place employees in more sensitive positions. Two cases from opposite ends of the United States illustrate this sliding scale. In *Welsh Manufacturing, Division of Textron, Inc. v. Pinkerton's, Inc.*, the Supreme Court of Rhode Island held that an employer hiring a security guard to protect valuable property had a duty to conduct a very thorough inquiry into the applicant's background, character, and qualifications.<sup>130</sup> In contrast, the Supreme Court of Hawaii suggested that the employer should be held to a much lower standard when the employee in question was a chef on a cruise ship and did not regularly interact with the ship's passengers.<sup>131</sup> An employee whose background information renders him or her unsuitable for the security guard position will often be able to accept the chef position without exposing his or her employer to negligent hiring liability.

The proposed statute incorporates this sliding scale by requiring employers to investigate job seekers' employment histories for a "reasonable time period prior to the prospective employee[s]' application[s]" and by specifying that employers should consider applicants' criminal histories in relation to the positions for which they apply.<sup>132</sup> Furthermore, the fact that the proposed statute is a presumption against negligent hiring rather than a complete defense allows some additional flexibility. In extreme circumstances, a plaintiff will be able to rebut the presumption by demonstrating that the position is so sensitive that the employer should have completed screening measures beyond the procedures outlined

---

129. See *supra* text accompanying note 47.

130. 474 A.2d 436, 441 (R.I. 1984) ("Realizing that job applicants generally provide references who are certain to produce favorable reports, we think that background checks in these circumstances should seek relevant information that might not otherwise be uncovered. When an employee is being hired for a sensitive occupation, mere lack of negative evidence may not be sufficient to discharge the obligation of reasonable care.").

131. See *Janssen v. Am. Haw. Cruises, Inc.*, 731 P.2d 163, 167 (Haw. 1987) ("Thus, it cannot be said that [the chef], because of the nature of his employment, posed a threat of injury to the public. To hold [the union to which the chef belonged] liable under these facts would make it an insurer of the safety of anyone who may have become acquainted with [the chef] while he worked on the ship.").

132. See *infra* Appendix.

in the model statute. Although enacting a statutory presumption rather than an affirmative defense allows some lingering ambiguity in the definition of “reasonable investigation,” this elasticity will ensure that courts can adapt their negligent hiring analyses to the particular employment at issue.

One category of job seekers that will likely warrant additional pre-employment scrutiny is individuals who apply for financially sensitive positions, such as accountants and bank tellers. For these applicants, a credit check may be a better indicator of suitability for employment than a criminal background check. Consequently, subsection (A)(5) of the proposed statute requires employers to run credit checks for applicants who will have access to third parties’ funds.<sup>133</sup> In *White v. Consolidated Planning, Inc.*, a North Carolina appeals court held that an employer could be liable for negligent hiring when a third party suffered economic, rather than physical, harm.<sup>134</sup> In that case, an employee at a financial planning firm embezzled a customer’s money for gambling purposes.<sup>135</sup> The court denied the employer’s motion to dismiss, noting that the employee’s actions were foreseeable in part because his prior employer had fired him for stealing.<sup>136</sup> The court found that the plaintiff could make a colorable argument that the employer would have discovered the employee’s financial problems if it had conducted a “reasonable investigation,”<sup>137</sup> which presumably would have included reference and credit report checks. *White* suggests that, in addition to investigating potential employees’ criminal and employment backgrounds, these types of employers should investigate applicants’ financial health.<sup>138</sup>

One obvious argument against encouraging employers to investigate candidates’ criminal backgrounds as a method of pre-employment screening is that doing so amounts to state-sanctioned

---

133. See *infra* Appendix.

134. 603 S.E.2d 147, 160 (N.C. Ct. App. 2004).

135. *Id.* at 152.

136. *Id.* at 155.

137. *Id.*

138. When an employer utilizes a credit report prepared by a consumer reporting agency, it must comply with the FCRA. See BUREAU OF CONSUMER PROT., *supra* note 2. Some state laws further regulate employers’ use of consumer reports. See, e.g., N.H. REV. STAT. ANN. § 359-B:6 (2010).

discrimination against ex-offenders.<sup>139</sup> In order to promote the hiring of individuals with prior convictions, scholars have called for statutes that prohibit employment discrimination based on applicants' criminal records when the convictions would not inhibit their abilities to perform their job functions.<sup>140</sup> Some state laws already govern how employers can use conviction information in hiring decisions,<sup>141</sup> and both the EEOC and many courts have interpreted Title VII to prohibit blanket policies against hiring ex-convicts.<sup>142</sup> In order to further the public policy in favor of providing ex-offenders with employment opportunities, subsection (B) of the proposed statute incorporates a provision that prohibits employers from making hiring decisions based on an applicant's criminal record unless the prior conviction indicates that the applicant is somehow unsuited for the position.<sup>143</sup>

## 2. *The Shortfalls of Existing Law*

To date, two states have adopted general statutory presumptions against negligent hiring: Florida and Louisiana. Unlike this Note's proposed statute, these laws provide liability protection to employers who complete only one pre-employment screening step. Therefore, although these laws combat the Catch-22 that arises from negligent hiring by eliminating the duty to search, they do not

---

139. See *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 913 (Minn. 1983) ("Were we to hold that an employer can never hire a person with a criminal record at the risk of later being held liable for the employee's assault, it would offend our civilized concept that society must make a reasonable effort to rehabilitate those who have erred so they can be assimilated into the community.").

140. See Barnett, *supra* note 119, at 1084; Jennifer Leavitt, Note, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1310 (2002).

141. See GREEN & REIBSTEIN, *supra* note 34, at 16; see, e.g., N.Y. CORRECT. LAW § 752 (McKinney 2010). Some states also prohibit employers from considering applicants' prior sealed arrest records when making hiring decisions. See, e.g., 775 ILL. COMP. STAT. ANN. 5/2-103 (West 2010).

142. See EEOC Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Feb. 4, 1987), <http://www.eeoc.gov/policy/docs/convict1.html>. This theory is predicated on the fact that African American and Hispanic individuals are statistically more likely to possess criminal records, meaning that a no-conviction policy will have a disparate impact on these protected classes. *Id.*

143. See *infra* Appendix.

require enough preventative measures to adequately safeguard third parties. Furthermore, neither law builds in a provision that clearly prohibits unnecessary discrimination on the basis of applicants' criminal histories.

Florida's negligent hiring law provides a list of pre-employment screening measures.<sup>144</sup> If the employer completes one of the enumerated tasks and does not discover "any information that reasonably demonstrate[s] the unsuitability of the prospective employee for the particular work to be performed," the statute allows a presumption in favor of the employer in a negligent hiring action arising out of the employee's intentional tort.<sup>145</sup> The employer's screening options include conducting a criminal background check via the Florida Crime Information Center, making a reasonable effort to contact the applicant's references and former employers, requiring the applicant to fill out a job application that asks questions regarding his or her criminal history, checking the applicant's driver's license record if the record is relevant to the work that employee will perform, or interviewing the potential employee.<sup>146</sup> Although Florida's legislature has unsuccessfully attempted to amend the existing law to require employers to take all of these preventative steps before they can enjoy the statutory presumption in their favor,<sup>147</sup> the current statute remains flawed due to its use of "or" rather than "and."<sup>148</sup> The model statute improves upon Florida's attempt to solve negligent hiring's Catch-22 by inserting the proper conjunction and thereby heightening the required degree of due diligence.

In addition to failing to require proper pre-employment screening, Florida's statute does not go far enough to prevent employers

---

144. FLA. STAT. ANN. § 768.096(1)(a)-(e) (West 2010).

145. *Id.* § 768.096(1). Under a widely recognized rule of statutory interpretation, the inclusion of the disjunctive "or" within a list of options indicates that only one of the requirements must be satisfied. *See, e.g.,* United States v. Williams, 326 F.3d 535, 541 (4th Cir. 2003).

146. FLA. STAT. ANN. § 768.096.

147. *See* H.B. 449, 2011 Leg., 113th Reg. Sess. (Fla. 2011), available at <http://www.flsenate.gov/Session/Bill/2011/0449/BillText/Filed/PDF>; S.B. 146, 2011 Leg., 113th Reg. Sess. (Fla. 2010), available at <http://www.flsenate.gov/Session/Bill/2011/0146/BillText/Filed/PDF>.

148. The adopted version of the bill does not include the amendments to section 768.096. *See* S.B. 146, 2011 Leg., 113th Reg. Sess. (Fla. 2011), available at [http://laws.flrules.org/files/Ch\\_2011-207.pdf](http://laws.flrules.org/files/Ch_2011-207.pdf).

from discriminating against applicants with criminal histories.<sup>149</sup> Florida's statute indirectly promotes the hiring of ex-offenders by listing its elements in the alternative and, consequently, allowing employers to escape negligent hiring liability without inquiring into a candidate's criminal history.<sup>150</sup> The statute reinforces this point by specifying that "[t]he election by an employer not to conduct the [criminal background] investigation ... does not raise any presumption that the employer failed to use reasonable care in hiring an employee."<sup>151</sup> Although at least one commentator has encouraged state legislatures to pass laws similar to Florida's present statute in order to encourage employers to hire individuals with criminal records,<sup>152</sup> the proposed statute enhances Florida's approach by combining an appropriate level of due diligence with protection against discrimination.<sup>153</sup>

Louisiana's negligent hiring law suffers from similar shortcomings. Like Florida's statute, Louisiana Revised Statutes section 23:291 creates a presumption that the employer was not negligent if it completed one of two enumerated pre-employment screening measures.<sup>154</sup> To enjoy the presumption in its favor, the employer must reasonably rely on information that the employee's previous employer provided or conduct a criminal background check.<sup>155</sup> To encourage previous employers to provide substantive employment references, the statute couples its negligent hiring presumption with a clause that protects previous employers from liability when they give references in good faith.<sup>156</sup> As discussed above, these provisions rarely succeed in quelling employers' fears regarding

---

149. Another Florida statute prohibits disqualifying individuals from licensing and public employment based on their criminal histories. See FLA. STAT. ANN. § 112.011. Although this provision certainly represents a step in the right direction, Florida has not done enough to ease the burden that background checks place on individuals with unfavorable criminal histories.

150. See *supra* text accompanying note 146.

151. FLA. STAT. ANN. § 768.096(3).

152. Barnett, *supra* note 119, at 1083 ("Reducing an employer's fear of liability when hiring an applicant with a criminal record will directly promote the rehabilitation of such ex-offenders and also reduce recidivism.")

153. See *infra* Appendix.

154. LA. REV. STAT. ANN. § 23:291 (2010).

155. *Id.* § 23:291(B), (D)(1).

156. *Id.* § 23:291(A).

defamation litigation and eliciting worthwhile references.<sup>157</sup> The statute therefore drives employers that want to circumvent negligent hiring liability and perform meaningful due diligence toward conducting criminal history investigations. However, Louisiana's statute does not contain any language that discourages employers from making employment decisions based on individuals' criminal histories.<sup>158</sup> Here again, this Note's proposed statute improves upon Louisiana's law by providing more meaningful guidelines for employers and safeguarding ex-offenders from unnecessary discrimination.

### 3. *Employers' Concerns*

Although the proposed statute benefits employers by outlining clear pre-employment screening guidelines and providing a shield from negligent hiring liability, fulfilling the statute's requirements may entail incurring increased screening costs. Employers should remember that complying with the statute is optional: if employers choose not to complete the statute's steps, they will simply run the same risk of negligent hiring liability that they face today. However, for some employers, satisfying the statute's prerequisites may actually decrease screening costs. Under the current negligent hiring regime, cautious employers may feel the need to over-screen applicants in order to avoid negligent hiring liability.<sup>159</sup> The proposed statute and its clearly delineated screening requirements will allow employers to eliminate these redundant steps.

---

157. *See supra* text accompanying note 27.

158. Louisiana does prohibit discrimination against ex-offenders based on their criminal histories when the position in question requires a state-issued license. The statute containing this prohibition carves out exceptions for several state agencies and for situations in which a felony conviction renders the applicant unsuitable for the position. *See* LA. REV. STAT. ANN. § 37:2950. Although this law protects some ex-convicts from the consequences of background checks, no Louisiana statute bans general employment discrimination based on applicants' criminal histories, leaving many applicants without recourse if employers turn them away due to their criminal convictions.

159. *See supra* text accompanying note 53.



*B. Employee Selection Guidelines*

Even after states implement the proposed statute and eliminate the duty to search, some employers may still feel compelled to investigate job seekers via the Internet. After all, the Internet is a quick, easy, cost-effective way to find out more information about an applicant's background and to ascertain whether he or she will be a good fit for an employer's business. Furthermore, some positions may be so highly sensitive that the employer must conduct an Internet search as part of its reasonable background investigation.<sup>160</sup> Part II's discussion of the ways in which spurned candidates may hold their potential employers liable for pre-employment Internet screening suggests some ways in which employers can reduce the likelihood of successful lawsuits. By creating and following well-crafted policies governing online screening, employers can enjoy the benefits of Internet investigations while minimizing their hazards.

As suggested above, discrimination and off-duty conduct laws vary wildly among states and localities.<sup>161</sup> Therefore, before creating online screening policies, employers should familiarize themselves with the applicable laws—including statutes that prohibit employers from discriminating against ex-offenders—to ascertain what information they can consider while making hiring decisions. To minimize the likelihood of liability, employers should designate a non-decision maker who will conduct any online searches.<sup>162</sup> If this individual relays findings that are pertinent to the hiring decision and filters out data that the hiring official cannot consider, the employer will decrease the likelihood that it will learn and utilize information that may subject it to liability. The person conducting the investigation should also document each search and keep a record of the search terms that he or she used.<sup>163</sup> By maintaining this information, the employer augments its ability to prove that its

---

160. *See supra* Part III.A.1.

161. *See supra* Parts II.A.2, II.B.

162. Thomas F. Holt, Jr. & Mark D. Pomfret, *Finding the Right Fit: The Latest Tool for Employers*, METROPOLITAN CORP. COUNS., Nov. 2006, at 29, 29.

163. *Id.*

Internet searches could not have led to illegal hiring decisions.<sup>164</sup> Furthermore, documenting the fact that the online searches did not reveal that the applicant possessed any dangerous propensities may provide the employer with additional ammunition with which to defend itself against future negligent hiring lawsuits in a state that does not adopt the proposed statute.<sup>165</sup>

Although asking a non-decision maker to conduct any Internet searches reduces the likelihood that an employer will violate antidiscrimination or off-duty conduct statutes, it does not hinder a job seeker's ability to bring a viable intrusion upon seclusion claim.<sup>166</sup> In order to avoid tort liability for invasion of privacy, employers should refrain from "friending" job applicants or circumventing privacy protections, such as passwords.<sup>167</sup> Consent is an absolute defense to intrusion upon seclusion,<sup>168</sup> so prudent employers should obtain the job seeker's written permission before conducting any online searches. Seeking the applicant's consent has the added benefit of informing him or her about the searches from the outset, thereby dispelling the atmosphere of distrust and resentment that may erupt if the job seeker learns about the online investigation on his or her own.<sup>169</sup>

### C. *The Applicant's Role*

A natural counterargument to these employer-focused solutions—the proposed statute and the suggested guidelines—is that the applicant should bear the burden of maintaining an Internet persona that is workplace-friendly. If an employer makes a negative hiring decision based on inappropriate information that a candidate has voluntarily shared on the Internet, the candidate should accept the consequences, unpleasant though they may be. This outlook, although reasonable on its face, presents two key problems. First,

---

164. See Mooney, *supra* note 8, at 759. One commentator has suggested updating the EEOC's Uniform Guidelines on Employee Selection Procedures to require employers to keep records of their pre-employment Internet searches. See Sprague, *Googling Job Applicants*, *supra* note 12, at 40.

165. See Mooney, *supra* note 8, at 759.

166. See *supra* Part II.C.

167. See *supra* notes 106-08 and accompanying text.

168. See *supra* note 109 and accompanying text.

169. See Mooney, *supra* note 8, at 760.

although employees should remain mindful of the ramifications of their online behavior, they cannot always guarantee that the information associated with their names accurately reflects their activities and views.<sup>170</sup> Second, the protections for privacy, antidiscrimination, and off-duty conduct described above evince a public policy in favor of allowing employees some degree of separation between their personal and professional lives.<sup>171</sup> Significantly, applicants may increasingly view the Internet as a job-seeking tool.<sup>172</sup> In a world in which the Internet is just another way for candidates to market themselves to employers,<sup>173</sup> an individual is unlikely to allow his or her online presence to become a way for employers to find out damaging facts about the person behind the resume. If this trend continues, it may render the duty to search practically moot.

#### CONCLUSION

The Internet provides employers with an extraordinary new way to evaluate job applicants. However, it also pegs employers between a rock and a hard place. An employer that fails to conduct pre-employment Internet screening risks negligent hiring claims, but an employer that performs this due diligence faces a litany of other potential lawsuits. Employers can mitigate this problem by fashioning internal policies for online screening, and job seekers can control their online personas to some degree. But the power to end the online screening tug-of-war truly rests with the state legisla-

---

170. See CROSS-TAB, *supra* note 3, at 9-10 (“Nearly 90% of U.S. recruiters and HR professionals surveyed say they are somewhat to very concerned that the online reputational information they discover may be inaccurate.”).

171. See *supra* Part II. Fifty-three percent of employees believe that their social networking profiles are private and employers should not monitor them. DELOITTE, SOCIAL NETWORKING AND REPUTATIONAL RISK IN THE WORKPLACE 6 (2009), available at [http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us\\_2009\\_ethics\\_workplace\\_survey\\_220509.pdf](http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_2009_ethics_workplace_survey_220509.pdf).

172. See Stacy Rapacon, *Social Networks Can Lend Friendly Hand to Job Hunt*, WASH. POST, July 4, 2010, at G3. As further evidence of this trend, the professional networking website LinkedIn boasted more than 70 million members in 2010. *Id.*

173. An industry has arisen around hiding unfavorable online information, such as web pages that job seekers do not want their prospective employers to encounter. See Johnny Diaz, *For a Fee, Digital Dirt Can Be Buried*, BOS. GLOBE, Aug. 26, 2010, at A1, available at 2010 WLNR 16981956.

tures. By passing well-drafted statutory presumptions against negligent hiring, the states can codify their pre-employment screening expectations and eliminate this legal Catch-22 once and for all.

*Katherine A. Peebles\**

---

\* J.D. Candidate 2012, William & Mary School of Law; B.A. 2007, Trinity University. I would like to thank my family and friends for their encouragement and support as I drafted this Note. For their suggestions and editing expertise, I am indebted to the staff of the *William and Mary Law Review*.

## APPENDIX

- (A) In a civil action for negligent hiring, an employer that completed a reasonable background investigation prior to hiring the employee who allegedly caused the harm at issue will be presumed not to have been negligent in hiring that employee if the background investigation did not demonstrate that the employee was unsuitable for the particular employment. A reasonable background investigation must include the following:
- (1) Conducting an investigation of the prospective employee's criminal background to the extent required by state law. If state law does not provide a requirement, the employer must obtain a criminal conviction history report from the state's law enforcement department.
  - (2) Requiring the prospective employee to complete a detailed job application that includes the following:
    - (a) A request for the names of the prospective employee's past employers and dates of prior employment, spanning a reasonable time period prior to the prospective employee's application, and a request for the addresses and telephone numbers of these past employers.
    - (b) A request for a detailed history of the prospective employee's criminal convictions, including the type of crime, the date of conviction, and the penalty imposed.
  - (3) Making a reasonable effort to contact the prospective employee's references and former employers concerning the prospective employee's suitability for the particular employment and the accuracy of the prospective employee's application.

- (4) Interviewing the prospective employee.
  - (5) Checking the prospective employee's credit history in accordance with the standards imposed by the Fair Credit Reporting Act and state law if the position for which the employer hired the prospective employee provided the prospective employee with significant access to and control over the funds or assets of customers, clients, or other third parties.
- (B) No employer shall deny an application for employment because the prospective employee has been convicted of a criminal offense unless there is a direct relationship between the prior conviction and the position for which the prospective employee applied that renders the prospective employee unsuitable for the particular employment.