LEGAL AND ETHICAL IMPLICATIONS OF USING SOCIAL MEDIA IN HUMAN RESOURCE MANAGEMENT

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ABSTRACT

Now more than ever we live in a society saturated with technology and media. We are captured by the technology whirlwind such as the internet, instant messages, emails, and social media such as Twitter and Facebook. Technologies not only are changing the way people live, work, and interact with each other but also the way companies conduct their businesses. Social media no doubt is one of such technologies that enables companies to market their products and services in new and unique dimensions. Beyond marketing, social media is also changing the way human resource professionals recruit and select employees. Recruiting and selecting potential new employees using social media, is gaining popularity. There are even software programs that capitalize on the information available on social media sites to assist human resources professionals to source, screen, and track job applicants. Although there are many advantages in using social media networks to assist HR to select and filter job candidates, there are reasons for concerns. In this paper, we'll examine the legal and ethical consequences of using social media in the area of human resource management.

Key words: Social media; Twitter and Facebook; Human Resources Professionals; Legal and Ethical.

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1 INTRODUCTION

Now more than ever we live in a society saturated with technology and media. We are captured by the technology whirlwind such as the internet, instant messages, emails, and social media such as Twitter and Facebook. Technologies not only are changing the way people live, work, and interact with each other but also the way companies conduct their businesses. Social media no doubt is one of such technologies that enables companies to market their products and services in new and unique dimensions. Beyond marketing, social media is also changing the way human resource professionals recruit and select employees.

Recruiting and selecting potential new employees using social media, also referred to as e-recruiting or e-sourcing in this writing, is gaining popularity. There are even software programs that capitalize on the information available on social media sites to assist human resources professionals to source, screen, and track job applicants. Although there are many advantages in using social media networks to assist HR to select and filter job candidates, there are reasons for concerns.

Both Borgmann (Borgmann, 1984) and Jonas (Jonas, 1974) are greatly concerned with the moral effects of technological culture while Hogue resonates with Borgmann and Jonas and contends that one of the primary challenges of our time is to think critically through technology's cultural pattern rather than simply its particular application (Hogue, 2007).

Borgmann argues that technology replaces the relatedness of the world by machineries thereby causing relational and contextual disengagement. On the other hand, as Hogue summarized in (Hogue, 2007), Jonas characterizes historical technology as a possession and state constrained within equilibrium of ends and means - technology was developed to give ends to human desires and needs.

However, as Hogue reflected in (Hogue, 2007), Jonas asserts that new technologies "suggest, create, even impose new ends, never before conceived" and therefore radically transform "the very objectives of human Desires." As pointed out in (Hogue, 2007), Jonas warns that ethics must face the lengthening arm of human power and its dilated orbit of consequences in contrast to the traditionally relatively compressed context of effects correlated to the short arm of human power.

Technology is no longer merely the extension of human efficacy and demands new ways of thinking ethically (Hogue, 2007). Therefore, in addition to think about as to how to use technologies to meet our needs, we also need to be concerned with the moral and ethical consequence of employing technologies. What is our ethical responsibility of working with technologies? What are the legal consequences of adopting technologies?

In this paper, we'll examine the legal and ethical consequences of using social media in the area of human resource management. First, we'll compare the use of social media to more formalized methods of recruitment. Afterwards, we'll explore the legal consequence of e-recruiting in terms of discrimination of race, age, gender, sexual orientation, country of origin, **marital status,** religious background, and **political affiliation.**

We'll also consider privacy issues associated with e-recruiting. Finally,

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we'll perform an ethical analysis and probe the ethical implication of e-recruiting.

2. COMPARISON BETWEEN RECRUITMENT USING SOCIAL MEDIA AND TRADITIONAL METHODS

Recruiting using social media has the advantage of fine tuning and targeting to specific people, although this could lead to legal consequences. For example, companies can create sponsored groups on social media sites to attract and source potential job seekers. Companies can usually leverage social media sites by providing more detailed information regarding the nature of the job, corporate culture, and career advancement opportunities. In addition, organizations can choose a specific social media site to target people, for instance, with specific skills and background. This would be, at least quite costly if not difficult, for traditional recruitment methods such as newspaper, professional publications, and trade magazine advertisements to match.

On the other hand, e-recruiting is only applicable for targeting certain sectors of the job market. For example, in my opinion, e-recruiting can be highly effective for technology-oriented positions but less productive for nontechnology-based jobs.

E-recruiting enables job applicants to apply for job opening and submit resumes online. As a result, information about them can be stored electronically inside databases. This not only opens up the opportunity for data mining but also allows companies to effectively and efficiently establish an easy-to-access talent pool. The talent pool can be snowballed into even bigger pool because birds of the same feather flock together. On the other hand, information received from job applicants via traditional recruitment sources such as internal candidates, referrals and networking, recruiters and job agencies, colleges and universities, and newspaper, professional publications, and trade magazine advertisements can be in a variety of forms such as email, paper, and fax. Centralizing such diverse forms of information in a consistent and uniformed format can be extremely difficult and costly. Thus, data mining using traditional recruitment methods is almost impossible.

In addition, with e-recruitment, software can be used to process and filter job applicant data efficiently. Sorting through them manually can be a time-consuming and daunting task, as is the case with traditional recruitment methods. However, software recruiting tools may be buggy and less flexible towards job applicants which may bring about undesirable results. On the other hand, this kind of errors can certainly be avoided when human beings intervene.

The internet is ubiquitous. Therefore, job postings on social media sites can be accessed at any time and from anywhere. Its global reach empowers organizations using e-sourcing to attract talents and find the best candidate.

Further, e-recruitment is highly interactive and dynamic. Traditional methods of recruitment are just the opposite. They are static, constrained by time, and usually limited geographically.

E-recruitment is cost-effective and can easily be automated.

On the contrary, traditional methods are more costly and manual-oriented.

Even though recruiting using social media has many advantages, it cannot negate the value of traditional ways of sourcing job applicants. Both methods should be used to complement each other.

This is especially true in light of legal implications.

An obvious disadvantage associated with e-recruitment is that it can be challenged as discrimination if it is the

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only means for advertising job availability. Traditional recruitment methods, therefore, can be used to augment e-recruitment to

provide equal opportunities to everyone and amplify the effectiveness.

Now let's turn out attention to selecting or screening job candidates using social media. Much more information can be learned about a job candidate via e-screening than traditional methods such as face-to-face interviews and references.

First of all, public postings and photos on social media sites may reveal a lot of information about a job candidate.

There are also ways, whether ethical or not, to be friended with a candidate so protected or private content can be obtained. Such information can paint a more comprehensive picture of the candidate than is available via traditional methods such as face-to-face interview. If used and examined properly, the information available from social mediate sites can help an employer make more informed decisions.

On the other hand, information such as sexual orientation, pregnancy, country of origin, **marital status,** religious background, and **political affiliation** may be readily available as well. Many of these characteristics are protected by federal, state or local laws. Once a person has seen such information, it would be almost impossible to unlearn it. As discussed earlier, relying protected characteristics to eliminate job candidates can subject an organization to lawsuits. It should be pointed out that software tools can be utilized to filter out protected characteristics. Nevertheless, note that this would not be an issue with traditional methods such as interviews since questions leading to such information are prohibited.

A job candidate can paint an exceptionally rosy picture on his or her social media sites and are only telling you what he or she wants to tell you, similar to what can be done on a resume. In this case, traditional face-to-face interview has a clear advantage. An experienced interviewer can discern the truthfulness and the accuracy of the information provided by the interviewee via face to face and eye contact. Social media information can certainly been used, for instance, as an extension of a job applicant's resume.

Although one can used the information available on social media sites to derive whether a person has used drug or not, it is both unwise and unnecessary because the alternative approach of using traditional drug test is more accurate and at the same time does not carry any legal risks whatsoever. The same applies to the traditional methods such as background checks, physical ability tests, cognitive ability tests, work samples, and honesty tests. Last but not the least, with e-screening, software applications can be deployed to automate and streamline the entire process.

Although using social media for selection or screen carries potential risk, it should be leveraged to its full extent and be integrated with traditional methods to given an organization a competitive advantage to recruit the best of the best.

As a final note, large and technology based companies probably have an unfair advantage over smaller and non-technology based companies and are most likely to use social media for both recruitment and screening.

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The following table compares e-screening with traditional selection methods such as face-to-face interviews, references, background checks, physical ability tests, cognitive ability tests, work samples, honesty tests, and drug tests.

	Reliability	Validity	Generalizability	Utility	Legality
E-screening	Low	Low	Low	High	Have legal implications, for example, when protected characteristics are used.
Interview	Low to high	Low to high	Low	Low	Low
Reference	Low	Low	Low	Low	People writing letters may be concerned with charges of libel
Physical Ability Test	High	Moderate criterion validity, high content validity for some jobs	Low	Moderate for some jobs	Often have adverse impact on women and people with disability
Cognitive Ability Test	High	Moderate criterion validity, content validation inappropriate	High for most jobs	High	Often have adverse impact on women and people with disability
Work Sample	High	High criterion and content validity	Usually job specific	High	High
Drug Test	High	High	High	Expensive but potentially high payoffs	May be challenged on invasion-of-privacy grounds

2.1 Legal Implications

According to Hampton, Goulet, Rainie, and Purcell [1], the majority of social network users are between the ages of 18 and 49. As shown in Figure 1 below, in 2008, about 90% social network users were between the ages of 18 and 49 while only 10% of them were older than 50, although this number increased to 26% in 2010. Figure 2 below reveals similar statistics. Figure 3 indicates that there are more female social network users than male while Figure 4 illustrates similar gender differences except that there are more male users on LinkedIn, a professional social network site. In terms of race and ethnicity, only 10% of the people on social media networks are African Americans and that number is only 2 percent on LinkedIn. As one can easily conclude based on the above information that (1) minority is underrepresented on social media sites, (2) people older than 50 are underrepresented, and (3) there are disparities between male and female on different social media sites.

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Therefore, recruiting via social media networks, especially from sites such as LinkedIn, subjects underrepresented groups to discrimination in the form of disparate treatment and does not ensure

that everyone, regardless of race, age, and gender, has equal employment opportunities. It can easily be challenged on the ground of discrimination.

Also, research shows that younger people are more likely to engage in self-disclosure online than in person. Hence, screening using social media arguably is unfair to younger job applicants.

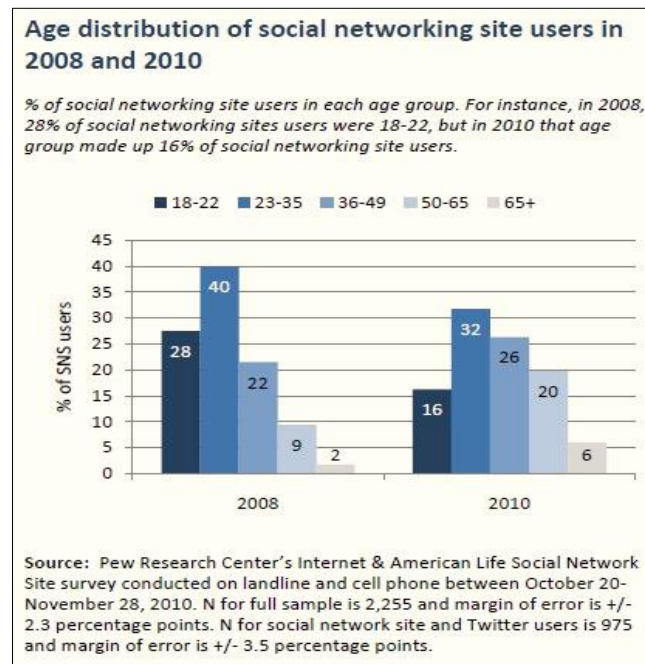**Figure 1: Age Distribution of Social Network Sites Users [1]**

Age distribution of social networking site users in 2008 and 2010

% of social networking site users in each age group. For instance, in 2008, 28% of social networking sites users were 18-22, but in 2010 that age group made up 16% of social networking site users.

■ 18-22 ■ 23-35 ■ 36-49 □ 50-65 □ 65+

Age group	2008	2010
18-22	28	16
23-35	40	32
36-49	22	26
50-65	9	20
65+	2	6

% of SNS users

Source: Pew Research Center's Internet & American Life Social Network Site survey conducted on landline and cell phone between October 20-November 28, 2010. N for full sample is 2,255 and margin of error is +/- 2.3 percentage points. N for social network site and Twitter users is 975 and margin of error is +/- 3.5 percentage points.

Figure 2: Age Distribution by Social Network Sites Platform [1]

Age distribution by social networking site platform

% of social networking site users on each site who are in each age group. For instance, 29% of MySpace users are 18-22 years old.

■ 18-22 ■ 23-35 ■ 36-49 □ 50-65 □ 65+

Age group	MySpace	Facebook	LinkedIn	Twitter	Other SNS
18-22	29	16	6	26	28
23-35	42	33	36	34	28
36-49	17	25	32	24	21
50-65	10	19	23	13	19
65+	3	6	4	4	4

% of users

Source: Pew Research Center's Internet & American Life Social Network Site survey conducted on landline and cell phone between October 20-November 28, 2010. N for full sample is 2,255 and margin of error is +/- 2.3 percentage points. N for social network site and Twitter users is 975 and margin of error is +/- 3.5 percentage points.
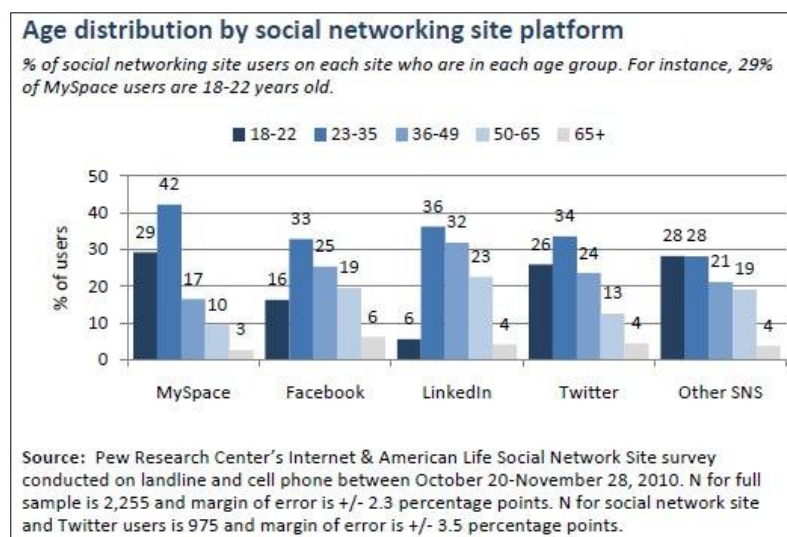
Figure 3: Gender Distribution of Social Network Sites Users [1]
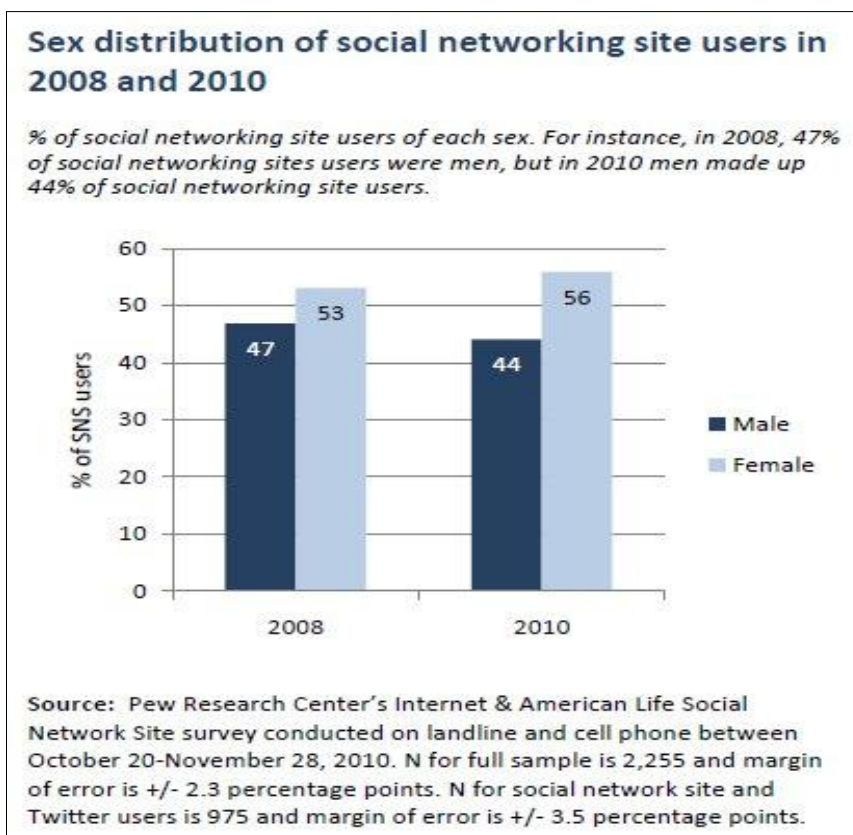
Figure 4: Gender Distribution by Social Network Sites Platform [1]

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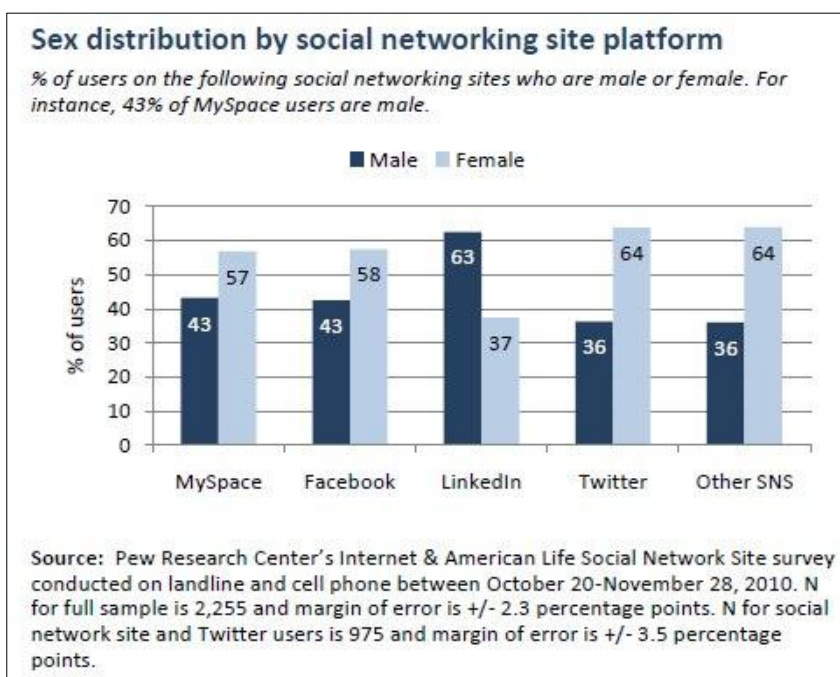
Furthermore, on social media sites, it is very easy to see information that is prohibited from inquiry during traditional selection venues such as face-to-face interviews. For example, pictures posted on social media network sites could reveal that a job candidate has young children or may expose a job candidate's disability.

Postings on social media sites may indicate that a job applicant's sexual orientation, country of origin, **marital status,** religious background, and **political affiliation**. Many of these characteristics are protected by federal, state or local laws. An organization can open itself up for lawsuits if such information is used to eliminate job candidates.

Also, an employer can choose to use a third party vendor to perform background screening. However, to comply with FCRA, the employer must obtain candidates' consent. The same rule can be applied to using social media for screening. An employer should obtain candidates' approval to avoid legal consequences.

Just as importantly, there are privacy issues that must be considered when using social media for recruiting and selecting job applicants. In general, public postings on public websites are not considered to be private. However, a posting should be considered private if it is password protected or marked as either protected or private. Attempts to gain access to private content on a job candidate's social media sites, by being "friended" both directly or indirectly, can be considered as invasion to privacy and is unethical. Even if the postings are public, accessing and using the information for job decision violate the 1st Amendment freedom of speech rights or privacy acts such as HIPPA, online privacy laws such

as the Electronic Communication Privacy Act and the Stored Communication Act, the Family Education Rights and Privacy Act, and Information Privacy laws.

Other areas of concerns are information accuracy and relevancy. Information posted on social networking sites may not be accurate. Job candidates may publish information on their social media pages that is opposite of who they really are in real life. They may project themselves as perfect citizens when they are nothing but. The information could be pretentious to project a positive image or otherwise. It could be exaggerated to be humorous or to be acceptable by certain groups. It could also be experimental. On the other hand, a person may post inaccurate and unfavorable information about other people either intentionally or unintentionally or just as a practical joke.

Further, pictures posted can easily be altered given the sophistication of today's technology. Therefore, it is not a good idea to judge people either positively or negatively based on the information on the internet.

Even if the information is deemed to be accurate, one still needs to discern whether it is job relevant or not. While it is acceptable to disqualify a candidate with traits that are contradictory to job requirements, it is wrong to reject someone who seems to have acted "funny". How do you interpret the information? In addition, the off-duty law prevents employers from taking adverse actions based on employee's lawful off-duty activities. Ethical and legal boundaries can easily be crossed if lawful off-duty activities are used in hiring decisions.

Facebook has policy statements declaring its non-commercial status. Using Facebook for recruiting and screening purposes may be considered a commercial use of the website. The Stored Communication Act makes it a punishable offense to intentionally access a site like Facebook without permission. Knowing

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this, does your organization really want to "poke" into other people's private lives using social media sites such as Facebook?

Is it ethical to persuade your current employees to either share private

and confidential information about a job applicant or extent friend status in an effort to gain additional information? We'll investigate the ethical aspect in the next section.

3.   ETHICAL IMPLICATIONS

In this section, **we'll perform an ethical analysis and probe the ethical implication of e-recruiting** using

Schuman's ethical framework. Based on our analysis, recruiting and screening using social media in general is unethical, especially when the information is obtained without explicit consent.

3.1   Analysis Based on Utilitarian Principle

The Pew Research Center's Internet & American Life Project surveyed the social network landscape and examined the demographics of the social network users [1]. Figure 1 and Figure 2 exhibited in section 1 illustrate the age distribution of social network sites users

and age distribution by social network sites platform respectively. On the other hand, Figure 3 discloses the gender distribution of social network sites users while Figure 4 documents the gender distribution by social network sites platform. Figure 5 below exemplifies the race and ethnicity by social network site platform.

Figure 5: Race and Ethnicity by Social Network Site Platform [1]

Race and ethnicity by social networking site platform

% of users on the following social networking sites of each race/ethnicity. For instance, 70% of MySpace users are white.

	MySpace	Facebook	LinkedIn	Twitter	Other SNS
White	70%	78%	85%	71%	68%
Black	16%	9%	2%	9%	13%
Hispanic	12%	9%	4%	12%	9%
Other Race	14%	12%	13%	21%	19%

Source: Pew Research Center's Internet & American Life Social Network Site survey conducted on landline and cell phone between October 20-November 28, 2010. N for full sample is 2,255 and margin of error is +/- 2.3 percentage points. N for social network site and Twitter users is 975 and margin of error is +/- 3.5 percentage points.

As we can see clearly from these figures, the majority of social network users are between the ages of 18 and 49.

As has already been digested in section 1, Figure 1 affirms that about 90% social network users are between the ages of 18 and 49 while only 10% of them were older than 50, although this number is

trending up. Figure 2 informs similar statistics. Figure 3 demonstrates that there are more female social network users than male while Figure 4 explains similar gender differences except that there are more male users on LinkedIn. In terms of race and ethnicity, only 10% of the people on social media networks are African

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Americans and that number is only 2 percent on LinkedIn.

We can safely conclude, based on the above statistics, that the demographics of the people on social media networks are not the same as that of the general population.

Therefore, recruiting exclusively via social media networks does not provide fair and equal accesses to all the qualified job candidates, regardless of age, race, and gender. Such practices can be challenged on the ground of discrimination.

Discrimination is unethical based on the utilitarian principle because it does not produce the most good and the least harm for an organization, its employees, job seekers, customers, shareholders, and the society as a whole. This is because hiring the most qualified person, regardless of that person's gender, race, or age, benefits the company, its products and services, its customers and shareholders, and the society as a whole.

When it comes to selecting via social media networks, first of all, the process is obviously skewed. Job candidates who are members of social media networks have clear advantages over those who are not. Again, as illustrated by the statistics discussed above, job candidates in the protected classes are excluded. This is discrimination. Furthermore, a potential job seeker may post information such as native country and religious background on social network sites. Also, pictures can disclose whether a person is pregnant or disabled. If such information is used to eliminate a job applicant, then this constitutes discrimination again, which is unethical based on the utilitarian principle.

Second, the practice of using social networks to screen job candidates is questionable. It is perfectly OK to reject job candidates with personal characteristics that will result in unacceptable job performances. However, the key issue is to separate a job candidate's personal life from his/her professional career. Screening decisions based on factors unrelated to job kills prevents an organization from hiring the most qualified person, which is unethical based on the utilitarian principle as we have already established above.

3.2 Analysis Based on Rights Principle

Using social networks for recruiting will fail the reversibility test.

One would not want to be excluded from job opportunities just because one does not use social media networks. Using social networks for recruiting fails the universalizability test as well since one would not want to live in a world where only those who are members of social networks are employed. We have already established that recruiting via social media networks excludes job candidates of certain race and age and therefore can be classified as discrimination. Certainly, when one discriminates, one does not treat people with respect. Consequently, using social networks for recruiting violates the respect/free consent rule.

On the other hand, some people would not object the use of social media for screening them as job candidates while other may. So there is a conflict.

However, the interests of the job seekers are more important and therefore selecting job candidates using social media is unethical with respect to the reversibility rule. Similar to the argument made against using social media for recruiting, using social networks for screening also fails the universalizability test since one would not want to live in a world where only those who are members of social networks have a chance in getting employed. Also, once an organization has used social media to

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screen one job applicant, then it has to do it for everyone!

In terms of the respect/free consent rule, whether it's ethical or not to use social media for screen is dependent on if the job seeker has explicitly given the permission to do so or not. It not, then the person has not been treated in the way that

3.3 Analysis Based on Distributive Justice Principle

Recruiting and screening using social media will result in unfair results and unfair distribution of benefits and costs. From egalitarianism's point view, people who use social media networks gain most of the benefits while those who do not use social networks will not be benefited at all. So this is unfair.

Capitalism doesn't apply to this situation. Socialists would have issues with recruiting and screening using social media because those who are capable of using social networks probably are much better off than those who don't. The people who are not capable of accessing social networks most likely are the people with the greatest needs.

Libertarians would find recruiting using social media to be unfair because people without social network accounts would not have chosen to be excluded. With respect to screening using social media, similar to the respect/free consent rule, it depends on whether the job candidates have consented or not.

Finally, applying Rawls' principle, recruiting and screening using social media doesn't provide the groups that do not use social networks with equal liberties and opportunities. Hence, it is unethical under the microscopes of the distributive justice principle.

Therefore, based on the distributive justice principle, recruiting using social media is unethical while selecting using social networks is unethical if it is not agreed upon by job candidates.

he or she has freely consented to be treated and therefore is unethical. Otherwise, it is ethical.

Therefore, based on the rights principle, recruiting using social media is unethical while selecting using social networks is unethical if it is not approved by job seekers.

3.4 Analysis Based on Caring Principle

There is no special relationship between a job seeker and a potential employer. Therefore, the caring principle doesn't apply to recruiting and screening using social media. However, people who are connected via social network sites do have special relationships among them. A friend of a job seeker can "friend", without the permission of the job seeker, the potential employee to give the employer access to the job seeker's profile. In this case, such action by the friend does not act in the best interest of the job seeker and therefore does not care for the needs of the job seeker. Consequently, under this circumstance, screening using social media violates the caring principle and is unethical.

3.5 Analysis Based on Virtue Principle

Finally, as far as the virtue principle is concerned, recruiting and screening using social media neither display virtues nor vices. However, under the circumstance where an employer gained access to a job candidate's social network profile without permission, the employer would have displayed vices instead of virtues because the action is cowardice, selfish, neglect, and dishonest. Hence, it is unethical.

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In conclusion, based on the analysis using Schuman's ethical framework, recruiting and screening using social media in general is unethical, especially under the circumstances where an employer gains access to a job applicant's social network profile without explicit consent.

## 4.	CONCLUSION

In conclusion, based on the analysis provided in this paper, recruiting via social media networks, especially from sites such as LinkedIn can easily be challenged on the ground of discrimination. An organization can open itself up for lawsuits if information that is prohibited from inquiry during traditional selection venues such as face-to-face interviews is used to eliminate job candidates. Such information includes job applicant's pregnancy, disability, sexual orientation, country of origin, **marital status,** religious background, and **political affiliation.** Also, screening using social media arguably is unfair to younger job applicants.

Analysis using Schuman's ethical framework suggests that recruiting and screening using social media in general is unethical, especially under the circumstances where an employer gains access to a job applicant's social network profile without explicit consent.

Other areas of concerns include privacy issues as well as information accuracy and relevancy. In terms of privacy, attempts to gain access to private content on a job candidate's social media sites, by being "friended" both directly or indirectly, can be considered as invasion to privacy and is unethical. On the other hand, Information posted on social networking sites may not be accurate.

Therefore, it is not a good idea to judge people either positively or negatively based on the information on the internet. Even if the information is deemed to be accurate, one still needs to discern whether it is job relevant or not.

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