





# Risks Engendered by Use of Social Media in Recruitment

## 社交媒体引起的招聘 风险

In recruitment, the use of personal information collected via social media platform may create risks of discrimination and privacy invasion.

招聘过程中，通过社交媒体平台收集并使用个人资料可能为雇主带来歧视和侵犯隐私的潜在风险。

With the revolution of information technology, social media such as Facebook, LinkedIn, YouTube, Flickr and Twitter etc. has become an integral part of the way we live. It does not only permeate our personal lives, but also our workplace.

While it is now pervasive for employees to share work-related information online, there is also an explosion in employers monitoring social media for the purpose of recruitment or employees management. Monitoring social media usage may rightly or wrongly be undertaken at any stage in an employment relationship, from vetting job applicants to assessing their suitability for employment, to monitoring current employees' usage of social media

to determine if such usage is exposing the organisation to any risks or challenges, and to checking ex-employees' social media activities to ensure confidential information has not been leaked.

Although there are obvious benefits associated with social media usage in the workplace, such usage at the same time can create legal risks if it is done in the wrong way or for the wrong reasons.

## WHAT ARE THE RISKS?

Managers involved in recruitment may often be tempted to check out a job applicant's social media as this allows them to ascertain the job applicant's work ethic, attitude towards previous employers, writing and communication skills and extra-curricular activities in ways which are not viable in an interview. However, employers need to be mindful of the potential legal consequences associated with using social media in the recruitment process.

In essence, there are two types of potential risks associated with this. First, this may lead to the risk of discrimination. Second, this type of background check may also infringe a job applicant's personal data privacy rights.

### Risk of discrimination

In Hong Kong, employers should afford all job applicants equal opportunities in the recruitment process. It is unlawful to discriminate against a person on the grounds of sex, marital status, pregnancy, family status, disability and race in relation to employment. These protected attributes are found in four ordinances, namely the Sex Discrimination Ordinance (Cap. 480), Disability Discrimination Ordinance (Cap. 487), Family Status



**JULIA GORHAM**

PARTNER, HEAD OF EMPLOYMENT - ASIA

合伙人，劳动雇佣业务部负责人



**ANITA LAM**

OF COUNSEL, SOLICITOR ADVOCATE

资深顾问、讼辩律师

**WUNDY LEE**

TRAINEE SOLICITOR

见习律师



随着资讯科技的进步，Facebook、LinkedIn、YouTube、Flickr 和Twitter等社交媒体成了我们生活中的一部分。社交媒体不仅渗透到我们的个人生活，还渗透到我们的职场。

现在，员工在网络上分享工作相关信息的情况很普遍，雇主为招聘或员工管理而监控社交媒体的情况也呈现爆炸式增长。在雇佣关系的任何阶段，从审核求职者以评定其是否适合招聘岗位，到监控在职员工使用社交媒体的情况以确认其使用是否将雇主置于风险或难题之中，到查看前雇

员的社交媒体活动以确认其是否泄露了公司的保密信息，雇主均有可能在正确或错误地监控着社交媒体。

尽管在工作中使用社交媒体的好处显而易见，但如果使用方式或目的不当，则可能产生法律风险。

### 存在哪些风险？

招聘经理往往忍不住查看求职者的社交媒体，确认其职业道德、对前雇主的态度、写作技巧、沟通技巧以及业余活动。这些都是难以在面试中观察到的。然而，雇主应该留心在招聘过程中使用社交媒体相关的潜在法律后果。

本质上，潜在风险有两类：第一，歧视风险；第二，这种背景调查的方式可能侵犯求职者的个人资料隐私权。

Discrimination Ordinance (Cap. 527) and Race Discrimination Ordinance (Cap. 602).

Turning down job applicants or treating them less favourably because of their sex, marital status, pregnancy, family status, disability and race may constitute unlawful discrimination.

Online social media profile of the job applicants may contain personal data, such as their marital status, family status, physical condition, pregnancy and religion peculiar to their race. These are protected attributes. As such, it is unlawful for an employer to ask a job applicant about these matters during the interview and use them as a basis of not hiring the job applicant. For instance, if an employer rejects a job applicant having learnt from his social media account that he is a single parent (which otherwise would not be disclosed in the interview and application documents), the job applicant may legitimately argue that this amounts to family status discrimination. Even if such information is merely viewed, discussed and not used in coming to a decision, the employer may still have difficulty in proving in subsequent investigation or litigation that the information had no effect on the decision-maker. Vetting and collecting information through social media may lure the employers to unconsciously cross the line to engage in unlawful, discriminatory hiring practices and in turn open a gate for complaints of discrimination from unsuccessful job applicants.

It is therefore important for employers to be aware of the danger and risks of vetting job applicants through social media. Job applicants should also be aware of the risks in sharing information on the social media sites and that it is not necessarily advisable for every aspect of their lives to be made

### 歧视风险

在香港，雇主在招聘过程中应为所有求职者提供平等机会。就雇佣范畴而言，因性别、婚姻状况、怀孕、家庭岗位、残疾和种族而歧视他人是违法的。这些受保护类别出现在四部条例中：《性别歧视条例》（第480章）、《残疾歧视条例》（第487章）、《家庭岗位歧视条例》（第527章）和《种族歧视条例》（第602章）。

因此，就性别、婚姻状况、怀孕、家庭岗位、残疾和种族而拒绝求职者或给予该求职者比他人较差的待遇，则可能构成非法歧视。

求职者的社交媒体资料可能包含了个人资料，如其婚姻状况、家庭岗位、身体状况、怀孕和种族特有的宗教信仰。这些是受保护的类别。因此，雇主如果在面试中问及个人资料，并以此决定不予录用，那就可能存在歧视。例如，如果雇主从求职者的社交媒体账户了解到他/她是位单身父亲/母亲（在面试和申请材料中不可能披露的信息），并拒绝其职位申请，该求职者可能可以合理地争辩说这是家庭岗位歧视。然而，即使雇主仅仅看到、讨论了这些信息，并没有依此做出决定，雇主仍然可能难以在接下来的调查或诉讼中证明，这些信息对决策者没有产生影响。通过社交媒体审核、搜集信息可能让雇主无意识地跨越了非法歧视的红线，可能为失意求职者投诉就业歧视敞开了大门。

因此，雇主应该知晓通过社交媒体审核求职者的危险和风险。这点很重要。求职者同样应该了解在社交媒体网站上分享信息的风险。将自己生活的方方面面公之于众，并不





publicly available. Reviewing the privacy setting of their social media accounts may well be the first step to prevent their personal information from being used to their disadvantage during job search.

### Risk of Privacy Invasion

In Hong Kong, the collection, use, retention and security of personal data of an individual is governed by the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO").

The PDPO defines "personal data" very broadly and it essentially includes any data (i) relating directly or indirectly to a living individual from which it is practicable to directly or indirectly ascertain the identity of such an individual; and (ii) in a form which is practicable to access or process. Since the information obtained about a job applicant through social media will most likely satisfy the definition of "personal data" under the PDPO, employers have to be conscious about not breaching the legal requirements relating to collecting, using and handling such information.

The core objective of the PDPO is materialised through six data protection principles ("DPPs"). In general, the employers should take note of the following:-

- They should not collect personal data of the job applicants unless the data is necessary for recruitment and not excessive (DPP 1(1)). While there is no definition as to what amounts to an excessive data collection, the "Code of Practice on Human Resources Management" published by the Office of the Privacy Commissioner for Personal Data ("**Privacy Commissioner**") provides that data relevant to a recruitment exercise may include "work

*experience, job skills, competences, academic/professional qualifications, good character and other attributes required for the job".* <sup>[1]</sup>

- They should collect personal data by means which are lawful and fair (DPP 1(2)).
- They should take all practicable steps to ensure that the personal data of the job applicants collected from social media is accurate if it is to be used for recruitment (DPP 2).
- They should take all practicable steps to ensure that the job applicants can ascertain their personal



明智，也没有必要。要防止个人资料在找工作过程中被不合理利用，检查自己社交媒体账号的隐私设定是可以做的第一步。

### 侵犯隐私的风险

在香港，个人资料的收集、使用、保留和安全是受《个人资料（隐私）条例》（第486章）（"PDPO"）所规管。

PDPO对“个人资料”的定义很广，本质上包括以下任何资料：(i) 直接或间接与一名在世的个人有关的；从该资料可直接或间接地确定有关个人的身份；(ii) 该资料的存在形式令予以查阅及处理均是切实可行的。鉴于通过社交媒体获得的求职者相关资料很大机会会符合PDPO项下“个人资料”的定义，雇主应小心谨慎，不要违反收集、使用和处理该等信息相关的法律要求。

PDPO的核心目标体现在六个资料保障原则（DPP）中。一般来说，雇主应注意以下事项：

- 除非资料与雇佣有关，否则雇主不应收集求职者的其他个人资料，但收集相关资料不得超乎适度（DPP 1 (1)）。鉴于“超乎适度的资料收集”没有明确定义，个人资料隐私专员（“隐私专员”）公署制定的《人力资源管理实务守则》提及了招聘活动相关的资料可能包括“工作经验、工作技能、能力、学术/职业资格、性格合适和工作要求的其他方面”。<sup>[1]</sup>
- 雇主应合法、公平地收集个人资料（DPP 1 (2)）。
- 社交媒体上信息的可信度可能并不确实。如果需要为招聘目的收集个人资料才使用，雇主应采取所有切实可行的步骤，确保从社交媒体收集求职者信息的准确性（DPP 2）。

- 雇主应采取所有切实可行的步骤，确保求职者能确定雇主在个人资料方面的政策和实务，能获告知雇主所持有的个人资料及该些资料是为什么目的而使用的（DPP 5）。
- 如果求职者提出要求，雇主必须允许求职者查阅其持有的个人资料，且在个人资料有误的情况下，允许求职者改正资料（DPP 6）。

如果雇主不恰当地收集或处理从社交媒体获得的个人资料，员工可能向隐私专员投诉。如果案件成立，隐私专员可向雇主发出执行通知。不遵守执行通知属于违法行为，雇主会面临50,000港元的罚款和两年有期徒刑。

### 实用小贴士

为避免承担歧视和侵犯隐私的责任，雇主应考虑：

- 制定使用社交媒体调查求职者相关的政策；
- 检查招聘的指导方针和实践，确保符合香港反歧视条例和PDPO的规定；
- 就有效、合规地使用社交媒体培训招聘团队；
- 从一开始就通知求职者，可能将从社交媒体收集个人资料，作为审核的一部分，并要求求职者签署个人资料收集声明；
- 如果公司使用社交媒体资料审核求职者，应只在通常含有职业和简历类信息的商务社交网站（如LinkedIn）进行搜索，而不应从很可能包含求职者社交和个人生活相关信息的社交网站（如FaceBook）收集信息；
- 聘请不参与雇佣决定的中立方在商务社交媒体上搜索信息，使其仅报告可在雇佣决定中合法使用的信息。👉

<sup>[1]</sup> 《人力资源管理实务守则》，个人资料隐私专员公署出版，2000年9月



such notice is an offence and the employer may be liable to a fine of HKD 50,000 and imprisonment for two years.

### PRACTICAL TIPS FOR EMPLOYER

To avoid exposing themselves to liability for discriminatory hiring practices and privacy invasion, employers should consider the following:-

- put in place policies relating to the use of social media in vetting job applicants;
- review the recruitment guidelines and practices to ensure they comply with the Hong Kong anti-discrimination ordinances and the PDPO;
- train the recruitment team on effective and compliant use of social media;
- inform the job applicants at the outset that their personal information may be collected from social media as part of the vetting process, and ask the job applicants to sign a personal information collection statement;
- if the company is to vet job applicants using information collected from social media, it should only conduct searches on business networking sites (such as LinkedIn) which usually contains professional and resume-style information. Do not collect personal data from social networking sites (such as FaceBook) which most likely contains information relating to a job applicant's social and personal life; and
- use a neutral party not involved in making the recruitment decision to conduct the search on business networking social media and report only information which can legitimately be used in the hiring decision. 👉

<sup>[1]</sup> Code of Practice on Human Resources Management published by the Office of the Privacy Commissioner for Personal Data, dated September 2000

data policies and practices, be informed of the kind of personal data they hold and how the data is to be used (DPP 5).

- If requested, they must allow a job applicant to access the personal data they hold and make corrections if such data is inaccurate (DPP 6).

Any improper collection or handling of personal data collected from social media could expose an employer to complaints to the Privacy Commissioner for Personal Data, who may issue an enforcement notice against the employer if the case is established. Failure to comply with