

## Facebook Background Checking: Shouldn't Smart Applicants Check Their Privacy Settings?

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I have written [here](#) and elsewhere that I think the trend in state legislatures to limit employers' ability to look at social media has gotten out of hand. Very few employers are demanding Facebook and other social media passwords, so legislation limiting that "practice" may scratch an itch, but has little practical impact, at least until legislatures intentionally or inadvertently expand the scope of those statutes to restrict other less intrusive practices – such as looking at information that applicants and employees make publicly available! It seems that at some point we should have a measured discussion that recognizes the reality that there is a lot of useful information about people on the internet that, for various reasons, employers should be looking at and that we can collectively figure out how to allow that without enabling discrimination. So Kashmir Hill's blog post, "[What Employers Are Thinking When They Look at Your Facebook Page](#)," sharing some of the feedback she got on an earlier post about a study suggesting that employers can judge future work performance by examining an applicant's Facebook page, caught my eye. The post does not address the legal aspects of this debate, but rather focuses on the practicalities of what individuals should reasonably expect when they publish information about themselves. She closes the post featuring the following comment she received: "Any candidate worth considering should be smart enough to set their privacy settings in order to hide all content from any potential employer." Hard to argue with that. The obvious question for employers is: If that is true, shouldn't employers be smart enough – and allowed – to look at the information that candidates who are *not* smart enough are publishing demonstrating that they would not be good employees? This is a fluid legal area that employers should not navigate without the assistance of counsel, but employers should strongly consider doing what they can in this regard under the laws applicable to them. And surely at some point the legislative pendulum is going to swing back after a few headlines above candidates whose Facebook pages *should* have been reviewed and were not.

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