

## **Tennessee Passes The Employee Online Privacy Act of 2014**

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The emergence of new social media outlets has formed a unique intersection of public and private information. This intersection has created a number of widely debated legal issues, most notably one's right to online privacy. Although social media websites are arguably part of the public domain, many social media users share private information with a select group of individuals and expect such information to be protected from public exposure. However, many employers believe they have a right to access information their employees and applicants share on social media. As a result, some employers demand access to private social media accounts.

In an effort to guard the privacy of employees, several states have passed laws prohibiting employers from requiring an employee or applicant to give the employer access to the employee or applicant's personal social media account. In 2012, Maryland<sup>1</sup>, Illinois<sup>2</sup>, California<sup>3</sup>, and Michigan<sup>4</sup> all passed laws preventing employers from requiring applicants or employees to provide access to private social media accounts. In 2013, Arkansas<sup>5</sup>, Colorado<sup>6</sup>, Nevada<sup>7</sup>, New Jersey<sup>8</sup>, New Mexico<sup>9</sup>, Oregon<sup>10</sup>, Utah<sup>11</sup>, and Washington<sup>12</sup> followed suit. In 2014, the list expanded to include Louisiana<sup>13</sup>, Oklahoma<sup>14</sup>, and Wisconsin<sup>15</sup>. New Hampshire recently passed online privacy legislation which will become law on September 30, 2014<sup>16</sup>.

In addition to these states that have passed online privacy legislation, Maine<sup>17</sup> and Vermont<sup>18</sup> have authorized studies to more closely examine the issue. Furthermore, online privacy legislation is currently pending in Delaware<sup>19</sup>, Georgia<sup>20</sup>, Hawaii<sup>21</sup>, Iowa<sup>22</sup>, Kansas<sup>23</sup>, Massachusetts<sup>24</sup>, Minnesota<sup>25</sup>, Missouri<sup>26</sup>, Nebraska<sup>27</sup>, New York<sup>28</sup>, North Carolina<sup>29</sup>, Ohio<sup>30</sup>, Pennsylvania<sup>31</sup>, and Rhode Island<sup>32</sup>.

Now, Tennessee has joined the list of states with online privacy legislation with the recent passage of the Employee Online Privacy Act of 2014 (Online Privacy Act).<sup>33</sup> The Online Privacy Act, which will take effect on January 1, 2015, applies to any person or entity that employs one or more employees and includes the state and its political subdivisions as well as an agent, representative or designee of the employer.

The Online Privacy Act prohibits an employer from:

- Requesting or requiring an employee or applicant to disclose a password that allows access to a personal internet account;
- Compelling an employee or applicant to add the employer or an employment agency to his or her list of contacts associated with a personal internet account;
- Compelling an employee or applicant to access a personal internet account in the presence of the employer in a manner that enables the employer to observe the contents of the personal internet account; or

- Discharging, failing to hire, taking adverse action or penalizing an employee or applicant because of a refusal to disclose the password or comply with a request for one of the above prohibited actions<sup>34</sup>.

There are, of course, some exceptions. An employer is not prohibited from:

- Requesting or requiring an employee to disclose a user name or password required to gain access to an electronic communications device supplied by or paid for wholly or in part by the employer, or to gain access to an account or service provided by the employer that is obtained by virtue of the employment relationship, or that is used for the employer's business purposes;
- Disciplining or discharging an employee for transferring the employer's proprietary or confidential information or financial data to the employee's personal internet account;
- Conducting an investigation or requiring an employee to cooperate in an investigation if there is specific information on the employee's personal internet account regarding compliance with applicable laws or prohibitions against work related employee misconduct, or the employer has specific information about an unauthorized transfer of the employer's proprietary information, confidential information or financial data to the employee's personal internet account;
- Restricting or prohibiting an employee's access to certain websites while using an electronic communications device supplied by or paid for wholly or in part by the employer, or while using an employer's network or resources;
- Monitoring, reviewing, accessing or blocking electronic data stored on an electronic communications device that is supplied by or paid for wholly or in part by the employer, or stored on the employer's network;
- Complying with the duty to screen employees or applicants before hiring, or to monitor or retain employee communications, in accordance with applicable law;
- Viewing, accessing or using information about an employee or applicant that is available in the public domain; or
- Conducting an investigation or requiring an employee to cooperate in an investigation regarding compliance with applicable law or prohibitions against work related employee misconduct, or an investigation about the unauthorized transfer of the employer's proprietary information, confidential information or financial data to the employee's personal internet account<sup>35</sup>.

Individuals whose rights are violated under the Online Privacy Act may sue the employer and recover not more than \$1,000.00 in damages for each violation, plus reasonable attorney's fees and court costs<sup>36</sup>.

Although the Online Privacy Act takes effect on January 1, 2015 it will not apply to a contract entered into prior to that date that permits any action prohibited by the act unless the contract is renewed on or after January 1, 2015<sup>37</sup>.

I have advised for several years that employers should not require employees to disclose passwords for personal social media accounts or grant them access to those accounts. Now, employers who impose this requirement will violate the Online Privacy Act and face the consequences from doing so<sup>38</sup>.

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<sup>1</sup> See Md. Code Ann., Lab. & Empl. § 3-712 (West 2013).

<sup>2</sup> See 820 Ill. Comp. Stat. Ann. 55/10 (West 2014).

<sup>3</sup> See Cal. Lab. § 980 (West 2014).

<sup>4</sup> See Mich. Comp. Laws Ann. § 37.273 (West 2012).

<sup>5</sup> See Ark. Code Ann. § 11-2-124 (West 2013).

<sup>6</sup> See Colo. Rev. Stat. Ann. § 8-2-127 (West 2013).

<sup>7</sup> See Nev. Rev. Stat. Ann. § 613.135 (West 2013).

<sup>8</sup> See N.J. Stat. Ann. § 34:6B-6 (West 2013).

<sup>9</sup> See N.M. Stat. Ann. § 50-4-34 (West 2013).

<sup>10</sup> See Or. Rev. Stat. Ann. § 659A.330 (West 2014).

<sup>11</sup> See Utah Code Ann. § 34-48-201 (West 2013).

<sup>12</sup> See Wash. Rev. Code Ann. § 49.44.200 (West 2013).

<sup>13</sup> See H.R. 340, 40th Leg., Reg. Sess. (La. 2014).

<sup>14</sup> See H.R. 2372, 54th Leg., Reg. Sess. (Ok. 2014).

<sup>15</sup> See Wis. Stat. Ann. § 995.55 (West 2014).

<sup>16</sup> See H.R. 414, 163rd Gen. Ct., Reg. Sess. (N.H. 2013).

<sup>17</sup> See H.R. 838, 126th Leg., 2d Reg. Sess. (Me. 2014).

<sup>18</sup> See S. 7, 2013 Gen. Assemb., Reg. Sess. (Vt. 2013).

<sup>19</sup> See H.R. 308, 146th Gen. Assemb., 2d Reg. Sess. (Del. 2011).

<sup>20</sup> See H.R. 117, 152nd Gen. Assemb., Reg. Sess. (Ga. 2013).

<sup>21</sup> See H.R. 713, 27th Leg., Reg. Sess. (Haw. 2013).

<sup>22</sup> See H.R. 2339, 85th Gen. Assemb., 2014 Sess. (Iowa. 2014).

<sup>23</sup> See S. 53, 85th Leg., Reg. Sess. (Kan. 2013).

<sup>24</sup> See S. 2118, 188th Gen. Assemb., Gen. Ct. (Mass. 2013).

<sup>25</sup> See H.R. 293, 88th Leg., Reg. Sess. (Minn. 2013).

<sup>26</sup> See H.R. 1834, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014).

<sup>27</sup> See Neb. Leg. 58, 103rd Leg., Reg. Sess. (Neb. 2013).

<sup>28</sup> See S. 2434, 237th Leg., Reg. Sess. (N.Y. 2013).

<sup>29</sup> See H.R. 846, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013).

<sup>30</sup> See H.R. 424, 130th Gen. Assemb., Reg. Sess. (Ohio 2014).

<sup>31</sup> See H.R. 1130, 197th Gen. Assemb., 2013 Sess. (Pa. 2013).

<sup>32</sup> See H.R. 7124, 2014 Gen. Assemb., Jan. Sess. (R.I. 2014).

<sup>33</sup> See S. 1808, 108th Gen. Assemb., 2d Reg. Sess. (Tenn. 2014).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> I would like to thank Kate Hutcherson, a 2L at the William & Mary School of Law, for her contributions to this article.