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Varied Facebook Password Laws Could Plague Employers

By **Abigail Rubenstein**

Law360, New York (August 02, 2012, 10:09 PM ET) -- Illinois on Wednesday became the second state to enact a law banning employers from requesting passwords for Facebook and other social media accounts from employees and job applicants, reflecting a growing trend that attorneys say may lead to a patchwork of state laws that will create headaches for national employers.

The Illinois statute signed into law Wednesday by Gov. Pat Quinn, which takes effect Jan. 1, 2013, bars employers from demanding passwords or otherwise accessing the nonpublic portions of workers' social media profiles. It does, however, allow employers to view information that is not shielded by the owner with a privacy setting and does not prohibit employers from maintaining policies that govern their employees' access to social networking websites while at work.

In April, Maryland became the first state to pass a law forbidding employers from asking or requiring workers to disclose their social media account passwords; Illinois' Legislature passed its law in May. And as of late July, at least a dozen other states were considering similar legislation, according to the National Conference of State Legislatures.

Although legislation has also been proposed at the federal level, attorneys told Law360 that they expect the trend of states enacting these types of laws to continue and that at least a handful of states will likely put such laws on their books. As such, employers will need to be mindful of the differences in those laws when setting policies that impact workers in multiple states, attorneys say.

"Other states that are looking to extend similar protections to applicants and employees can follow the lead of Illinois and Maryland and use the law in those states to pattern their own law," said Carol A. Poplawski of Ogletree Deakins Nash Smoak & Stewart PC. "However, to the extent there are differences in the laws from state to state, national employers will have to tailor their practices to the laws of the states in which they employ individuals."

Even if the federal government does eventually pass its own law concerning employers' access to social media passwords, it won't lessen the burden of complying with state laws that are more restrictive, as in other areas of employment law, Poplawski said.

"In that case, a federal law governing this subject matter may not remove the complications for national employers," Poplawski said.

Multistate employers crafting companywide policies, therefore, will need to ensure that their employment applications, handbooks, and other documents and policies comport with

whatever state laws end up in place, as they do for other areas of employment law in which state laws diverge.

"For employers with a footprint in multiple states, they are going to have to be aware of the different laws in different states, and sometimes employers choose to take the path of least resistance and create policies that pass muster in all the states they operate in," Steven L. Brennehan of Ford & Harrison LLP said.

This may be an especially attractive option when it comes to policies regarding employer access to social media passwords because Facebook and other social media profiles often contain information employers would be better off not knowing from a liability standpoint, attorneys say.

"The law may protect some employers from themselves to the extent that they were trying to do this," Gary Clark of Quarles & Brady LLP said, noting that he was not aware of any companies that actually engaged in the practices prohibited by the Illinois law.

"Facebook and other social media have some pretty private things that employers shouldn't be delving into and really should not know when making hiring and other employment decisions," Clark said. "It's an issue of you don't know what you're going to find out, and once you find out you can't unring the bell."

Viewing workers' profiles could give employers access to all kinds of information about characteristics that are protected by federal law from being considered in hiring and other employment decisions, such as disability or religion.

Whether or not the employer actually takes this information into account when making employment decisions, the fact that the employer had access to it through a worker's social media profile could be enough to cause trouble for the employer, according to Donald Schroeder of Mintz Levin Cohn Ferris Glovsky & Popeo PC.

Even having access to social media information but not actually looking at it could create issues for an employer, Schroeder said. If an employer does not consistently apply its policy of accessing social media profiles it could be opening itself up to a discrimination suit, or if an employee turns violent after making threats on sites the employer could have accessed but didn't, the employer could get hit with a negligence suit, he said.

"My advice to employers would be don't do this in any states, and therefore you don't have to worry about [the variation in state laws]," Schroeder said.

Nonetheless, laws like the one in Illinois may have unintended consequences, so employers will need to remain aware of what the various state laws forbid in order to avoid inadvertently running afoul of them.

The Illinois law, for example, contains fairly broad language saying that the employer shall not access the nonpublic content of social media accounts either through a request for passwords or in any other manner, which could cause problems for employers trying to investigate complaints of harassment or abuse via such websites, according to Peter J. Gillespie of Fisher & Phillips LLP.

"The statute itself was primarily intended to protect applicants from having to turn over Facebook passwords, but by sweeping in employees, the law ended up placing a potential land mine for employers who may have a legitimate reason for wanting to see what employees are putting on these sites," Gillespie said. "Employers trying to resolve workplace disputes might find themselves in hot water under the statute without realizing it."

These kinds of issues could trip up employers that aren't paying close attention to how far the law goes in Illinois and potentially in other states.

"National employers should be thinking about trying to flag this issue when creating policies and protocols for investigating issues involving, for example, online harassment or the dissemination of confidential information using social media websites," Gillespie said.

The Illinois law should put employers on notice that they need to be prepared for laws restricting access to employee social media information, attorneys say.

"The new law in Illinois is going to make it all the more important for employers to instruct supervisors and other managers to run those types of decisions through the proper human resources or legal channels within the organization," Brenneman said.

And that will only become more significant for employers looking to protect themselves if a hodgepodge of state statutes are enacted, he said.

--Editing by John Quinn and Kat Laskowski.

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