

Governor O'Malley Signs Maryland Law Prohibiting Employers from Seeking Access to Personal Social Media Information; Other States Considering Similar Bans

By Heather R. Pruger

SUMMARY

On May 2, 2012, Governor O'Malley signed legislation making Maryland the first state to legislatively ban employers from requiring employees or job applicants to provide access to their personal social media and other Internet-based accounts. While Maryland is the only state to have enacted such legislation to date, other states appear poised to follow suit.

Similar legislation was introduced before Congress on Friday, April 27, 2012.

What Happened?

Under Maryland's User Name and Password Privacy and Exclusions law, which was signed by Governor O'Malley on May 2, 2012 and will take effect on October 1, 2012, all employers engaged in business in Maryland will be prohibited from requesting or requiring that an employee or job applicant disclose any username, password, or other means of accessing an electronic communications personal account or service, including a social media account. It also prohibits employers from discharging, disciplining, or otherwise penalizing an employee or job applicant for refusing to disclose such information. An exception to these prohibitions allows employers to require employees to disclose their login information for any non-personal accounts that provide access to the employer's internal computers or information systems.

The law will not allow employees to use these privacy protections as a "shield" to hide business-related activity from their employers, however. If an employer receives information that an employee is using a personal account for "business purposes" or has copied sensitive company information, without authorization, to a personal account, the employer may investigate, although the legislation does not detail what investigative measures employers may use. The legislation also specifically prohibits employees from copying their employer's proprietary information or financial data into a personal account without proper authorization.

A number of other states are following Maryland's lead. New Jersey legislators plan to introduce a bill that would prohibit employer inquiries into existing and prospective employees' personal account login information, a prohibition that the bill provides cannot be waived as a condition of employment. Unlike Maryland's bill, which does not articulate any specific penalties or enforcement mechanism, New Jersey's proposed bill would also include civil penalties for violation. A bill introduced in Massachusetts would prohibit employers from requiring employees or prospective employees to provide access to any otherwise private social networking site or personal email account. Legislation introduced in New York would bar employers from inquiring into employees' or job applicants' personal account login information, and would allow the state attorney general to seek injunctive relief to remedy any violation. The

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New York legislation proposes that violators be fined, in addition to being subject to suit by individuals for equitable relief and damages. Other states in which similar legislation has been introduced include California, Illinois, and Washington.

At the federal level, lawmakers introduced the Social Networking Online Protection Act on Friday, April 27, 2012. This legislation would prohibit current or potential employers from requiring employees or job applicants to provide access to online content, whether by providing a username and password or by other means. The bill would forbid employers from seeking such access to discipline, discriminate against, or deny employment to any individual. Violation of any of these prohibitions would subject an employer to a civil penalty of up to \$10,000. In addition, this legislation would go beyond the employment relationship, to also prohibit educational institutions from requesting such information from students.

Meanwhile, U.S. Senators are pressing the Department of Justice and U.S. Equal Employment Opportunity Commission ("EEOC") to investigate employers' practices of asking job applicants for social media passwords during interviews under current laws. Their concerns include that such practices may violate existing privacy, fraud, or anti-discrimination laws.

What Does This Mean For Employers?

Maryland's new law goes beyond prohibiting employers that do business in Maryland from requesting login information for social media and other personal Internet-based accounts from any employee or job applicant, regardless of whether the employee or applicant is physically located within the state. It also encompasses such practices as requiring a job applicant to log into his or her account during a job interview, asking a job applicant or employee to provide printouts of his or her social media account, or requiring an employee to "friend" the company or a human resources manager, for example. However, employers may still investigate an employee's business-related use of an otherwise personal account, or an employee's unauthorized copying of company information to a personal account, although the law does not define what characteristics separate a personal account from a professional or business account. Also, the law does not prohibit employers from searching the Internet — including any publically-accessi-

ble portions of social media pages — for information about employees or job applicants.

In light of Maryland's new legislation, Maryland employers should examine their hiring and employment policies to ensure compliance before the law takes effect on October 1, 2012. Employers should also stay alert for legal developments that may further define areas that Maryland's law leaves open for interpretation — such as the characteristics of a "personal" account and what investigative inquiries are reasonable in the social media context. While similar laws have not yet been enacted outside of Maryland, employers in other states should be aware that many state legislatures appear poised to quickly follow Maryland's lead, and similar restrictions at the federal level may not be far behind.

Moreover, employers should also be aware that their policies regarding employees' use of social media may implicate the National Labor Relations Act ("NLRA"). Within the last several months, the National Labor Relations Board ("NLRB") has received dozens of unfair labor practice charges against union and nonunion employers alike, alleging that employers' social media policies unduly restrict employee rights protected under the NLRA. The NLRB has issued complaints in several cases and, in at least one case, an employer has been ordered to reinstate employees it terminated for having engaged in social media activity the employer considered to be inappropriate.

One thing seems clear: employers can expect increasing scrutiny of their policies and practices regarding employees' use of social media from federal and state regulators, legislators and the courts.

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