The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

BILL:	CS/CS/SB 198
INTRODUCER:	Governmental Oversight and Accountability Committee, Commerce and Tourism Committee, and Senators Clemens and Latvala
SUBJECT:	Social Media Privacy
DATE:	March 14, 2014 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Siples	Hrdlicka	CM	**Fav/CS**
2.	McKay	McVaney	GO	**Fav/CS**
3.			JU	
4.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 198 prohibits employers from requiring or requesting an employee or a prospective employee to provide a user name, password, or other means of accessing a social media account, unless it is an account used for business purposes. An employer may not take an adverse employment action against an employee or refuse to hire a prospective employee based on a refusal to provide such access. Employers who violate these provisions may be subject to a civil action, and if the employee or prospective employee prevails, he or she may be granted injunctive relief or may recover actual damages or $500 for each violation, whichever is greater. A prevailing employee or prospective employee may also recover court costs and reasonable attorney fees. The bill provisions do not apply to: an employer complying with a duty to monitor or retain employee communications pursuant to state or federal law; a self-regulatory organization defined in the Securities Exchange Act; or law enforcement agencies screening prospective employees or investigating employees.

II. Present Situation:

Federal and State Employee Protections

Under current law, employers are prohibited from discriminating against applicants or employees on the basis of disabilities, race or color, gender, national origin, religion, age, or genetic

information.[1] These prohibitions can be found in the Americans with Disabilities Act,[2] the Civil Rights Act of 1964,[3] the Age Discrimination in Employment Act of 1967,[4] and the Genetic Information Nondiscrimination Act of 2008.[5] Additionally, the federal bankruptcy law makes it illegal for an employer to discriminate against an individual based on bankruptcy.[6]

Florida law also provides similar protections from discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or marital status.[7] Florida law also provides protection from employment discrimination on the basis of sickle-cell trait.[8]

Employers may not ask job applicants about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform specific job functions. In some cases a job offer may be conditioned on the results of a medical examination, but only if the examination is required for all entering employees in similar jobs. Medical examinations of employees must be job related and consistent with the employer's business needs.

Employers are not specifically prohibited from asking an employee or applicant his or her age or date of birth, race, national origin, gender, or status of pregnancy. In fact, it can be necessary for employers to track information about race for affirmative action purposes or applicant flow; the U.S. Equal Employment Opportunity Commission (EEOC) suggests the use of separate forms to keep information about race separate from the application. However, in general, with regard to interview questions, requests for certain information will be closely scrutinized to ensure that the inquiry was made for a lawful purpose, rather than for a purpose prohibited by a federal law. If the information is used in the selection decision and members of particular groups are excluded from employment, the inquiries can constitute evidence of discrimination. For example, unless the information is for such a legitimate purpose, pre-employment questions about race can suggest that race will be used as a basis for making selection decisions.

Social Media and Employment

In recent years, the use of social media by individuals has become widespread and pervasive. The largest websites boasts monthly average users of over 1.5 billion.[9] Social media refers to

[1] More information is available on the U.S. Equal Employment Opportunity Commission website, "Discrimination by Type," *available at* http://www.eeoc.gov/laws/types/index.cfm (last visited Feb. 5, 2014). Gender discrimination also includes issues related to pregnancy, childbirth, related medical conditions, sexual harassment, and equal pay.
[2] 42 U.S.C. s. 12101 et. seq.
[3] 42 U.S.C. s. 2000e et. seq.
[4] 29 U.S.C. s. 621 et. seq.
[5] 29 U.S.C. s. 1635 et. seq.
[6] 11 U.S.C. s. 525.
[7] Chapter 760, F.S., Florida Civil Rights Act.
[8] Section 448.075, F.S.
[9] Facebook reports the number of average monthly active users of 1.23 billion as of December 31, 2013 ("Facebook Reports Fourth Quarter and Full Year 2013 Results," *available at* http://investor.fb.com/releasedetail.cfm?ReleaseID=821954 (last visited February 5, 2014)); Twitter reports the number of average monthly users of 241 million in October 2013 ("Twitter Reports Fourth Quarter and Fiscal Year 2013 Results," *available at* https://investor.twitterinc.com/releasedetail.cfm?releaseid=823321 (last visited February 5, 2014)); LinkedIn reports a membership of 259 million members ("LinkedIn Announces Third Quarter 2013 Financial Results," *available at* http://press.linkedin.com/News-Releases/319/LinkedIn-Announces-Third-Quarter-2013-Financial-Results (last visited February 5, 2014).

electronic communication through which users may create online communities to share information, ideas, personal messages, and other content.[10] Social media is used for both personal and commercial purposes, with businesses primarily using the platform to interact with consumers. Individuals may use the platform for a variety of reasons, including social, business, and educational uses.

Increasingly, employers have used social media to monitor employees' behavior outside the workplace and to screen applicants for employment.[11] Employers indicate that reviewing information about prospective employees available online helps reduce legal liability associated with negligent hiring or may be used to discover or investigate otherwise impermissible behavior such as harassment of a co-worker.[12] However, access to social media accounts may also provide the employer information that it would not legally be permissible to inquire of an employee or an applicant, such as the nature of an individual's disability.[13]

Also, as part of the terms of use for many social networking websites, the user agrees not to disclose the user name and password information. Failure to adhere to the terms of use may result in the user account being limited, suspended, or terminated.[14]

Since 2012, several states have introduced legislation or enacted laws that limit an employer's or prospective employer's ability to require access to the social media accounts of its employees or applicants.[15] A few states have also passed laws that provide protection for students by limiting the ability of educational institutions to require access to social media accounts.

Federal Law and Social Media

National Labor Relations Act

The National Labor Relations Board (NLRB) has issued guidance that certain work-related conversations may be protected concerted activity under the National Labor Relations Act (NLRA). The NLRA protects the rights of certain employees to organize into labor organizations and engage in concerted activity for the purposes of collective bargaining.[16] The law prohibits

[10]Merriam-Webster definition, *available at* http://www.merriam-webster.com/dictionary/social%20media (last visited February 4, 2014).
[11] Sprague, Robert, *Invasion of the Social Networks: Blurring the Line Between Personal Life and the Employment Relationship*, 50 U. Louisville L. Rev. 1, 4 (2011). One study found that nearly 80 percent of those involved in hiring and recruiting individuals research the candidates on the Internet.
[12] Id. at 7-9, 19-27.
[13] Id. at 11-12.
[14] For more information, see Facebook. "Statement of Rights and Responsibilities," *available at* http://www.facebook.com/terms.php (last visited Feb. 17, 2014); LinkedIn, "User Agreement," *available at* http://www.linkedin.com/legal/user-agreement?trk=hb_ft_userag (last visited Feb. 17, 2014); and Instagram, "Terms of Use," *available at* http://instagram.com/legal/terms/ (last visited Feb. 17, 2014).
[15] The states who have enacted laws include Arkansas, California, Colorado, Illinois, Maryland, Michigan, Nevada, New Jersey, New Mexico, Oregon, Utah, and Washington. National Conference of State Legislatures, "Employer Access to Social Media Usernames and Passwords," *available at* http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords-2013.aspx (last visited February 5, 2014). Links are available for legislation considered in 2012, 2013, and 2014.
[16] 29 U.S.C. s. 181 et. seq. The NLRA does not apply to the federal government or any wholly owned government corporation, federal reserve banks, state government or its political divisions, those subject to the Railway Labor Act, agricultural laborers, independent contractors, or those employed by either a parent or spouse.

employers from interfering or restraining this activity. The guidance from the NLRB, provided in a series of memos from its General Counsel, advises that activity of social media in which terms and conditions of employment were addressed with other employees, is protected as "protected concerted activity." The General Counsel also advises that social media policies should not be so broad as to prohibit activities that would be protected under federal law, and that an employee's "gripes" are not protected activity if they are not made in relation to group activity among employees.[17]

Stored Communications Act

Some courts have found some privacy right exists under the Stored Communications Act (SCA). The SCA, enacted in 1986, makes it unlawful for anyone who "intentionally accesses without authorization a facility through which an electronic communications service is provided; or intentionally exceeds an authorization to access such facility and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in the electronic storage in such system…"[18] The SCA includes some exceptions to its provisions, including conduct authorized by the person or entity providing the electronic communications service, by a user of that service, or certain governmental agencies with specific authorization.

A few courts have found that the SCA provides individuals with some privacy rights. For example, *Ehling v. Monmouth-Ocean Hospital Service Corp.*, involved screenshots of an employee's Facebook wall that were provided to a supervisor by a co-worker. Based on the information provided in these screenshots, the employer took adverse employment action against the employee, and the employee brought suit alleging violations of the Stored Communications Act and invasion of privacy, among other claims. The court held that a Facebook wall post met the definition of an electronic communication and is held in electronic storage on the Facebook servers.[19] If a user chooses to make posts on her or his Facebook wall private, meaning that it is not publicly available, then it would be protected under the SCA.[20]

Social Networking Online Protection Act

The Social Networking Online Protection Act was introduced in the U.S. House of Representatives in 2013. It prohibits employers from requiring or requesting employees or applicants to provide a user name, password, or any other means of accessing a private email or social networking account. It also provides for civil penalties and injunctive relief for violations of its provisions.[21]

III. Effect of Proposed Changes:

Section 1 creates s. 448.077, F.S., to limit an employer's access to employees' social media accounts.

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[17] The NLRB and Social Media, *available at* http://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media (last visited February 10, 2014).
[18] 18 U.S.C. s. 2701
[19] 2013 WL 4436539 (D.N.J. Aug. 20, 2013).
[20] Id. citing *Viacom Int'l Inc. v. YouTube, Inc.* 253 F.R.D. 256, 265 (S.D.N.Y. 2008); *Crispin v. Christian Audiger, Inc.* 717 F.Supp.2d 965, 991 (C.D. Cal 2010); *cf. Snow v. DirecTV, Inc.* 450 F.3d 1314, 1321 (11th Cir. 2006).
[21] H.R. 537 (113th Congress). The bill was referred to the Subcommittee on Workplace Protections on April 23, 2013.

"Social media account" is defined as an interactive account or profile that an individual establishes through an electronic application, service, or platform that is used to generate or store content, such as blogs, instant messages, or e-mail not generally available to the public.

The bill provides that an employer[22] may not require or request an employee or prospective employee to disclose the username, password, or other means of access to a social media account maintained by the employee or prospective employee. The employer may not require or request an employee or prospective employee to provide the employer access to the employee or prospective employee's social media account if its contents are not available to the general public. Nothing in the bill prevents an employer from accessing and viewing publicly available information on an employee's social media account. However, an employer may request or require access to social media accounts used for "business purposes." The term "business purpose" is not defined, and the application of the term is unclear. For example, it is unknown if a court would interpret the term to apply only to a social media account used *exclusively* for "business purposes" or if a single posting about an employer on an account would allow the employer to request or require access.

The bill prohibits the employer from taking any retaliatory personnel action against an employee for refusing to allow access to his or her social media account.[23] An employer may not refuse or fail to hire an individual based on a refusal to allow access to his or her social media account.

The bill provides a private right of action against an employer who violates the provisions of the bill. The action must be brought within two years of occurrence of the violation. An employee or prospective employee may recover damages in the amount of actual damages or $500 per violation, whichever is greater, and may seek injunctive relief to enjoin the employer from continued violations. The bill provides that a prevailing plaintiff may recover court costs and reasonable attorney fees. Civil actions may be brought in a court in the county in which the employee or prospective employee resides or where the alleged violation occurred.

The bill provisions do not apply to:

- an employer complying with a duty to monitor or retain employee communications pursuant to state or federal law;
- a self-regulatory organization defined in the Securities Exchange Act;[24] or
- law enforcement agencies screening prospective employees or investigating employees.

Section 2 provides an effective date of October 1, 2014.

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[22] "Employer" is not defined in the bill.

[23] "Retaliatory personnel action" has the same meaning as provided in s. 448.101, F.S., which is the discharge, suspension, demotion, or any other adverse employment action in the terms and conditions of employment taken by an employer against an employee.

[24] 15 U.S.C. s. 78c(a)(26) defines "self-regulatory organization" as any national securities exchange, registered securities association, or registered clearing agency, or (solely for purposes of sections 78s (b), 78s (c), and 78w (b) of Title 15 of the U.S. Code) the Municipal Securities Rulemaking Board established by section 78o–4 of Title 15.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Businesses may incur costs in defending lawsuits alleging violations of these provisions.

C. Government Sector Impact:

CS/CS/SB 198 may have some indeterminate impact on the State Court System due to the availability of a new cause of action.

If the employers impacted by the bill include all public employers, all levels of government in Florida could incur costs in defending lawsuits alleging violations of these provisions.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill does not provide a definition of "employer." Without a definition, the bill appears to apply to employers of every size, whether public or private.

VIII. Statutes Affected:

This bill creates section 448.077 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Governmental Oversight and Accountability on March 13, 2014:
The committee substitute added a section specifying that the bill provisions do not apply to: an employer complying with a duty to monitor or retain employee communications pursuant to state or federal law; a self-regulatory organization defined in the Securities Exchange Act; or law enforcement agencies screening prospective employees or investigating employees.

CS by Commerce and Tourism on Feb. 17, 2014:
The committee substitute provides that an employer may request or require disclosure of the username, password, or other means of access to a social media account used for business purposes.

B. Amendments:

None.