

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 Commerce and Tourism

BILL: SB 186

INTRODUCER: Senator Clemens

SUBJECT: Social Media Privacy

DATE: October 2, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Siples	McKay	CM	Pre-meeting
2.			JU	
3.			RC	

I. Summary:

SB 186 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 or 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

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 Sept. 23, 2015). 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.

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.⁹

Social Media and Employment

In recent years, the use of social media by individuals has become widespread and pervasive. Three of the largest social media communities collectively report more than 2 billion monthly average users.¹⁰ Social media refers to electronic communication through which users may create online communities to share information, personal messages, and other content.¹¹ Social media is used for both personal and commercial purposes, with businesses primarily using the platform to

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 U.S. Equal Employment Opportunity Commission, "Questions and Answers About Race and Color Discrimination in Employment," available at http://www.eeoc.gov/policy/docs/qanda_race_color.html (last visited Sept. 23, 2015).

¹⁰ Facebook reports the number of average monthly active users is 1.49 billion as of June 30, 2015 ("Facebook Reports Second Quarter 2015 Results," available at <http://investor.fb.com/releasedetail.cfm?ReleaseID=924562> (last visited Sept. 23, 2015)); Twitter reports the number of average monthly users is 316 million as of June 30, 2015 ("Twitter Reports Second Quarter 2015 Results," available at http://files.shareholder.com/downloads/AMDA-2F526X/757570822x0x841607/E35857E7-8984-48C1-A33B-15B62F72A0F7/2015_Q2_Earnings_press_release.pdf (last visited Sept. 23, 2015)); LinkedIn reports a membership of 380 million members ("LinkedIn Announces Second Quarter 2015 Results," available at <https://press.linkedin.com/site-resources/news-releases/2015/linkedin-announces-second-quarter-2015-results> (last visited Sept. 23, 2015)).

¹¹ Merriam-Webster definition, available at <http://www.merriam-webster.com/dictionary/social%20media> (last visited February 4, 2014).

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.¹² 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.¹³ 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.¹⁴

In addition, 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.¹⁵

Since 2012, many 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.¹⁶ 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 Act¹⁷

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).¹⁸ The NLRA protects the rights of certain employees to organize into labor organizations and engage in concerted activity for the purposes of collective bargaining. The law prohibits 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 on social media in which terms and conditions of employment were addressed with other employees, is protected

¹² 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).

¹³ Id. at 7-9, 19-27.

¹⁴ Id. at 11-12.

¹⁵ For more information, see Facebook, "Statement of Rights and Responsibilities," available at <http://www.facebook.com/terms.php> (last visited Sept. 23, 2015); LinkedIn, "User Agreement," available at http://www.linkedin.com/legal/user-agreement?trk=hb_ft_userag (last visited Sept. 23, 2015); and Instagram, "Terms of Use," available at <http://instagram.com/legal/terms/> (last visited Sept. 23, 2015).

¹⁶ The states who have enacted laws include Arkansas, California, Colorado, Connecticut, Illinois, Louisiana, Maryland, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Virginia, Washington, and Wisconsin. National Conference of State Legislatures, "Employer Access to Social Media Usernames and Passwords," available at <http://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-prohibiting-access-to-social-media-usernames-and-passwords.aspx> (last visited Sept. 23, 2015).

¹⁷ 29 U.S.C. s. 151 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.

¹⁸ Although the NLRA does not define "concerted activity," the NLRB defines it as "two or more employees tak[ing] action for their mutual aid or protection regarding terms and conditions of employment." National Labor Relations Board, "Employee Rights," available at <https://www.nlr.gov/rights-we-protect/employee-rights> (last visited Sept. 23, 2015).

communication 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.¹⁹

Stored Communications Act²⁰

The Stored Communications Act (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...”²¹ 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 SCA 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.²² 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 protectable under the SCA.²³

Fair Credit Reporting Act²⁴

Under the Fair Credit Reporting Act (FCRA), employers are permitted to obtain consumer reports for employment purposes.²⁵ The uses may include employment, promotion, reassignment or retention as an employee. The FCRA places a number of requirements on the employer regarding notification and disclosure about the use of the consumer reports and only applies to

¹⁹ The NLRB and Social Media, available at <http://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media> (last visited Sept. 23, 2015).

²⁰ 18 U.S.C. s. 2701 et. seq.

²¹ 18 U.S.C. s. 2701(a).

²² 961 F.Supp.2d 659 (D.N.J. Aug. 20, 2013). The employee had her profile set to “private,” and limited access to only her Facebook friends, and the supervisor was not a friend on Facebook. See also *Pietrylo v. Hillstone Restaurant Group*, 2009 WL 3128420 (D.N.J. Sept. 25, 2009).

²³ 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).

²⁴ 15 U.S.C. s. 1681 et. seq.

²⁵ A consumer report is any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is issued or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for credit or insurance, employment, or any other authorized purpose. 15 U.S.C. s. 1681a(d)(1). An employment purpose is defined as “a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.” 15 U.S.C. s. 1681a(h).

those reports obtained from a third party that are utilized to make an employment decision.²⁶ The employer must obtain written consent from the applicant or employee authorizing the employer to obtain a consumer report. If a consumer report that is used for employment purposes contains information that is obtained from a social media account, the third party provider must comply with the FCRA, including taking reasonable steps to ensure the accuracy of the information, providing a dispute process, and requiring any employer using its services to certify that the consumer report will not be used in any way to violate federal or state equal employment opportunity laws.²⁷

III. Effect of Proposed Changes:

Section 1 creates s. 488.077, F.S., to limit an employer's or prospective employer's access to a social media²⁸ account of an employee or prospective employee.

This bill prohibits an employee from requesting the username, password, or any other means of accessing the social media account of an employee or prospective employee, if the social media account's contents are not available to the general public. Nothing in the bill prohibits an employer from accessing and viewing publicly available information on an employee's social media account. The bill also allows an employer to request or require access to a social media account used primarily for the employer's business purposes.

The employer may not take any retaliatory personnel action as a result of an employee's refusal to allow the employer access to his or her private social media account.²⁹ An employer may not refuse or fail to hire an individual based on a refusal to allow employer access to the individual's social media account.

The bill creates a private right of action against an employer or prospective employer who violates the provisions of the bill. The civil action must be brought within two years after the violation occurred and remedies include injunctive relief to enjoin the employer from continuing to violate the provisions of the bill, as well as damages equal to the amount of actual damages or \$500 per violation, whichever is greater. A prevailing plaintiff is also entitled to recover court costs and reasonable attorney fees.

The bill's provisions do not apply to:

- an employer complying with a duty to monitor or retain employee communications pursuant to state or federal law;

²⁶ If the applicant has applied by mail, telephone, computer or other similar means, the applicant must be advised by oral, written, or electronic means that a consumer report may be obtained for employment purposes and the applicant must consent orally, in writing, or electronically.

²⁷ Fair, Lesley, Federal Trade Commission, "The Fair Credit Reporting Act & Social Media: What Businesses Should Know," (June 23, 2011), available at <https://www.ftc.gov/news-events/blogs/business-blog/2011/06/fair-credit-reporting-act-social-media-what-businesses> (last visited Sept. 23, 2015).

²⁸ "Social media" is defined as an interactive personal account or profile that an individual establishes and uses through an electronic application, service, or platform to generate or to store content, including, but not limited to, videos, photographs, blogs, instant messages, audio recordings, and e-mail.

²⁹ "Retaliatory personnel action" is defined as the discharge, suspension, demotion, or any other adverse employment action in the terms and conditions of employment taken by an employer against an employee. See s. 488.101, F.S.

- a self-regulatory organization defined in the Securities Exchange Act;³⁰ or
- law enforcement agencies screening prospective employees or investigating employees.

Section 2 provides an effective date of October 1, 2016.

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:

SB 186 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.

³⁰ 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.

The bill also does not define “prosecutorial agency.” It is unclear if the term refers to only agency that prosecute criminal violations of the law, or if it also refers to other agencies that may investigate violations of state law that are subject to an administrative penalties.

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.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.
