

DRAFT
FOR DISCUSSION ONLY

SOCIAL MEDIA PRIVACY ACT
(EMPLOYEE ONLINE PRIVACY PROTECTION ACT)

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAW

April 17-19, 2015 Drafting Committee Meeting

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April 3, 2015

SOCIAL MEDIA PRIVACY ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following individuals:

SAMUEL A. THUMMA, Arizona Court of Appeals, State Courts Bldg., 1501 W. Washington St., Phoenix, AZ 85007, *Chair*

JERRY L. BASSETT, Legislative Reference Service, 613 Alabama State House, 11 S. Union St., Montgomery, AL 36130

NICOLE M. BORDONARO, Governor's Office General Counsel, Commonwealth of Pennsylvania, 333 Market St., 17th Floor, Harrisburg, PA 17101

DIANE F. BOYER-VINE, Office of Legislative Counsel, State Capitol, Room 3021, Sacramento, CA 95814-4996

STEPHEN Y. CHOW, 125 Summer St., Boston, MA 02110-1624

BRIAN K. FLOWERS, 1345 Irving St. NE, Washington, DC 20017

WILLIAM H. HENNING, University of Alabama School of Law, Box 870382, 101 Paul W. Bryant Dr. E., Tuscaloosa, AL 35487-0382

DANIEL A. IVEY-SOTO, 1420 Carlisle Blvd. NE, Suite 208, Albuquerque, NM 87110-5662

LISA R. JACOBS, One Liberty Place, 1650 Market St., Suite 4900, Philadelphia, PA 19103-7300

PETER F. LANGROCK, P.O. Drawer 351, 111 S. Pleasant St., Middlebury, VT 05753-1479

JAMES G. MANN, Main Capitol Bldg., Room B-6, P.O. Box 202228, Harrisburg, PA 17120

ANN R. ROBINSON, 45 Memorial Cir., Augusta, ME 04330

STEVE WILBORN, 306 Tower Dr., Shelbyville, KY 40065

DENNIS D. HIRSCH, Capital University Law School, 303 E. Broad St., Columbus, OH 43215, *Reporter*

UNIFORM LAW CONFERENCE of CANADA

CLARK DALTON, 9909 – 110th St., Suite 203, Edmonton, AB T5K 2E5, *ULCC Liaison*

EX OFFICIO

HARRIET LANSING, 1 Heather Pl., St. Paul, MN 55102-2615, *President*

THOMAS J. BUI TEWEG, Capital University Law School, 303 E. Broad St., Columbus, OH 43215, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISORS

FRANK H. LANGROCK, P.O. Drawer 351, 111 S. Pleasant St., Middlebury, VT 05753-1479, *ABA Advisor*

HEATHER A. MORGAN, 515 S. Flower St., Suite 2500, Los Angeles, CA 90071-2228, *ABA Section Advisor*

EXECUTIVE DIRECTOR

LIZA KARSAI, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.uniformlaws.org

EMPLOYEE ONLINE PRIVACY PROTECTION ACT

TABLE OF CONTENTS

SECTION 1. SHORT TITLE	1
SECTION 2. DEFINITIONS.....	1
SECTION 3. PROHIBITIONS AND RESTRICTIONS.....	2
SECTION 4. EXCEPTIONS.....	3
SECTION 5. CIVIL ACTION.....	4
SECTION 6. SEVERABILITY.....	5
SECTION 7. REPEALS; CONFORMING AMENDMENTS.....	5
SECTION 8. EFFECTIVE DATE.....	5

1 **EMPLOYEE ONLINE PRIVACY PROTECTION ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the [Employee Online
3 Privacy Protection Act.]

4 **SECTION 2. DEFINITIONS.** In this [act]:

5 (1) “Electronic” means relating to technology having electrical, digital, magnetic,
6 wireless, optical, electromagnetic, or similar capabilities.

7 (2) “Employee” means an individual who provides services or labor to an employer in
8 exchange for wages or other remuneration. The term includes a prospective employee who has
9 expressed an interest in or applied for employment, or whom an employer is otherwise
10 considering for employment.

11 (3) “Employer” means a person that pays wages or other remuneration to one or more
12 employees in exchange for services or labor. The term:

13 (A) includes an agent, a representative, or a designee of the employer; and

14 (B) does not include:

15 (i) The United States of America, or any agency thereof;

16 (ii) a state, county, or local law enforcement agency;

17 (iii) a state, county, or local department of correction;

18 (iv) [a child care provider; or]

19 (v) [a home health care provider.]

20 (4) “Login information” means a user name, a password, or other means of authentication
21 required to access to a protected personal online account.

22 (5) “Person” means an individual, estate, business or nonprofit entity, public corporation,
23 government or governmental subdivision, agency or instrumentality, or other legal entity.

1 (6) “Protected personal online account” means an online account, created or maintained
2 by an individual, that requires login information to access or exercise control over that account.

3 The term:

4 (A) includes an electronic device that provides access to a protected personal
5 online account; and

6 (B) does not include an online account or electronic device that:

7 (i) an employer supplies or pays for; or

8 (ii) an employee creates or maintains on behalf of or under the direction of
9 an employer pursuant to that employee’s employment-related responsibilities.

10 **SECTION 3. PROHIBITIONS AND RESTRICTIONS.** Except as otherwise
11 provided in Section 4:

12 (1) An employer may not require, request or coerce an employee to:

13 (A) disclose the [existence of,] [identifying information for,] contents or meta-
14 data of, or login information for, a protected personal online account;

15 (B) alter the settings of a protected personal online account, including settings that
16 affect whether another person is able to view the contents of that account; or

17 (C) access a protected personal online account in the presence of the employer in
18 a manner that enables the employer to observe the contents of the account.

19 (2) An employer may not discharge, discipline, or otherwise penalize, or threaten to
20 discharge, discipline, or otherwise penalize, an employee for refusing or failing to comply with
21 an employer action that violates paragraph (1).

22 (3) [An employer that inadvertently, or through a person other than the employee, [learns
23 of the existence of,] acquires [identifying information or] login information for, or accesses the

1 contents or meta-data of, an employee’s protected personal online account:

2 (A) [properly] may possess the information;

3 (B) may not use the [identifying or] login information to access or alter the
4 employee’s protected personal online account;

5 (C) may not use the existence, contents or meta-data of the employee’s protected
6 personal online account as the basis for a decision or action detrimental to any employee; and

7 (D) shall dispose of the [identifying information or] login information for, or
8 contents or meta-data of, the employee’s protected personal online account as soon as
9 practicable.]

10 **SECTION 4. EXCEPTIONS.**

11 (a) Section 3 does not apply to an employer’s actions that would otherwise violate
12 Section 3 if the employer’s actions are necessary to:

13 (1) comply with federal, state, or local law, or with the rules of a self-regulatory
14 organization, including a self-regulatory organization as defined in section 3(a)(26) of the
15 Securities and Exchange Act of 1934, 15 USC 78c(a)(26), that exercises delegated federal, state
16 or local power to make those rules;

17 (2) investigate an employee’s violation of law, or of written employer policies
18 regarding employment-related misconduct of which the employee had reasonable notice, where
19 the employer reasonably suspects that the employee has violated, is violating, or will violate
20 those laws or policies, and the employer accesses only accounts, content and meta-data that it
21 reasonably believes to be directly relevant to the investigation;

22 (3) penalize an employee violating the law, or written employer policies regarding
23 employment-related misconduct of which the employee had reasonable notice; or

1 (4) protect against
2 (A) an imminent and significant threat to health, safety, [property], or the
3 functioning of the employer’s information or communications technology systems; or
4 (B) disclosure of information that the employer has a proprietary interest
5 in, or has a legal obligation to keep confidential.

6 (b) Section 3 does not apply to an employer insofar as it accesses or uses information
7 about an employee that can be obtained without login information and without taking an action
8 that Section 3 otherwise prohibits.

9 (c) This section does not permit an employer to:

10 (1) alter the settings of an employee’s protected personal online account, or

11 (2) alter or remove the content or meta-data of an employee’s protected personal
12 online account, except that an employer may [alter the settings of an employee’s protected
13 personal online account and] alter or remove the content or meta-data of an employee’s protected
14 personal online account if it has a clear proprietary interest in, or the law requires it to, alter or
15 remove [those settings and] that content or meta-data, or if authorized by court order or other law
16 to do so.]

17 **SECTION 5. CIVIL ACTION.**

18 (a) An employer that violates this [act] is subject to a civil penalty of [\$1000] for each
19 violation. For this purpose, each violation of this [act] with respect to a particular online account
20 is a separate violation.

21 (b) An employee injured by a violation of this [act] may bring a civil action against the
22 employer.

23 (c) In a civil action under subsection (b):

- 1 (1) a prevailing employee may obtain:
- 2 (A) injunctive or other equitable relief;
- 3 (B) [damages in the amount of [\$1000] or] actual damages[, whichever is
- 4 greater];
- 5 (C) [punitive damages]; and
- 6 (D) costs and reasonable attorneys' fees.
- 7 (2) the court may award a prevailing employer costs and reasonable attorneys'
- 8 fees if the court determines the action was frivolous and without reasonable cause.

9 **SECTION 6. SEVERABILITY.** If any provision of this [act] or its application to any

10 person or circumstance is held invalid, the invalidity does not affect other provisions or

11 applications of this [act] which can be given effect without the invalid provision or application,

12 and to this end the provisions of this [act] are severable.

13 **SECTION 7. REPEALS; CONFORMING AMENDMENTS.**

- 14 (a)
- 15 (b)
- 16 (c)

17 **SECTION 8. EFFECTIVE DATE.** This [act] takes effect on [effective date].