

TO: Committee of the Whole, 2015 ULC Annual Meeting, Williamsburg

FROM: Samuel A. Thumma, Chair  
Professor Dennis D. Hirsch, Reporter

DATE: June 1, 2015                      SUBJECT: **SOCIAL MEDIA  
PRIVACY ACT  
INITIAL READING**

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### **Summary of the Committee's Work**

In July 2014, the Executive Committee approved the formation of a Drafting Committee on Social Media Privacy. This Drafting Committee is charged with drafting legislation concerning employers' access to employees' or prospective employees' social media accounts and educational institutions' access to students' or prospective students' social media accounts. The Committee's charge is limited to these issues. The Committee is directed to provide a draft act for final consideration by the Committee as a Whole at the 2016 Annual Meeting.

To date, the Committee has met four times: (1) November 17, 2014 (by telephone to discuss process, scope and scheduling); (2) February 5, 2014 (by telephone to begin substantive discussions); (3) February 27-28 and March 1, 2015 in Washington, D.C. (the first face-to-face meeting) and (4) April 17-19, 2015 in Chicago. Before the February 2015 meeting in D.C., Reporter Dennis Hirsch provided the Committee with a "structure and variables" document that set out the structure of a draft act and identified the principal issues the Committee would need to consider. The meeting started with an interactive PowerPoint presentation by an Observer (a labor and employment lawyer with expertise in social media-related legal issues) about how various social media platforms work and how they differ in terms of technology and functionality. The Committee then engaged in a robust discussion, worked through the issues that Dennis had identified, and provided useful drafting guidance. After that meeting, Dennis prepared two separate draft acts (one addressed the education context, the other the employment context) to focus the discussion at the April 2015 meeting. With the benefit of another robust discussion at the April 2015 meeting, Dennis prepared a single draft act that covers both contexts. This draft is submitted for its initial reading and consideration by the Committee as a Whole at the 2015 Annual Meeting.

### **Background**

Social media use in the United States is burgeoning. Ordinarily, users can decide for themselves whom to include in their network of friends or contacts, and who will have access to information that is not otherwise publicly available. However, social media users are finding it hard to exercise this autonomy in the employment and educational contexts. Employers and educational institutions possess the power to demand access to employees' and students' (and prospective employees' and students') social media and other online accounts to gain access to information that is not publicly available. Recent years have seen a growing number of incidents in which employers and educational institutions have demanded, and received, such access.

In response, many states have passed social media privacy legislation that prohibits employers and/or educational institutions from requesting such access. *See* <http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords-2013.aspx#2015>. In 2015, at least twenty-three states introduced or considered such legislation, although a substantial number of these bills were not enacted. *Id.* The state acts and bills vary widely in their definition of the problem and their proposed solutions. Some focus narrowly on social networking, while others protect all personal online accounts. Some address the employment context, others the education context, and still others address both contexts. Some apply to post-secondary education only, while others extend protections as early as kindergarten. The acts and bills contain divergent definitions, obligations, and exceptions. This variation makes it difficult for multi-state employers and educational institutions to order their affairs and comply with the law. These entities, and their employees and students, would benefit from more unified and consistent statutory schemes. The Committee's draft seeks to provide a uniform approach and to promote greater consistency among the states while, at the same time, selecting best practices from, and implementing improvements to, current acts and bills.

### **Scope**

The draft submitted is limited to preventing: (1) employers coercing their employees or prospective employees to provide login information for or access to their protected personal online accounts; and (2) educational institutions coercing their students or prospective students to provide login information for or access to their protected personal online accounts. There may be other coercive situations (the landlord-tenant relationship is one such situation that has been suggested) in which individuals can be pushed to provide such information. The scope of the Committee's work, however, is limited to the employment and education contexts. This scope is consistent with the vast majority of legislation enacted by the states. Accordingly, although recognizing that there may be other coercive situations, the Committee has limited (and will continue to limit) its work to these two critically-important contexts.

### **Issues for Consideration**

The Committee welcomes input on all aspects of the draft, including by email, letter or informal suggestion. Given the particularly full agenda at the 2015 Annual Meeting, ninety minutes have been allocated for discussion of the draft. The Committee is grateful for each minute provided. In an effort to best use the time allocated for discussion, the Committee is particularly interested in input on the following issues during the discussion of the draft at the 2015 Annual Meeting.

1. Definition of "Educational institution." Section 2(1). The Committee is particularly interested in comments on whether this definition is consistent with what schools do and are. In addition, although there appears to be consensus that the act should apply to post-secondary schools, the Committee is particularly interested in comments on whether the act should apply to secondary or even middle-schools.
2. Definition of "Employee" and "Employer." Sections 2(3) & (4). Definition of these terms varies substantially depending upon context and origin and that there is not one generally-accepted definition of either term. The Committee has no desire to attempt

to provide new, whole cloth definitions of the terms. The draft does, however, use comparatively broad definitions so that independent contractors are included. The Committee is particularly interested in comments on the definitions used.

3. Definition of “Protected personal online account.” Section 2(9). The draft protects all online accounts, not just social media accounts. Existing state acts vary on this point. Some acts govern only social media accounts, while others govern all personal online accounts. The reasons for protecting social media accounts—to prevent employers and educational institutions from using their coercive power in order to invade a private realm—appear to apply with equal force to personal e-mail, messaging, photo-sharing, video-sharing and other such online accounts. In addition, a significant number of states have adopted acts protecting personal online accounts (not just social media accounts), meaning a focus on protected personal online accounts may enhance enactability. Accordingly, the draft applies to protected personal online accounts, a phrase that would cover all login-protected, personal online accounts. The Committee welcomes comments and thoughts on this approach.
4. No Waiver Provision. Section 6 of the draft prohibits employees and students from waiving the act’s protections and granting access to their personal online accounts, although it does allow waiver where necessary to demonstrate a skill or proficiency that is directly relevant to employment or education. Some state statutes include similar “no waiver” provisions. Allowing waiver could undermine the act’s protections. The competition for jobs and school admissions would cause some employees and students to provide access. This would likely push others to follow suit and, as a result, substantially undercut the act’s protections. The opportunity for waiver could also cause some employers or educational institutions implicitly to suggest that they would like employees or students to provide the information, even if they did not expressly request it. This, too, would erode the act’s protections. The Committee would appreciate input on the no waiver provision, including whether the draft provides the proper exceptions to it.

Respectfully submitted.

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