

**Uniform Law Commission**  
**Social Media Privacy Drafting Committee**  
**Statutory Structure and Variables**

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With Input by the Drafting Committee  
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1) Drafting Committee Charge

- a) “This committee will draft 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.”

2) Scope of legislation

- a) What is protected?
  - i) Social networking accounts
    - (1) Narrowest category
    - (2) Social networking sites
  - ii) Social media accounts
    - (1) Broader category.
    - (2) Platforms and services that allow users to interact and collaborate with each other in a virtual community as co-creators of user-generated content. Examples include social networking sites, blogs, wikis, photo sharing sites, video sharing sites, and mashups
  - iii) “Personal Internet accounts”?
    - (1) Still broader category
    - (2) Potentially includes all of the above and, in addition: e-mail, text messaging and other online services or accounts
  - iv) Content that is “behind the wall”?
- b) Who is protected?
  - i) Employment
    - (1) Current vs. prospective
      - (a) Current employees
      - (b) Applicants for employment
      - (c) Prospective applicants for employment (including recruits that employer identifies and contacts)
    - (2) Type of employment
      - (a) Duration
        - (i) Full time
        - (ii) Part time
        - (iii) Seasonal

- (b) Paid vs. Unpaid
        - (i) Interns?
        - (ii) Volunteers?
    - ii) Educational institutions
      - (1) Current vs. prospective
        - (a) Current students
        - (b) Applicants for admission
        - (c) Potential applicants for admission (including recruits that educational institution identifies and contacts).
      - (2) How define student
        - (a) Duration
          - (i) Full time
          - (ii) Part time
        - (b) Degree status
          - (i) Degree candidate?
          - (ii) Non -degree candidate?
            - 1. E.g. Adult continuing education
    - iii) Social media providers themselves?
- c) Who is regulated?
  - i) Employers
    - (1) Public vs. private
      - (a) Private sector
      - (b) Government
      - (c) Non-profit
    - (2) Size threshold
      - (a) Small businesses excluded.
        - (i) How define?
  - ii) Educational institutions
    - (1) Public vs. Private
      - (a) Public
      - (b) Private
    - (2) Educational level
      - (a) Post-secondary (college, graduate school) (majority approach)
      - (b) Secondary (high school)
      - (c) Middle school
      - (d) Primary (elementary school)
  - iii) Social media providers themselves (?)

### 3) Prohibitions and restrictions

- a) Disclosure of information
  - i) Causing subject to disclose information. Organization cannot cause subject to disclose:
    - (1) Existence of social media account
    - (2) Contents of social media account
    - (3) Login information that gives access to social media account
      - (a) Username
      - (b) Password
      - (c) Other authentication information that gives access
    - (4) Identifying information that connects individual to anonymous online persona (e.g. Twitter handle)
  - ii) Other means of obtaining information. Organization cannot:
    - (1) Receive the prohibited information from
      - (a) Subject who voluntarily discloses it
      - (b) Third party who voluntarily discloses it (e.g. another employee/student who is a "friend" of the subject)
    - (2) Use login or identifying information that organization receives inadvertently in order access the subject's account
- b) Organization cannot cause the subject to take the following actions that cause information to be revealed:
  - i) "Friend" the organization
  - ii) Access social media account in presence of organization ("shoulder surfing")
  - iii) Reduce privacy settings
- c) Organization cannot seek to cause disclosure and or action by the following means and/or action:
  - i) Requiring
  - ii) Demanding
  - iii) Conditioning
  - iv) Requesting
  - v) Suggesting
  - vi) Asking
- d) Organization cannot use subject's social media information that
  - i) Organization obtained in contravention of these prohibitions or
  - ii) Organization inadvertently received

- e) Organization cannot retaliate against those who refuse to disclose/act by:
  - i) Employers:
    - (1) Current employees
      - (a) Discharge
      - (b) Discipline
      - (c) Threaten to discharge or discipline
      - (d) Otherwise retaliate
    - (2) Prospective employees
      - (a) Reject application
  - ii) Educational institutions
    - (1) Current students
      - (a) Expel
      - (b) Suspend
      - (c) Discipline
      - (d) Threaten to expel, suspend or discipline
      - (e) Otherwise retaliate
    - (2) Prospective students
      - (a) Fail to admit
      - (b) Threaten not to admit

#### 4) Reporting and Procedural Protections

- a) Where organization is legally authorized to, and does, access subject's social media account:
  - i) Employers must provide notice of that accessing to
    - (1) Employee
    - (2) Applicant
    - (3) Prospective applicant
  - ii) Educational institutions must provide notice of that accessing to
    - (1) If student is a minor
      - (a) Parent/guardian
      - (b) Student
    - (2) If student is an adult, to the student
- b) Report instances of access
  - i) Individualized vs. aggregate reporting
  - ii) Report to whom?
- c) Organization must have institutional policy governing
  - i) Access to subject's social media accounts
  - ii) Restrictions on who can access
  - iii) Consent (written vs. verbal) from high-level person required before can access?

## 5) Exceptions/exclusions

- a) Organization may access a subject's social media accounts, or take other action that causes the subject to reveal information about or in these accounts, when such access or actions are necessary to:
  - i) Comply with
    - (1) Federal law
    - (2) State law
    - (3) Local law
    - (4) Self-regulatory organization rules?
  - ii) An investigation
    - (1) Required by law (e.g. securities or financial laws)
    - (2) Of suspected misconduct violation of
      - (a) Laws or regulations
      - (b) Internal policies (written vs. unwritten)
      - (c) Threshold of suspicion (reasonable suspicion?)
  - iii) Protect against
    - (1) Imminent threat to health or safety
    - (2) Disclosure of
      - (a) Proprietary information
      - (b) Confidential information (e.g. patient health records)
      - (c) Other categories of protected information
    - (3) Damage to organization's information and communications technology systems.
  
- b) Organization may access a subject's social media accounts, or take other action that causes the subject to reveal information about or in these accounts, when such access or actions are limited to:
  - i) Information that is publicly available
    - (1) How define this? Open to the world? What about someone with 1000 Facebook friends? Is this public, or private?
  - ii) Organizational accounts, i.e. accounts that are
    - (1) Provided by the organization
    - (2) Identified as organizational account (even if individual provides)
    - (3) Used for business or educational purposes
    - (4) Opened by an employee at the request of an employer
    - (5) Set up by an employee on behalf of an employer
  - iii) Accounts that the subject establishes and/or accesses by using organizational funds, equipment or other resources
    - (1) E.g. individual accesses personal social media on computer that employer owns.
  - iv) Social media accounts that the subject is using for organizational purposes
    - (1) Requires affirmative act on subject's part, not just receiving organization-related information from the organization or from a third party.
    - (2) Use of account must be primarily or substantially for organizational purposes

- (3) No exemption if subject incidentally uses personal account for organizational purpose
- c) Employer
  - i) Particular sectors exempted
    - (1) Law enforcement
    - (2) Correctional institutions
- d) Educational institution
  - i) Student athletes
    - (1) Required to “friend” their coaches
- 6) Enforcement mechanisms
  - a) Characterization of violation
    - i) Civil
    - ii) Criminal
      - (1) Level of crime
        - (a) Misdemeanor
  - b) Forum
    - i) Judicial
      - (1) Public enforcement in court
      - (2) Private right of action
    - ii) Administrative
      - (1) Individual initiates through complaint
      - (2) Regulatory officials monitor and initiate enforcement
    - iii) Self-regulatory
      - (1) Industry complaints board
  - c) Remedy
    - i) Administrative penalty
    - ii) Equitable relief
    - iii) Damages
      - (1) Cap on damages (ceiling)?
      - (2) Minimum amount of damages (floor) in order to succeed in suit?
      - (3) Type of damages
        - (a) Compensatory
        - (b) Consequential
        - (c) Punitive
    - iv) Industry sanction
      - (1) Dismissal from industry association

- d) Employers
  - i) Reconsider subject's application
  - ii) Hire subject
  - iii) Reinstate subject
  
- e) Educational institutions
  - i) Reconsider student's application
  - ii) Admit student
  - iii) Reinstate student

## 7) Definitions

- a) "Social networking account"
  - i) Defining characteristics
    - (1) Internet-based
    - (2) Public or semi-public profile
      - (a) Within a bounded system
    - (3) Friends
      - (a) List of other users with whom they share connection within the system
    - (4) Private (partially or completely)
      - (a) Not those that completely open to public (e.g. Twitter)
      - (b) Password protected?
  
- b) "Social media account"
  - i) Broader term that might include: social networking sites, blogs, wikis, photo sharing sites, video sharing sites, and mashups
  - ii) Possible definition:
    - (1) Platforms and services that allow users to interact and collaborate with each other in a virtual community as co-creators of user-generated content.
  - iii) Personal Internet account
    - (1) Still broader definition that includes e-mail, text messaging, and other online services and accounts.
  
- c) Employer-focused
  - i) "Employer"
    - (1) Include
      - (a) Scope
        - (i) Individual
        - (ii) Entity/organization
      - (b) Public vs. private
        - (i) Government entity
        - (ii) Corporation
        - (iii) Non-profit private

- (c) Principal/agent
    - (i) Includes agent of employer?
- (2) Exclude
  - (a) Employer characteristics
    - (i) Size threshold
      - 1. Number of employees
    - (b) Particular types of employers
      - (i) Departments of corrections
      - (ii) Law enforcement agencies
        - 1. Federal, state, local
  - ii) "Employee"
    - (1) Full-time only
    - (2) Both full- and part-time
  - iii) "Applicant for employment"
    - (1) Prospective applicant who has as yet taken no action to apply
    - (2) Query submitted
    - (3) Referred
    - (4) Application filed
    - (5) Hired but not yet commenced employment
- d) Educational institution-focused
  - i) "Educational institution"
    - (1) Public vs. Private
      - (a) Public
      - (b) Private
    - (2) Educational level
      - (a) Post-secondary (college, graduate school)
      - (b) Secondary (high school)
      - (c) Middle school
      - (d) Primary (elementary school)
  - ii) "Student"
    - (1) Full-time only
    - (2) Both full- and part-time
    - (3) Active vs. on-leave
    - (4) Alumnus using school account?
  - iii) "Applicant for admission"
    - (1) Prospective applicant who has as yet taken no action to apply?
    - (2) Query submitted
    - (3) Application filed
    - (4) Accepted but not yet matriculated

- 8) Structure of legislation
  - a) One Act, or two?
    - i) Treat employers and educational institutions together in a single Act (majority approach)
    - ii) Or, break them out into two separate Acts