

DRAFT
FOR DISCUSSION ONLY

~~SOCIAL MEDIA PRIVACY ACT~~

~~(EMPLOYEE AND STUDENT ONLINE
PRIVACY PROTECTION)~~ ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAW

~~July 15~~ November 20-21, 2015 ~~Annual Meeting~~ Committee Meeting Draft

REDLINE COMPARISON DRAFT

Copyright © 2015
By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

~~June 4~~ November 5, 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

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, 441 4th St. NW, Suite 830 South, Washington, DC 20001

WILLIAM H. HENNING, Texas A & M School of Law, 1515 Commerce St., Fort Worth, TX 76102

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, House Republican Legal Staff, Main Capitol Bldg., Room B-6, P.O. Box 202228, Harrisburg, PA 17120

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

STEVE WILBORN, 3428 Lyon Dr., Lexington, KY 40513

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

RICHARD T. CASSIDY, 100 Main St., P.O. Box 1124, Burlington, VT 05402, *President*

JOHN T. MCGARVEY, 601 W. Main St., Louisville, KY 40202, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISORS

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

PETER J. GILLESPIE, 1000 Marquette Bldg., 140 South Dearborn St., Chicago, IL 60603, *ABA Section 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

SOCIAL MEDIA EMPLOYEE AND STUDENT ONLINE PRIVACY PROTECTION
ACT

TABLE OF CONTENTS

SECTION 1. SHORT TITLE	1
SECTION 2. DEFINITIONS.....	1
SECTION 3. APPLICABILITY.....	3
SECTION 4. EMPLOYEE PROTECTIONS.....	4
SECTION 5. STUDENT PROTECTIONS.....	7
SECTION 6. CIVIL ACTION.....	11
SECTION 7. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.....	12
[SECTION 8. SEVERABILITY.]	12
SECTION 9. SAVING CLAUSE.....	12
SECTION 10. REPEALS; CONFORMING AMENDMENTS.....	12
SECTION 11. EFFECTIVE DATE.....	13

1 SOCIAL MEDIA EMPLOYEE AND STUDENT ONLINE PRIVACY PROTECTION

2 ACT

3 SECTION 1. SHORT TITLE. This [act] may be cited as the ~~Social Media Privacy Act~~
4 ~~(Employee and Student Online Privacy Protection)~~. Act.

5 SECTION 2. DEFINITIONS. In this [act]:

6 (1) “Educational institution” means a person that provides ~~to~~ students at the ~~post-~~
7 postsecondary or secondary~~[, secondary or middle school]~~ level an organized course of study
8 ~~[that is academic, technical, trade-oriented or preparatory for gaining employment in a~~
9 ~~recognized occupation-].~~ The term includes a public or private educational institution but does
10 not include a home school as defined by state law. The term includes an agent, representative, or
11 designee of the educational institution.

12 (2) “Electronic” means relating to technology having electrical, digital, magnetic,
13 wireless, optical, electromagnetic, or similar capabilities.

14 (3) “Employee” means an individual who provides services or labor to an employer in
15 exchange for compensation. The term includes a prospective employee who has expressed an
16 interest in or applied for employment or whom an employer is otherwise considering for
17 employment.

18 (4) “Employer” means a person that provides compensation to an employee in exchange
19 for services or labor. The term includes an agent, representative, or designee of the employer.

20 (5) “Login information” means a user name and password, password, or other means or
21 credentials of authentication required to access or control a protected personal online account, or
22 to access or control an electronic device that the employer or educational institution has not
23 supplied or paid for and that itself provides access to or control over a protected personal online

1 account.

2 ~~(6)~~ “(6) ‘Login requirement’ means a requirement that login information be provided
3 before a user can access or control an online account.

4 (7) “Metadata” means data that provides information about other data.

5 ~~(78)~~ “Online” means ~~connected to~~ accessed by means of a computer, a computer network,
6 or the Internet.

7 ~~————(8)~~ “(9) ‘Online account’ means a discrete set of online information concerning or
8 established by an individual that the individual can access and control.

9 ~~————~~ (10) “Person” means an individual, estate, business or nonprofit entity, public
10 corporation, government or governmental subdivision, agency or instrumentality, or other legal
11 entity.

12 (911) “Protected personal online account” means an individual’s online account that
13 requires login information in order to access or control that account. The term does not include
14 ~~an online account that:~~

15 (A) an employee’s online account that an employer ~~or educational institution~~
16 supplies or pays for;

17 (B) an online account that an employee creates or maintains on behalf of or under
18 the direction of an employer in connection with that employee’s employment; ~~or~~

19 ~~(C)~~ ~~————~~ (C) a student’s online account that an educational institution supplies or pays for;
20 or

21 (D) an online account that a student creates or maintains on behalf of or under the
22 direction of an educational institution in connection with that student’s education.

23 ~~(1012)~~ “Record” means information that is inscribed on a tangible medium or that is

1 stored in an electronic or other medium and is retrievable in a perceivable form.

2 (1113) “Student” means an individual who participates, on a full-time or part-time basis,
3 in an educational institution’s organized course of study. The term includes:

4 (A) a prospective student who has expressed an interest in attending or applied for
5 admission to an educational institution or whom an educational institution is otherwise
6 considering for admission; and

7 (B) a parent or legal guardian of a student who is under the age of [majority].

8 **SECTION 3. APPLICABILITY.** ~~This [act] does not apply to:~~

9 (a) Except as otherwise provided in subsection (b), this [act] applies to an employer that
10 coerces an employee, and an educational institution that coerces a student, to provide access to or
11 control over a personal online account that is protected by a login requirement.

12 (b) This [act] does not apply to:—

13 (1) an employer or educational institution that accesses an employee’s or
14 student’s personal online account that is not protected by a login requirement;

15 (2) [the federal government;]

16 ~~(2)~~ (3) a state, [county,] or local law enforcement agency;

17 ~~(3)~~ (4) a state, [county,] or local department of ~~correction;~~ corrections, including an
18 authorized private entity that performs the same correctional functions as a state, [county,] or
19 local department of corrections; or

20 (4) a licensed child care provider; or

21 (5) a licensed home health care provider, or other licensed employer that needs access to
22 its employee’s protected personal online account to protect the interests of a vulnerable third
23 party.

1 **SECTION 4. EMPLOYEE PROTECTIONS.**

2 (a) Except as otherwise provided in ~~subsections~~subsections (b) or (c):

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

4 ~~_____ (A) disclose the content or metadata of, or login information for, a~~
5 ~~protected personal online account;~~

6 ~~_____ (B) alter the settings of a protected personal online account, including~~
7 ~~settings that affect whether another person is able to view the content of that account;~~

8 _____ (A) disclose the content or metadata of, or login information for, a
9 protected personal online account;

10 _____ (B) alter the settings of a protected personal online account, including
11 settings that affect whether another individual is able to view the content of the account;

12 (C) add the employer to the ~~employee's list of~~ contacts associated with a
13 protected personal online account; or

14 (D) access a protected personal online account in the presence of the
15 employer in a manner that enables the employer to observe the content of the account.

16 (2) An employer may not take or threaten to take an adverse action against an
17 employee ~~because the employee does not comply~~for noncompliance with a requirement, request,
18 ~~or coercive~~an action of the employer that violates paragraph (1) ~~prohibits~~.

19 (3) An employer that, without violating paragraph (1), inadvertently acquires
20 login information for, or the login-protected content or metadata of, an employee's protected
21 personal online account:

22 (A) ~~may possess the login~~does not, solely by inadvertently acquiring that
23 information, content, and metadata; violate this section;

1 (B) may not use the login information to access or alter an employee's
2 protected personal online account;

3 (C) may not take or threaten to take an adverse employment-related action
4 against the employee based on the content or metadata of the employee's protected personal
5 online account;

6 (D) may not read, review, record, or share the login information for, or the
7 content or metadata of, the employee's protected personal online account; and

8 (E) shall, as soon as practicable, dispose of the login information for, and
9 the content or metadata of, the employee's protected personal online account ~~as soon as~~
10 practicable, in such a way as to make it infeasible for the employer to retrieve that information.

11 (4) An employee may, of the employee's own initiative, give informed, voluntary
12 consent to having others, including the employer, access or control the employee's protected
13 personal online account.

14 (b) ~~Subsection~~ Subsections (a) does (1) through (3) do not apply to an employer action
15 that is necessary to:

16 (1) comply with federal, state, or local law, ~~or with~~ the rules of a self-regulatory
17 organization defined in section 3(a)(26) of the Securities and Exchange Act of 1934, 15 USC
18 78c(a)(26);, or the rules of another self-regulatory organization established by statute that
19 requires an employer to inspect or monitor an employee's protected personal online account;

20 (2) investigate whether the employee has violated or is violating [or intends to
21 violate] federal, state, or local law, or ~~an~~ bona fide employer policy that is in writing or
22 otherwise in a record, and of which the employee had reasonable notice, where:

23 (A) the employer reasonably suspects that the employee has violated or is

1 violating [or intends to violate] ~~the law or policy and the employer accesses only accounts,~~
2 ~~content or metadata that it reasonably believes to be relevant to the investigation of the~~
3 ~~employee; the law or policy; and~~

4 (B) the employer accesses only accounts, content, or metadata that it
5 reasonably believes to be relevant to the investigation;

6 (3) take adverse action against the employee for violating federal, state, or local
7 law or ~~an~~ bona fide employer policy that is in writing or otherwise in a record and of which the
8 employee had reasonable notice; or

9 (4) protect against:

10 (A) a significant threat to health or safety or to employer information or
11 communications technology systems or other employer property; or

12 (B) disclosure of information ~~that~~ in which the employer has a proprietary
13 interest ~~in or~~ that the employer has a legal obligation to keep confidential.

14 (c) An employer may:

15 (1) ~~access~~ an employee's protected personal online account if it can do so without
16 the employee's login information and without taking an action that subsection (a) prohibits; and

17 (2) ~~maintain and monitor the functioning of the employer's information and~~
18 ~~communications technology systems and equipment if the employer can do so without employee~~
19 ~~login information and without taking an action that subsection (a) prohibits.~~

20 (d) Subsections (b) and (c) do not permit an employer to:

21 (1) use its access to, or the content or metadata of, an employee's protected
22 personal online account obtained pursuant to subsection (b) for a purpose ~~other than a purpose~~ not
23 specified in subsection (b); or

1 (2) alter the settings or content of an employee’s protected personal online
2 account, ~~except that an employer may alter the [settings and] content of an employee’s protected~~
3 ~~personal online account if~~unless:

4 (A) the employer has a proprietary interest in ~~[those settings or]~~ that
5 content;

6 (B) federal, state or local law or a court order requires or authorizes the
7 employer to alter ~~[those settings or]~~ that content; or

8 (C) ~~doing to do~~ so is necessary to protect against a significant threat to
9 health or safety.

10 **SECTION 5. STUDENT PROTECTIONS.**

11 (a) Except as otherwise provided in ~~subsection~~subsections (b) or (c):

12 (1) An educational institution may not require, request, or otherwise coerce a
13 student, to:

14 ~~_____ (A) disclose the content or metadata of, or login information for, a~~
15 ~~protected personal online account;~~

16 ~~_____ (B) alter the settings of a protected personal online account, including~~
17 ~~settings that affect whether another person is able to view the content of that account;~~

18 ~~_____ (A) disclose the content or metadata of, or login information for, a~~
19 ~~protected personal online account;~~

20 ~~_____ (B) alter the settings of a protected personal online account, including~~
21 ~~settings that affect whether another person is able to view the content of that account;~~

22 (C) add the educational institution to the ~~student’s list of~~ contacts
23 associated with a protected personal online account; or

1 (D) access a protected personal online account in the presence of the
2 educational institution in a manner that enables the educational institution to observe the content
3 of the account.

4 (2) An educational institution may not take or threaten to take an adverse action
5 against a student ~~because the student does not comply~~for noncompliance with a ~~requirement,~~
6 ~~request, or coerce~~an action of the educational institution that violates paragraph (1) ~~prohibits~~.

7 (3) An educational institution that, without violating paragraph (1), inadvertently
8 acquires login information for, or the login-protected content or metadata of, a student's
9 protected personal online account:

10 (A) ~~may possess the login~~does not, solely by inadvertently acquiring that
11 ~~information, content and metadata;~~violate this section;

12 (B) may not use the login information to access or alter a student's
13 protected personal online account;

14 (C) may not take or threaten to take an adverse education-related action
15 against a student based on the content or metadata of the student's protected personal online
16 account;

17 (D) may not read, review, record, or share the login information for, or the
18 content or metadata of, the student's protected personal online account; and

19 (E) shall, as soon as practicable, dispose of the login information for, and
20 content or metadata of, the student's protected personal online account ~~as soon as practicable~~in
21 such a way as to make it infeasible for the educational institution to retrieve that information.

22 (4) A student may, of the student's own initiative, give informed, voluntary
23 consent to having others, including the educational institution, access or control the student's

1 [protected personal online account.](#)

2 (b) ~~Subsection~~[Subsections \(a\) does](#)~~(1) through (3) do~~ not apply to an educational
3 institution's action that is necessary to:

4 (1) comply with federal, state, or local law, [or with the rules of a self-regulatory](#)
5 [organization established by statute that requires an educational institution to inspect or monitor a](#)
6 [student's protected personal online account](#);

7 (2) investigate whether the student has violated or is violating [or intends to
8 violate] federal, state, or local law, ~~or a~~ [bona fide](#) educational institution policy that is in
9 writing or otherwise in a record and of which the student had reasonable notice, where:

10 [\(A\)](#) the educational institution reasonably suspects that the student has
11 violated or is violating [or intends to violate] the law or policy; and

12 [\(B\)](#) the educational institution accesses only accounts, content, or
13 metadata that it reasonably believes to be relevant to the investigation ~~of the student~~;

14 (3) take adverse action against the student for violating federal, state, or local law
15 or ~~a~~ [bona fide](#) educational institution policy that is in writing or otherwise in a record and of
16 which the student had reasonable notice; or

17 (4) protect against:

18 (A) a significant threat to health or safety or to educational institution
19 information or communications technology systems or other educational institution property; or

20 (B) disclosure of information [in which the educational institution has a](#)
21 [proprietary interest or](#) that the educational institution ~~has a proprietary interest in or~~ has a legal
22 obligation to keep confidential.

23 (c) An educational institution may:

1 (1) access a student's protected personal online account if it can do so without the
2 student's login information and without taking an action that subsection (a) prohibits~~;~~ and]

3 (2) ~~maintain and monitor the functioning of its information and communications~~
4 technology systems and equipment if it can do so without student login information and without
5 taking an action that subsection (a) prohibits~~;~~.

6 (d) Subsections (b) and (c) do not permit an educational institution to:

7 (1) use its access to, or the content or metadata of, a student's protected personal
8 online account obtained pursuant to subsection (b) for a purpose ~~other than a purpose~~not
9 specified in subsection (b); or

10 (2) alter the settings or content of a student's protected personal online account,
11 ~~except that an educational institution may alter the [settings and] content of a student's protected~~
12 ~~personal online account if:~~unless:

13 (A) the educational institution has a proprietary interest in ~~those settings~~
14 ~~or] that content;~~

15 (B) federal, state or local law or a court order requires or authorizes the
16 educational institution to alter ~~those settings or] that content;~~ or

17 (C) ~~doing to do~~ so is necessary to protect against a significant threat to
18 health or safety. _____

19
20 **SECTION 6. NO WAIVER.**

21 ~~—(a) Except where necessary to demonstrate a skill or proficiency that is directly relevant~~
22 ~~to the employee's employment or application for employment, an employer may not:~~

23 ~~—(1) authorize an employer to take an action that Section 4 prohibits with respect to~~

1 ~~the employee; or~~

2 ~~(2) provide an employer with access to, control over, or the content or metadata~~
3 ~~of, the employee's protected personal online account.~~

4 ~~——(b) Except where necessary to demonstrate a skill or proficiency that is directly relevant~~
5 ~~to the student's education or application for admission to an educational institution, a student~~
6 ~~may not:~~

7 ~~(1) authorize an educational institution to take an action that Section 5 prohibits~~
8 ~~with respect to the student; or~~

9 ~~————(2) provide an educational institution with access to, control over, or the content~~
10 ~~or metadata of, the student's protected personal online account.~~

11 ~~=====~~ **SECTION 7. CIVIL ACTION.**

12 (a) [~~A public authority~~The state Attorney General] may bring a civil action against an
13 employer or educational institution alleging a violation of this ~~Act, and~~[act]. [~~A prevailing state~~
14 Attorney General] may obtain:

15 (1) injunctive and other equitable relief; and

16 (2) a civil penalty of ~~[\$\$]~~[1000] for each violation.

17 (b) ~~The~~An affected employee or student may bring a civil action against an employer or
18 educational institution ~~alleging~~for a violation of this ~~Act,~~[act]. An action under subsection (a)
19 does not preclude an action under this subsection.

20 (c) In ~~a civilian~~a action under subsection (b):

21 (1) a prevailing employee or student may obtain:

22 (A) injunctive and other equitable relief;

23 [(B) for each violation, damages in the amount of ~~[\$\$]~~[1000] or] actual

1 damages[, whichever is greater]; [\[and\]](#)

2 [(C) punitive damages]; and

3 (D) [\]costs and reasonable attorneys' fees; and](#)

4 (2) the court may award a prevailing employer or educational institution costs and
5 reasonable attorneys' fees if the court determines the action was frivolous.

6 **SECTION 87. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
7 **NATIONAL COMMERCE ACT.** - This [act] modifies, limits, or supersedes the Electronic
8 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not
9 modify, limit or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize
10 electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.
11 Section 7003(b).

12 **[SECTION 98. SEVERABILITY.** If any provision of this [act] or its application to any
13 person or circumstance is held invalid, the invalidity does not affect other provisions or
14 applications of this [act] which can be given effect without the invalid provision or application,
15 and to this end the provisions of this [act] are severable.]

16 *Legislative Note: Include this section only if this state lacks a general severability statute*
17 *or a decision by the highest court of this state stating a general rule of severability.*
18

19 **SECTION 9. SAVING CLAUSE.** This statute does not affect the validity or effect of
20 an existing state, [county], or local law that protects a protected personal online account to a
21 greater degree than this [act] does.

22
23 **SECTION 10. REPEALS; CONFORMING AMENDMENTS.**

24 (a)

25 (b)

1 (c)

2 **SECTION 11. EFFECTIVE DATE.** This [act] takes effect on [effective date].