

D R A F T
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EMPLOYEE AND STUDENT ONLINE PRIVACY PROTECTION ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAW

February 26-27, 2016 Drafting Committee Meeting

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February 19, 2016

EMPLOYEE AND STUDENT ONLINE PRIVACY PROTECTION ACT

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1 **EMPLOYEE AND STUDENT ONLINE PRIVACY PROTECTION ACT**

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

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

5 (1) “Educational institution” means a person that provides students at the postsecondary
6 [or secondary] level an organized course of study that is academic, technical, trade-oriented or
7 preparatory for gaining employment in a recognized occupation. The term includes a public or
8 private educational institution but not a home school. The term includes a teacher, coach, school
9 administrator or other person that acts, or that a student reasonably believes is acting, on behalf
10 of the educational institution.

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

13 (3) “Employee” means an individual who provides services or labor to an employer in
14 exchange for compensation. The term includes a prospective employee.

15 (4) “Employer” means a person that provides compensation to one or more employees in
16 exchange for services or labor. The term includes a person that acts, or that an employee
17 reasonably believes is acting, on behalf of the employer.

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

23 (6) “Login requirement” means a requirement that login information be provided before

1 an online account or an electronic device can be accessed or controlled.

2 [(7) “Metadata” means data that provides information about other data.]

3 (8) “Online” means accessed by means of a computer network or the Internet.

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

6 (10) “Protected personal online account” means an individual’s online account that is
7 protected by a login requirement. In a situation in which an employee or student has reasonable
8 notice that the employer or educational institution may require login information for, or access
9 to, the online account, the term does not include:

10 (A) an employee’s online account that an employer supplies or pays for[, except
11 where an employer pays only for additional features or enhancements];

12 (B) an online account that an employee creates, maintains, or uses primarily on
13 behalf of or under the direction of an employer in connection with that employee’s employment,
14 [or that an employee obtained by virtue of the employee’s employment relationship with the
15 employer];

16 (C) a student’s online account that an educational institution supplies or pays for[,
17 except where an educational institution pays only for additional features or enhancements]; or

18 (D) an online account that a student creates, maintains, or uses primarily on behalf
19 of or under the direction of an educational institution in connection with that student’s education,
20 [or that a student obtains by virtue of the student’s educational relationship with the educational
21 institution].

22 (11) “Record” means information that is inscribed on a tangible medium or that is stored
23 in an electronic or other medium and is retrievable in a perceivable form.

1 (12) “Student” means an individual who participates in an educational institution’s
2 organized course of study. The term includes:

3 (A) a prospective student; and

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

5 **SECTION 3. APPLICABILITY.**

6 (a) Except as otherwise provided in subsection (b), this [act] applies to an employer that
7 requires, coerces or requests an employee, and an educational institution that requires, coerces or
8 requests a student, to provide the login information for, disclose the content of, or alter the
9 settings of a protected personal online account, or that requires or coerces an employee or student
10 to add the employer or educational institution to the list of contacts associated with the account.

11 (b) This [act] does not apply to

12 (1) employer or educational institution access to an online account or the part of
13 an online account that is available to the general public or not protected by a login requirement;

14 (2) employer or educational institution actions, other than the actions described in
15 subsection (a), that are necessary to maintain or monitor the functioning of the employer’s or
16 educational institution’s information and communications technology systems;

17 [(3) the federal government;]

18 [(4) a federal, state, county, or local law enforcement agency that seeks to view
19 the contents of, but not to obtain login information for, an employee’s protected personal online
20 account;]

21 [(5) a federal, state, county, or local department of corrections, including an
22 authorized private entity that performs the same correctional functions as a state, county, or
23 local department of corrections, that seeks to view the content of, but not to obtain login

1 information for, an employee’s protected personal online account;] or

2 (6) an individual who employs another individual to provide care for a minor
3 child, elderly adult or other vulnerable person.

4 **SECTION 4. EMPLOYEE PROTECTIONS.**

5 (a) Except as otherwise provided in subsections (b) and (c):

6 (1) An employer may not:

7 (A) require, coerce, or request an employee to:

8 (1) disclose the login information for a protected personal online
9 account;

10 (2) disclose the content [or metadata] of a protected personal
11 online account;

12 (3) alter the settings of a protected personal online account,
13 including settings that affect whether another individual is able to view the content of the
14 account; or

15 (4) access the content of a protected personal online account in the
16 presence of the employer in a manner that enables the employer to observe the content; or

17 (B) require or coerce an employee to add the employer to the list of
18 contacts associated with the employee’s protected personal online account.

19 (2) An employer may not take or threaten to take an adverse action against an
20 employee for noncompliance with a requirement, coercive demand, or request that violates
21 paragraph (1).

22 (3) An employer that, without violating paragraph (1), inadvertently acquires
23 login information for, or the login-protected content [or metadata] of, an employee’s protected

1 personal online account:

2 (A) does not, solely by acquiring that information, violate this section;

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

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

8 (D) may not record or share the login information for, or the content [or
9 metadata] of, the employee's protected personal online account;

10 (E) shall, as soon as and to the extent practicable, dispose of the login
11 information for, and the content [or metadata] of, the employee's protected personal online
12 account; [and]

13 [(F) shall, as soon as and to the extent practicable, notify the employee of
14 its acquisition of the information.]

15 (b) Subsection (a) does not apply to an employer action that is necessary to:

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

20 (2) investigate whether the employee has violated, is violating or is reasonably
21 likely to violate federal or state law or a non-pretextual 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 is reasonably likely to violate the law or policy; and

2 (B) the employer accesses only an account, content, [or metadata] that it
3 reasonably believes to be relevant to the investigation;

4 (3) take adverse action against the employee for violating federal or state law or a
5 non-pretexual employer policy that is in writing or otherwise in a record and of which the
6 employee had reasonable notice; or

7 (4) protect against:

8 (A) a threat to health or safety; or

9 (B) a significant threat to employer information or communications
10 technology systems or other employer property; or

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

13 (c) Subsection (b) does not permit an employer to:

14 (1) use its access to, or the content [or metadata] of, an employee's protected
15 personal online account obtained pursuant to subsection (b) for a purpose unrelated to a purpose
16 specified in subsection (b);

17 (2) alter the settings or content of an employee's protected personal online
18 account, unless:

19 (A) the employer has a proprietary interest in the settings or content;

20 (B) federal or state law or a court order requires or authorizes the
21 employer to alter the settings or content; or

22 (C) to do so is necessary to protect against a threat to health or safety; or

23 (3) require, coerce, or request an employee to provide login information unless

1 there is no less intrusive means of accomplishing the purpose specified in subsection (b).

2 **SECTION 5. STUDENT PROTECTIONS.**

3 (a) Except as otherwise provided in subsections (b) and (c):

4 (1) An educational institution may not

5 (A) require, coerce, or request a student to:

6 (1) disclose the login information for a protected personal online
7 account;

8 (2) disclose the content [or metadata] of a protected personal
9 online account;

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

13 (4) access the content of a protected personal online account in the
14 presence of the educational institution in a manner that enables the educational institution to
15 observe the content; or

16 (B) require or coerce a student to add the educational institution to the list
17 of contacts associated with the student's protected personal online account.

18 (2) An educational institution may not take or threaten to take an adverse action
19 against a student for noncompliance with a requirement, coercive demand, or request that
20 violates paragraph (1).

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

1 (A) does not, solely by acquiring that information, violate this section;

2 (B) may not use the login information to access or alter a student's

3 protected personal online account;

4 (C) may not take or threaten to take an adverse education-related action

5 against a student based on the content [or metadata] of the student's protected personal online

6 account;

7 (D) may not record or share the login information for, or the content [or

8 metadata] of, the student's protected personal online account;

9 (E) shall, as soon as and to the extent practicable, dispose of the login

10 information for, and content [or metadata] of, the student's protected personal online account;

11 and

12 [(F) shall, as soon as and to the extent practicable, notify the student of its

13 acquisition of the information.]

14 (b) Subsection (a) does not apply to an educational institution's action that is necessary

15 to:

16 (1) comply with federal or state law, or with the rules of a self-regulatory

17 organization established by statute that requires an educational institution to inspect or monitor a

18 student's protected personal online account;

19 (2) investigate whether the student has violated, is violating or is reasonably likely

20 to violate federal or state law or a non-pretextual educational institution policy that is in writing

21 or otherwise in a record and of which the student had reasonable notice, where:

22 (A) the educational institution reasonably suspects that the student has

23 violated, is violating or is reasonably likely to violate the law or policy; and

1 (B) the educational institution accesses only an account, content, [or
2 metadata] that it reasonably believes to be relevant to the investigation;

3 (3) take adverse action against the student for violating federal or state law or a
4 non-pretexual educational institution policy that is in writing or otherwise in a record and of
5 which the student had reasonable notice; or

6 (4) protect against:

7 (A) a threat to health or safety

8 (B) a significant threat to educational institution information or
9 communications technology systems or other educational institution property; or

10 (C) disclosure of information in which the educational institution has a
11 proprietary interest or that the educational institution has a legal obligation to keep confidential.

12 (c) Subsection (b) does not permit an educational institution to:

13 (1) use its access to, or the content [or metadata] of, a student's protected personal
14 online account obtained pursuant to subsection (b) for a purpose unrelated to a purpose specified
15 in subsection (b); or

16 (2) alter the settings or content of a student's protected personal online account,
17 unless:

18 (A) the educational institution has a proprietary interest in the settings or
19 that content;

20 (B) federal or state law or a court order requires or authorizes the
21 educational institution to alter those settings or that content; or

22 (C) to do so is necessary to protect against a threat to health or safety; or

23 (3) require, coerce, or request a student to provide login information unless there

1 is no less intrusive means of accomplishing the purpose specified in subsection (b).

2 **SECTION 6. CIVIL ACTION.**

3 (a) The [Attorney General] may bring a civil action against an employer or educational
4 institution alleging a violation of this [act]. A prevailing [Attorney General] may obtain:

- 5 (1) injunctive and other equitable relief; and
- 6 (2) a civil penalty of \$[] for each violation.

7 (b) An employee or student may bring a civil action against an employer or educational
8 institution for a violation of this [act]. An action under subsection (a) does not preclude an
9 action under this subsection.

10 (c) In an action under subsection (b):

- 11 (1) an employee or student may obtain:
 - 12 (A) injunctive and other equitable relief;
 - 13 (B) [for each violation, damages in the amount of \$[] or] actual damages[,
14 whichever is greater]; and
 - 15 (C) costs and reasonable attorneys' fees; and
- 16 (2) the court may award a prevailing employer or educational institution costs and
17 reasonable attorneys' fees if the court determines the action was frivolous.

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

1 **[SECTION 8. SEVERABILITY.** If any provision of this [act] or its application to any
2 person or circumstance is held invalid, the invalidity does not affect other provisions or
3 applications of this [act] which can be given effect without the invalid provision or application,
4 and to this end the provisions of this [act] are severable.]

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

7
8 **SECTION 9. REPEALS; CONFORMING AMENDMENTS.**

9 (a)

10 (b)

11 (c)

12 **SECTION 10. EFFECTIVE DATE.** This [act] takes effect