TO: Committee of the Whole, 2016 ULC Annual Meeting, Stowe, VT

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

DATE: June 10, 2016 SUBJECT: **EMPLOYEE AND STUDENT ONLINE PRIVACY PROTECTION ACT (FORMERLY SOCIAL MEDIA PRIVACY ACT) FINAL READING**

Summary of the Committee's Work

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

To date, the Committee has met nine times: (1) November 17, 2014 (by telephone to discuss process, scope and scheduling); (2) February 5, 2015 (by telephone to begin substantive discussions); (3) February 27-28 and March 1, 2015 (in Washington, D.C.); (4) April 17-19, 2015 (in Chicago); (5) November 20-21, 2015 (in Chicago); (6) February 26-27, 2016 (in Dallas); (7) April 7, 2016 (by telephone in preparation for review by the Style Committee); (8) May 23, 2016 (by telephone to discuss Style Committee feedback); and (9) June 8, 2016 (by telephone).

At the 2015 Annual Meeting, the Scope and Program Committee, and then the Executive Committee, approved the Drafting Committee's request that the protected personal online account concept used in the draft (which is somewhat broader than a traditional definition of a social media account) does not exceed the Committee's charge. Following this clarification of scope, the Executive Committee approved the Drafting Committee's request for a name change, from Social Media Privacy to Employee and Student Online Privacy Protection, which is more descriptive of the focus and scope.

Before the February 2015 meeting in Washington, 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 some primary 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 initial 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. The Committee has used this single draft model during the discussions that have followed.

Given the robust discussion at and after the 2015 Annual Meeting, we have had significant further discussions, evolution and refinement in our work. The project also has attracted more and more active interest and input from divergent groups who have thoughtful, deeply-held perspectives on what the draft should and should not do and how the draft should read. Along with input from Committee members, Advisors and Observers, we have received input from industry groups and companies; privacy advocates and consultants; trade associations; academics; universities and colleges and many others. This additional involvement and input, which is ongoing, is very much appreciated and, although complicating significantly the work of the Committee, has helped strengthen the current draft. The Committee also received, accounted for and appreciates formal review and feedback from the Style Committee.

The draft presented at the 2016 Annual Meeting is a substantial revision from what was considered at the 2015 Annual Meeting. This draft is, we submit, significantly stronger than the good draft discussed last year. This draft is submitted for its final reading and consideration by the Committee of the Whole at the 2016 Annual Meeting.

Background

As we reported last year, 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 personal 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, beginning in 2012, state lawmakers introduced legislation preventing employers from requesting such information from employees or potential employees and preventing schools from requesting such information from students or prospective students. *See* http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords-2013.aspx#2015. In 2016, at least fourteen states introduced or considered such legislation, although a substantial number of these bills were not enacted. *Id.* 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

As we reported last year, 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 its work to these two critically-important contexts.

Issues to Highlight

1. As the table of contents demonstrates, the structure of the draft has been revised somewhat from last year. For example, the "No Waiver" provision (discussed more fully below) has been removed.

2. Definition of "Educational institution." Section 2(2). After substantial consideration, input and research, the Committee recommends that the Act apply only to postsecondary educational institutions. As noted above, state legislation varies on this point. Some state statutes apply to primary and secondary schools, in addition to postsecondary schools. Although conceding there are arguments for coverage in primary and secondary schools, the reasons for the recommendation that the Act only apply to postsecondary schools include the greater responsibility that primary and secondary schools have for their students' welfare and the fact that the majority of the state statutes limit coverage to post-secondary schools.

3. Definition of "Employee" and "Employer." Sections 2(5) and (6). These definitions are broad and differ from those being proposed by the Wage Garnishment Act Drafting Committee. This difference is intentional for a variety of reasons, including that this Act is intended to apply to prospective employees with respect to whom no employer-employee relationship yet exists (and may never exist). Similarly, the protections in this Act do not depend upon the transfer of money, as would appear to be the case in the context of the Wage Garnishment Act.

4. Removal of "No Waiver" Provision. Given comments received and further research, the Committee elected to remove a provision in an earlier draft of the Act that would have prohibited employees and students from waiving the Act's protections. In addition, the revised draft allows an employer or educational institution to request that an employee or student add the employer or educational institution to the set of persons that are granted access to the individual's protected personal online account (a "friend

request," in Facebook terms). This is consistent with the notion that privacy consists, in large part, of the ability to control one's personal information and that voluntary waiver is, accordingly, consistent with prevailing notions of privacy. The Act, however, still prohibits coercive action, meaning any waiver must be voluntary.

5. Section 5 (Civil Action) has been changed and simplified. Section 5 now allows for a civil action by the [Attorney General] to obtain equitable relief and a civil penalty of up to [$1000] for each violation (with a maximum penalty of [$100,000] for the same act causing more than one violation). Section 5 also allows an employee or student, or prospective employee or student, to obtain equitable relief, actual damages and costs and reasonable attorneys' fees. The relief available to an [Attorney General] and an employee or student, or prospective employee or student, is not mutually exclusive.

Respectfully submitted.

Samuel A. Thumma
Dennis D. Hirsch