

Memorandum in Opposition

COMMERCIAL & FEDERAL LITIGATION SECTION

Com-Fed # 1

June 13, 2013

S.2434-B

By: Senator Klien

A.443-B

By: M of A Dinowitz

Senate Committee: Labor

Assembly Committee: Labor

Effective Date: 180 days after becoming law

AN ACT to amend the labor law and the education law, in relation to prohibiting an employer or educational institution from requesting or requiring that an employee, applicant or student disclose any user name, password, or other means for accessing a personal account or service through specified electronic communications devices

LAW AND SECTION REFERRED TO: Labor Law § 201-g and Education Law §115

THE COMMERCIAL AND FEDERAL LITIGATION SECTION OPPOSES THIS LEGISLATION

The Commercial and Federal Litigation Section (the “Section”) has reviewed this bill (“Legislation”). For the reasons set forth below, the Section opposes the Legislation in its current form and suggests areas for further consideration.

INTRODUCTION

There is a national movement to legislate an employer’s ability to request access to an individual’s social media account. To date, nine states have passed such legislation pertaining to employers and employees, and seven states have passed legislation pertaining to educational institutions and students. Many more states have bills pending relating to this issue.

In its current form, the Legislation does not appear to balance the competing interests of an individual’s expectation of privacy as it relates to use of social media and an organization’s need to access social media communications in furtherance of its operation and management.

There are many issues which require more thoughtful consideration by the Legislature, and we highlight below some of the more salient issues.

PROPOSED AMENDMENTS TO THE LABOR LAW

Business Purposes

While electronic communication devices provided by employers in the past were nearly exclusively for the business purpose of the employer, the rise of smartphones and tablets has changed the landscape and blurred the lines of device ownership and usage. It is now common for employees to use their devices for business purposes, while using the same device for personal, non-business purposes, not only often with the employer's consent, but in accordance with company policy. Employers sometimes do not pay for such devices and, in other cases subsidize, in part or in whole, the purchase of the device and/or the monthly service fee. Additionally, any device used by an employee, whether it is personal or is supplied and/or paid for by the employer, may utilize an employer's computer system, network or other system. Accordingly, the Legislature should take the above into consideration when carefully weighing the attendant benefits and risks to both employees and business of the Legislation

Concomitantly, consideration should be given as to whether an employer may request a waiver of an applicant's or employee's rights under the Legislation where the employer has a specific justification for seeking such information due to the employee's suspected violation of, for example, law, statute, regulation, or company policy or misconduct.

In addition, consideration should be given whether the Legislation should include language that would limit the use of information obtained in accordance with the Legislation to be used only in connection with the employer's investigation of, or actions with respect to, for example, an employee's suspected violation of law, statute, regulation, or company policy or misconduct, and related proceedings or actions.

Unintentional Possession of Employee Passwords Does Not Create Liability

The Legislation does not include a provision eliminating liability on the part of an employer when an employer unintentionally receives or comes into possession of an employee's username, password, or other means for accessing an employee's personal account. Exceptions should be considered to protect against, for instance, an employer which may need to or be required to access an electronic device used by an employee to address synchronization issues with the employer's computer systems, to provide maintenance or upgrades, or to repurpose the device for a new employee and, where in connection with these actions, the employer learns of the employee's user name, password or other means for accessing her personal account. If such exception were to be included, then the Legislature should consider prohibiting the employer from using such unintentionally disclosed information to access an employee's non-business related information.

PROPOSED AMENDMENTS TO THE EDUCATION LAW

In considering the portion of the Legislation that seeks to amend the education law, the Legislature should take into account, among other issues: (1) whether it should apply to all levels of education; (2) whether it should apply to all individuals who utilize the network of an educational institution; (3) whether it should not apply to all accounts and services provided by an educational institution; (4) whether, notwithstanding notice, there should be any limitations as to the scope of the information that an educational institution may seek; and (5) whether it should apply equally to public and private educational institutions.

REMEDIES FOR VIOLATION OF THE LEGISLATION

The Legislature needs to make clear whether a private right of action exists under the Legislation. It should consider whether there should be: (a) minimum and maximum monetary caps on any recovery; (b) class actions; (c) jury trials; and (d) a mandatory or discretionary award to a prevailing party of attorneys' fees. Further, the Legislature should consider whether the Legislation should be extended to protect employees who file a complaint, action, or proceeding under the Legislation as well as whether it should be extended to employees who participate in an investigation of an alleged violation of the Legislation.

CONCLUSION

For the reasons stated above, the Section opposes the Legislation in its current form, and suggests that the Legislature further consider the above issues raised by the Legislation.

Memorandum prepared by the Social Media Committee of the
Commercial and Federal Litigation Section

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