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New Michigan Law Bans Employer Requests For Access To Employees' and Job Applicants' Personal Internet Accounts

Governor Snyder, on December 28, 2012, signed the Internet Privacy Protection Act, which takes effect immediately. The Internet Privacy Protection Act addresses a concern that employers may be demanding that job applicants and employees furnish their passwords to social media sites. Although a small number of employers have made that kind of demand, most employers have not been doing it. Even one of the sponsors of the Act, Representative Aric Nesbitt, according to *Crain's Detroit Business*, acknowledged that the impetus for the legislation stemmed from some of his constituents who had "heard" about this practice allegedly occurring in other states and asked him to prevent it from occurring in Michigan.

The Internet Privacy Protection Act specifically prohibits an employer from doing any of the following activities:

- Requesting an employee or a job applicant to "grant access to, allow observation of, or disclose information that allows access to or observation of the employee's or applicant's personal internet account"; and
- Discharging, disciplining, failing to hire, or otherwise penalizing an employee or a job applicant for failing to grant that kind of access to a personal internet account.

The "access information" protected from disclosure to an employer consists of "user name, login information, or other security information that protects access to a personal internet account."

A violation by an employer is subject to the following penalties:

- Criminal misdemeanor "punishable by a fine of not more than $1,000.00"; and
- Lawsuit seeking injunctive relief, damages of "not more than $1,000.00," "reasonable attorney fees," and "court costs." A plaintiff must make a demand for damages of "not more than $1,000.00" at least 60 days before filing a lawsuit for damages or 60 days before adding a claim for damages to a lawsuit.

The definition of "employer" includes "an agent, representative, or designee of the employer." That means that an individual supervisor, manager, or human resource employee could be subjected to personal liability for violating the Act.

Importantly, the Act does not impede an employer's ability to conduct background checks. Specifically, it does not restrict an employer from "viewing, accessing, or utilizing" information about an employee or a job applicant that can be obtained "without any required access information or that is available in the public domain." In addition, an employer retains the right to comply with a "duty to screen" employees or job applicants or to "monitor or retain employee communications" that is established under federal law or, under the Securities and Exchange Act, a "self-regulatory organization."

Similarly, the Act permits an employer to conduct an investigation or to require employee cooperation in an investigation in the following situations:

- When there is “specific information about activity on the employee’s personal internet account, for the purpose of ensuring compliance with applicable laws, regulatory requirements, or prohibitions against work-related employee misconduct”; or
- When the employer has “specific information about an unauthorized transfer of the employer’s proprietary information, confidential information, or financial data to an employee’s personal internet account.”

The Act further recognizes an employer’s right to discipline or discharge an employee for “transferring the employer’s proprietary or confidential information or financial data to an employee’s personal internet account without the employer’s authorization.”

The Act also permits an employer to request or require access information to gain access to or to operate an “electronic communications device paid for, in whole or in part, by the employer” and to an “account or service provided by the employer, obtained by virtue of the employee’s employment relationship with the employer, or used for the employer’s business purpose.” An employer can also restrict or prohibit employee access to “certain websites while using an electronic communications device paid for in whole or in part by the employer or while using an employer’s network” as permitted by state and federal law. Similarly, an employer can monitor, review, or access electronic data “stored on an electronic communications device paid for, in whole or in part, by the employer, or traveling through or stored on an employer’s network,” as permitted by state and federal law.

Employers generally have not requested access information for employees’ or job applicants’ “personal internet accounts,” including Facebook and Twitter. Moreover, employers, in fact, rarely have a need for that kind of access information. The Internet Privacy Protection Act, in other words, will ensure that all employers do not do in the future what, to date, the overwhelming majority of employers generally have not done in the past. Prospectively, it will thus establish a clear legal rule for all employers to follow: the access information to job applicants’ and employees’ “personal internet accounts” is none of an employer’s business, subject only to the limited exceptions set forth in the Internet Privacy Protection Act.

If you have any questions about the impact of the Internet Privacy Protection Act, please contact the author of this Client Alert, your Butzel Long attorney, or any member of the Labor and Employment Law Group.

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