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Practical Implications of the New Restrictions on New York Employers' Access to Employee and Applicant Social Media Accounts

On March 12, New York's Governor Kathy Hochul signed a bill into law that effectively prohibits employers from accessing employees' or job applicants' personal social media accounts. New York employers should evaluate their current application processes and social media policies to ensure compliance with the new law.

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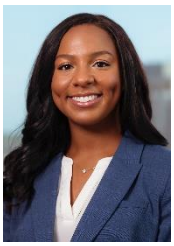

On March 12, 2024, a new New York law went into effect that effectively prohibits employers from accessing employees' or job applicants' *personal* social media accounts.

Under the new legislation, "personal accounts" are broadly defined to mean "an account or profile on an electronic medium where users may create, share, and view user-generated content, including uploading or downloading videos or still photographs, blogs, video blogs, podcasts, instant messages, or internet website profiles used exclusively for personal purposes."

The new law makes it unlawful for an employer to request, require, or coerce an employee or applicant to: (i) disclose the username, password, or "other authentication information" for accessing personal accounts, (ii) access "personal account in the presence of the employer," (iii) or "reproduce in any manner photographs, videos, or other information contained within a personal account" obtained by the prohibited means in (i) and (ii). Employers are prohibited from retaliating against an employee or applicant that refuses to provide personal account access information to an employer that unlawfully requests it.

There are a few exceptions to the sweeping prohibition on accessing employee and applicant social media accounts.

• First, if an employee or applicant voluntarily adds the employer to their list of contacts associated with a personal account, the employer is not prohibited from then accessing the account. For example, applicants may "add" the employer to their list of "connections" on LinkedIn, allowing the employer to view the content on that applicants private LinkedIn account. The new law does not prohibit this kind of access to an employee's account who has voluntarily added the employer as a "connection" or "friend." On the other hand, employers are now explicitly prohibited from requiring that employees disclose the username for their personal accounts. In sum, employers are still permitted to view personal accounts of applicants and employees who voluntarily add the employer to the list of contacts but cannot require that the employer be added to that list.

• Second, an employer may require employees to disclose the username, password, or other authenticating information for non-personal accounts that "provide access to the employer's internal computer or information systems," such as through a link to the employer's intranet or internal database. As a matter of internal data security, employers should always be cognizant of entry-points into their internal intranet and databases. Employers should be especially vigilant in ensuring the security of any non-personal accounts that provide direct access to such non-public information. Part of this vigilance may include keeping track of employee's with non-personal accounts that provide such access, as well as the access information for those accounts. Such a data security practice would not violate New York's new law.

• Third, employers can still require that employees disclose access information to an account provided by the employer for business purposes and access an electronic communications device paid for by the employer, so long as the employee was provided prior notice of the employer's right to request such access and the provision of the device was conditioned on the employer's right to access it. Notably, however, employers are still prohibited from accessing personal accounts on devices it paid for. Employers with business social media accounts such as LinkedIn, Instagram, TikTok, and Facebook are, of course, permitted to require the disclosure of the access information to those business accounts. Further, employers that provide cell phones and laptops to their employees should be sure to include language in their Acceptable Use policies clarifying that the employer has the right to request access to these devices and the employee's use of the device is conditioned on this right. The policy should also state that under no circumstances will the employer access the employee's personal accounts, even if those accounts are on an employer-provided device.

• Finally, the new legislation does not restrict employers from viewing, accessing, or utilizing information: (i) "about an employee or applicant that can be obtained without any required access information," (ii) "that is available in the public domain," or (iii) "for the purposes of obtaining reports of misconduct or investigating misconduct, photographs, video, messages, or other information that is voluntarily shared by an employee, client, or other third party that the employee subject to such report or investigation has voluntarily given access to contained within such employee's personal account." Common sense dictates that employers are still permitted to view, access, and use employees' and applicants' publicly available information. Employers should be careful how they use such information, but generally are not restricted from accessing publicly available information online even under New York's strict new law. Additionally, employers still have limited leeway to view information on an employee's personal account when, for instance, another employee makes a workplace complaint about an interaction between the two employees on their personal social media accounts. As written, the law permits employers to view and investigate the exchange the two employees had on social media, despite not being "friends" with either account. Importantly, while employers can view this information, they are still prohibited from requiring that employees give them access to their personal accounts.

New York's law is just one of many similar measures introduced across the country this year related to safeguarding employees' online privacy from employer inquiries. States including California, Connecticut and Oregon prohibit employers from asking employees to access their social media accounts while the employer is present. New Hampshire, Maine, and Delaware prohibit employers from requiring employees to add the employer as a "friend" or to invite the employer to a group that gives access to non-public information. Most of these laws, like the new New York law, include an anti-retaliation provision to protect employees that refuse to share their personal social media accounts with their employer. In New York,

the law is enforced through the state's Department of Labor's Division of Labor Standards and there is no private right of action.

New York employers should evaluate their current application processes, social media and acceptable use policies, and general social media practices to ensure compliance with the new law.

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