

DRAFT
FOR DISCUSSION ONLY

SOCIAL MEDIA PRIVACY ACT
**(EMPLOYEE AND STUDENT ONLINE
PRIVACY PROTECTION ACT)**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAW

November 20-21, 2015 Drafting Committee Meeting

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November 5, 2015

SOCIAL MEDIA PRIVACY ACT

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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 does not include a home school as defined by state law. The
9 term includes an agent, representative, or designee of the educational institution.

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

12 (3) “Employee” means an individual who provides services or labor to an employer in
13 exchange for compensation. The term includes a prospective employee who has expressed an
14 interest in or applied for employment or whom an employer is otherwise considering for
15 employment.

16 (4) “Employer” means a person that provides compensation to an employee in exchange
17 for services or labor. The term includes an agent, representative, or designee 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 a

1 user can access or control an online account.

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

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

5 (9) “Online account” means a discrete set of online information concerning or established
6 by an individual that the individual can access and control.

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

10 (11) “Protected personal online account” means an individual’s online account that
11 requires login information in order to access or control that account. The term does not include:

12 (A) an employee’s online account that an employer supplies or pays for;

13 (B) an online account that an employee creates or maintains on behalf of or under
14 the direction of an employer in connection with that employee’s employment;

15 (C) a student’s online account that an educational institution supplies or pays for;

16 or

17 (D) an online account that a student creates or maintains on behalf of or under the
18 direction of an educational institution in connection with that student’s education.

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

21 (13) “Student” means an individual who participates, on a full-time or part-time basis, in
22 an educational institution’s organized course of study. The term includes:

1 (A) a prospective student who has expressed an interest in attending or applied for
2 admission to an educational institution or whom an educational institution is otherwise
3 considering for admission; and

4 (B) a parent or legal guardian of a student who is 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 coerces an employee, and an educational institution that coerces a student, to provide access to or
8 control over a personal online account that is protected by a login requirement.

9 (b) This [act] does not apply to:

10 (1) an employer or educational institution that accesses an employee's or
11 student's personal online account that is not protected by a login requirement;

12 (2) [the federal government;]

13 (3) a state, [county,] or local law enforcement agency;

14 (4) a state, [county,] or local department of corrections, including an authorized
15 private entity that performs the same correctional functions as a state, [county,] or local
16 department of corrections; or

17 (5) a licensed child care provider, licensed home health care provider, or other
18 licensed employer that needs access to its employee's protected personal online account to
19 protect the interests of a vulnerable third party.

20 **SECTION 4. EMPLOYEE PROTECTIONS.**

21 (a) Except as otherwise provided in subsections (b) or (c):

22 (1) An employer may not require, request, or otherwise coerce an employee to:

23 (A) disclose the content or metadata of, or login information for, a

1 protected personal online account;

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

4 (C) add the employer to the contacts associated with a protected personal
5 online account; or

6 (D) access a protected personal online account in the presence of the
7 employer in a manner that enables the employer to observe the content of the account.

8 (2) An employer may not take or threaten to take an adverse action against an
9 employee for noncompliance with an action of the employer that violates paragraph (1).

10 (3) An employer that, without violating paragraph (1), inadvertently acquires
11 login information for, or the login-protected content or metadata of, an employee's protected
12 personal online account:

13 (A) does not, solely by inadvertently acquiring that information, violate
14 this section;

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

17 (C) may not take or threaten to take an adverse employment-related action
18 against the employee based on the content or metadata of the employee's protected personal
19 online account;

20 (D) may not read, review, record, or share the login information for, or the
21 content or metadata of, the employee's protected personal online account; and

22 (E) shall, as soon as practicable, dispose of the login information for, and
23 the content or metadata of, the employee's protected personal online account in such a way as to

1 make it infeasible for the employer to retrieve that information.

2 (4) An employee may, of the employee's own initiative, give informed, voluntary
3 consent to having others, including the employer, access or control the employee's protected
4 personal online account.

5 (b) Subsections (a)(1) through (3) do not apply to an employer action that is necessary to:

6 (1) comply with federal, state, or local law, the rules of a self-regulatory
7 organization defined in section 3(a)(26) of the Securities and Exchange Act of 1934, 15 USC
8 78c(a)(26), or the rules of another self-regulatory organization established by statute that requires
9 an employer to inspect or monitor an employee's protected personal online account;

10 (2) investigate whether the employee has violated or is violating [or intends to
11 violate] federal, state, or local law, or a bona fide employer policy that is in writing or otherwise
12 in a record, and of which the employee had reasonable notice, where:

13 (A) the employer reasonably suspects that the employee has violated or is
14 violating [or intends to violate] the law or policy; and

15 (B) the employer accesses only accounts, content, or metadata that it
16 reasonably believes to be relevant to the investigation;

17 (3) take adverse action against the employee for violating federal, state, or local
18 law or a bona fide employer policy that is in writing or otherwise in a record and of which the
19 employee had reasonable notice; or

20 (4) protect against:

21 (A) a significant threat to health or safety or to employer information or
22 communications technology systems or other employer property; or

23 (B) disclosure of information in which the employer has a proprietary

1 interest or that the employer has a legal obligation to keep confidential.

2 (c) An employer may:

3 (1) access an employee's protected personal online account if it can do so without
4 the employee's login information and without taking an action that subsection (a) prohibits; and

5 (2) maintain and monitor the functioning of the employer's information and
6 communications technology systems and equipment if the employer can do so without employee
7 login information and without taking an action that subsection (a) prohibits.

8 (d) Subsections (b) and (c) do not permit an employer to:

9 (1) use its access to, or the content or metadata of, an employee's protected
10 personal online account obtained pursuant to subsection (b) for a purpose not specified in
11 subsection (b); or

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

14 (A) the employer has a proprietary interest in those settings or that
15 content;

16 (B) federal, state or local law or a court order requires or authorizes the
17 employer to alter those settings or that content; or

18 (C) to do so is necessary to protect against a significant threat to health or
19 safety.

20 **SECTION 5. STUDENT PROTECTIONS.**

21 (a) Except as otherwise provided in subsections (b) or (c):

22 (1) An educational institution may not require, request, or otherwise coerce a
23 student, to:

1 (A) disclose the content or metadata of, or login information for, a
2 protected personal online account;

3 (B) alter the settings of a protected personal online account, including
4 settings that affect whether another person is able to view the content of that account;

5 (C) add the educational institution to the contacts associated with a
6 protected personal online account; or

7 (D) access a protected personal online account in the presence of the
8 educational institution in a manner that enables the educational institution to observe the content
9 of the account.

10 (2) An educational institution may not take or threaten to take an adverse action
11 against a student for noncompliance with an action of the educational institution that violates
12 paragraph (1).

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

16 (A) does not, solely by inadvertently acquiring that information, violate
17 this section;

18 (B) may not use the login information to access or alter a student's
19 protected personal online account;

20 (C) may not take or threaten to take an adverse education-related action
21 against a student based on the content or metadata of the student's protected personal online
22 account;

23 (D) may not read, review, record, or share the login information for, or the

1 content or metadata of, the student’s protected personal online account; and

2 (E) shall, as soon as practicable, dispose of the login information for, and
3 content or metadata of, the student’s protected personal online account in such a way as to make
4 it infeasible for the educational institution to retrieve that information.

5 (4) A student may, of the student’s own initiative, give informed, voluntary
6 consent to having others, including the educational institution, access or control the student’s
7 protected personal online account.

8 (b) Subsections (a)(1) through (3) do not apply to an educational institution’s action that
9 is necessary to:

10 (1) comply with federal, state, or local law, or with the rules of a self-regulatory
11 organization established by statute that requires an educational institution to inspect or monitor a
12 student’s protected personal online account;

13 (2) investigate whether the student has violated or is violating [or intends to
14 violate] federal, state, or local law, or a bona fide educational institution policy that is in writing
15 or otherwise in a record and of which the student had reasonable notice, where:

16 (A) the educational institution reasonably suspects that the student has
17 violated or is violating [or intends to violate] the law or policy; and

18 (B) the educational institution accesses only accounts, content, or
19 metadata that it reasonably believes to be relevant to the investigation;

20 (3) take adverse action against the student for violating federal, state, or local law
21 or a bona fide educational institution policy that is in writing or otherwise in a record and of
22 which the student had reasonable notice; or

23 (4) protect against:

1 (A) a significant threat to health or safety or to educational institution
2 information or communications technology systems or other educational institution property; or

3 (B) disclosure of information in which the educational institution has a
4 proprietary interest or that the educational institution has a legal obligation to keep confidential.

5 (c) An educational institution may:

6 (1) access a student's protected personal online account if it can do so without the
7 student's login information and without taking an action that subsection (a) prohibits; and

8 (2) maintain and monitor the functioning of its information and communications
9 technology systems and equipment if it can do so without student login information and without
10 taking an action that subsection (a) prohibits.

11 (d) Subsections (b) and (c) do not permit an educational institution to:

12 (1) use its access to, or the content or metadata of, a student's protected personal
13 online account obtained pursuant to subsection (b) for a purpose not specified in subsection (b);

14 or

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

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

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

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

23

1 **SECTION 6. CIVIL ACTION.**

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

- 5 (1) injunctive and other equitable relief; and
- 6 (2) a civil penalty of \$[1000] for each violation.

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

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

11 (1) a prevailing employee or student may obtain:

12 (A) injunctive and other equitable relief;
13 [(B) for each violation, damages in the amount of \$[1000] or] actual
14 damages[, whichever is greater]; [and]

15 [(C) punitive damages; and

16 (D)]costs and reasonable attorneys' fees; and

17 (2) the court may award a prevailing employer or educational institution costs and
18 reasonable attorneys' fees if the court determines the action was frivolous.

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

1 Section 7003(b).

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

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

8
9 **SECTION 9. SAVING CLAUSE.** This statute does not affect the validity or effect of
10 an existing state, [county], or local law that protects a protected personal online account to a
11 greater degree than this [act] does.

12 **SECTION 10. REPEALS; CONFORMING AMENDMENTS.**

13 (a)

14 (b)

15 (c)

16 **SECTION 11. EFFECTIVE DATE.** This [act] takes effect