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NJ Social Media Bill Could Prompt Flurry Of Employee Suits

By Joshua Alston

Law360, New York (March 25, 2013, 9:20 PM ET) -- A bill before New Jersey Gov. Chris Christie not only would prevent employers from asking job candidates for their social media passwords, but would allow job seekers to sue if companies even asked them if they had such accounts, making it the strictest proposal of its kind and a potential litigation land mine for employers, experts say.

A2878 passed the state's Legislature last week, and if the bill wins Christie's signature, it would make New Jersey the eighth state to pass legislation preventing employers from asking prospective and current employees for passwords to their accounts on social media sites such as Facebook and Twitter. But New Jersey's bill is the first to include language prohibiting employers from asking employees if they have such accounts.

That provision, coupled with the rare measure of allowing employees to bring suits over violations, could create a host of challenges for employers trying to implement it, experts say.

"I do think the New Jersey Legislature went too far," says Heather Weine Brochin, a partner in Day Pitney LLP's Social Media Task Force. "I'm a little concerned about employers inadvertently tripping up over the provision in New Jersey's bill that says you can't ask employees if they have an account. It's problematic in many senses, because many employees are using social networking accounts to do their jobs."

Brochin says lawmakers are too focused on keeping employers from poking their noses into workers' Facebook or Twitter pages, and are not thinking about the effect the bill would have on workplace use of a professional social media platform such as LinkedIn.

"In the business world, LinkedIn is used a lot, and it would be useful for an employer to know if their employees are represented there and using it as a way to network with vendors, for example," Brochin says. "It could create a real issue if asking an employee about a tool like that opened employers to liability."

A2878, if passed, would punish violators with civil penalties of up to \$1,000 for the first instance, and up to \$2,500 for each additional violation. But the bigger worry, experts say, is that the bill would let an aggrieved employee file suit against an employer for up to a year following the violation, and allow the collection of damages and attorneys' fees — which could spark a litigation feeding frenzy.

Donald W. Schroeder, a member in the labor practice of Mintz Levin Cohn Ferris Glovsky and Popeo PC, says such workplace privacy laws are generally preventive and tend not to lead to litigation. But because the law, as written, would be so easy to unwittingly violate,

he says, attorneys could be drawn in.

The bill was sponsored by New Jersey Assembly members Louis Greenwald, D-Camden; John Burzichelli, D-Cumberland; Ruben Ramos Jr., D-Hudson; Herb Conaway Jr., D-Burlington; and Marlene Caride, D-Bergen, amid reports that those seeking work in the state were being pressured to relinquish their electronic privacy in order to secure employment.

"If we don't draw this line in the sand now, who knows how far this invasion of privacy might be taken," Ramos said in a statement. "In an economy where employers clearly have the upper hand, we need to protect the rights of job seekers from being trampled."

But Schroeder said the law is mostly unnecessary because the private sector has learned over time that involving itself with employees' social media opens it to liability in many ways.

"I didn't think we needed to legislate this issue in the first place, because I think the private sector is figuring out that it's simply not a good idea to do that," Schroeder said. "I just don't think the lawmakers who came up with this bill thought through the practical ramifications."

But in spite of the challenges a bill like A2878 presents, Bradley S. Shear, a Bethesda, Md., social media and Internet lawyer, said such legislation can protect companies from liability by allowing them to decline involvement in employee activity on social media networks.

He gave the example of an employee making social media posts that could be construed to indicate violent tendencies, then later committing workplace violence. The employer would be open to liability if a plaintiff could prove it had access to the posts and could have prevented the acts.

"This is saving businesses probably tens of millions of dollars in judgments, because lawyers would say, 'You had a duty to scan this person's Facebook page, and because you didn't, there was a shooting at the office,'" Shear said.

A representative for Christie did not immediately respond to a request for comment, but according to recent reports, the governor has not yet seen the bill, and there is not a firm timeline for signing it into law.

Maryland was the first state to pass such a law in March 2012, and since then, California, Illinois, Michigan and Delaware have enacted similar laws. Similar laws have been introduced or are pending in 32 other states, according to the National Conference of State Legislatures.

--Editing by Kat Laskowski and Chris Yates.