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Tennessee Enacts Trio of Employment Laws

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Tennessee's governor recently signed three new employment laws. The first, a social media law, takes effect on January 1, 2015,[1] and provides applicants and employees with social media protections similar to those in fifteen other states.[2] The second, a negligent hiring and retention law, designed to provide a measure of protection to employers that hire and retain certain employees with convictions, goes into effect on July 1, 2014. The third limits liability and the damages available under the state's statutory employment discrimination laws and applies to actions accruing on or after July 1, 2014. This alert highlights key provisions of these new laws and examines the implications for Tennessee employers.

Social Media Law

Tennessee's new social media law applies to employers with one or more employees (including the state and its political subdivisions), as well as any agent, representative, or designee of an employer. Under the new law, an employer may not:

- request or require an employee or applicant to disclose a password that allows access to his or her "personal Internet account";[3]
- compel an employee or applicant to add the employer or an employment agency to his or her list of contacts associated with a personal Internet account;
- force an employee or applicant to access a personal Internet account in the presence of the employer (so as to permit the employer to observe the contents of the account); or
- take an adverse action, fail to hire, or otherwise penalize an employee or applicant for failing to disclose information or for refusing to comply with a prohibited directive involving his or her personal Internet account.

Despite these prohibitions, the social media law expressly permits employers to:

request or require employee disclosure of usernames and passwords for purposes of gaining access to (i) an electronic communications device supplied or paid for by the employer, or (ii) an account or service provided by the employer that is obtained by virtue of the employee's employment relationship, or used for the employer's business purposes;

- discipline or discharge an employee for transferring the employer's proprietary, confidential, or financial information to his or her personal Internet account without the employer's authorization;
- conduct an investigation or require an employee to cooperate in an investigation if (i) there is specific information contained on the employee's personal Internet account regarding compliance with applicable laws, regulatory requirements, or prohibitions against work-related employee misconduct, or (ii) the employer has specific information about an unauthorized transfer of the employer's proprietary, confidential, or financial information;[4]
- restrict or prohibit access to certain web sites while using an electronic communications device supplied by or paid for by the employer or while using the employer's network or resources, in accordance with state and federal law;
- monitor, review, access, or block electronic data stored on an electronic communications device supplied by or paid for by the employer, or stored on an employer's network, in accordance with state and federal law;
- screen employees or applicants prior to hiring, or to monitor or retain employee communications (i) pursuant to a duty imposed under federal law or by a self-regulatory organization (as defined by federal law), or (ii) for purposes of employment in law enforcement or an investigation into a law enforcement officer's conduct performed by a law enforcement agency; or
- view, access, or use information about an employee or applicant that can be obtained without violating the social media law, or that is available in the public domain.

The social media law also makes clear that an employer is under no duty to search or monitor activity on a personal Internet account, nor is it liable for failing to request or require that an employee or applicant grant access to or allow observation of his or her personal Internet account.

To ensure compliance with Tennessee's new social media law, employers should review their hiring, monitoring, and investigatory procedures regarding the use of social media, and make any necessary changes. Although the social media law is silent as to remedies, employers should be aware that, by engaging in the type of conduct the law prohibits, they may violate other laws that allow for substantial damages (such as the federal Stored Communications Act or common law privacy rights). Furthermore, although the social media law permits employers to view publicly accessible profiles, employers should recognize that such conduct may give rise to a discrimination claim under Title VII of the Civil Rights Act of 1964 or a state equivalent if the employer takes adverse action based on information that reveals a protected characteristic such as race or religion. Given these risks, Tennessee employers should adopt a clear and compliant workplace policy governing the use of social media.

Negligent Hiring and Retention Law

Tennessee's new negligent hiring and retention law encourages the employment of ex-convicts by shielding employers from negligence claims for hiring, retaining or licensing an ex-offender who has received a "certificate of employability" ("Certificate"),[5] provided that the employer knew of the Certificate at the time of the alleged negligence. An employer still may be liable, however, for retaining an ex-offender who has received a Certificate if, after hire, the employee "demonstrates danger" or is convicted of a felony and the employer willfully retains the employee despite having actual knowledge of this information.

Tennessee joins other states that have tried to protect employers from negligent hiring and retention claims, such as Georgia, Texas, Minnesota, Florida, and New York. Nevertheless, with more states and cities limiting employers from running criminal background checks on current or prospective employees, or from using criminal records in hiring and personnel decisions, there is concern that an increasing number of jurisdictions have not accorded enough protection from negligent hiring and retention claims stemming from the criminal conduct of repeat offenders. Employers, therefore, should continue to vet applicants and employees carefully, consistent with the law in their jurisdictions.

Amendments to Limit Liability and Damages Under Tennessee Employment Discrimination Laws

Another recent Tennessee law amends various Tennessee discrimination laws to impose caps on damages available in employment-related litigation and to limit liability in certain circumstances.

Specifically, the amendments impose caps on compensatory damages available under Tennessee's Human Rights Act, its Disability Act and its retaliatory discharge statute, for future pecuniary losses as well as non-pecuniary losses (including emotional pain and suffering).[6] The caps operate based on the number of employees employed on the date the alleged adverse employment action occurred:

- 8 to 14 employees, $25,000;
- 15 to 100 employees, $50,000;
- 101 to 200 employees, $100,000;
- 201 to 500 employees, $200,000; and
- more than 500 employees, $300,000.

The amendments also:

- eliminate aider-abettor and individual liability under the Tennessee Human Rights Act;
- limit coverage under the Tennessee Disability Act to employers with eight or more employees, including the state and its subdivisions;

- preclude common law claims for retaliatory discharge that could have been brought pursuant to the Tennessee retaliatory discharge act; and
- forbid bringing a lawsuit in state court under Tennessee's Human Rights Act, Disability Act and/or retaliatory discharge statute while concurrently asserting a federal action premised on a common nucleus of operative facts.

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If you have any questions regarding these three new Tennessee laws, please contact your Proskauer lawyer.

[1] The social media law does not apply to contracts entered into prior to January 1, 2015, that permit an employer to engage in conduct prohibited by the statute, unless or until the contract is renewed on or after that date.

[2] The social media law is similar to statutes in Louisiana, Oklahoma, Wisconsin, New Jersey, Maryland, Illinois, California, Michigan, Utah, New Mexico, Arkansas, Colorado, Washington, Oregon and Nevada. A number of other states and the U.S. Congress are considering similar legislation.

[3] The social media law defines "personal Internet account" as an online account used exclusively for personal communications unrelated to any business purpose of the employer, and includes emails, messages, instant messages, text messages, blogs, podcasts, photographs, videos, or user-created profiles.

[4] As part of the permitted investigation, the employer may require the employee to share the reported content or information to make a factual determination.

[5] The Tennessee negligent hiring and retention law authorizes a court to issue a Certificate in its discretion only if the ex-offender establishes that: (i) the ex-offender has sustained the character of a person of honesty, respectability, and veracity and is generally esteemed as such by his or her neighbors; (ii) granting the petition will materially assist the ex-offender in obtaining employment or occupational licensing; (iii) there is a substantial need for the relief requested in order to live a law-abiding life; and (iv) granting the petition would not pose an unreasonable risk to the safety of the public or any individual. The Certificate is presumptively revoked if the person is convicted of or pleads guilty to a felony offense committed after the Certificate was issued.

[6] The caps do not apply to back pay, interest on back pay, front pay, or equitable relief.

***Authors of this alert**:*

Joseph C. O'Keefe, Daniel L. Saperstein, Kelly Anne Targett, Julianne Apostolopoulos, Allison Lynn Martin and Nicholas M. Tamburri.