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Illinois Second State to Prohibit Employers from Requiring Applicants and Employees to Divulge Social Media Passwords

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On August 1, 2012, Illinois' governor signed a law (Public Act 097-0875) to make it unlawful for an employer to request or require that an applicant or employee provide any password or other related account information in order to gain or demand access to the account or profile on a social networking website.

Illinois' new law expressly permits an employer to (1) maintain lawful workplace policies governing the use of the employer's electronic equipment, including those regarding the Internet, social networking sites, and electronic mail; and (2) monitor the usage of the employer's electronic equipment and electronic mail, so long as the employer does not engage in the practices made unlawful by the new law. Illinois' new law also states that nothing prohibits an employer from obtaining information in the public domain about an applicant or employee.

Illinois' new law amends the Right to Privacy in the Workplace Act (RPWA), which, among other things, generally prohibits an employer from discriminating against an individual because he or she uses lawful products off the employer's premises during nonworking hours, and proscribes employer inquiries into whether an applicant has received or filed a claim for benefits under the Workers' Compensation Act or Workers' Occupational Diseases Act.

The RPWA affords an applicant or employee the right to commence an action in court to pursue an alleged violation of the Act. Accordingly, under Illinois' new law, a prevailing applicant or employee is entitled to (1) actual damages plus costs, and (2) for a willful and knowing violation, $200 plus costs, reasonable attorney's fees, and actual damages. The Illinois Department of Labor also may file a lawsuit in court to enforce the new law. To brace for the prospect of lawsuits and penalties under Illinois' new law, employers should carefully review their hiring and personnel policies regarding the use of social media.

Illinois' new law, which takes effect on January 1, 2013, is part of a growing national trend. Maryland recently became the first state to pass such legislation, with the U.S. Congress and a number of state legislatures proposing similar laws. In addition to monitoring these legislative developments, employers in Illinois and across the country should ensure that their searches and use of information located on the Internet and social media sites do not run afoul of certain privacy and antidiscrimination laws.

If you have any questions or concerns regarding the new Illinois law, please contact your Proskauer lawyer or any co-chair of the Employment Law Counseling Practice Group. Please also see our past client alerts on background checks: EEOC Issues New Guidance on Criminal Background Checks and Law Prohibiting Discrimination Based on Unemployment Status Signed by DC Mayor: Employers Beware – Similar Laws Likely to Follow.

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