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Use of Employee Social Media and E-Mail Accounts for Employment Decisions

On August 1, 2012, Governor Pat Quinn signed into law new provisions of the Illinois Right to Privacy in the Workplace Act which significantly curtail an employer's right to gain access to the private social media and e-mail accounts of employees and prospective employees. The new provisions of the Act, which take effect on January 1, 2013, make it unlawful for an employer to demand that its employees or those applying for employment disclose their "password or any other account-related information in order to gain access to the employee's or prospective employee's account or profile on a social networking website or to demand access in any manner to an employee's or prospective employee's account or profile on a social networking website." 820 ILCS 55/10(b). There are no exceptions to the new restrictions set forth in the Act. Illinois is the second State in the country to enact such a sweeping piece of legislation.

19730 Governors Highway, Suite 10, Flossmoor, IL 60422-2083
Telephone: **708.799.6766** | Facsimile: 708.799.6866

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BOYLE & IZZO, LLC
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Despite its breath, the new law makes it clear that its provisions do not prohibit employers from developing and implementing policies "governing the use of its electronic equipment including policies concerning Internet usage, social networking site use and e-mail use." Moreover, the new law does not prohibit an employer from "monitoring its employees' use of its electronic equipment and e-mail without requesting or requiring any employee or prospective employee to provide any password or other account-related information in order to gain access to the employee's or prospective employee's account or profile on a social media networking site." The changes to the Act do not prohibit employers from obtaining information about an employee or job applicant that is in the public domain or is obtained in compliance with the new provisions of the Act.

According to the new provisions of the law, a "social networking website" is an "Internet based service that allows individuals to a) construct private or semi-private profiles within a bounded system, created by the service; b) create a list of other users with whom they share a connection within the system and; c) view and navigate their list of connections and those made by others within the system." E-mail is not considered a

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"social networking site" under the new law. However, Facebook, Twitter, My Space, Google Plus and Live Journal certainly are examples of websites that are "social networking sites."

The new Illinois law follows a series of National Labor Relations Board (NLRB) decisions tackling the issue of an employer's restrictions on employee social media use. In Hispanics United of Buffalo and Ortiz, 3-CA-27872 (NLRB September 2, 2011), the NLRB decided that an employer's termination of employees for complaints about the employer on their private Facebook accounts was a violation of the National Labor Relations Act (NLRA) because
it was a restraint on the employees' right to discuss matters affecting their employment amongst themselves." Particularly salient to the Board's finding was the fact that the employees were using their private accounts outside of work.

However, in Karl Knauz Motors, Inc. and Becker, 13-CA-46452 (NLRB September 28, 2011), the Board found that an employee's termination as a result of Facebook postings on his private page did not violate the NLRA as the employee made mocking comments about his employer which did not involve any discussion with other employees and there were no comments made about the terms

and conditions of his employment. The Board also reaffirmed that an employee's use of disparaging terms or even profanity may be protected activity under the NLRA. While the Board found that the employee's conduct was not protected activity under the NLRA, it nevertheless found that the employer's application of its policies against company "disrespect" and "bad attitude" could be interpreted as chilling an employee's right to communicate with co-workers concerning the terms and conditions and of employment and therefore violated Section 7 of the Act.

While the NLRB's rulings are merely persuasive and not binding, Hispanics United and Kauz elucidate three guiding principles for employers trying to determine if social media commentary is "protected activity" under the NLRA: 1) the social medial comments in question must involve terms and conditions of employment; 2) an employee's use of profanity or disparaging remarks about an employer on a social media site may not be enough to remove the Act's protection of the employee's commentary and; 3) an employee's social media commentary must be in conjunction with other employees or somehow involve other employees.

Employers still have the right to set policy restricting the use

of electronic media both as to employer-owned technology and, to a lesser degree, disruptive use of employee-owned technology. However, in light of the new Illinois law and recent rulings by the NLRB, employers should proceed with caution. An employer should not demand that an employee or applicant for employment turn over their private social media or e-mail account as a condition of their employment or continued employment. An employer should also be very careful in developing social media use restrictions for its employees and disciplining employees for discussions posted about their employer on private social media accounts. If you have any questions concerning your social media policy or access to employee email or social media accounts, please contact our attorneys at 708-799-6766 or 630-928-1200.