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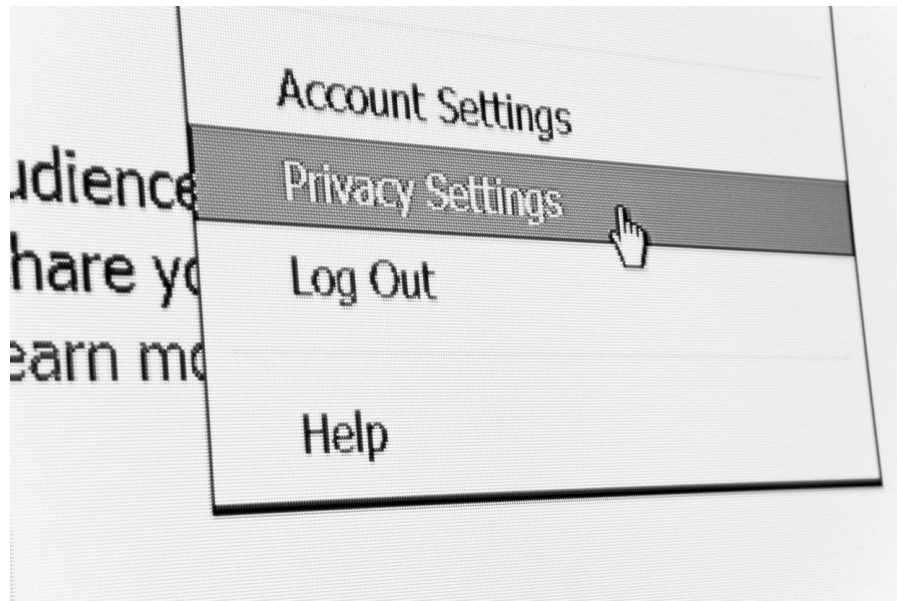
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FEATURE

**ACCESS DENIED: THE
"FACEBOOK LAW" AND
ILLINOIS' EVOLVING
WORKPLACE PROTECTIONS**

by STEVEN A. MONTALTO

In his biography, Nobel Prize in Literature recipient Gabriel García Márquez wrote, "[E]veryone has three lives: a public life, a private life and a secret life."¹ Yet, in July 2012 alone, individuals within the United States spent 121 billion minutes sharing information on social media sites, blurring the apparent dichotomy between the discrete lives Mr. Márquez articulated.²



To restore this progressively obscured contrast, Illinois recently amended its Right to Privacy in the Workplace Act (Privacy Act).³ As a result, Illinois employers cannot compel applicants or current employees to disclose their social media credentials.⁴ With this amendment, Illinois has ensured Mr. Márquez's notion and the distinction between one's public and private life endures.⁵

ILLINOIS' AMENDED RIGHT TO PRIVACY IN THE WORKPLACE ACT

Imagine an aspiring job candidate interviewing for his ideal position.⁶ He is donning a pressed suit, crisp white shirt and is confident in his proficiencies.⁷ However, just as the interview's end draws near, the employer states, "Before I recommend you for the position, please provide your Facebook user name and password for company review."⁸ Stunned, the candidate refuses to disclose this information and is not hired for the position.⁹ Essentially, Illinois' Privacy Act amendment protects job seekers and current employees from this precise circumstance.¹⁰

In fact, probing applicants and employees for their social media credentials has become a recurrent business practice, particularly in the law enforcement field where comprehensive background checks are advantageous.¹¹ "Some compa-

nies and government agencies are going beyond merely glancing at a person's social networking profiles and instead asking to log in as the user to have a look around."¹² In 2012, Congress introduced legislation to prevent employers from demanding social media credentials.¹³ However, inaction since the bill's introduction has allowed states to take the issue under their own control.¹⁴

Consequently, Illinois amended its Privacy Act, making it illegal for employers to gain access to applicants' and current employees' social media credentials.¹⁵ Illinois' amended Privacy Act reads, in relevant part:

It shall be unlawful for any employer to request or require any employee or prospective employee to provide any password or other related account 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.¹⁶

Labeled the "Facebook Law," Illinois' Privacy Act now protects job seekers and employees while limiting restrictions on employer access to public domain information.¹⁷ One state legislator stated, "Any time you have high unemployment, we have barriers, and we have to do everything we can to help people get to work."¹⁸ With the new legislation Illinois became the sixth state to ban employers from demanding social media credentials.¹⁹

DEFINING SOCIAL NETWORKING

While social networking lacks a precise definition, the term generally refers to any electronic communication through which users create online communities to share information.²⁰ Specifically, the Privacy Act defines social networking websites as any internet-based services allowing users to: (1) construct a public or semi-public profile; (2) create a list of users with whom they share a connection; and (3) view and navigate their list of connections and those made by others.²¹

Consumers spend more time on social media networks than on any other category of sites.²² In fact, "[T]ime spent [on social networking websites] increased 24 percent over the same period [in 2011], suggesting that users are more deeply engaged."²³ In the United States, Facebook continues to be consumers' most-visited social networking website, with roughly 152.2 million unique vis-

itors in 2012.²⁴ Blogger and Twitter both trail Facebook in popularity, with 58.5 million and 37.0 million visitors during the same period respectively.²⁵

ADVOCATES & OPPONENTS OF THE NEW ACT

Advocates of Illinois' amended Privacy Act contend the law preserves current employees' and job applicants' privacy and prevents intentional discrimination in the workplace.²⁶

Proponents argue the amended Privacy Act preserves applicant and employee security against social media privacy invasions.²⁷ In enacting the amendment, Illinois Governor Pat Quinn affirmed this notion stating, "[W]e're dealing with 21st-century issues . . . privacy is a fundamental right."²⁸ In accordance, proponents assert that by demanding social media credentials, employers invade job seekers' privacy interest.²⁹ In fact, one proponent stated that demanding an individual's social media credentials is "akin to requiring someone's house keys."³⁰ Similarly, one of the amendment's House sponsors noted, "[E]mployers certainly aren't allowed to ask for the keys to an employee's home to nose around there, and I believe that same expectation of personal privacy and personal space should be extended to a social networking account."³¹

In response, adversaries argue that job seekers and current employees willingly add information to their social media sites.³² Thus, this voluntarily entered material should be made available to employers who seek it.³³ Proponents counter that while individuals certainly share information with others via social media, the information shared is communicated voluntarily and often with a selective audience.³⁴ Disclosure under duress, i.e., an employer probing an applicant or employee for his or her social media credentials, is distinct from voluntary disclosure and is off-limits to employers.³⁵ Indeed, Facebook's Chief Privacy Officer, Erin Egan, agrees with this notion.³⁶ According to Egan, an employer demanding credentials "undermines the privacy expectations and the security of both the user and the user's friends."³⁷

In addition to preserving confidentiality, proponents maintain that the Privacy Act limits intentional discrimination in the workplace.³⁸ Specifically, advocates assert that if employers were allowed access to social media credentials, it would essentially "open the door" to intentional discrimination.³⁹ "[O]nline

profiles can contain information about a person's religious beliefs, political affiliations and sexual preferences."⁴⁰ If employers are granted access to such information, it may foster an environment where businesses hand-select certain candidates based on beliefs, political views, or sexual orientation.⁴¹ "[A]t the end of the day, you don't want to create anything that hinders businesses but you want to ensure businesses are protected and employees are protected."⁴²

Illinois' amended Privacy Act opponents, on the other hand, argue that the law overregulates businesses and undermines employers' ability to conduct comprehensive background investigations.⁴³ Opponents contend the Privacy Act overregulates employers' abilities to make business decisions.⁴⁴ The Illinois General Assembly Labor Committee believed the amended Privacy Act is a quintessential illustration of government overregulation.⁴⁵ Echoing this sentiment, another opponent suggested, "[T]his is a situation where a small number of employers you might count on one hand has single-handedly created more government regulation for the rest of the employers across America that do not solicit social media passwords."⁴⁶

Rather than regulate hiring decisions, opponents maintain potential applicants should monitor their respective social media network posts.⁴⁷ One opponent stated, "[I]f you have something that you don't want anyone to know, maybe you shouldn't be doing it in the first place."⁴⁸

Moreover, adversaries claim the Privacy Act amendment undermines employers' abilities to conduct thorough background investigations when needed for public safety.⁴⁹ This is particularly important in the law enforcement field.⁵⁰ Opponents believe law enforcement agencies across Illinois need social media credentials to get a "complete picture" of an applicant's qualifications.⁵¹ However, critics argue alternative methods exist, such as monitoring public domains and company-provided email accounts.⁵²

CONCLUSION

"Never in the course of human interaction have so many shared so much about themselves with so many others."⁵³ Though Mr. Márquez believed individuals are entitled to a public and private life, the immense sharing between individuals on social networking sites has opened such notion up for debate.⁵⁴

Illinois' recently amended Privacy Act reiterates Mr. Márquez's notion and the distinction between one's public and private lives endures.⁵⁵ Yet, only time will tell whether such distinction will fall victim to social media's increasing influence.

NOTES

1 GERALD MARTIN, GABRIEL GARCÍA MÁRQUEZ: A LIFE 198 (2009).

2 NIELSEN, STATE OF SOCIAL MEDIA: THE SOCIAL MEDIA REPORT 6 (2012); see Gary Price, *Nielsen Releases Treasure Chest of Updated Social Media Usage Statistics for U.S.*, INFODOCKET, Mar. 29, 2013, available at <http://www.infordocket.com/2012/12/03/nielsen-releases-chest-of-updated-social-media-usage-statistics-for-u-s>; see also Helen A.S. Popkin, *We Spent 230,060 Years on Social Media in One Month*, NBC NEWS, Dec. 4, 2012, available at <http://www.nbcnews.com/technology/technolog/we-spent-230-060-years-social-media-one-month-1C7389508>.

3 Right to Privacy in the Workplace Act, P.A. 97-875 (codified as amended at 820 ILCS 55/10 (2013)); see *Employer Access to Social Media Usernames and Passwords*, NAT. CONF. OF STATE LEG., Jan. 17, 2013, available at <http://www.ncsl.org/issues-research/telecom/employer-access-to-social-media-passwords.aspx>.

4 Monique Garcia, *Quinn Signs 'Facebook Law'*, CHI. TRIB., Aug. 2, 2012, available at http://articles.chicagotribune.com/2012-08-02/news/ct-met-quinn-facebook-law-0802-20120802_1-social-media-passwords-quinn-signs-illinois-employers; see James Kelleher, *Facebook Password Ban Among New State Laws Going into Effect in 2013*, HUFF. POST, Aug. 1, 2012, available at http://www.huffingtonpost.com/2012/12/31/facebook-password-ban_n_2388491.html; see also Joseph Sheahan, *Illinois Fire Chiefs Are No Longer Able to Compel Disclosure of Employees' Social Media Passwords*, ILL. FIRE CHIEFS ASS'N., Dec. 2012, available at <http://www.illinois-firechiefs.org/about-ifca/legal-corner>.

5 MARTIN, *supra* note 1.

6 Jeff Nowak, *Much More Than a Friend Request*, CHI. TRIB., Apr. 8, 2012, available at http://articles.chicagotribune.com/2012-05-23/business/ct-biz-0524-facebook-bill—20120523_1-social-media-passwords-bradley-shear-employers.

7 *Id.*

8 *Id.*

9 *Id.*

10 *Right to Privacy in the Workplace Act*, ILL. DEP'T. OF LABOR, 2012, available at <http://www.illinois.gov/idol/Laws-Rules/legal/Pages/privacy-workplace.aspx>.

11 *Facebook Forbids Employers from Asking Job Seekers for Passwords*, FOX NEWS, Mar. 23, 2012, available at <http://www.foxnews.com/tech/2012/03/23/facebook-forbids-employers-from-asking-job-seekers-for-passwords/>; see Sheahan, *supra* note 4.

12 Manuel Valdes & Shannon McFarland, *Job Seekers Getting Asked for Facebook Passwords*, YAHOO! FINANCE, Mar. 20, 2012, available at <http://finance.yahoo.com/news/job-seekers-getting-asked-facebook-passwords-071251682.html>.

13 H.R. 537: Social Networking Online Protection Act, 113th Cong. (2013); see Press Release, U.S. House of Reps., *Rep. Engel Seeks to Protect Personal Online Content*, Apr. 27, 2012, available at <http://engel.house.gov/index>. Rep. Engel stated the Social Networking Online Protection Act would “prohibit current or potential employers from requiring a username, password

or other access to online content." *Id.*; see also Kristin Samuelson, *Bill Protecting Job Seekers', Employees' Social Media Passwords Advances to Gov. Quinn*, CHI. TRIB., May 23, 2012, available at http://articles.chicagotribune.com/2012-05-23/business/ct-biz-0524-facebook-bill—2012-0523_1-social-media-passwords-bradley-shear-employers.

14 Dana Kerr, *Six States Outlaw Employer Snooping on Facebook*, CNET NEWS, Jan. 2, 2013, available at http://news.cnet.com/8301-1023_3-57561743-93/six-states-outlaw-employer-snooping-on-facebook. As of April 2013, Congress' bill preventing employers from asking for social media credentials was stuck in committee with a one percent chance of getting past committee and a zero percent chance of being enacted. H.R. 537: Social Networking Online Protection Act, *supra* note 13.

15 *Employer Access to Social Media Usernames and Passwords*, *supra* note 3; Interview with Hon. Dennis Reboletti, Ill. Gen. Assemb. (Apr. 22, 2013); see Right to Privacy in the Workplace Act, *supra* note 3.

16 Right to Privacy in the Workplace Act, *supra* note 3; see Amend. to H.B. 1047, 98th Gen. Assemb., Reg. Sess. (Ill. 2013). As of April 2013, a new amendment to the Illinois Privacy Act, HB1047, passed the Illinois House of Representatives and was awaiting a vote in the Illinois Senate. *Id.* If the proposed amendment passes the Illinois Senate and is signed into law, Illinois' Privacy Act would allow employers to request an employee's user name and password for any accounts provided by the employer or accounts the employee uses for business purposes. *Id.*

17 Garcia, *supra* note 4; see Governor Quinn Signs Legislation to Protect Workers' Right to Privacy, ILL. GOV'T. NEWS NETWORK, Aug. 1, 2012, available at <http://www.illinois.gov/Press-Releases/ShowPressRelease.cfm?SubjectID>. In other words, employers are still allowed to conduct background investigations on applicants and current employees through information available on public sites, including public social media sites. *Id.*

18 Samuelson, *supra* note 13.

19 Kerr, *supra* note 14.

20 *Social Media*, MERRIAM-WEBSTER, Mar. 30, 2013, available at <http://www.merriam-webster.com/dictionary/social%20media>.

21 Right to Privacy in the Workplace Act, *supra* note 3.

22 see Price, *supra* note 2.

23 NIELSEN, *supra* note 2.

24 *Id.*

25 *Id.*

26 Lance Whitney, *Facebook: Don't Reveal Your Password to Snooping Employers*, CNET, available at, http://news.cnet.com/8301-1009_3-57403259-83/facebook-dont-reveal-your-password-to-snooping-employers/; see also Jason Keyser, *Illinois Facebook Password Law Bars Employers from Asking for Social Media Logins*, HUFF. POST, Aug. 1, 2012, available at http://www.huffingtonpost.com/2012/08/01/illinois-facebook-passwor_0_n_1730396.html.

27 Keyser, *supra* note 26; see Rich Miller, *Illinois Employers Can No Longer Demand Social Network Passwords*, CAPITOL FAX, Aug. 2, 2012, available at <http://capitolfax.com/2012/08/02/illinois-employers-can-no-longer-demand-social-network-passwords>; see also Rachel Bogart, *Illinois Law Bans Employers from Requesting Social Networking Passwords*, YAHOO! NEWS, Aug. 2, 2012, available at <http://news.yahoo.com/ilinois-law-bans-employers-requesting-social-networking-passwords-174200993.html>.

28 Keyser, *supra* note 26; see Ashley Post, *Illinois Passes Social Media Privacy Law to Safeguard Employee Passwords*, INSIDE COUNSEL, Aug. 3, 2012, available at <http://www.insidecounsel.com/2012/08/03/illinois-passes-social-media-privacy-law-to-safegu>.

29 Valdes & McFarland, *supra* note 12.

30 *Id.*

31 Governor Quinn Signs Legislation to Protect Workers' Right to Privacy, *supra* note 17; see Joe Erbentraut, *Illinois Bill Would Outlaw Employers From Asking for Applicants' Social Media Passwords*, HUFF. POST, Feb. 2, 2012, available at http://www.huffingtonpost.com/2012/02/05/illinois-bill-would-outla_n_1255881.html (quoting Illinois General Assembly House sponsor La Shawn Ford [D-Chicago], "If legislators had to give up their Twitter and Facebook account passwords how would they like that? They wouldn't like it. They wouldn't want to give their passwords to anyone because it's their personal password.").

32 Naomi Troni, *Social Media Privacy: A Contradiction in Terms?*, FORBES, Apr. 24, 2012, available at, http://www.forbes.com/fdc/welcome_mjx.shtml.

33 *Id.*

34 *Id.*

35 Valdes & McFarland, *supra* note 12.

36 Erin Egan, *Protecting Your Passwords and Your Privacy*, FACEBOOK, Mar. 23, 2012, available at, <https://www.facebook.com/notes/facebook-and-privacy/protecting-your-passwords-and-your-privacy/326598317390057>.

37 *Id.*

38 Keyser, *supra* note 26.

39 *Id.*

40 *Id.*

41 *Id.*

42 Samuelson, *supra* note 13.

43 Samuelson, *supra* note 13.

44 *Id.*

45 Erbentraut, *supra* note 31.

46 Samuelson, *supra* note 13.

47 Helen Popkin, *Privacy is Dead on Facebook. Get Over It.*, NBC NEWS, Jan. 13, 2010, available at http://www.nbcnews.com/id/34825225/ns/technology_and_science-tech_and_gadgets/#.US4_XzB-i68.

48 *Id.*

49 Miller, *supra* note 27.

50 *Id.*

51 *Id.*

52 Sheahan, *supra* note 4.

53 Troni, *supra* note 32.

54 Nielsen, *supra* note 2

55 MARTIN, *supra* note 1.