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LAW ALERT

PUBLIC ACT 97-0875: ILLINOIS' NEW "FACEBOOK" LAW

August 2, 2012

On August 1, 2012, Governor Quinn signed into law an amendment to the *Illinois Right to Privacy in the Workplace Act* ("*Workplace Privacy Act*") which prohibits employers from "requesting or requiring any employee or prospective employee to provide a password or 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."

The Amendment is limited in scope. It only bars an employer from *asking or requiring* employees and applicants to reveal a password to or information on *social network pages* (e.g. Facebook or Myspace). The Amendment explicitly permits employers to review employees' or applicants' electronic mail. The Amendment also does not prohibit an employer from using the Internet to obtain information about employees and prospective employees that "is in the public domain," including information from publicly accessible blogs, social networking pages that are open to the public because the employee has not protected the content by activating the social networking site's privacy controls or other information revealed through an Internet search. The Amendment further permits employers to review print-outs from an employee's or applicant's social networking site, and access a social networking site if someone else provides the employee's or applicant's password or provides the access through being a "friend" of the employee or applicant. Employers are also permitted to ask or require an employee or prospective employee to provide a password to electronic content that is not located on a social networking site, such as blogs and electronic gaming sites.

The limited scope of the Amendment means that, for example, in the course of an investigation into reports that an employee has posted confidential job-related information, statements or photographs suggesting job-related misconduct on a Facebook page, employers may still lawfully access the employee's social networking site so long as they do it without forcing the employee to reveal his or her password or give the employer access to the social networking site. In that instance, an employer could review the employee's Facebook page if access is provided by a "friend" of the employee, the employee has not marked the page "private" and it is publicly accessible, or the person reporting the inappropriate material provides access to it or a print out of it. Employers will need to tread carefully, however, in investigations in which an employee or applicant *volunteers* to provide his or her password to a social networking site. Depending on the circumstances, the employee may be able to subsequently establish a violation of the Act by arguing that he or she was under duress and, therefore, "required" to give the employer access to the social networking site.

Additionally, the Amendment is consistent with Illinois' existing limits on employers' use of information about employees and applicants. The *Workplace Privacy Act* already extends to information that may be available on social network websites, including employees' use of lawful products such as alcohol and tobacco. In addition, the *Illinois Personnel Record Review Act*, 820 ILCS 40/9 ("PRRA") prohibits employers from keeping or gathering a record of employees' "associations, political activities, publications, communications or nonemployment activities, unless the employee submits the information in writing or authorizes the employer in writing to keep or gather the information." Social networking pages frequently contain information about political affiliation, association with religious, social, philanthropic and other groups, and other off duty activities which, if gathered or kept by an employer, may violate the PRRA or the *Workplace Privacy Act*.

If you have any questions regarding this new law feel free to contact any RSNLT attorney.

This *Law Alert* was prepared by Rachel E. Lutner of the firm's Chicago office.

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