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Curious About Your Newest Employee's Social Media Presence? Too Bad, Because in New York, It Could Cost You!

By Reeya Khurana

In the era of Tiktok influencers and Instagram models, almost everyone has an online side hustle, and that highly qualified referral you just interviewed or bright new hire you just made might just be one of them! The same digital world that created social media celebrities has also made it easier than ever for employers to dig up information on employees and job seekers to find out who they are *really* hiring. But, before checking social media on current and prospective employees, employers need to be aware of New York's new Social Media Access Law.

New York State Senate Bill 2518A/Assembly Bill 836 amends the New York Labor Law to add a new Section 201-I, which "prohibits an employer from requesting that an employee or applicant disclose any means for accessing an electronic personal account."

So, What Exactly Are the Restrictions?

The new law prohibits employers from "requesting, requiring, or coercing" employees or applicants to disclose their login credentials for their personal accounts or to access such accounts in the presence of the employer. Additionally, employers may not reproduce or download photos, videos, or other information contained in the personal accounts.

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The law also protects employees who refuse to disclose social media information, prohibiting employers from firing, disciplining, or threatening an employee or applicant because the employee or applicant refused to disclose protected information.

So, As An Employer, What Am I still Allowed to Access?

Although the new law broadly protects most employees' private social media activity, it includes key exceptions that permit employers to request social media information, such as:

- When it is necessary to abide by federal, state, or local law;
- A non-personal account that provides the employer access to the employer's internal computer or information systems;
- The non-personal accounts were provided by the employer and used for business purposes;
- A non-personal account that the employer knows is used for business purposes;
- It is necessary to comply with a court order; or
- To restrict or prohibit employees from accessing certain websites while using the employer's network or electronic communications devices.

But wait ... what about my employee's public Instagram account? Employers may access or utilize information about an employee or job applicant that is accessible or voluntarily disclosed without any required login credentials or is publicly available. Also, if the employee or applicant voluntarily connects with his or her employer on social media, the employer may utilize and share the discovered information with the company. Employers may also access or utilize information that was voluntarily shared by an employee or third party in connection with investigating misconduct.

What if I paid for my employee's device? Under the following circumstances: (i) the employer paid for it, either in whole or in part; (ii) the employer's payment for the device was conditioned on the employer retaining the right to access the device; (iii) the employee explicitly agreed to such a condition; (iv) and the employee was given prior notice, the employer may request or require access for "business" purposes or if they are business accounts. That said, an employer may not access any personal accounts on the device without a court order.

So, As An Employer, What Are My Next Steps?

Employers are encouraged to ensure that their hiring and personal practices comply with the new restrictions imposed by the law. Employers also should consult with their legal counsel to review their written policies and handbooks to determine if any changes are needed to ensure compliance with this new law.

The next time you find yourself curious about your employees' or applicants' socials, before you slide into their DMs you should contact your Akerman labor and employment attorney on how to connect without landing in trouble.
