



**Testimony for the House Economic Matters Committee
HB 964 - Labor and Employment – User Name and Password
Privacy Protection**

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SUPPORT

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The ACLU of Maryland urges a favorable report on HB 964, a bill to prohibit employers from requesting or requiring employees or applicants to disclose their user names or passwords to Internet sites and Web-based accounts as a condition of employment.

This issue was brought to the attention of the ACLU of Maryland last year when Division of Corrections (DOC) Officer Robert Collins approached us because of his concern regarding DOC's blanket requirement that applicants for employment with the Division, as well as current employees undergoing recertification, provide the government with their social media account usernames and personal passwords for use in employee background checks. Robert Collins was an employee with the Maryland Department of Public Safety and Correctional Services when he took a voluntary leave of absence. Upon returning, he had to undergo a recertification process. It was at this time that Mr. Collins first learned that providing social media login information was now a standard part of the DOC's process for hiring and recertification and that he had to provide his Facebook username and password. He was also told that background checks can take a month or two, and that DOC would likely need his account information to log into the account again during that time.¹

We believe that policies such as the DOC's that request or require employees or applicants to disclose user names and/or passwords to their private internet or web-based accounts, or require individuals to let employers view their private content, constitute a frightening and illegal invasion of privacy for those applicants and employees -- as well those who communicate with them electronically via social media. We are concerned that other employers may also begin to require this information from job applicants without clear statutory language against it. While employers may permissibly incorporate some limited review of public internet postings into their background

¹ Note that after the ACLU of Maryland objected to this practice, the DOC decided to suspend the practice for a period of 45 days to study it further. They then changed the policy and now prospective employees are not required to share their user name and log in but are asked to voluntarily enter their user name and password into a computer during the interview for the interviewer to review their social media content. While this may not be literally mandatory, it is unlikely that many job applicants or current employees will feel free to refuse a governmental "request" for social media information, particularly in this tough job market. Thus, we still believe this policy to be just as coercive and damaging to personal privacy.

investigation procedures, review of password-protected materials overrides the privacy protections users have erected and thus violates their reasonable expectations of privacy in these communications. As such, we believe that policies such as this are illegal under the federal Stored Communications Act (SCA), 18 U.S.C. §§2701-11 and its state analog, Md. Courts & Jud. Proc. Art., §10-4A-01, *et seq.*² These laws were enacted to ensure the confidentiality of electronic communications, and make it illegal for an employer or anyone else to access stored electronic communications without valid authorization. Additionally, such practices constitute the common law tort of invasion of privacy,³ and arguably chill employee speech and due process rights protected under the First and Fourteenth Amendments to the U.S. Constitution.⁴

These types of practices also violate Facebook's own policies. Facebook's Statement of Rights and Responsibilities states under the "Registration and Account Security" section that Facebook users must make ten commitments to the company relating to the registration and maintenance of the security of the account. The Eighth Commitment states "You will not share your password, (or in the case of developers, your secret key), let anyone else access your account, or do anything else that might jeopardize the security of your account." <https://www.facebook.com/terms#!/legal/terms>. Thus, sharing one's password or access to one's account with potential or current employers violates these terms of agreement.

Finally, this bill would benefit employers as well. If employers do start reviewing employees' and applicants' private social media sites, they then

² Section 2701 of the SCA makes it illegal to intentionally (1) access a facility through which an electronic communication service is provided, without valid authorization; or (2) exceed an authorization to access that facility, thereby obtaining an electronic communication while it is in electronic storage in such a system. 18 U.S.C. §2701(a)(1)-(2). The Maryland law establishes these same prohibitions, offering both criminal and civil penalties for violations.

³ Under Maryland law, one form of the tort of Invasion of Privacy is defined as an intentional intrusion upon the solitude or seclusion of another *or of his private affairs* that would be highly offensive to a reasonable person. Md. Law Enc. Torts, 21 M.L.E. Torts §24; *Mitchell v. Baltimore Sun Co.*, 164 Md. App. 497, 883 A.2d 1008 (Md. App. 2005).

⁴ In a different context factually, the National Labor Relations Board (NLRB) made headlines last November by issuing a complaint against a Connecticut company that fired an employee who criticized the company on Facebook, in violation of the company's social media policy. *E.g.*, "Feds: Woman Illegally Fired Over Facebook Remarks," available at: http://www.myfoxdc.com/dpp/news/offbeat/feds-woman-illegally-fired-over-facebook-remarks-110910?CMP=201011_emailshare; "Labor Board: Facebook Vent Against Supervisor Not Grounds for Firing," available at: <http://www.cnn.com/2010/TECH/social.media/11/09/facebook.firing/index.html> The NLRB maintains that both the firing and the social media policy itself violate

employees' protected speech rights under the National Labor Relations Act. *See* NLRB Press Release, http://www.nlr.gov/shared_files/Press%20Releases/2010/R-2794.pdf. While the Connecticut case involves the employee's right to engage in particular speech protected under the NLRA, it also addresses the limits that federal law places on employers' interference and monitoring of employees' social media use more generally, and thus is worthy of notice.

run the risk of being held liable if there is criminal activity revealed on these sites that they don't catch and/or report to authorities.

Job applicants and employees should not have to give up their first amendment rights, as well as risk the security of their private information, by being forced to divulge their passwords to accounts in order to gain or maintain employment. Accordingly, we urge a favorable report on HB 964.

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