Date of Hearing: June 28, 2022

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION
Jesse Gabriel, Chair
SB 638 (Hertzberg) – As Amended June 16, 2022

SENATE VOTE: 37-0

SUBJECT: Employment: personal social media of applicant or employee

SUMMARY: This bill would update the definition of "social media" to mean an electronic service, *platform*, or account, or electronic content, as specified, and to include chat rooms, bulletin boards, and internet websites, for purposes of existing law prohibiting an employer from requiring or requesting an employee or applicant do any of the following: disclose a username or password for the purpose of accessing personal social media; access personal social media in the presence of the employer; or divulge any personal social media, except as specified.

EXISTING LAW:

1) Provides, under the California Constitution, that all people have inalienable rights, including the right to pursue and obtain privacy. (Cal. Const. art. I, Sec. 1.)

2) Prohibits an employer from requiring or requesting an employee or applicant for employment do any of the following: disclose a username or password for the purpose of accessing personal social media; access personal social media in the presence of the employer; divulge any personal social media, except as provided. (Lab. Code Sec. 980(b).)

3) Prohibits an employer from discharging, disciplining, threatening to discharge or discipline, or otherwise retaliating against an employee or applicant for not complying with a request or demand by the employer that is in violation of 2), above. (Lab. Code Sec. 980(d).)

4) Specifies that 2), above, shall not affect an employer's existing rights and obligations to request an employee to divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations, provided that the social media is used solely for purposes of that investigation or a related proceeding. (Lab. Code Sec. 980(c).)

5) Specifies that 2), above, does not preclude an employer from requiring or requesting an employee to disclose a username, password, or other method for the purpose of accessing an employer-issued electronic device. (Lab. Code Sec. 980(d).)

6) Defines "social media" for the above purposes to mean an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations. (Lab. Code Sec. 980(a).)

FISCAL EFFECT: None. This bill has been keyed non-fiscal by the Legislative Counsel.

COMMENTS:

1) **Purpose of this bill**: This bill seeks to ensure that the definition of "social media," for purposes of protecting the privacy of employees and applicants for employment, is sufficiently comprehensive and up-to-date. This bill is author-sponsored.

2) **Author's statement**: According to the author**:**

> Under existing labor law, employees and applicants for employment have certain privacy protections relating to their personal social media accounts. The definition of "social media," however, does not capture how much electronic communication has evolved and expanded. SB 638 simply updates the definition of social media to reflect new forms of social networking.

3) **Employers and online media**: In 2012, this Legislature passed AB 1844 (Campos, Ch. 618, Stats. 2012), which prohibits an employer from requiring or requesting an employee or applicant for employment to do any of the following: disclose a username or password for the purpose of accessing social media; access personal social media in the presence of the employer; or divulge any personal social media, except as specified. That bill defined "social media" to mean "an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations." While this definition is rather expansive, the universe of online services through which private information is transmitted continues to expand.

   Even as early as 2011, a New York Times article profiling a start-up, Social Intelligence, dedicated to scraping the internet on behalf of employers to investigate applicants, pointed out that traditional social media were not necessarily the most sensitive content in these circumstances:

   > Less than a third of the data surfaced by [Social Intelligence] comes from such major social platforms as Facebook, Twitter and MySpace. [Social Intelligence CEO Max Drucker] said much of the negative information about job candidates comes from deep Web searches that find comments on blogs and posts on smaller social sites, like Tumblr, the blogging site, as well as Yahoo user groups, e-commerce sites, bulletin boards and even Craigslist.[1]

   Since then, the role social media, and online media more generally, play in our daily lives has increased exponentially. A substantial portion of day-to-day social communication is now carried out online through a broader range of services, and even online services that are not traditionally "social," such as user accounts on news, educational, retail, and entertainment websites, contribute to one's digital footprint. Though an employer could obtain a great deal of information concerning an applicant or employee's life outside of work through access to traditional social media, compelling an employee or applicant to provide access to an online account used to post comments on news websites or that maintains logs from group chats can arguably provide equivalently private information. The COVID-19 pandemic's acceleration

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[1] Jennifer Preston, "Social Media History Becomes a New Job Hurdle," *New York Times*, Jul. 20, 2011, https://www.nytimes.com/2011/07/21/technology/social-media-history-becomes-a-new-job-hurdle.html [as of Jun. 23, 2022].

of the transition toward digital social interaction has inflated the role services such as chat rooms and internet forums play in maintaining social connections outside of the workplace.

The modifications this bill makes to the definition of "social media" as it pertains to laws governing employer access to personal social media seem appropriately tailored to account for the growing and changing role social media play in daily life.

4) **Definition of "social media"**: As issues pertaining to social media have come into focus in the policymaking arena, this Legislature has generally struggled to consistently define what constitutes a "social media platform" (SMP) for regulatory purposes. While certain services clearly constitute SMPs, some services maintain social components but may not be appropriately subject to the same regulations. For instance, while canonical SMPs such as Facebook and Twitter invariably fall within scope, those that permit sharing fitness information with friends or transferring money along with descriptive messages may or may not. Depending on the nature of the legislation in question, the appropriate contours of services captured may indeed vary, but a consistent starting point to define the universe of services being discussed would arguably facilitate thoughtful policymaking.

   Toward this end, this Committee, in collaboration with the Senate Judiciary Committee, endeavored to develop a uniform definition of "social media platform" to use consistently across bills pertaining to social media that are currently pending. The definition fundamentally relies on essential aspects of SMPs, including a substantial function of interacting socially, the ability to establish connections with others, and the creation or sharing of content. Both this Committee and the Senate Judiciary Committee have sought to incorporate this definition into bills moving through the Legislative process.

   Though this bill incorporates an "electronic platform" into the definition of "social media," the objective of the statute amended by this bill is fundamentally distinct from legislation seeking to regulate those operating SMPs. In this case, in order to protect the privacy of employees and applicants, incorporating into the scope a broader set of services that reflect an employee or applicant's online presence, whether or not they are strictly considered SMPs, seems appropriate. For instance, while the uniform definition of "social media platform" incorporated into other bills that have been heard in this Committee excludes email and direct messaging services, compelling an employee or applicant to provide access to their personal email or direct messaging accounts seems similarly invasive to compelling access to a personal canonical social media account. Notably, definitions substantively similar or identical to the expansive definition of "social media" being amended by this bill are present elsewhere in California law, including in the Education Code (Secs. 99120 and 49073.6), the Penal Code (Secs. 423.2 and 632.01), and the Business & Professions Code (Sec. 23355.3).

   That said, some services included in this definition of "social media" are not generally thought of as social media in its common usage. In order to avoid inconsistency and confusion in relation to the more narrow and functionally distinct definition of "social media platform" incorporated elsewhere, the author or others may consider future legislation to replace the term "social media" in this statute and those using a similar definition with a term that is easily distinguishable and more clearly refers to the specified services, such as "online media."

5) Related legislation: AB 1651 (Kalra), among other things, would impose various duties on employers and their vendors regarding the ability to collect and use worker data, including through electronic monitoring.

AB 2871 (Low) would eliminate the sunset date for provisions of the California Consumer Privacy Act of 2018 (CCPA) that exempt employee personal information and personal information obtained in the context of business-to-business transactions from several of the rights afforded to consumers with respect to their personal information maintained by businesses.

AB 2891 (Low) would extend the sunset date for provisions of the CCPA that exempt employee personal information and personal information obtained in the context of business-to-business transactions from several of the rights afforded to consumers with respect to their personal information maintained by businesses from January 1, 2023 to January 1, 2026.

6) Prior legislation: AB 1844 (Campos, Ch. 618, Stats. 2012) *See* Comment #3.

SB 1349 (Yee, Ch. 619, Stats. 2012) prohibits public and private postsecondary educational institutions, and their employees and representatives, from requiring or requesting a student, prospective student, or student group to do any of the following: disclose a user name or password for accessing personal social media; access personal social media in the presence of the institution's employee or representative; divulge any personal social media information.

7) Double referral: This bill was double-referred to the Assembly Committee on Labor & Employment, where it was heard on June 22, 2022, and passed out 6-0.

REGISTERED SUPPORT / OPPOSITION:

Support

None on file

Opposition

None on file

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