> Client Alert

# Employers Take Note: New York Enacts Several Additional Labor Law Updates

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On September 14, 2023, New York Governor Kathy Hochul signed into law three more labor law provisions affecting workers' rights in the State of New York. These new laws follow a prior package of labor legislation signed by the Governor on September 6, 2023. Here is a breakdown of the most recent enactments:

## Employers Prohibited from Requiring Access to Employee Personal Social Media Accounts

Effective March 12, 2024, New York Labor Law will include a new Section 201-i, which will prohibit employers from requesting access to the personal social media accounts of applicants and employees. Under this new law, employers may not discharge, discipline, threaten discipline, or otherwise penalize an employee who refuses to disclose personal social media information. Employers also may not refuse to hire applicants who fail to disclose this information as part of the hiring process.

The law defines a "personal account" as "an account or profile on an electronic medium where users may create, share and view user-generated content, including uploading or downloading videos or still photographs, blogs, video blogs, podcasts, instant messages, or internet website profiles or locations that is used by an employee or applicant exclusively for personal purposes." Based on this definition, many of today's popular social media applications would be covered, such as TikTok, Instagram, Facebook, X (formerly known as Twitter), YouTube, and WhatsApp, as well as other platforms on which users create personal profiles and post content, such as gaming platforms and dating applications.

The new law prohibits employers from requesting, requiring, or coercing an applicant or employee to disclose passwords or other information with which to access content of such person's social media accounts. It also prohibits employers from compelling applicants and employees to access their personal social media accounts in the employer's presence or requiring that materials from a personal account be reproduced to the employer.

Employers may, however, require employees to disclose information necessary to access nonpersonal accounts that provide access to the employer's internal systems. Employers and their agents are also not legally prohibited from

"friending" or "following" an employee or applicant on a personal social media account, provided that the employee or applicant voluntarily accepts the request. Employers may also view, access, or utilize information that an employee or applicant posts or shares in the public domain. Should employers choose to view such public content, however, employers should be aware that some applications allow users to see who has viewed their postings or profiles such as LinkedIn. Additionally, supervisors and managers should exercise discretion and good judgment in outside-of-work virtual interactions with subordinates, just as they would for in-person interactions. In analyzing compliance with this new provision, it should also be borne in mind that the inequality of bargaining power between staffers and their supervisors or managers may result in staffers feeling uncomfortable refusing an invitation to "friend" or be "followed" even if their natural preference would be to refuse such a request. It will be interesting to see whether that issue or concern is raised in enforcement proceedings after this provision has been in effect for some time.

For purposes of investigating misconduct, employers may continue to view information from social media sites that is voluntarily provided to the employer by employees, clients, or customers, or other third parties who had legitimate access to view the subject employee's personal social media accounts. For example, if an employee reports to Human Resources that she received a harassing message through a colleague's personal social media account and provides a screenshot of the offending message to the employer to demonstrate the report, the employer may view the messages as part of its investigation. The employer may not, however, threaten discipline or discharge if the employee does not voluntarily provide a password or other access to their message history as part of that investigation.

The new law also addresses social media accounts used for business purposes and accounts that are accessed on employer-provided or employer-subsidized electronic devices. Employers are not prohibited from requesting or requiring access to employer-provided business social media accounts or to social media accounts known to be used for business purposes. Employers may also access electronic devices where employees have agreed to allow employer access to the device, but employers cannot access personal accounts used on such devices. Employers may also restrict or prohibit access to certain websites or social media platforms while using the employer's network or devices paid for in whole or part by the employer, provided that the payment or provision of such device was conditioned on the employer's right to restrict such access and the employee was provided notice and agreed to such conditions.

Significantly, the law does not prevent employers from complying with a duty to screen applicants or to monitor employee communications when required by law, nor does it apply to law enforcement agencies, fire departments, or correctional departments. Employers may use as an affirmative defense that they were acting in compliance with federal, state, or local, and employers can certainly comply with Court orders that grant them access to materials from employees' accounts for purposes of pursuing or defending litigation.

In consequence of Section 201-i taking effect, employers should consider revisiting and revising existing policies and agreements for use of electronic devices (such as cell phones, tablets, and laptops) and limitations on such use. In doing so, employers should specify in their agreements whether the employer can access the device and whether the employer can restrict the websites and programs that may be used on such a device, and obtain the employee's express consent as part of the acknowledgment of such policies.

As another area destined to foster litigation the law does not expressly define what is a "personal purpose" or a "business purpose." Many social media posts today are arguably blurred between personal and professional usage. Is an employee's LinkedIn profile used for a business purpose or a personal one? For those in the arts and entertainment industries, social media accounts may function as a virtual portfolio and for others simply deemed personal expression. Marketing professionals might wish to view an applicant's use of social media to assess the applicant's proficiency with such platforms as opposed to monitoring their lifestyle. In

some client-facing industries, employees might use their "personal" social media accounts to befriend or engage with clients or attract new clients. Would these be considered business purposes? One expects that these issues will soon be resolved either in the courts, by legislative amendment or both.

Although the new law does not appear to include a specific penalty for violation, the inclusion of an affirmative defense suggests that employers could face legal action for violating this new provision of the Labor Law. Employers should also consider revising any employment policies, employment applications, or onboarding forms that appear to request social media access information. Employers may also wish to document when a social media account is to be used for business purposes such that there is a clear understanding between the employee and employer as to whether the account is being used for "personal" reasons.

## Notifying Employees of Eligibility for Unemployment Insurance

The Governor also signed into law an amendment to New York Labor Law § 590, requiring employers to provide notice to employees that they may be eligible for unemployment benefits upon a reduction in hours or termination. In passing this bill, the New York State Legislature noted it was intended to expand upon existing laws and to improve workers' awareness of the benefits that may be available to them in the event of job loss or reduction in hours. The Legislature also expressed concern that employers were disincentivized from discussing unemployment benefits with workers out of fear that their unemployment insurance tax rate (based on an employer's experience rating) would increase if former employees (or those experiencing reduced hours) claimed such benefits.

This new law takes effect on November 13, 2023. The notice to employees must include the employer's name and registration number, the address of the employer, and any other information required by the Commissioner of Labor. Because the law requires that notice be provided to employees in writing on a form furnished or approved by the Department of Labor, it is likely that a form notice will be made available in the coming weeks, and it is possible that such a form will expand upon the Department of Labor's current Record of Employment form that is provided to employees upon separation. Employers should revise any separation checklists or templates to include this new requirement. Additionally, employers should remember that this written notice should be provided not just at termination, but in the event of a temporary separation or reduction in hours sufficient to allow an employee to obtain unemployment benefits.

## New York Department of Labor to Notify Unemployment Applicants of Food Assistance Programs

Although not directed toward direct employer obligations, New York Labor Law § 540 has been amended, effective January 12, 2024, to require the New York Department of Labor to inform individuals who file claims for unemployment insurance benefits about specific food assistance programs known as Supplemental Nutrition Assistance Program ("SNAP") and Women, Infants and Children ("WIC"). The prior version of this section referencing "food stamp" programs has been replaced because it no longer accurately reflects the benefits available to those in need.

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Our Labor & Employment Law team is available to help employers navigate compliance with these new and updated provisions of the New York Labor Law, as well as with other guidance regarding employee separations, discipline, and employees' use of social media and electronic devices and related issues. As seasoned practitioners in these areas, we can also provide counsel with respect to the circumstances under which contesting a former employee's claim for unemployment benefits may also assist in analyzing and defending other, more serious, post-employment claims.