SB 207 Testimony

Measure Title:	RELATING TO SOCIAL MEDIA.
Report Title:	Social Media; Password; Username; Privacy; Employer; Employee; Employment
Description:	Prohibits employers from requiring employees and applicants for employment from disclosing social media usernames or passwords.
Companion:	
Package:	None
Current Referral:	TEC, JDL
Introducer(s):	ESPERO, ENGLISH, Ihara, Slom

From:	mailinglist@capitol.hawaii.gov
To:	TECTestimony
Cc:	William.D.Hoshijo@hawaii.gov
Subject:	Submitted testimony for SB207 on Feb 5, 2013 13:15PM
Date:	Friday, February 01, 2013 2:24:02 PM
Attachments:	SB 207 HCRC test. Senate TEC 2-5-13.pdf

SB207
Submitted on: 2/1/2013
Testimony for TEC on Feb 5, 2013 13:15PM in Conference Room 414

Submitted By	Organization	Testifier Position	Present at Hearing
William Hoshijo	Hawai`i Civil Rights Commission	Support	Yes

Comments: The HCRC supports the intent of SB 207, but does not support the placement of this employment practice provision in HRS Chapter 378, Part I, under HCRC jurisdiction. If there is any problem with this testimony, please contact me.

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HAWAI'I CIVIL RIGHTS COMMISSION

830 PUNCHBOWL STREET, ROOM 411 HONOLULU, HI 96813 · PHONE: 586-8636 FAX: 586-8655 TDD: 568-8692

February 5, 2013
Rm. 414, 1:15 p.m.

To: The Honorable Glenn Wakai, Chair
Members of the Senate Committee on Technology and the Arts

From: Linda Hamilton Krieger, Chair
and Commissioners of the Hawai'i Civil Rights Commission

Re: S.B. No. 207

The Hawai'i Civil Rights Commission (HCRC) has enforcement jurisdiction over Hawai'i's laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state-funded services. The HCRC carries out the Hawai'i constitutional mandate that no person shall be discriminated against in the exercise of their civil rights. Art. I, Sec. 5.

The HCRC supports the intent of S.B. No. 207, but does not support the placement of this employment practice provision in HRS Chapter 378, Part I, under HCRC jurisdiction. S.B. No. 207 would prohibit employers from requiring applicants and employees from disclosing the usernames or passwords to their social media accounts. The HCRC has jurisdiction over only Part I of Chapter 378, which is our state fair employment law prohibiting discrimination in employment on the bases of race, sex, including gender identity or expression, sexual orientation, age, religion color, ancestry, disability, marital status, arrest and court record, domestic violence or sexual violence victim status, retaliation, National Guard participation, assignment of income for child support, breastfeeding, or credit history or credit report. The HCRC does not have jurisdiction over the other parts of Chapter 378: Part II (Lie Detector Tests); Part III (Unlawful Suspension or Discharge; Part IV (Fair Representation); Part V (Whistleblower Protection Act); or Part VI (Victims Protection).

If added to Chapter 378, this prohibited practice would protect a right and expectation of privacy for applicants and employees with regard to their personal social media accounts. This protection is different in kind from the anti-discrimination focus of the civil rights laws that the HCRC enforces. It is more akin to

the protections found in the parts of Chapter 378 that the HCRC does not enforce – more like the employment practices protections regarding lie detector tests and whistleblowers. Of course, under current law if an employer uses access to social media, whether authorized by an applicant/employee or not, to screen out or discriminate on the basis of race, sex, sexual orientation, age, religion, ancestry, or any other protected basis, that would be a prohibited practice under Chapter 378, Part I. The proposed new protection applies to any requirement or request for a user name or password for an applicant or employee, even if used in a non-discriminatory manner. It does not belong in Chapter 378, Part I, under HCRC jurisdiction.

If the Committee decides to move and recommend passage of S.B. No. 207, the HCRC respectfully requests that it be in the form of an amended S.D.1, removing the new employment practices prohibition from HRS Chapter 378, Part I, to a new part of the same chapter.

Thank you for considering the HCRC's concerns.

From:	Kimberly Canepa
To:	TECTestimony
Subject:	Chamber Testimony on SB 207 (2/5 Hearing)
Date:	Friday, February 01, 2013 4:24:48 PM
Attachments:	2.5 Sen TEC Hearing Re SB 207 Social Media.pdf

Aloha,

Please find attached the Chamber of Commerce of Hawaii's testimony on SB 207 scheduled for hearing on Tuesday, February 5 at 1:15 pm.

Mahalo,

Kimberly Canepa
Special Projects Assistant
The Chamber of Commerce of Hawaii
1132 Bishop Street, Suite 402
Honolulu, HI 96813
Phone: (808)545-4300 ext. 314
Fax: (808)545-4369
Website: www.cochawaii.org
Business Advocacy Website: www.cocaction.com

The Chamber of Commerce of Hawaii
The Voice of Business in Hawaii

Testimony to the Senate Committee on Technology and the Arts
Tuesday, February 5, 2013 at 1:15 P.M.
Conference Room 414, State Capitol

RE: SENATE BILL 207 RELATING TO SOCIAL MEDIA

Chair Wakai, Vice Chair Nishihara, and Members of the Committee:

The Chamber of Commerce of Hawaii ("The Chamber") **has serious concerns on SB 207 Relating to Social Media.**

The Chamber is the largest business organization in Hawaii, representing more than 1,100 businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of its members, which employ more than 200,000 individuals, to improve the state's economic climate and to foster positive action on issues of common concern.

The Chamber appreciates the intent of the bill. We understand that several high profile cases that happened on the mainland brought this issue forward. However, we do not believe that this is a prevalent problem in Hawaii.

We appreciate the intent of the bill but we believe that it needs more discussion before moving forward.

Thank you for this opportunity to express our views.

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From: mailinglist@capitol.hawaii.gov
To: TECTestimony
Cc: lt@acluhawaii.org
Subject: Submitted testimony for SB207 on Feb 5, 2013 13:15PM
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Attachments: 2.5.13.pdf

SB207
Submitted on: 2/4/2013
Testimony for TEC on Feb 5, 2013 13:15PM in Conference Room 414

Submitted By	Organization	Testifier Position	Present at Hearing
Laurie Temple	ACLU of Hawaii	Support	No

Comments:

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Committee:	Committee on Technology and The Arts
Hearing Date/Time:	Tuesday, February 5, 2013, 2:00 p.m.
Place:	Conference Room 414
Re:	*Testimony of the ACLU of Hawaii in Support of S.B. 207, Relating to Prohibiting Employers from Requiring Employees and Applicants from Disclosing Social Media Usernames and Passwords*

Dear Chair Wakai and Members of the Committee on Technology and The Arts:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in support of S.B. 207, which will prohibit employers from requiring employees or applicant's social media passwords.

As this is growing problem for students, we ask that the bill be amended to apply to educational institutions as well. You might consider amending the bill to mirror the prohibitions laid out in H.B. 1023, the Internet Privacy Protection Act, which protects both employees and students and will be heard by EDN/HED on Wednesday, February 6, 2013 at 2:10 p.m.

Employees and Applicants

A growing number of employers are demanding that job applicants and employees hand over the passwords to their private social networking accounts such as Facebook. Such demands constitute a grievous invasion of privacy. Private activities that would never be intruded upon offline should not receive less privacy protection simply because they take place online. It is inconceivable that an employer would be permitted to read an applicant's diary or postal mail, listen in on the chatter at their private gatherings with friends, or look at their private videos and photo albums. Nor should they expect the right to do the electronic equivalent.

Employer policies 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 employers may 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 investigation

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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 may be illegal under the federal Stored Communications Act (SCA), 18 U.S.C. §§2701-11 and Hawaii's privacy laws.[1] 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 and arguably chill employee speech and due process rights protected under the First and Fourteenth Amendments to the U.S. Constitution.[2]

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 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.

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[1] 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).

[2] 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.nlrb.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.

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Students

Students have the same privacy rights like any American, and school officials should not have the right to fish through their password-protected information. Students do not give up their constitutional rights when they walk onto school grounds.

Schools have an important duty to provide education for all students, and students are responsible for following reasonable school rules so school remains a safe, welcoming place where all students can learn. But students also have free speech and privacy rights that our schools must recognize and respect. Just as an employer requesting the passwords of an applicant or employee is an invasion of privacy, school officials requesting the same from their students is also.

Many universities have recently started requiring student athletes to provide them with access to the private content on their social media accounts. The University of Maryland, for example, currently monitors athletes' social media activity through an internal compliance office. Sometimes this is done by requiring student athletes to install social media spying software onto their personal electronic devices. Other times schools will require that friend them on Facebook or allow them to follow them on their private Twitter account. Some schools hire private companies to do this.

A recent article in the Washington Post reported the following:

Schools are essentially paying for a software program that scans athletes' Tweets, Facebook posts and other social media activity 24 hours a day. The program zeroes in on keywords (popular ones include expletives, brands of alcohol, drinking games, opponents' names and common misspellings of racial profanities) and sends each athlete and coach or administrator an e-mail alert when a questionable post has been published. Coaches or administrators can log in with a username and password to see a list of student, and each student's "threat level" — green for low, orange for medium and red for high — and a link or screen shot of the comment that set off red flags.

While students must agree to the terms of use and install applications allowing these companies to do so, if their school requires them to agree to these terms as a condition for playing on a particular team it is hardly done of free will or freely consented to.

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This raises a number of concerning legal questions. By requiring students to friend a third party on Facebook, this may be a violation of the 4th amendment as an unreasonable search and seizure since students likely have a reasonable expectation of privacy if they have set their settings such that most information is to be kept private and only available to those they wish to have access.

In addition, monitoring the social media private accounts of students will likely lead to censorship of these accounts and this could violate the students' first amendment rights to freedom of speech. At least one federal circuit court has already held that Universities don't have the right to punish professors for what they state in their own publications. *See Bauer v. Sampson*, 261 F.3d 775 (9th Cir. 2001) (ruling that community college professor's self-published newsletter which placed another professor on his "shit list" which was a "two-ton slab of granite" which he hoped to drop one day on the president's head was protected speech under the First Amendment, and that the school could not punish him for it).

An additional problem is that often only high profile teams are required to provide this information. Accordingly, such a policy may violate Title IX due to gender discrimination.

Lastly, schools that require their student athletes or any students or applicants to give them access to their personal social media accounts may be subjecting themselves to significant legal liability. By taking on the responsibility of watching over the accounts, the school may be assuming legal liability for student activities reported on the sites. For example, if a student reports criminal activity or intent to commit such activity, the school may be liable if they don't catch it and report it.

Please pass S.B. 207 with amendments to include protections for students.

Thank you for this opportunity to testify.

Sincerely,
Laurie A. Temple
Staff Attorney and Legislative Program Director
ACLU of Hawaii

About the American Civil Liberties Union of Hawaii

The American Civil Liberties Union of Hawaii ("ACLU") has been the state's guardian of liberty for 47 years, working daily in the courts, legislatures and communities to defend and

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preserve the individual rights and liberties equally guaranteed to all by the Constitutions and laws of the United States and Hawaii.

The ACLU works to ensure that the government does not violate our constitutional rights, including, but not limited to, freedom of speech, association and assembly, freedom of the press, freedom of religion, fair and equal treatment, and privacy.

The ACLU network of volunteers and staff works throughout the islands to defend these rights, often advocating on behalf of minority groups that are the target of government discrimination. If the rights of society's most vulnerable members are denied, everyone's rights are imperiled.

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Submitted By	Organization	Testifier Position	Present at Hearing
Oren		Oppose	Yes

Comments:

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TESTIMONY OF THE AMERICAN COUNCIL OF LIFE INSURERS
IN OPPOSITION TO SB 207, RELATING TO SOCIAL MEDIA

February 5, 2013

Hon. Glenn Wakai, Chair
Committee on Technology and the Arts
State Senate
Hawaii State Capitol, Conference Room 414
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Wakai and Committee Members:

Thank you for the opportunity to testify in opposition to SB 207, relating to Social Media.

Our firm represents the American Council of Life Insurers ("ACLI"), a Washington, D.C., based trade association with more than 300 member companies operating in the United States and abroad. ACLI advocates in federal, state, and international forums for public policy that supports the industry marketplace and the 75 million American families that rely on life insurers' products for financial and retirement security. ACLI members offer life insurance, annuities, retirement plans, long-term care and disability income insurance, and reinsurance, representing more than 90 percent of industry assets and premiums. Two hundred thirty-two (232) ACLI member companies currently do business in the State of Hawaii; and they represent 94% of the life insurance premiums and 92% of the annuity considerations in this State.

Today, many individuals use social media accounts and personal devices for both business and personal purposes.

ACLI and its member companies believe that an individual's personal information should remain private and should not be subject to inspection by an employer or prospective employer.

However, legislation which seeks to protect strictly personal social media account information must simultaneously accommodate legal and regulatory requirements imposed upon life insurers that certain communications be reviewed and retained to comply with recordkeeping requirements.

Life insurance companies have legal obligations with respect to business communications made by their captive insurance producers and registered representatives of their affiliated broker-dealers or registered investment advisers (RIAs).

State insurance laws and regulations require insurers to supervise their captive producers' communications with the public.

The National Association of Insurance Commissioners (NAIC) has issued a White Paper titled "The Use of Social Media in Insurance." This Paper provides an overview of insurance regulatory and compliance issues associated with the use of social media, and guidance for addressing identified regulatory and compliance issues. Insurance regulators have emphasized

the requirement that "[a]n insurer's policies, procedures and controls relative to social media communications must comport with existing regulations, which include, but are not limited to, statutes and rules related to advertising and marketing, record retention, consumer privacy and consumer complaints." To comply with these requirements, insurers must have the ability to properly supervise their producers' social media communications, if such content is attributable to the insurer or the insurer's products or services.

In addition, federal and state securities laws and regulations as well as self-regulatory organization rules require broker-dealers and RIAs to comply with specific requirements related to its communications with the public in order to protect investors and consumers. For example, the Financial Industry Regulatory Authority[1] (FINRA) rules require prior review of certain advertisements and other specified communications. In addition, strict recordkeeping requirements apply to business communications of registered representatives.

FINRA has also addressed social media through two regulatory notices:

1. Social Media Websites—Guidance on Blogs and Social Networking Web Sites (Regulatory Notice 10-06); and
2. Social Media Websites and the Use of Personal Devices for Business Communications—Guidance on Social Networking Websites and Business Communications (Regulatory Notice 11-39).

Further, the Securities Exchange Commission issued National Examination Risk Alert earlier this year which details regulatory requirements related to the use of social media by RIAs and their investment advisory representatives (IARs). As part of an effective compliance program, the SEC staff stressed a firm's obligation to maintain an effective compliance program to ensure compliance with securities laws and rules related to their use of social media. Key components of an effective compliance program includes policies and procedures which establish usage guidelines, content standards, sufficient monitoring, approval of content, training, and recordkeeping responsibilities.

In large part these regulatory notices and guidelines affirm that existing approval, supervision, and recordkeeping requirements are applicable regardless of the delivery mechanism. Supervising employers have an obligation to monitor personal social media accounts utilized for business purposes, and must have in place mechanisms to capture and store relevant communications.

SB 207 would prevent a life insurer from accessing the personal social media of its captive insurance producers, RIAs and their IARs to insure their compliance with these legal and regulatory requirements.

SB 207 in relevant part provides:

An employer shall not require or request and employee . . . to do any of the following:

[1] "The Financial Industry Regulatory Authority (FINRA) is the largest independent regulator for all securities firms doing business in the US. Its mission is to protect America's investors by making sure the securities industry operates fairly and honestly." FINR website – "About FINRA".

(1) Disclose a username or password for the purpose of accessing the employee's . . . personal social media;
(2) Access the employee's . . . personal social media in the presence of the employer;
(3) Divulge any personal social media . . . .

SB 207 would, therefore, make it unlawful for a life insurer to access the personal social media account of its insurance producer, RIAs and their IARs.

For the foregoing reasons, as currently drafted ACLI must respectfully oppose SB 207.

Again, thank you for the opportunity to testify in opposition to SB 207, relating to social media.

LAW OFFICES OF
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Subject: *Submitted testimony for SB207 on Feb 5, 2013 13:15PM*
Date: Wednesday, January 30, 2013 8:06:56 AM

SB207
Submitted on: 1/30/2013
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Submitted By	Organization	Testifier Position	Present at Hearing
Henry Curtis	Ililani Media	Support	No

Comments:

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Submitted By	Organization	Testifier Position	Present at Hearing
Kerri Marks	Individual	Support	No

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Daniel Alvarez	Individual	Support	No

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Submitted By	Organization	Testifier Position	Present at Hearing
christine johnson	Individual	Support	No

Comments:

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