



STATE OF HAWAII
DEPARTMENT OF EDUCATION
P.O. BOX 2360
HONOLULU, HAWAII 96804

Date: 02/25/2020
Time: 02:00 PM
Location: 325
Committee: House Judiciary

Department: Education

Person Testifying: Dr. Christina M. Kishimoto, Superintendent of Education

Title of Bill: HB 1904, HD1 RELATING TO THE UNIFORM EMPLOYEE AND STUDENT ONLINE PRIVACY PROTECTION ACT.

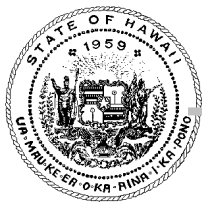
Purpose of Bill: Establishes The Uniform Employee and Student Online Privacy Protection Act that adopts uniform laws on protecting the online accounts of employees, prospective employees, unpaid interns, applicants, students, and prospective students from employers and educational institutions. Takes effect 1/1/2050. (HD1)

Department's Position:

The Department of Education (Department) supports HB 1904, HD1, which is in line with protecting employee and student online accounts while ensuring that employers and educational institutions are able to address non-compliance with laws and regulations that directly impact the employer or educational institution.

Thank you for the opportunity to provide testimony on this measure.

The Hawai'i State Department of Education is committed to delivering on our promises to students, providing an equitable, excellent, and innovative learning environment in every school to engage and elevate our communities. This is achieved through targeted work around three impact strategies: school design, student voice, and teacher collaboration. Detailed information is available at www.hawaiipublicschools.org.



HAWAII CIVIL RIGHTS COMMISSION

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

February 25, 2020
Rm. 325, 2:00 p.m.

To: The Honorable Chris Lee, Chair
The Honorable Joy A. San Buenaventura, Vice Chair
Members of the House Committee on Judiciary

From: Liann Ebesugawa, Chair
and Commissioners of the Hawaii Civil Rights Commission

Re: H.B. No. 1904, H.D. 1

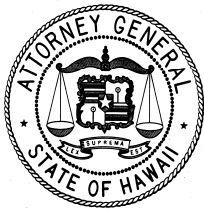
The Hawaii Civil Rights Commission (HCRC) has enforcement jurisdiction over Hawaii's laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state funded services. The HCRC carries out the Hawaii constitutional mandate that no person shall be discriminated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

H.B. No. 1904, H.D. 1, if enacted, will add a new chapter to the Hawaii Revised Statutes, protecting the online accounts of employees, prospective employees, interns, applicants, students and prospective students.

The HCRC supports H.B. No. 1904, H.D. 1. In previous years, HCRC has supported similar bills, with a requested amendment providing that nothing in the new law shall diminish the authority and obligation of an employer to investigate complaints, allegations, or the occurrence of sexual, racial, or other prohibited harassment under chapter 378, part I. This requested provision is included on page 9 of H.B. No. 1904, in § ___-3 (4)(e), and we support this version of the bill.

Current state and federal fair employment law, HRS chapter 378, part I, and Title VII of the Civil Rights Act of 1964, require employers, once on notice of discriminatory harassment in the workplace, to promptly investigate and take effective corrective action. Failure to investigate and take effective corrective action is a violation of law. An employer investigation of sexual, racial, or other prohibited discrimination could involve allegations of harassment via social media.

The HCRC supports H.B. No. 1904, H.D. 1.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2020**

ON THE FOLLOWING MEASURE:

H.B. NO. 1904, H.D. 1, RELATING TO THE UNIFORM EMPLOYEES AND STUDENT ONLINE PRIVACY PROTECTION ACT.

BEFORE THE:

HOUSE COMMITTEE ON FINANCE

LATE

DATE: Tuesday, February 25, 2020

TIME: 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Clare E. Connors, Attorney General, or
Lori N. Tanigawa, Deputy Attorney General

Chair Lee and Members of the Committee:

The Department of the Attorney General provides the following comments.

The purpose of this bill is to establish the Uniform Employee and Student Online Privacy Protection Act that adopts uniform laws on protecting online accounts of employees, prospective employees, unpaid interns, applicants, students, and prospective students from employers and educational institutions.

Article X, section 6, of the Hawai'i Constitution, gives the University of Hawai'i Board of Regents "exclusive jurisdiction over the internal structure, management, and operation of the university." Section 6 further provides: "This section shall not limit the power of the legislature to enact laws of statewide concern. The legislature shall have the exclusive jurisdiction to identify laws of statewide concern." We therefore suggest that the Legislature consider amending this bill to add a statement identifying this bill as a law of statewide concern.

Thank you for the opportunity to provide these comments.

**TESTIMONY OF THE
COMMISSION TO PROMOTE UNIFORM LEGISLATION**

ON H.B. NO. 1904, H.D. 1

**RELATING TO THE UNIFORM EMPLOYEE AND
STUDENT ONLINE PRIVACY PROTECTION ACT.**

BEFORE THE HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, February 25, 2020, at 2:00 p.m.
Conference Room 325, State Capitol

PERSON TESTIFYING: BLAKE OSHIRO or KEN TAKAYAMA
Commission to Promote Uniform Legislation

Chair Lee, and Members of the House Committee on Judiciary:

My name is Ken Takayama, and I am a Life Member of the Uniform Law Commission and a former member of the State of Hawai'i Commission to Promote Uniform Legislation. Thank you for this opportunity to submit this testimony in strong support of House Bill No. 1904, H.D. 1, which enacts the Uniform Employee and Student Online Privacy Protection Act (UESOPPA).

Ordinarily, individuals decide for themselves who will have access to information that is not otherwise publicly available in their social media profiles and other online accounts. Employers and educational institutions, however, may have the power to coerce access to non-public information of students' and employees' personal online accounts. In recent years, there have been a number of reported incidents in which employers and schools have demanded, and received, such access.

This act, which was developed by the Uniform Law Commission (ULC) with input from employers, educational institutions, internet and other technology companies and privacy organizations, prevents employers and public and private educational institutions from coercing access to such information from employees and students who will normally have less than equal bargaining power. Adoption

of this uniform act will establish a set of rules that will help employers, educational institutions, employees, students, technology service providers, practitioners, judges, and others to effectively apply, comply with, or enforce the law in a more consistent manner.

UESOPPA broadly protects all online accounts protected by a login requirement.¹ This includes not just social media networking accounts, but also email, trading, banking, credit card, and other online accounts.

Stated simply, UESOPPA does *four* things to protect information in these types of online accounts.

FIRST, this act prohibits employers and schools from requiring, coercing, or requesting an employee or student to:

- (1) Disclose login information for a protected account;
- (2) Disclose non-publicly available content of a protected account;
- (3) Alter the settings of the protected account to make the login information or non-publicly available content more accessible to others;
- (4) Access the protected account in a way that allows another to observe the login information for, or non-publicly available content of, the account; or
- (5) Take or threaten to take adverse action against the employee or student for failing to comply with conduct that violates these prohibitions.

SECOND, recognizing that there are some instances where employers and schools have a strong and justifiable interest in having the act's prohibitions lifted, the act contains a limited number of important but narrowly-tailored exceptions. The act does not prevent access to information that is publicly

¹ The act does not apply to accounts opened at the direction or behest of an employer or educational institution, and that are intended to be used solely or primarily on behalf of or under the direction of the employer or educational institution.

available or that is required to comply with federal or state law, a court order, or the rule of a self-regulatory organization established by federal or state statute. Additionally, only if the employer or school has **specific facts** about the protected account, the employer or school may seek access to content (but not login information) for the limited purposes of compliance with law, investigation of employee or student misconduct, or a threat to the safety of persons or technology networks, or protection of confidential or proprietary information. In such event, the student or employee will provide the access, either by printing out the relevant content or by otherwise showing the content to the requesting employer or school. **In either case, the individual is involved in providing the requested content and can limit the content to that relevant to the request.**

THIRD, if information is obtained for one of the purposes specified under one of the act's authorized exceptions, the act provides certain limits on how the information can be used.

FOURTH, the act provides for how login information, if lawfully obtained, can be used.

For violations, UESOPPA authorizes the state attorney general to bring a civil action for injunctive and other equitable relief and to obtain a civil penalty for each violation, with a cap for violations caused by the same action. An employee or student may also bring a civil action to obtain injunctive and other equitable relief, actual damages, and an award of costs and reasonable attorney's fees.

We ask that the effective date of the bill be changed to January 1, 2021.

In conclusion, we urge your support for House Bill No. 1904, H.D. 1, to adopt the Uniform Employee and Student Online Privacy Protection Act. Doing so will bolster individual choice by enabling employees and students to make decisions to maintain the privacy of their personal online accounts.

Thank you very much for this opportunity to testify on this measure.

HB-1904-HD-1

Submitted on: 2/23/2020 1:57:01 PM

Testimony for JUD on 2/25/2020 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Pride at Work - Hawaii	Pride @ Work - Hawaii	Support	No

Comments:



LATE

Committee: Committee on Judiciary
Hearing Date/Time: Tuesday, February 25, 2020, 2:00 p.m.
Place: Conference Room 325
Re: Testimony of the ACLU of Hawai'i with Comments on H.B. 1904, H.D. 1, Relating to the Uniform Employee and Student Online Privacy Protection Act

Dear Chair Lee, Vice Chair San Buenaventura, and Committee Members:

The American Civil Liberties Union of Hawai'i ("ACLU of Hawai'i") **writes with comments and concerns** regarding H.B. 1904, H.D. 1, which aims to prohibit employers and educational institutions from demanding access to the personal online accounts such as Facebook, Snapchat, and email, of both current and prospective employees and students. Unfortunately, as written, this measure leaves serious loopholes for abuse.

Social media provides an important platform for free speech and open dialogue, and has become central to the way that we communicate in the 21st century. As social media use has increased, so too has the incentive for schools, employers, and landlords to monitor what students, employees, and tenants are expressing online. But access by those who have leverage over our education and livelihood inevitably leads to discrimination, self-censorship, and the chilling of the free expression of ideas.

For this reason, the ACLU of Hawai'i appreciates that the Legislature is taking steps to protect students and employees against unwarranted invasions of privacy. The Uniform Law Commission's Employee and Student Online Privacy Protection Act ("ULC bill"), however, fails to adequately protect students and employees, and does not even address online privacy for tenants. **The ACLU of Hawai'i prefers the alternative and more comprehensive reform measure, the Personal Online Account Privacy Act ("POAPA"), attached.** POAPA creates stronger safeguards against abuse, and includes within its protection Hawaii's renters.

As currently written, H.B. 1904, H.D. 1 allows employers and educational institutions to view employees' and students' personal online account content based solely on a general — and potentially unsubstantiated — allegation of misconduct tenuously linked to the account. POAPA's protections are much stronger, requiring allegations of misconduct to point to specific content, and only allowing employers/educational institutions/landlords to access content that has been specifically identified. POAPA defines "specifically identified content," whereas the ULC bill provides no clarity regarding what would constitute "specific facts" about the employee's/student's protected personal online account sufficient to allow employers and schools to access the content of these accounts.

Finally, housing has become an increasingly troubling area for online privacy, with more and more stories emerging of landlords demanding access to tenants' social media accounts. While POAPA

ACLU of Hawai'i comments regarding H.B. 1904, H.D. 1

February 25, 2020

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protects tenants against unwarranted invasions of privacy from their landlords, the ULC bill simply fails to address this issue.

For these reasons, the ACLU of Hawai'i respectfully requests that the Committee amend this measure by inserting the language of "POAPA," attached. Alternatively, if the Committee is not inclined to amend H.B. 1904, H.D. 1, we ask that the Committee defer the measure.

Thank you for the opportunity to testify.

Sincerely,



Mandy Fernandes
Policy Director
ACLU of Hawai'i

The mission of the ACLU of Hawai'i is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawai'i fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawai'i is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawai'i has been serving Hawai'i for more than 50 years.

American Civil Liberties Union of Hawai'i
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Personal Online Account Privacy Act Section 1. Definitions – As used in this Act,

(A) “Applicant” shall mean an Applicant for employment.

(B) “Employee” shall mean an individual who provides services or labor to an Employer in return for wages or other remuneration or compensation.

(C) “Employer” shall mean a person who is acting directly as an Employer, or acting under the authority or on behalf of an Employer, in relation to an Employee.

(D) “Educational Institution” shall mean:

1. (1) A private or public school, institution, or school district, or any subdivision thereof, that offers participants, Students, or trainees an organized course of study or training that is academic, trade-oriented, or preparatory for gainful employment, as well as school Employees and agents acting under the authority or on behalf of an Educational Institution; or
2. (2) A state or local educational agency authorized to direct or control an entity in Section 1(D)(1).

(E) “Personal Online Account” means any online account maintained by an Employee, Student, or Tenant, including but not limited to a social media or email account, that is protected by a login requirement. “Personal Online Account” does not include an account, or a discrete portion of an account, that was either (1) opened at an Employer’s behest, or provided by an Employer and intended to be used solely or primarily on behalf of or under the direction of the Employer, or (2) opened at a school’s behest, or provided by a school and intended to be used solely or primarily on behalf of or under the direction of the school.

(F) “Prospective Student” shall mean an Applicant for admission to an Educational Institution.

(G) “Prospective Tenant” shall mean a person who inquires about or applies to rent real property from a Landlord for residential purposes.

(H) “Landlord” shall mean the owner or lawful possessor of real property who, in an exchange for rent, Leases it to another person or persons for residential purposes, or someone acting under the authority or on behalf of a Landlord, in relation to a Tenant or Prospective Tenant.

(I) “Lease” shall mean a legally binding agreement between a Landlord and a residential Tenant or Tenants for the rental of real property.

(J) “Specifically Identified Content” shall mean data or information stored in a Personal Online Account that is identified with sufficient particularity to distinguish the discrete, individual piece of content being sought from any other data or information stored in the account with which it may share similar characteristics.

(K) "Student" shall mean any full-time or part-time Student, participant, or trainee that is enrolled in a class or any other organized course of study at an Educational Institution.

(L) "Tenant" shall mean a person who Leases real property from a Landlord, in exchange for rent, for residential purposes.

Section 2. Employers – An Employer shall not:

(A) Require, request, or coerce an Employee or Applicant to:

(1) Disclose the user name and password, password, or any other means of authentication, or to provide access through the user name or password, to a Personal Online Account;

(2) Disclose the non-public contents of a Personal Online Account;

(3) Provide password or authentication information to a personal technological device for purposes of gaining access to a Personal Online Account, or to turn over an unlocked personal technological device for purposes of gaining access to a personal online account;

(4) Access a Personal Online Account in the presence of the Employer in a manner that enables the Employer to observe the contents of such account; or

(5) Change the account settings of a Personal Online Account so as to increase third party access to its contents;

(B) Require or coerce an Employee or Applicant to add anyone, including the Employer, to their list of contacts associated with a Personal Online Account;

(C) Take any action or threaten to take any action to discharge, discipline, or otherwise penalize an Employee in response to an Employee's refusal to disclose any information specified in Section 2(A)(1)-(3) or refusal to take any action specified in Section 2(A)(4)-(5) or (B); or

(D) Fail or refuse to hire any Applicant as a result of an Applicant's refusal to disclose any information specified in Section 2(A)(1)-(3) or refusal to take any action specified in Section 2(A)(4)-(5) or (B).

Section 3. Educational Institutions – An Educational Institution shall not:

(A) Require, request, or coerce a Student or Prospective Student to:

(1) Disclose the user name and password, password, or any other means of authentication, or provide access through the user name or password, to a Personal Online Account;

(2) Disclose the non-public contents of a Personal Online Account;

(3) Provide password or authentication information to a personal technological device for purposes of gaining access to a Personal Online Account, or to turn over an unlocked personal technological device for purposes of gaining access to a personal online account;

(4) Access a Personal Online Account in the presence of an Educational Institution Employee or Educational Institution volunteer, including, but not limited to, a coach, teacher, or school administrator, in a manner that enables the Educational Institution Employee or Educational Institution volunteer to observe the contents of such account; or

(5) Change the account settings of a Personal Online Account so as to increase third party access to its contents;

(B) Require or coerce a Student or Prospective Student to add anyone, including a coach, teacher, school administrator, or other Educational Institution Employee or Educational Institution volunteer, to their list of contacts associated with a Personal Online Account;

(C) Take any action or threaten to take any action to discharge, discipline, prohibit from participating in curricular or extracurricular activities, or otherwise penalize a Student in response to a Student's refusal to disclose any information specified in Section 3(A)(1)-(3) or refusal to take any action specified in Section 3(A)(4)-(5) or (B); or

(D) Fail or refuse to admit any Prospective Student as a result of the Prospective Student's refusal to disclose any information specified in Section 3(A)(1)-(3) or refusal to take any action specified in Section 3(A)(4)-(5) or (B).

Section 4. Landlords – A Landlord shall not:

(A) Require, request, or coerce a Tenant or Prospective Tenant to:

(1) Disclose the user name and password, password, or any other means of authentication, or to provide access through the user name or password, to a Personal Online Account;

(2) Disclose the non-public contents of a Personal Online Account;

(3) Provide password or authentication information to a personal technological device for purposes of gaining access to a Personal Online Account, or to turn over an unlocked personal technological device for purposes of gaining access to a personal online account;

(4) Access a Personal Online Account in the presence of the Employer in a manner that enables the Employer to observe the contents of such account; or

(5) Change the account settings of a Personal Online Account so as to increase third party access to its contents;

(B) Require or coerce a Tenant or Prospective Tenant to add anyone, including the Employer, to their list of contacts associated with a Personal Online Account;

(C) Take any action or threaten to take any action to evict or otherwise penalize a Tenant in response to Tenant's refusal to disclose any information specified in Section 4(A)(1)-(3) or refusal to take any action specified in Section 4(A)(4)-(5) or (B);

(D) Fail or refuse to rent real property to, or otherwise penalize any Prospective Tenant as a result of a Prospective Tenant's refusal to disclose any information specified in Section 4(A)(1)-(3) or refusal to take any action specified in Section 4(A)(4)-(5) or (B); or

(E) Include any provisions in a new or renewal Lease, executed after the date this Act takes effect, that conflict with Section 4 of this Act. Any such conflicting Lease provisions shall be deemed void and legally unenforceable.

Section 5. Limitations – Nothing in this Act shall prevent an Employer, Educational Institution, or Landlord from:

(A) Accessing information about an Applicant, Employee, Student, Prospective Student, Tenant, or Prospective Tenant that is publicly available;

(B) Complying with state and federal laws, rules, and regulations, and the rules of self-regulatory organizations as defined in section 3(a)(26) of the Securities and Exchange Act of 1934, 15 USC 78c(a)(26), or another statute governing self-regulatory organizations;

(C) For an Employer, without requesting or requiring an Employee or Applicant to provide a user name and password, password, or other means of authentication that provides access to a Personal Online Account, requesting or requiring an Employee or Applicant to share Specifically Identified Content that has been reported to the Employer for the purpose of:

(1) Enabling an Employer to comply with its own legal and regulatory obligations;

(2) Investigating an allegation, based on the receipt of information regarding Specifically Identified Content, of the unauthorized transfer of an Employer's proprietary or confidential information or financial data to an Employee or Applicant's Personal Online Account; or

(3) Investigating an allegation, based on the receipt of information regarding Specifically Identified Content, of unlawful harassment or threats of violence in the workplace;

(D) For an Educational Institution, without requesting or requiring a Student or Prospective Student to provide a user name and password, password, or other means of authentication that provides access to a Personal Online Account, requesting or requiring a Student or Prospective Student to share Specifically Identified Content that has been reported to the Educational Institution for the purpose of:

(1) Complying with its own legal obligations, subject to all legal and constitutional protections that are applicable to the Student or Prospective Student;

(E) For a Landlord, without requesting or requiring Tenant or Prospective Tenant to provide a user name and password, password, or other means of authentication that provides access to a Personal Online Account, requesting or requiring a Tenant or Prospective Tenant to share Specifically Identified Content that has been reported to the Landlord for the purpose of:

(1) Enabling a Landlord to comply with its own legal and regulatory obligations; or

(2) Investigating an allegation, based on the receipt of information regarding Specifically Identified Content, of a Lease violation by the Tenant where such a violation presents an imminent threat of harm to the health or safety of another Tenant or occupant of the real property or of damage to the real property;

(F) Prohibiting an Employee, Applicant, Student, or Prospective Student from using a Personal Online Account for business or Educational Institution purposes; or

(G) Prohibiting an Employee, Applicant, Student, or Prospective Student from accessing or operating a Personal Online Account during business or school hours or while on business or school property.

Section 6. Inadvertent receipt of password –

(A) If an Employer, Educational Institution, or Landlord inadvertently receives the user name and password, password, or other means of authentication that provides access to a Personal Online Account of an Employee, Applicant, Student, Prospective Student, Tenant, or Prospective Tenant through the use of an otherwise lawful technology that monitors the Employer's, Educational Institution's, or Landlord's network or Employer- provided, Educational Institution-provided, or Landlord-provided devices for network security or data confidentiality purposes, the Employer, Educational Institution, or Landlord:

(1) Is not liable for having the information;

(2) May not use the information to access the Personal Online Account of the Employee, Applicant, Student, Prospective Student, Tenant, or Prospective Tenant;

(3) May not share the information with any other person or entity; and 5

(4) Must delete the information as soon as is reasonably practicable, unless the information is being retained by the Employer, Educational Institution, or Landlord in connection with the pursuit of a specific criminal complaint or civil action, or the investigation thereof.

Section 7. Enforcement –

(A) Any Employer, Educational Institution, or Landlord, including its Employee or agents, who violates this Act shall be subject to legal action for damages and/or equitable relief, to be brought by any person claiming a violation of this Act has injured his or her person or reputation. A person so injured shall be entitled to actual damages, including mental pain and suffering endured on account of violation of the provisions of this Act, and reasonable attorneys' fees and other costs of litigation.

(B) Any Employee or agent of an Educational Institution who violates this Act may be subject to disciplinary proceedings and punishment. For Educational Institution Employees who are represented under the terms of a collective bargaining agreement, this Act prevails except where it conflicts with the collective bargaining agreement, any memorandum of agreement or understanding signed pursuant to the collective bargaining agreement, or any recognized and established practice relative to the members of the bargaining unit.

Section 8. Admissibility – Except as proof of a violation of this Act, no data obtained, accessed, used, copied, disclosed, or retained in violation of this Act, nor any evidence derived therefrom, shall be admissible in any criminal, civil, administrative, or other proceeding.

Section 9. Severability – The provisions in this Act are severable. If any part or provision of this Act, or the application of this Act to any person, entity, or circumstance, is held invalid, the remainder of this Act, including the application of such part or provision to other persons, entities, or circumstances, shall not be affected by such holding and shall continue to have force and effect.

Section 10. Effective Date – This Act shall take effect upon passage.