

Written Testimony of the  
State Privacy and Security Coalition  
Regarding HB5523 Substitute Amendment

May 29, 2012

---

Dear Mr. Chairman and Members of the Committee:

We appreciate the opportunity to submit written testimony regarding HB5523 and apologize that we are unable to testify in person today. Our coalition is comprised of leading technology and media companies and trade associations, including several significant Michigan employers.

The issue of protecting the privacy of the log-in credentials of job applicants and employees has become the most active privacy issue in the states this year. Maryland enacted a law earlier this spring, and legislation has advanced out of committee in California, Delaware, Illinois and New Jersey.

Our coalition strongly supports the intent of your bill -- protecting the privacy of log-in credentials for employee and job applicant online accounts that are personal. We agree that there is no valid reason for employers to ask that job applicants relinquish log-in credentials for personal social networking or other personal online accounts. It is likewise true that obtaining private account log-in credentials for an employee is a significant privacy intrusion.

At the same time, this issue can be a complicated one. In limited circumstances, involving employees (as opposed to job applicants), there can be compelling circumstances that justify an employer request to see the contents of an account.

For example, it is essential that employers be able to access employee work accounts or work equipment that the employer provided to the employee as employers can be held legally responsible for employee actions using these accounts and devices, and because they are the employer's property.

Furthermore, employees can harass other employees from a personal online account. Employees may also steal confidential business information, such as business plans or sales contacts, to set up a competing business. Or they may download sensitive personal information, such as customer government ID numbers or financial account numbers, for use in identity theft or fraud. What is more, employees can engage in criminal activities from personal accounts that implicate their employers, such as bribery, insider trading, or distorting user feedback ratings on a company product to inflate user feedback ratings for the product.

500 8th Street, NW  
Washington, DC 20004  
202.799.4441 Tel  
202.799.5441 Fax

It is very important that employers be able to obtain employee cooperation to investigate specific allegations of illegal activity or work-related misconduct involving an employee personal account. Where an employer receives a specific allegation of these sorts of behaviors, the employer *should* investigate, and the very positive privacy principles that underlie this bill should not interfere with an employer requesting access to the employee's personal account in order to conduct the investigation.

We congratulate you on getting these issues right in the substitute amendment to HB5523 through narrow exemptions to clarify that an employer require employee cooperation to share the contents of a personal account in response to a specific allegation of these sorts of work-related wrongdoing involving that personal account. These exceptions ensure that the privacy of employee personal accounts is protected without the bill being used as a pretext by employees to hide illegal conduct. With them, the bill would address an important privacy issue in a thoughtful and balanced way.

We also agree that to the extent that employers are prohibited from requesting job applicants' or employees' log-in credentials, employers should not be subject to any claim for negligent hiring for failing to make that prohibited request.

The one area in which we hope that you will make further changes to HB5523 is in its private right of action for statutory damages. The threat of a lawsuit for injunctive relief and attorneys' fees should be sufficient to deter violations. To the extent that a suit for statutory damages is part of the bill, it should be conditioned on 60 days prior notice, without an exception for "good cause". In other words if good cause is shown, a lawsuit could be filed prior to the 60 day warning period, but the plaintiff should not be able to add a claim for damages without submitting a demand letter 60 days before filing the claim. This would adequately address potential emergency relief situations without generating frivolous lawsuits for statutory damages in an economic climate in which Michigan employers can ill afford defending against threats of abusive litigation.

We thank you for considering our views and stand ready to assist the Committee in its further work on this bill.