

SENATE BILL NO. 270

INTRODUCED BY K. REGIER

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A BILL FOR AN ACT ENTITLED: "AN ACT PROTECTING EMPLOYEE AND JOB APPLICANT RIGHTS TO LEGAL EXPRESSIONS OF FREE SPEECH, INCLUDING POSTS MADE ON SOCIAL MEDIA; PROVIDING THAT TERMINATION OF AN EMPLOYEE BASED ON THE EMPLOYEE'S LEGAL EXPRESSION OF FREE SPEECH, INCLUDING BUT NOT LIMITED TO STATEMENTS MADE ON SOCIAL MEDIA, IS DISCRIMINATION AND SUBJECT TO WRONGFUL DISCHARGE LAWS; AND AMENDING SECTIONS 39-2-307 AND 39-2-904, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 39-2-307, MCA, is amended to read:

**"39-2-307. Employer access limited regarding personal social media account of employee or job applicant -- conditions for exceptions -- employer retaliation prohibited -- penalties.** (1) Except as provided in subsection (2), an employer or employer's agent may not require or request an employee or an applicant for employment to:

- (a) disclose a user name or password for the purpose of allowing the employer or employer's agent to access a personal social media account of the employee or job applicant;
- (b) access personal social media in the presence of the employer or employer's agent; or
- (c) divulge any personal social media or information contained on personal social media.

(2) An employee shall provide, if requested, to an employer or employer's agent the employee's user name or password to access personal social media when:

- (a) (i) the employer has specific information about an activity by the employee that indicates work-related employee misconduct or criminal defamation, as provided in 45-8-212;
- (ii) the employer has specific information about the unauthorized transfer by the employee of the employer's proprietary information, confidential information, trade secrets, or financial data to a personal online account or personal online service; or

1 (iii) an employer is required to ensure compliance with applicable federal laws or federal regulatory  
2 requirements or with the rules of self-regulatory organizations as defined in section 3(a)(26) of the Securities  
3 and Exchange Act of 1934, 15 U.S.C. 78c(a)(26); and

4 (b) an investigation is under way and the information requested of the employee is necessary to  
5 make a factual determination in the investigation.

6 (3) Nothing in this section:

7 (a) limits an employer's right to promulgate and maintain lawful workplace policies governing the  
8 use of the employer's electronic equipment, including a requirement for an employee to disclose to the  
9 employer the employee's user name, password, or other information necessary to access employer-issued  
10 electronic devices, including but not limited to cell phones, computers, and tablet computers, or to access  
11 employer-provided software or e-mail accounts;

12 (b) prevents an employee from seeking injunctive relief in response to the provisions of subsection  
13 (2); or

14 (c) prevents the prosecution of a person for violating privacy in communications under 45-8-213.

15 (4) An employer may not discharge, discipline, threaten to discharge or discipline, or otherwise  
16 retaliate against an employee or job applicant for:

17 (a) \_\_\_\_\_ not complying with a request or demand by the employer that violates this section; or

18 (b) legal expressions of free speech by the employee or job applicant, as protected in 39-2-904,  
19 made on personal social media.

20 (5) (a) As used in this section, "personal social media" means a password-protected electronic  
21 service or account containing electronic content, including but not limited to e-mail, videos, still photographs,  
22 blogs, video blogs, podcasts, instant and text messages, internet website profiles or locations, and online  
23 services or accounts, including password-protected services or accounts to which an employee may post  
24 information, data, or pictures.

25 (b) The term does not include a social media account that is:

26 (i) opened for or provided by an educational institution and intended solely for educational  
27 purposes; or

28 (ii) opened for or provided by an employer and intended solely for business-related purposes.

1           (6)     (a) An employee or an applicant for employment may bring an action against an employer for  
 2 violating this section within 1 year in a small claims court. An employee or an applicant for employment may  
 3 also have a cause of action under 45-8-213.

4           (b)     Damages are limited to \$500 or actual damages up to the limit provided in 3-10-1004. Legal  
 5 costs may be awarded to the party that prevails in court.

6           (7)     If an employer gains information improperly under this section and subsequently is involved in  
 7 a computer security breach as provided in 30-14-1704, the employer is subject to penalties under 30-14-142."

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9           **Section 2.** Section 39-2-904, MCA, is amended to read:

10          **"39-2-904. Elements of wrongful discharge.** (1) A discharge is wrongful only if:

11          (a)     it was in retaliation for the employee's refusal to violate public policy or for reporting a violation  
 12 of public policy;

13          (b)     the discharge was not for good cause and the employee had completed the employer's  
 14 probationary period of employment; ~~or~~

15          (c)     the employer materially violated an express provision of its own written personnel policy prior to  
 16 the discharge, and the violation deprived the employee of a fair and reasonable opportunity to remain in a  
 17 position of employment with the employer; or

18          (d)     the employer terminated the employee solely based on the employee's legal expression of free  
 19 speech, including but not limited to statements made on social media.

20          (2)     During a probationary period of employment, the employment may be terminated at the will of  
 21 either the employer or the employee on notice to the other for any reason or for no reason.

22          (3)     The employer has the broadest discretion when making a decision to discharge any  
 23 managerial or supervisory employee."

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