

**SUBJECT: Rule 010.14-500; Prohibiting Employer from Requiring Access to Employee Social Media Account****DESCRIPTION:** This rule is in response to Act 1480 of 2013.

1. The rule states its general purpose and summarizes the statutory provisions. It also states the Director of Labor's authority to adopt the rule.

2. The rule defines certain terms that are not defined by the statute. Specifically, the statute provides that an employer "shall not require, request, suggest, or cause a current or prospective employee" to take certain actions which would require the employee to provide access to their personal social media account. The definitions deal with the terms "request, suggest, or cause" to ensure that there is some element of stated or implied coercion.

**PUBLIC COMMENT:** A public hearing was held on February 13, 2014, and the public comment period expired on that date. Public comments were as follows:

1. *Comments of Gregory J. Northen, Cross, Gunter, Witherspoon & Galchus, P.C.*

Mr. Northen's comments were essentially that the proposed regulation needed additional language to ensure that simple "friend requests" with no "stated or implied coercion" were not deemed to be violations of the statute. Mr. Northen suggested specific language to state outright that voluntary issuance and/or acceptance of an invitation to add an employee, supervisor or administrator by a current or prospective employee does not violate the statute. **RESPONSE:** The agency incorporated Mr. Northen's proposed language in the proposed rule.

2. *Comments of State Privacy and Security Coalition*

The coalition is comprised of 20 leading communications, technology and media companies and 6 trade associations. It wrote in "strong support" of the proposed rule.

3. *Comments of H. Wayne Young, Jr., Friday Eldredge & Clark LLP*

Mr. Young had a number of specific proposals on behalf of various clients.

(a) Mr. Young proposed language that would allow an employer to utilize social media as a means of communicating with employees, including requiring employees to link to a page in order to view and receive such communication. Provided nothing in this interpretation shall be deemed to limit an employee's ability to set his or her own privacy settings for their social media account. **RESPONSE:** The agency agrees with Mr. Young that this proposed language would not implicate privacy concerns. It appears very reasonable, but it exceeds the scope of the agency's authority. The statute is clear that "An employer shall not require. . . a current. . . employee to. . . add an employee,

supervisor, or administrator to the list of contacts associated with his or her social media account.” Several scenarios in Mr. Young’s proposed language would violate the statute. This would require the agency to do more than define a term; clarify an ambiguity; or establish an administrative procedure. It would require the agency to create an exemption that is not present in the statute, and thus exceeds our regulatory authority.

(b) Mr. Young proposed language which provides that an employer is not prohibited from utilizing social media as a means of advertising to the general public and recruiting prospective employees. He proposed language that clarifies engaging in voluntary social media activity is not prohibited. This proposal also provides “Nor does the Act prohibit an individual from voluntarily promoting its employer or its services or products on social media or as may be required by the employee’s job.” (emphasis supplied). The proposed language would define the term “prospective employee” as an individual who has submitted a job application or equivalent document, such as a resume, for an open position and is currently being considered for that position by the employer.”

**RESPONSE:** The agency incorporated Mr. Young’s proposed language on advertising and recruiting, but with the additional language that “provided there is no stated or implied threat to refuse to hire a prospective employee who exercises any right pursuant to the statute.”

Mr. Young’s proposal regarding voluntary social media activity is addressed by the changes Mr. Northen proposed. The additional language that addresses promoting an employer or its services or products on social media voluntarily or as may be required by the employee’s job was not adopted by the agency. To the extent the interaction is voluntary, it is already addressed. Further, the statute also addresses that it does not cover an account opened by an employee at the request of the employer. Ark. Code Ann. § 11-2-124(a)(3)(B)(iii). As a result, the employer can request/require an employee to open a social media account for promoting the employer’s business interests.

Mr. Young’s comment regarding a definition for the term “prospective employee” is well taken and the agency has defined the term, although the definition varies from the proposed language submitted by Mr. Young to include not only individuals who have applied for an open position, but those individuals who are actively and specifically recruited by an employer.

(c) Mr. Young proposed language to allow an employer to require an applicant for employment to release non-public social media information and passwords for the purpose of conducting background checks. **RESPONSE:** Mr. Young raises legitimate issues for the public policy debate, particularly with respect to certain employers, such as those who care for the elderly and children. The Department of Labor, however, has no authority to create what is, in effect, an exemption from the statute.

(d) Mr. Young proposed that the statute shall not apply to churches and other religious organizations. **RESPONSE:** Again, while Mr. Young raises legitimate questions for debate, the agency cannot create by administrative rule an exemption that does not exist in the statute itself.

(e) Mr. Young proposed language that would exempt from the statute's provisions employers charged with the oversight and care of minors. **RESPONSE:** The agency cannot create an exemption by administrative rule.

(f) Mr. Young argues that it was never the intent of the General Assembly for this statute to carry criminal penalties. He proposes regulatory language that specifically states the statute does not carry criminal penalties. **RESPONSE:** The agency has proposed alternate language that addresses Mr. Young's concern, while recognizing the plain language of the statutes. Act 1480 of 2013 amended Arkansas Code Title 11, Chapter 2, Subchapter 1 to add § 11-2-124. This subchapter carries a separate statutory provision, Ark. Code Ann. §11-2-104 which provides for a misdemeanor offense for violations of the subchapter. The criminal penalty is from \$10 to \$100 or up to 6 months imprisonment or both. Further, Ark. Code Ann. § 11-2-105 provides that "It shall be the duty of the Attorney General and the several prosecuting attorneys , **upon request of the Director of the Department of Labor. . .** to prosecute any violation of the law. . ." (emphasis supplied). The agency's proposed language provides that the Department of Labor will not make a criminal referral, but will enforce the provisions of § 11-2-124 by assessing a civil penalty and seeking injunctive relief.

4. *Comments by Representative Nate Steel*

Representative Steel was the sponsor of Act 1480 of 2013, codified at Ark. Code Ann. § 11-2-124. Representative Steel wrote in support of the comments submitted by Wayne Young. **RESPONSE:** See responses to the comments of Wayne Young above.

5. *Comments by the Arkansas Society for Human Resource Management (ARSHRM)*

The organization had six (6) concerns.

(a) The proposed rule did not sufficiently clarify that voluntary associations on social media were permissible. **RESPONSE:** This concern was also expressed by Messrs. Northen and Young. The agency addressed this concern in new proposed language in ADL Rule 010.14-500(C).

(b) The proposed rule did not define "prospective employee." **RESPONSE:** This has been done. See response to 3(b) above.

(c) The statute defines "Employer" to include "without limitation an agent, representative, or designee of the employer." ARSHRM feels that this definition is too broad. **RESPONSE:** The agency agrees and has included a definition of "agent, representative or designee of the employer."

(d) ARSHRM states that neither the statute nor proposed rule indicate how an employer is to handle existing social media relationships. **RESPONSE:** The agency has added interpretive guidance on this issue.

(e) ARSHRM is concerned that employers can no longer use LinkedIn as a recruiting source or tool. **RESPONSE:** To the extent that the employer utilizes LinkedIn on a voluntary basis, it can still be utilized. There cannot be any stated or implied coercion and specifically this means no stated or implied threat of a refusal to hire a prospective employee who does not allow access to his/her LinkedIn account. The agency believes it has no authority to establish a blanket exemption for LinkedIn as a recruiting tool.

(f) ARSHRM is also concerned with the existence of criminal penalties for violations of the statute. **RESPONSE:** Mr. Young had the same concern and it has been addressed by the agency as noted above.

The proposed effective date is June 9, 2014.

**CONTROVERSY:** This is not expected to be controversial.

**FINANCIAL IMPACT:** There is no financial impact.

**LEGAL AUTHORIZATION:** The Director of the Department of Labor is authorized to make, modify, or repeal such rules, or changes in rules, as he or she may deem necessary to carry out the provisions of this subchapter. Ark. Code Ann. § 11-2-110(b). These rules implement Act 1480 of 2013, which prohibits an employer from requiring or requesting a current or prospective employee from disclosing his or her username or password for a social media account or to provide access to the content of his or her social media account.

JCS 4-28-14

**QUESTIONNAIRE FOR FILING PROPOSED RULES AND REGULATIONS  
WITH THE ARKANSAS LEGISLATIVE COUNCIL AND JOINT INTERIM COMMITTEE**

DEPARTMENT/AGENCY Department of Labor  
DIVISION Labor Standards Division  
DIVISION DIRECTOR Lindsay Moore, Labor Standards Manager  
CONTACT PERSON Denise P. Oxley, General Counsel  
ADDRESS 10421 W. Markham Street, Little Rock, AR 72205  
PHONE NO. (501) 682-4504 FAX NO. (501) 682-4535 E-MAIL denise.oxley@arkansas.gov  
NAME OF PRESENTER AT COMMITTEE MEETING Denise P. Oxley  
PRESENTER E-MAIL denise.oxley@arkansas.gov

**INSTRUCTIONS**

- A. Please make copies of this form for future use.
- B. Please answer each question completely using layman terms. You may use additional sheets, if necessary.
- C. If you have a method of indexing your rules, please give the proposed citation after "Short Title of this Rule" below.
- D. Submit two (2) copies of this questionnaire and financial impact statement attached to the front of two (2) copies of the proposed rule and required documents. Mail or deliver to:

Donna K. Davis  
Administrative Rules Review Section  
Arkansas Legislative Council  
Bureau of Legislative Research  
One Capitol Mall, 5<sup>th</sup> Floor  
Little Rock, AR 72201

- \*\*\*\*\*
1. What is the short title of this rule? ADL Rule 010.14-500, Prohibiting Employer from Requiring Access to Employee Social Media Account
  2. What is the subject of the proposed rule? Prohibiting Employer from Requiring Access to Employee Social Media Account
  3. Is this rule required to comply with a federal statute, rule, or regulation? Yes  No   
If yes, please provide the federal rule, regulation, and/or statute citation. \_\_\_\_\_
  4. Was this rule filed under the emergency provisions of the Administrative Procedure Act? Yes  No   
If yes, what is the effective date of the emergency rule? \_\_\_\_\_  
  
When does the emergency rule expire? \_\_\_\_\_

Will this emergency rule be promulgated under the permanent provisions of the Administrative Procedure Act? Yes  No

5. Is this a new rule? Yes  No

If yes, please provide a brief summary explaining the regulation. The rule defines certain terms not defined by the statute in order to ensure that there is an element of stated or implied coercion and not inadvertent violations of the law.

Does this repeal an existing rule? Yes  No

If yes, a copy of the repealed rule is to be included with your completed questionnaire. If it is being replaced with a new rule, please provide a summary of the rule giving an explanation of what the rule does. \_\_\_\_\_

Is this an amendment to an existing rule? Yes  No

If yes, please attach a mark-up showing the changes in the existing rule and a summary of the substantive changes. **Note: The summary should explain what the amendment does, and the mark-up copy should be clearly labeled "mark-up."**

6. Cite the state law that grants the authority for this proposed rule? If codified, please give the Arkansas Code citation. Ark. Code Ann. 11-2-110(b)

7. What is the purpose of this proposed rule? Why is it necessary? The rule is necessary so that there are no inadvertent violations caused by legitimate friend or contact requests. Employers and employees both use social media accounts, such as LinkedIn for recruiting and networking for job opportunities.

8. Please provide the address where this rule is publicly accessible in electronic form via the Internet as required by Arkansas Code § 25-19-108(b). <http://www.labor.ar.gov/Pages/default.aspx>

9. Will a public hearing be held on this proposed rule? Yes  No

If yes, please complete the following:

Date: Thursday, February 13, 2014

Time: 10:00 a.m.

Arkansas Department of Labor,  
10421 W. Markham Street, Room 305

Place: Little Rock, AR 72205

10. When does the public comment period expire for permanent promulgation? (Must provide a date.)

Thursday, February 13, 2014 at 10:00 a.m.

11. What is the proposed effective date of this proposed rule? (Must provide a date.)

April 15, 2014

12. Do you expect this rule to be controversial? Yes  No

If yes, please \_\_\_\_\_

explain.

13. Please give the names of persons, groups, or organizations that you expect to comment on these rules?

Please provide their position (for or against) if known.

Will Castleberry, FOR  
Facebook State Public Policy

Steve Schulte, FOR  
Director of Governmental Affairs  
Arkansas Society of Human Resource Management

Greg Northen, FOR  
Attorney  
Cross, Gunter, Witherspoon & Galchus, P.C.

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**FINANCIAL IMPACT STATEMENT**

**PLEASE ANSWER ALL QUESTIONS COMPLETELY**

**DEPARTMENT**     Arkansas Department of Labor  
**DIVISION**        Labor Standards Division  
**PERSON COMPLETING THIS STATEMENT**   Denise P. Oxley, General Counsel  
**TELEPHONE NO.**   (501)682-4504 **FAX NO.**   (501)682-4535 **EMAIL:** denise.oxley@arkansas.gov

To comply with Ark. Code Ann. § 25-15-204(e), please complete the following Financial Impact Statement and file two copies with the questionnaire and proposed rules.

**SHORT TITLE OF THIS RULE**     ADL Rule 010.14-500, Prohibiting Employer from Requiring Access to Employee Social Media Account

1. Does this proposed, amended, or repealed rule have a financial impact?     Yes      No
2. Is the rule based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule?     Yes      No
3. In consideration of the alternatives to this rule, was this rule determined by the agency to be the least costly rule considered?     Yes      No

If an agency is proposing a more costly rule, please state the following:

- (a) How the additional benefits of the more costly rule justify its additional cost;  
\_\_\_\_\_
- (b) The reason for adoption of the more costly rule;  
\_\_\_\_\_
- (c) Whether the more costly rule is based on the interests of public health, safety, or welfare, and if so, please explain; and;  
\_\_\_\_\_
- (d) Whether the reason is within the scope of the agency's statutory authority; and if so, please explain.  
\_\_\_\_\_

4. If the purpose of this rule is to implement a federal rule or regulation, please state the following:

- (a) What is the cost to implement the federal rule or regulation?

**Current Fiscal Year**

General Revenue \_\_\_\_\_  
Federal Funds \_\_\_\_\_  
Cash Funds \_\_\_\_\_  
Special Revenue \_\_\_\_\_  
Other (Identify) \_\_\_\_\_

**Next Fiscal Year**

General Revenue \_\_\_\_\_  
Federal Funds \_\_\_\_\_  
Cash Funds \_\_\_\_\_  
Special Revenue \_\_\_\_\_  
Other (Identify) \_\_\_\_\_



Total \_\_\_\_\_

Total \_\_\_\_\_

(b) What is the additional cost of the state rule?

**Current Fiscal Year**

**Next Fiscal Year**

General Revenue \_\_\_\_\_  
Federal Funds \_\_\_\_\_  
Cash Funds \_\_\_\_\_  
Special Revenue \_\_\_\_\_  
Other (Identify) \_\_\_\_\_

General Revenue \_\_\_\_\_  
Federal Funds \_\_\_\_\_  
Cash Funds \_\_\_\_\_  
Special Revenue \_\_\_\_\_  
Other (Identify) \_\_\_\_\_

Total \_\_\_\_\_

Total \_\_\_\_\_

5. What is the total estimated cost by fiscal year to any private individual, entity and business subject to the proposed, amended, or repealed rule? Identify the entity(ies) subject to the proposed rule and explain how they are affected.

**Current Fiscal Year**

**Next Fiscal Year**

\$ -0- \_\_\_\_\_

\$ -0- \_\_\_\_\_

There are no costs associated with the proposed rule. There are potential fines for violation of the statute.

6. What is the total estimated cost by fiscal year to state, county, and municipal government to implement this rule? Is this the cost of the program or grant? Please explain how the government is affected.

**Current Fiscal Year**

**Next Fiscal Year**

\$ -0- \_\_\_\_\_

\$ -0- \_\_\_\_\_

Same answer as to No. 5.

7. With respect to the agency's answers to Questions #5 and #6 above, is there a new or increased cost or obligation of at least one hundred thousand dollars (\$100,000) per year to a private individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined?

Yes  No

If YES, the agency is required by Ark. Code Ann. § 25-15-204(e)(4) to file written findings at the time of filing the financial impact statement. The written findings shall be filed simultaneously with the financial impact statement and shall include, without limitation, the following:

- (1) a statement of the rule's basis and purpose;
- (2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;
- (3) a description of the factual evidence that:
  - (a) justifies the agency's need for the proposed rule; and

- (b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;
- (4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and
- (7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
  - (a) the rule is achieving the statutory objectives;
  - (b) the benefits of the rule continue to justify its costs; and
  - (c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.

**SUMMARY OF RULE 010.14-500  
OF THE LABOR STANDARDS DIVISION OF THE ARKANSAS DEPARTMENT OF  
LABOR**

May 20, 2014

This Rule is in response to Act 1480 of 2013, codified at Ark. Code Ann. §11-2-124(Supp. 2013). This summary includes revisions made by the agency following public comment.

**Section A** of the Rule states its general purpose and summarizes the statutory provisions. It also states the Director of Labor's statutory authority to adopt the rule

**Section B** of the Rule defines certain terms that are not defined by the statute. It should be specifically noted that the statute provides that an employer "shall not require, request, suggest, or cause a current or prospective employee" to take certain actions which would require the employee to provide access to their personal social media account. The definitions deal with the terms "request, suggest, or cause" to ensure that there is some element of stated or implied coercion. The phrase "stated or implied coercion" is also defined as a "stated or implied threat to discharge, discipline, or otherwise penalize a current employee. . .or to refuse to hire a prospective employee."

**Section C** of the Rule lists five (5) specific acts that are not prohibited. This was designed to provide employers with specific guidelines and clarification. One provision specifically clarifies that where the social media interaction is voluntary and there is not stated or implied coercion, there is no violation.

Other acts not prohibited include advertising; recruitment of prospective employees; monitoring communications from an employer through websites or email; or acts that occurred prior to the effective date of the act.

**Section D** of the Rule deals with enforcement. Act 1480 of 2013 was codified in a subchapter of the Arkansas Code that provides for criminal penalties, *i.e.*, a misdemeanor offense with \$10 to \$100 fine or six (6) months imprisonment. Ark. Code Ann. § 11-2-104. It is the duty of the prosecuting attorneys to prosecute any violation of the law "upon request of the Director of the Department of Labor." Ark. Code Ann. § 11-2-105(a)(1). By rule, the Director has provided that violations of Act 1480 of 2013 will not be referred for criminal prosecution, but will be enforced through civil money penalties and seeking of injunctive relief.

The effective date will be 30 days after filing with the Secretary of State.

**RULE 010.14-500 OF THE LABOR STANDARDS DIVISION,  
ARKANSAS DEPARTMENT OF LABOR**

**SUMMARY OF PUBLIC COMMENT AND AGENCY RESPONSE**

1. *Comments of Gregory J. Northen, Cross, Gunter, Witherspoon & Galchus, P.C.* Mr. Northen's comments were essentially that the proposed regulation needed additional language to ensure that simple "friend requests" with no "stated or implied coercion" were not deemed to be violations of the statute. Mr. Northen suggested specific language to state outright that voluntary issuance and/or acceptance of an invitation to add an employee, supervisor or administrator by a current or prospective employee does not violate the statute.

*Agency Response.* The agency incorporated Mr. Northen's proposed language in the proposed rule.

2. *Comments of State Privacy and Security Coalition.* The coalition is comprised of 20 leading communications, technology and media companies and 6 trade associations. It wrote in "strong support" of the proposed rule.

3. *Comments of H. Wayne Young, Jr., Friday Eldredge & Clark LLP.* Mr. Young had a number of specific proposals on behalf of various clients.

a. Mr. Young proposed language that would allow an employer to utilize social media as a means of communicating with employees, including requiring employees to link to a page in order to view and receive such communication. Provided nothing in this interpretation shall be deemed to limit an employee's ability to set his or her own privacy settings for their social media account.

*Agency Response.* The agency agrees with Mr. Young that this proposed language would not implicate privacy concerns. It appears very reasonable, but it exceeds the scope of the agency's authority. The statute is clear that "An employer shall not require. . . a current. . . employee to. . . add an employee, supervisor, or administrator to the list of contacts associated with his or her social media account." Several scenarios in Mr. Young's proposed language would violate the statute. This would require the agency to do more than define a term; clarify an ambiguity; or establish an administrative procedure. It would require the agency to create an exemption that is not present in the statute, and thus exceeds our regulatory authority.

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term “prospective employee” as an individual who has submitted a job application or equivalent document, such as a resume, for an open position and is currently being considered for that position by the employer.”

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Respectfully submitted,

Denise P. Oxley  
General Counsel  
Arkansas Department of Labor  
10421 W. Markham Street  
Little Rock, AR 72205  
(501) 682-4502  
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