

1 S.7

2 Introduced by Senator Sears

3 Referred to Committee on Economic Development, Housing and General

4 Affairs

5 Date: January 11, 2013

6 Subject: Labor; employment practices; social media privacy

7 Statement of purpose: This bill proposes to prohibit employers from requiring
8 an employee to disclose the means of access to a personal electronic account or
9 service, or requiring an employee to allow the employer access to the
10 employee's social networking profile.

11 An act relating to social networking privacy protection

12 It is hereby enacted by the General Assembly of the State of Vermont:

13 ~~Sec. 1. 21 V.S.A. § 495j is added to read:~~

14 ~~§ 495j. PRIVACY PROTECTION; SOCIAL NETWORKING SERVICES~~

15 ~~(a) For purposes of this section:~~

16 ~~(1) "Electronic communications device" means any device that uses~~
17 ~~electronic signals to create, transmit, and receive information, and includes~~
18 ~~computers, telephones, personal digital assistants, and other similar devices.~~

19 ~~(2) "Retaliatory action" means discharge, threat, suspension, demotion,~~
20 ~~denial of promotion, discrimination, or other adverse employment action.~~

1 ~~regarding the employee's compensation, terms, conditions, location, or~~
2 ~~privileges of employment.~~

3 (3) "Social networking service" means an online service, platform,
4 or website that enables an individual to establish a profile within a bounded
5 system created by the service for the purpose of sharing information with other
6 users of the service.

7 (b) An employer shall not:

8 (1) request or require that an employee or applicant disclose any user
9 name, password, or other means for accessing a personal account or service
10 through an electronic communications device;

11 (2) request or require that an employee or applicant take an action that
12 permits the employer to gain access to the employee's or applicant's account
13 or profile on a social networking service if that information is not available to
14 the general public;

15 (3) take retaliatory action against an employee for an employee's refusal
16 to disclose any information specified in subdivision (1) or (2) of this
17 subsection; or

18 (4) fail or refuse to hire any applicant as a result of the applicant's
19 refusal to disclose any information specified in subdivision (1) or (2) of this
20 subsection.

1 ~~(c) An employer may require an employee to disclose any user name,~~
2 ~~password, or other means for accessing nonpersonal accounts or services that~~
3 ~~provide access to the employer's internal computer or information systems.~~

4 Sec. 2. VERMONT DEPARTMENT OF LABOR

5 ~~The Vermont Department of Labor shall take appropriate steps to inform~~
6 ~~employers of this act.~~

7 Sec. 3. EFFECTIVE DATE

8 ~~This act shall take effect on July 1, 2013.~~

*Sec. 1. SOCIAL NETWORKING PRIVACY PROTECTION STUDY
COMMITTEE*

~~(a) A Committee is established to study the issue of prohibiting employers
from requiring employees or applicants for employment to disclose a means of
accessing the employee's or applicant's social network account.~~

*(a) A Committee is established to study how to create statutory language
to prohibit employers from requiring employees or applicants for employment
to disclose a means of accessing the employee's or applicant's social network
account.*

(b) The Committee shall examine:

*(1) existing social networking privacy laws and proposed legislation in
other states;*

*(2) the interplay between state law and existing or proposed federal law
on the subject of social networking privacy and employment; and*

*(3) any other issues relevant to social networking privacy or
employment.*

*(c) The Committee shall make recommendations, including proposed
legislation.*

(d) The Committee shall consist of the following members:

~~*(1) two representatives of employers, one appointed by the Speaker of
the House and one by the Committee on Committees;*~~

~~(2) two representatives from labor organizations, one appointed by the Speaker and one by the Committee on Committees;~~

~~(3) the Attorney General or designee;~~

~~(4) the Commissioner of Labor or designee;~~

~~(5) the Commissioner of Financial Regulation or designee;~~

~~(6) the Commissioner of Human Resources or designee;~~

~~(7) the Commissioner of Public Safety or designee;~~

~~(8) the Executive Director of the Human Rights Commission or designee; and~~

~~(9) a representative of the American Civil Liberties Union of Vermont.~~

~~(e) The Committee shall convene its first meeting on or before September 1, 2013. The Commissioner of Labor or designee shall be designated Chair of the Committee and shall convene the first and subsequent meetings.~~

~~(f) The Committee shall report its findings and recommendations on or before January 15, 2014 to the House Committee on General, Housing and Military Affairs and the Senate Committee on Economic Development, Housing and General Affairs.~~

~~(g) The Committee shall cease to function upon transmitting its report.~~

~~Sec. 2. 21 V.S.A. § 495j is added to read:~~

~~§ 495j. **PRIVACY PROTECTION**~~

~~An employer shall not require or request that an applicant for employment disclose a means for accessing the applicant's personal computer, e-mail account, or telephone.~~

~~Sec. 3. **EFFECTIVE DATE**~~

~~This act shall take effect on passage.~~

~~*** Social Networking Privacy Protection Study ***~~

~~Sec. 1. **SOCIAL NETWORKING PRIVACY PROTECTION STUDY COMMITTEE**~~

~~(a) A Committee is established to study the issue of prohibiting employers from requiring employees or applicants for employment to disclose a means of accessing the employee's or applicant's social network account.~~

~~(b) The Committee shall examine:~~

(1) existing social networking privacy laws and proposed legislation in other states;

(2) the interplay between state law and existing or proposed federal law on the subject of social networking privacy and employment; and

(3) any other issues relevant to social networking privacy or employment.

(c) The Committee shall make recommendations, including proposed legislation.

(d) The Committee shall consist of the following members:

(1) two representatives of employers, one appointed by the Speaker of the House and one by the Committee on Committees;

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**** Bad Faith Assertions of Patent Infringement ****

Sec. 2. 9 V.S.A. chapter 120 is added to read:

CHAPTER 120. BAD FAITH ASSERTIONS
OF PATENT INFRINGEMENT

§ 4195. LEGISLATIVE FINDINGS AND STATEMENT OF PURPOSE

(a) The General Assembly finds that:

(1) Vermont is striving to build an entrepreneurial and knowledge based economy. Attracting and nurturing small and medium sized internet technology (“IT”) and other knowledge based companies is an important part of this effort and will be beneficial to Vermont’s future.

(2) Patents are essential to encouraging innovation, especially in the IT and knowledge based fields. The protections afforded by the federal patent system create an incentive to invest in research and innovation, which spurs economic growth. Patent holders have every right to enforce their patents when they are infringed, and patent enforcement litigation is necessary to protect intellectual property.

(3) The General Assembly does not wish to interfere with the good faith enforcement of patents or good faith patent litigation. The General Assembly also recognizes that Vermont is preempted from passing any law that conflicts with federal patent law.

(4) Patent litigation can be technical, complex, and expensive. The expense of patent litigation, which may cost hundreds of thousands of dollars or more, can be a significant burden on small and medium sized companies. Vermont wishes to help its businesses avoid these costs by encouraging the most efficient resolution of patent infringement claims without conflicting with federal law.

(5) In order for Vermont companies to be able to respond promptly and efficiently to patent infringement assertions against them, it is necessary that they receive specific information regarding how their product, service, or technology may have infringed the patent at issue. Receiving such information at an early stage will facilitate the resolution of claims and lessen the burden of potential litigation on Vermont companies.

(6) Abusive patent litigation, and especially the assertion of bad faith infringement claims, can harm Vermont companies. A business that receives a letter asserting such claims faces the threat of expensive and protracted litigation and may feel that it has no choice but to settle and to pay a licensing fee, even if the claim is meritless. This is especially so for small and medium

sized companies and nonprofits that lack the resources to investigate and defend themselves against infringement claims.

(7) Not only do bad faith patent infringement claims impose a significant burden on individual Vermont businesses, they also undermine Vermont's efforts to attract and nurture small and medium sized IT and other knowledge based companies. Funds used to avoid the threat of bad faith litigation are no longer available to invest, produce new products, expand, or hire new workers, thereby harming Vermont's economy.

(b) Through this narrowly focused act, the General Assembly seeks to facilitate the efficient and prompt resolution of patent infringement claims, protect Vermont businesses from abusive and bad faith assertions of patent infringement, and build Vermont's economy, while at the same time respecting federal law and being careful to not interfere with legitimate patent enforcement actions.

§ 4196. DEFINITIONS

In this chapter:

(1) "Demand letter" means a letter, e-mail, or other communication asserting or claiming that the target has engaged in patent infringement.

(2) "Target" means a Vermont person:

(A) who has received a demand letter or against whom an assertion or allegation of patent infringement has been made;

(B) who has been threatened with litigation or against whom a lawsuit has been filed alleging patent infringement; or

(C) whose customers have received a demand letter asserting that the person's product, service, or technology has infringed a patent.

§ 4197. BAD FAITH ASSERTIONS OF PATENT INFRINGEMENT

(a) A person shall not make a bad faith assertion of patent infringement.

(b) A court may consider the following factors as evidence that a person has made a bad faith assertion of patent infringement:

(1) The demand letter does not contain the following information:

(A) the patent number;

(B) the name and address of the patent owner or owners and assignee or assignees, if any; and

(C) factual allegations concerning the specific areas in which the target's products, services, and technology infringe the patent or are covered by the claims in the patent.

(2) Prior to sending the demand letter, the person fails to conduct an analysis comparing the claims in the patent to the target's products, services, and technology, or such an analysis was done but does not identify specific areas in which the products, services, and technology are covered by the claims in the patent.

(3) The demand letter lacks the information described in subdivision (1) of this subsection, the target requests the information, and the person fails to provide the information within a reasonable period of time.

(4) The demand letter demands payment of a license fee or response within an unreasonably short period of time.

(5) The person offers to license the patent for an amount that is not based on a reasonable estimate of the value of the license.

(6) The claim or assertion of patent infringement is meritless, and the person knew, or should have known, that the claim or assertion is meritless.

(7) The claim or assertion of patent infringement is deceptive.

(8) The person or its subsidiaries or affiliates have previously filed or threatened to file one or more lawsuits based on the same or similar claim of patent infringement and:

(A) those threats or lawsuits lacked the information described in subdivision (1) of this subsection; or

(B) the person attempted to enforce the claim of patent infringement in litigation and a court found the claim to be meritless.

(9) Any other factor the court finds relevant.

(c) A court may consider the following factors as evidence that a person has not made a bad faith assertion of patent infringement:

(1) The demand letter contains the information described in subdivision (b)(1) of this section.

(2) Where the demand letter lacks the information described in subdivision (b)(1) of this section and the target requests the information, the person provides the information within a reasonable period of time.

(3) The person engages in a good faith effort to establish that the target has infringed the patent and to negotiate an appropriate remedy.

(4) The person makes a substantial investment in the use of the patent or in the production or sale of a product or item covered by the patent.

(5) The person is:

(A) the inventor or joint inventor of the patent or, in the case of a patent filed by and awarded to an assignee of the original inventor or joint inventor, is the original assignee; or

(B) an institution of higher education or a technology transfer organization owned or affiliated with an institution of higher education.

(6) The person has:

(A) demonstrated good faith business practices in previous efforts to enforce the patent, or a substantially similar patent; or

(B) successfully enforced the patent, or a substantially similar patent, through litigation.

(7) Any other factor the court finds relevant.

§ 4198. BOND

Upon motion by a target and a finding by the court that a target has established a reasonable likelihood that a person has made a bad faith assertion of patent infringement in violation of this chapter, the court shall require the person to post a bond in an amount equal to a good faith estimate of the target's costs to litigate the claim and amounts reasonably likely to be recovered under § 4199(b) of this chapter, conditioned upon payment of any amounts finally determined to be due to the target. A hearing shall be held if either party so requests. A bond ordered pursuant to this section shall not exceed \$250,000.00. The court may waive the bond requirement if it finds the person has available assets equal to the amount of the proposed bond or for other good cause shown.

§ 4199. ENFORCEMENT; REMEDIES; DAMAGES

(a) The Attorney General shall have the same authority under this chapter to make rules, conduct civil investigations, bring civil actions, and enter into assurances of discontinuance as provided under chapter 63 of this title. In an action brought by the Attorney General under this chapter the court may award or impose any relief available under chapter 63 of this title.

(b) A target of conduct involving assertions of patent infringement, or a person aggrieved by a violation of this chapter or by a violation of rules adopted under this chapter, may bring an action in Superior Court. A court may award the following remedies to a plaintiff who prevails in an action brought pursuant to this subsection:

(1) equitable relief;

(2) damages;

(3) costs and fees, including reasonable attorney's fees; and

(4) exemplary damages in an amount equal to \$50,000.00 or three times the total of damages, costs, and fees, whichever is greater.

(c) This chapter shall not be construed to limit rights and remedies available to the State of Vermont or to any person under any other law and shall not alter or restrict the Attorney General's authority under chapter 63 of this title with regard to conduct involving assertions of patent infringement.

** * * Effective Date * * **

Sec. 3. EFFECTIVE DATE

This act shall take effect on passage.