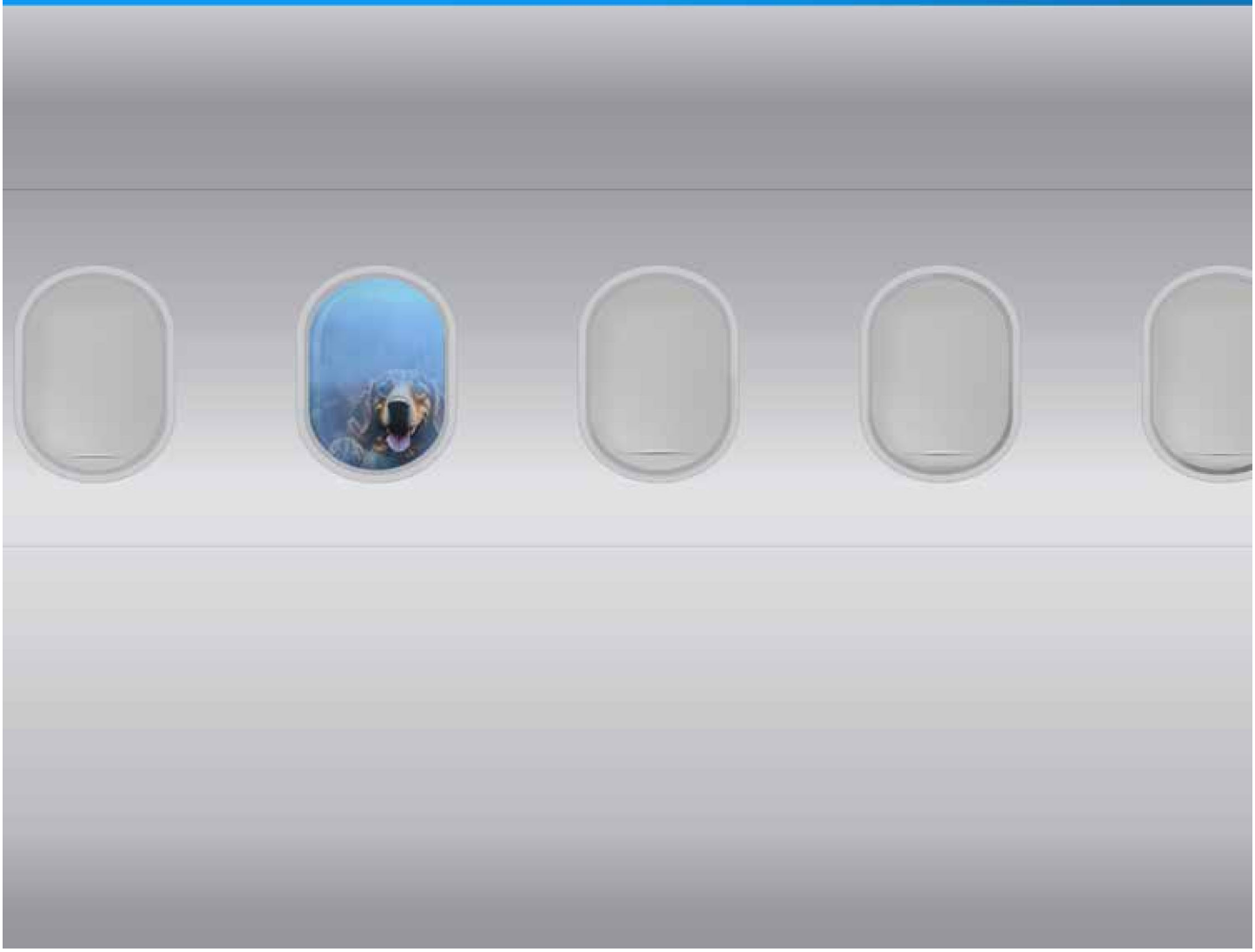
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Flying With Fido: A Brief Survey of Federal Service Animal Law



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Every year it seems that more of us are relying on the benefits of "emotional support" creatures, bringing them into previously animal-free environments. While these companions, four-legged or otherwise, undoubtedly provide great benefits, many are not "service animals" for purposes of federal law. Our author explains the regulations governing animals on airlines and related statutory nuances.

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THE PREROGATIVE TO UNSEAT: REMOVING COUNCILMEMBERS FROM COUNCIL COMMITTEES

By: Stephen K. Postema, City Attorney Ret., Ann Arbor, Michigan and Jennifer A. Richards, Assistant City Attorney, Ann Arbor, Michigan

Most city councilmembers comport themselves in a productive and cooperative manner. Occasionally, however, the city or county attorney will be called upon to evaluate the prospects for redressing unprofessional or unethical behavior by a councilmember. One such action may be to remove the member from a committee post. A thorough understanding of the rules and ramifications is required.

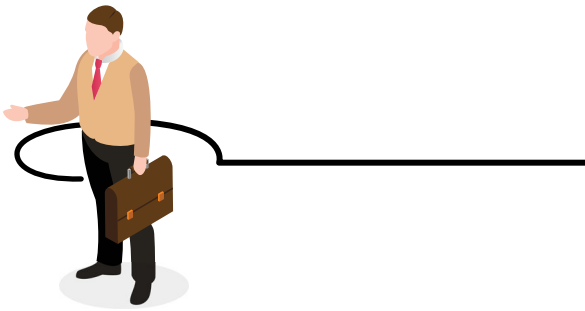
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"WE'RE HIRING, WE JUST NEED YOUR SOCIAL MEDIA LOGINS AND PASSWORDS"

By: Laura S. Burton, Police Attorney, Gastonia, North Carolina

Checking a job applicant's social media activity can provide a wealth of information, potentially revealing troublesome behavior and helping to avoid future problems. But such an inquiry triggers statutory and even constitutional issues, and many jurisdictions prohibit searching through a job seeker's non-public online activity.

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EMPLOYMENT

NANCY C. ROGERS
City and County Attorney, Broomfield, Colorado

Marital Secrets: Spousal Privilege in Administrative Employment Proceedings

INTRODUCTION

Chad has been employed with the city for six years as an electrician, which requires him to travel around town to different facilities. He is married to Susan, who works as an account manager in the finance department. A few weeks ago, Chad's department head receives an anonymous report that Chad is not working the hours he puts on his time sheets. Instead, he is rushing through his work and then going home, napping, or running personal errands. The report alleges that Susan is aware of this behavior because Chad texts her about it. During the investigation interview, Chad denies the allegations and points to various electrician reports to prove he has been working. The investigator pulls door access records and emails, interviews other employees, and reviews Chad's reports. None are conclusive one way or the other as to whether Chad has been working the hours he reports. The investigator notifies Susan that she wants to interview her. Susan objects to the interview, citing the spousal privilege. Chad also objects to Susan being interviewed, again based on the spousal privilege. The investigator wants to push for the interview, but the department head is concerned about violating Susan's or Chad's rights.

This article examines the application of the spousal privilege in a non-testimonial, non- court proceeding, such as an administrative investigation.

I. The History of the Spousal Privilege.
The spousal privilege, also known as the marital privilege, protects the confidentiality of communications between spouses. It generally allows one spouse to refuse to testify against their spouse in court proceedings and prevents one spouse from being compelled to disclose private conversations or other confidential information shared between spouses. The concept of spousal privilege has a long history that can be traced back to English common law. The origins can be found in the notion that a wife's legal existence was suspended when she married and she became part of a single legal entity with her husband. This was known as "coverture."[1] Under the principle of coverture, a married woman's legal rights were subsumed by her husband's authority. As a result, a wife was generally considered incompetent to testify either for or against her husband in legal proceedings.[2] Over time, this principle evolved into the modern concept of spousal privilege, which recognizes the right of one spouse to refuse to testify against the other.[3] The rationale behind spousal privilege shifted from the idea of marital unity to notions of protecting marital privacy, fostering open communication, and preventing the erosion of trust within the marital relationship.[4] "Like the physician-patient and clergy-penitent privileges, the marital communications privilege recognizes that society has an enormously strong interest in preserving a particular social institution—here, the institution of marriage."[5] The recognition and scope of spousal privilege have been the subject of ongoing debate. Some argue that spousal privilege should be abolished or limited in certain circumstances, while others contend that it remains an important protection for marital privacy and communication.[6] These debates continue to shape the interpretation and application of spousal privilege in contemporary legal systems.

II. Legal Framework.
The spousal privilege can be different in federal court than in state court. In criminal and civil cases based on federal questions, federal privilege law applies.[7] In diversity cases where the parties are in federal court to address a state question and the "state law supplies the rule of decision," state law governs privilege.[8] If there is a conflict about the same piece of evidence, "the rule favoring reception of the evidence should be applied."[9] In criminal and civil cases in state court, state law applies.

A. Federal Law
The spousal privilege is an evidentiary privilege which "enables parties and potential witnesses in legal proceedings to refuse to disclose relevant and material evidence, both at trial and during the court of pretrial discovery."[10] There are two types of spousal privilege. The first is the adverse spousal testimonial privilege. This privilege prevents one spouse from being compelled to testify against the other.[11] Under the privilege against adverse spousal testimony, "the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying."[12] Previously, one spouse could not testify against the other unless both consented.[13] Now, it is only the witness-spouse that has the privilege to refuse to testify. In establishing the current rule in *Trammel v. United States,* the Supreme Court noted that the original concept of the husband and wife

being one legal entity had no current relevance.[14] The modern justification for the privilege is "its perceived role in fostering the harmony and sanctity of the marriage relationship."[15] However, the Court in *Trammel* found that this modern justification was unpersuasive when one spouse is *willing* to testify against the other.[16] Therefore, the Court held that the privilege vests only in the testifying spouse, noting that this holding would further "the important public interest in marital harmony without unduly burdening legitimate law enforcement needs."[17] In federal cases governed by federal law, the spousal testimonial privilege is available only in criminal proceedings or in proceedings where one spouse may testify to another's crime, such as grand jury or criminal forfeiture proceedings.[18] It is not applicable to civil proceedings.[19] There are exceptions to the spousal testimonial privilege including when the communications were for the purpose of committing a crime and both spouses knew that fact,[20] for statements relating to a crime where a spouse or a spouse's children are the victims,[21] when there is a sham marriage,[22] and nontestimonial acts such as handwriting and fingerprint exemplars.[23]

The second type of spousal privilege is the confidential marital communications privilege.[24] This privilege is distinct from the privilege against adverse spousal testimony.[25] It protects the content of conversations or communications between spouses.[26] "Communications between the spouses, privately made, are generally assumed to have been intended to be confidential, and hence they are privileged."[27] Both spouses retain the privilege to foreclose testimony regarding confidential marital communications, and can do so even after the marriage ends.[28] To successfully assert the confidential marital communications privilege, three requirements must be met: (1) at the time of the communication there must have been a marriage recognized as valid by state law; (2) the privilege applies only to utterances or expressions intended by one spouse to convey a message to the other; and (3) the communication must be made in confidence.[29] The marital communications privilege applies in both criminal and in civil proceedings.[30]

B. State Law

Every state recognizes one or both types of spousal privileges. Many states have statutes identifying the privilege(s) and when it may be invoked.[31] However, there are differences between states. Consider New Mexico, which abolished the state's spousal communications privilege in 2019,[32] as compared with North Dakota, which protects the confidentiality of communication made private between spouses by evidentiary rule.[33] Colorado's privilege statute is contained within the title on *Courts and Court Procedure* and article on *Witnesses*, and includes the spousal privilege, attorney-client privilege, clergy privilege, and physician privilege, among others.[34]

The Colorado statute recognizes the spousal testimonial privilege and the spousal communications privilege. It first provides for a spousal testimonial privilege, and states that a "husband shall not be examined for or against his wife without her consent nor a wife for or against her husband without his consent."[35] (Despite the outdated language in Colorado's statute, the privilege applies to individuals who are lawfully married, which includes same-sex couples.)[36] The testimony privilege recognized by Colorado's statute is not focused on *adverse* testimony. Rather, the key is consent and, without it, a spouse cannot be examined "for or against" the other.[37] Then, the statute recognizes the spousal communication privilege, and states "nor during the marriage or afterward shall either be examined without the consent of the other as to any communications made by one to the other during the marriage."[38] There are exceptions. The statutory privilege does not apply in child custody proceedings, "a civil action or proceeding by one against the other, a criminal action or proceeding for a crime committed by one against the other, or a criminal action or proceeding against one or both spouses when the alleged offense occurred prior to the date of the parties' marriage."[39] Additionally, the spousal communication privilege does not apply in felony cases, except for class 4 felonies, and does not apply to level 1 or 2 drug felonies.[40] However, the spousal adverse testimonial privilege will apply if the testifying spouse consents.[41]

III. Does the Spousal Privilege Apply in Internal Administrative Interviews?

Returning to the situation involving Chad and Susan, can they invoke the spousal privilege so that Susan will not be compelled to answer questions about Chad's work habits? The privilege is an evidentiary rule. Therefore, the threshold inquiry is whether the administrative investigations are proceedings within the contemplation of the federal case law on spousal privilege and the state statutes applicable to each jurisdiction. Next is whether there is a confidentiality rule that would protected the information no matter the proceeding. Under federal law, the adverse spousal testimonial privilege would not apply because this internal investigation, even if considered a "legal proceeding," is civil, and the testimonial privilege does not apply in civil matters. The application of the spousal communication privilege under federal law is not as clear. On one hand, the privilege could apply, particularly if the rules governing the investigation recognize "lawful privileges." In such a case, the protection of the spousal communication privilege can be asserted so long as there is a valid marriage, there is a communication between spouses, and the spouses intended the communication to be confidential.[42]

There is no limitation on the type of "proceeding," and the marital communications privilege has been held to apply in both criminal and in civil proceedings.[43] Arguably, this is not only an evidentiary privilege, but it is a confidentiality rule. "The confidential communications privilege . . . provides assurance that all private statements between spouses — aptly called the 'best solace of human existence,' — will be forever free from public exposure."[44] The confidences between spouses are privileged under the independent rule protecting confidential marital communications.[45] On the other hand, the federal rule is an evidentiary privilege to be used in legal proceedings. Although an internal employment

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investigation may result in a legal claim or cause of action in the future regarding any resulting discipline, it is not a legal proceeding governing by the rules and evidentiary principles that govern federal cases.

Under state law, using Colorado's statute, the privilege set forth in Colo. Rev. Stat. § 13- 90-107 applies to "testimony" and is a rule found in Title 13, *Courts and Court Procedure*, applicable to witnesses.[46] Arguably, based on the plain language of the statute, Colorado's rule is only applicable to *witnesses* who are being examined in a *court proceeding*. An internal investigation is not a court proceeding and is not governed by Title 13. Therefore, the statutory spousal privilege, to include the confidentiality communication privilege, does not apply outside of court proceedings. There are no Colorado cases examining this question. However, a similar conclusion was made in a case out of Riverside, California, where the California Court of Appeals held that a police officer could not invoke the marital privilege in an administrative investigation into her police officer husband's acts and avoid discipline.[47] In that case, the court focused on the definition of "proceeding" in California's Evidence Code, finding that it did not include administrative investigations. This ruling is specific to police officers' internal investigations. Additionally, given the differences between states on the statutory spousal privilege, the analysis may be different depending on the state and the specific wording of the statutory spousal privilege.

For Susan, she cannot rely on the spousal testimonial privilege to avoid being interviewed at all. She also cannot rely on the spousal communication privilege to withhold communications that were not with Chad or were with Chad but not confidential (such as a conversation where a third party is present). The more complicated question involves her ability to withhold, based on the spousal privilege, truly confidential communications with Chad. An employer could, based on the limited applicability of evidentiary privilege, assert that the privilege does not apply for the purpose of the interview during the investigation and that the public purpose for the privilege (protecting marital privacy, fostering open communication, and preventing the erosion of trust within the marital relationship) do not outweigh the need for the employer to conduct the investigation in their workplace.

Conclusion

The goal of an employee administrative investigation is to find out the facts to understand whether or not a policy has been violated. Prudent investigators work hard to ensure that those being interviewed, as well as those that are the subject of the interview, are treated with respect and afforded the rights due to them. When spousal privilege is asserted, applicable state statutory and common law should be reviewed to see if the spousal privilege applies in the administrative investigation. Although it may seem axiomatic that it should apply, practitioners should remember that the spousal privilege is an evidentiary privilege that applies in civil and criminal cases, and its use could be rejected in an administrative investigative interview.

Notes

1. Merriam-Webster. (n.d.). "Coverture". In Merriam-Webster.com dictionary. Retrieved June 25, 2023, from https://www.merriam-webster.com/dictionary/coverture.
2. Steven N. Gofman, *Honey the Judge Says We're History: Abrogating the Marital Privileges via Modern Doctrines of Marital Worthiness*, 77 Corn L. Rev. §5.31 (1992).
3. *Id.; see also* Funk v. United States. 290 U.S. 371 (1933) (abolished the doctrine of spousal incompetency, but preserving the spousal testimonial privilege).
4. Todd Butler, *Milton, Deliberative Liberty, and the Law of Spousal Privileges*, 59 Milton Studies. 231, 231-258 (2017); *see also* Hawkins v. United States, 358 U.S. 74, 77 (1978) (basic reason for refusing "to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well").
5. United States v. Fomichev, 899 F.3d 766, 772 (9th Cir. 2018).
6. Edward J. Imwinkelried, *State v. Gutierrez Abolishing the Spousal Communications Privilege: An Opinion Raising Profound Questions About the Future of Evidentiary Privileges in the United States Future of Evidentiary Privileges in the United States*, 53 N.M. L. Rev. 71, 71-99.
7. Fed. R. Evid. 501 (2011).
8. *Id.*
9. *Id.* at Notes of Committee on the Judiciary, Senate Report No. 93-1277.
10. Michael D. Moberly, *Extending a Qualified Evidentiary Privilege to Confidential Communications Between Employees and Their Union Representatives*, 5 Nev. L.J. 508, 508 (2005) (footnotes omitted).
11. United States v. Ammar, 714 F.2d 238, 258 (3d Cir. 1983).
12. Trammel v. United States, 445 U.S. 40, 53 (1980).
13. Hawkins v. United States, 358 U.S. 74, 78 (1958).
14. *Id.* at 44.
15. *Id.* at 44.
16. *Id.* at 52.
17. *Id.* at 53.
18. *See* United States v. Yerardi, 192 F.3d 14, 19 (1st Cir. 1999) ("The privilege is almost always invoked only in criminal proceedings in which one spouse is called to testify against the other, and understandably so since criminal jeopardy is the threat with which the privilege is concerned. And some formulations of the privilege, and dicta in some of the cases, assume that the privilege could never be asserted in a civil case."); S.E.C. v. Lavin, 111 F.3d 921, 925 (D.C. Cir. 1997) ("The [privilege against adverse spousal testimony] allows a spouse called as a witness against his or her spouse in a criminal proceeding to refuse to testify."); United States v. Premises Known as 281 Syosset Woodbury Rd., 71 F.3d 1067, 1070 (2d Cir. 1995) ("The adverse spousal testimony privilege has traditionally been limited to criminal cases."); In re Grand Jury Matter, 673 F.2d 688, 692-692 (3d Cir. 1982) *cert. denied,* 459 U.S. 1015 (1982).
19. *Lavin*, 111 F.3d at 925.
20. United States v. Estes, 793 F.2d 465, 467 (2d Cir. 1986)
21. United States v. Banks, 556 F.3d 967, 974 (9th Cir. 2009)
22. In re Grand Jury Proceedings *(84-5)*, 777 F.2d 508, 509 (9th Cir. 1985) (considering applicability of sham marriage exception because couple married on the eve of trial); United States v. Apodaca, 522 F.2d 568, 571 (10th Cir. 1975) (holding the spousal testimonial privilege could not be invoked by a witness-spouse because she and the defendant "were married only three days before trial").
23. In re Grand Jury, 666 F. Supp. 196, 200 (D. Colo. 1987).
24. Wolfle v. United States, 291 U.S. 7, 14 (1924); Blau v. United States, 340 U.S. 332, 333-34 (1951).
25. *Trammel,* 445 U.S., at 51.
26. Mark S. Brodin, 3 Weinstein's Federal

Evidence § 505.09 (2d ed. 2016).
27. *Wolfle*, 291 U.S. at 12.
28. *Id.*
29. *Id.* at 14.
30. *Lavin*, 111 F.3d at 925.
31. e.g. Mich. Comp. Law, § 600.2162; Or. Rev. Stat. § 40.255; Fla. Sta. § 90.504; Va. Code Ann. § 8.01-398 (2005) (civil) and § 19.3-271.2 (2020) (criminal)
32. State v, Guttierez, 142 N.M. 1 (2007).
33. N.D.R. Evid. 504
34. Colo. Rev. Stat. § 13-90-107 (2023).
35. *Id.* at (a)(I).
36. Obergefell v. Hodges, 135 S. Ct. 2584 (2015); *See* In re Hogsett, 478 P.3d 713 (refining test for establishing common law marriage first articulated in *People v. Lucero* to reflect changed circumstances since that decision, including the recognition of same-sex marriage); In re LaFleur, 479 P.3d 869 (recognizing same-sex common law marriages predating Colorado's recognition of formal same-sex marriages).
37 Colo. Rev. Stat. § 13-90-107 (2023).
38. *Id.*
39. *Id.*
40. *Id.* at (a)(II).
41. *Id.*
42. *Id.* at 14.
43. *Lavin*, 111 F.3d at 925.
44. In re Witness Before Grand Jury, 791 F.2d 234, 237 (2d Cir. 1986) (quoting *Trammel*, 445 U.S. at 51) (internal quotations omitted).
45. *Blau*, 340 U.S. at 333.
46. Colo. Rev. Stat. § 13-90-107 (2023) (reference Article 90 (Court and Court Procedures) and Title 13 ("Witnesses"))
47. Riverside Cnty. Sheriff's Dep't v. Zigman, 169 Cal. App. 4th 763 (Cal. Ct. App. 2008).

We're Hiring *cont'd from page 17*

tion if the employer's email system fails. La. Rev. Stat. §51:1953(F).
20. Cal. Lab. Code §980(a).
21. Conn. Gen. Stat. §31-40x(a)(5).
22. Colo. Rev. Stat. §8-2-127; Wash. Code. Ann. §49.44.200. West Virginia also uses "personal account" and it means an account, service or profile on a social networking website that is used by an employee or potential employee exclusively for personal communications unrelated to any business purposes of the employer. W. Va. Code §21-5H-1.
23. 820 Ill. Comp. Stat. 55/10(b)(6)(B).
24. Md. Code Ann. Lab & Empl. §3-712.
25. Mich. Comp. Laws Serv. §37.273(a), effective December 28, 2012.
26. As examples: Or. Rev. Stat. §659A.330(1)(c), effective January 1, 2014; Del. Code Ann. tit. 19, §709A(b)(5) and (6), effective August 7, 2015; Neb. Rev. Stat. §48-3503, effective July 21, 2016; Vt. Stat. Ann tit. 21, §495l(b)(4) and (c), effective January 1, 2018.
27. R.I. Gen. Laws §28-56-2(3).
28. Me. Rev. Stat. Ann. tit. 26, §616(3).
29. Mont. Code. Ann. §39-2-307(1)(c).
30. Vt. Stat. Ann tit. 21, §495l(b)(3).
31. Haw. Rev. Stat. §487G-3(a)(1)(B).
32. Wis. Stat. §995.55(2)(b)(3). Virginia merely allows an employer to *request* the username and password for an investigation if the employer reasonably believes the employee's social media account information is relevant. Va. Code. Ann. §40.1-28.7:5(F)(2) (emphasis added).
33. Wis. Stat. §995.55(2)(b)(3).
34. Tenn. Code Ann. §50-1-1003(c).
35. Tenn. Code Ann. §50-1-1003(b)(3)(A) and (B).
36. Utah Code Ann. §34-48-201(2).
37. W. Va. Code Ann. §21-5H-1(b)(6). W. Va. Code Ann. §21-5H-1(b)(4) states that an employer can require an employee to cooperate in an investigation.
38. R.I. Gen. Laws §28-56-2(3).
39. Mont. Code Ann. §39-2-307(2)(b).
40. Wis. Stat. §995.55(2)(b)(1). Additional examples: Del. Code Ann. tit. 19, §709A(d) and Tenn. Code Ann. §50-1-1003(b)(1).
41. Me. Rev. Stat. Ann. tit. 26, §618.
42. Okla. Stat. Ann. tit. 40, §173.2 (F).
43. Okla. Stat. Ann. tit. 40 §173.2 (F) and (H)(2) (emphasis added).
44. Wis. Stat. §995.55(2)(b)(5).
45. Neb. Rev. Stat. §48-3507(8).
46. La. Rev. Stat. Ann. §51:1953(D). Virginia is similar, stating that an employer is not prevented from complying with the requirements of federal, state, or local laws, rules, or regulations or the rules or regulations of self-regulatory organizations. Va. Code. Ann. §40.1-28.7:5(F).
47. Vt. Stat. Ann. tit. 21, §495l(e)(1)(A).
48. W. Va. Code. §21-5H-1(b)(6).
49. Mont. Code. Ann. §39-2-307(2)(a)(iii).
50. Colo. Rev. Stat. §8-2-127(1)(c) and Conn. Gen. Stat. §31-40x(a)(3).
51. N.M. Stat. Ann. §50-4-34(D).
52. Colo. Rev. Stat. §8-2-127(1)(c); N.J. Stat. Ann. §34:6B-5 and §34:6B-6. New Jersey also excludes the State Parole Board.
53. Or. Rev. Stat. §659A.330.
54. Conn. Gen. Stat. §31-40x(a)(3).
55. Vt. Stat. Ann. tit. 21, §495l(e)(2).
56. Vt. Stat. Ann. tit. 21, §495l(e)(2).
57. Wash. Rev. Code Ann. §43.101.095(2)(b)(iv).
58. Wash. Rev. Code Ann. §43.101.095(4).
59. Wash. Rev. Code Ann. §49.44.200(3)(e).
60. Wisconsin prohibits an employer from discharging or otherwise discriminating against an employee for exercising their rights under the law and prohibits an employer from refusing to hire an applicant because the applicant refused to disclose access information, grant access or allow observation of the account. Wis. Stat. §995.55(2)(a) (2) and (3). *See for further example* 820 Ill. Comp. Stat. Ann. 55/10(b)(E) and (F) and Me. Rev. Stat. Ann. tit. 26 §616.
61. N.J. Stat. Ann. §34:6B-7; Neb. Rev. Stat. Ann. §48-3504. New Mexico contains neither provision. N.M. Stat. Ann. §50-4-34.
62. Vt. Stat. Ann. tit. 21, §495l(d).
63. Or. Rev. Stat. §659A.330(1)(a). Oregon also prohibits an employer from requiring an employee or applicant to allow the employer to advertise on their social media account. Or. Rev. Stat. §659A.330(1)(b).
64. Mont. Code Ann. §39-02-307(4)(b) and (5).
65.Title VII of the Civil Rights Act of 1964 prohibits employers from failing or refusing to hire or discharging any individual, or otherwise discriminating against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. §2000e-2(a)(1).
66. Gaskell v. Univ. of Kentucky, 2010 U.S. Dist. LEXIS 124572 (E.D. Ky. 2010).
67. *See id.* at *10.
68. The Age Discrimination in Employment Act of 1967 prohibits age discrimination in employment. 29 U.S.C. §623.
69. Nieman v. Grange Mut. Cas. Co., 2012 U.S. Dist. LEXIS 59180, *4 (C.D. Ill. 2012).
70. The Americans with Disabilities Act of 1990 prohibits discrimination against individuals with disabilities in daily life. 42 U.S.C. §12101 *et seq.*