Notable Changes to Maine Employment Laws

By Kelly M. Hoffman In its recently concluded session the Maine Legislature enacted L.D. 921 “An Act To Strengthen the Right of a Victim of Sexual Assault or Domestic Violence To Take Necessary Leave from Employment and To Promote Employee Social Media Privacy.” The new bill imposes two significant changes to employment laws that affect all Maine employers of any size and will become effective on October 14, 2015. 1.Employment Leave For Victims of Violence The first part of the law increases penalties for employers that fail to grant reasonable and necessary leave from work to employees who are victims of domestic violence, sexual assault, stalking, and other acts that would support a court order for protection. 26 M.R.S. § 850. If the Maine Department of Labor (“DOL”) receives notice of a violation of the law within six (6) months of the occurrence, the DOL may fine noncompliant employers up to $1,000.00 per occurrence. The previous law provided that the DOL could only fine employers no more than $200.00 per occurrence. In addition to fines that may be paid to the DOL, the law further dictates that the employer must pay liquidated damages to the employee in an amount equal to three (3) times the amount of total assessed DOL fines. If the employee is unlawfully terminated, she may choose one of two remedies: either the employee may elect the treble damages discussed above or she can demand re-employment with back wages. In addition to protections provided by this law, an employee also may be entitled to protected leave under the Maine Family Medical Leave Requirements Law or the federal Family Medical Leave Act if she has sustained a qualifying medical condition as a result of domestic violence or is needed to care for certain family members with such conditions. An employee who has suffered a serious physical or mental injury as a result of domestic violence also may be disabled for purposes of the Americans with Disabilities Act (“ADA”) or the Maine Human Rights Act (“MHRA”). Both laws require employers to provide reasonable accommodations to employees with disabilities. For example, an employer who has an employee with a traumatic brain injury caused by a domestic violence assault would likely be required to provide her with a reasonable accommodation, such as a modified work schedule so that she may attend speech or occupational therapy. The ADA and MHRA also may require an employer to provide an employee with a protected period of leave from work as a reasonable accommodation for a disability even if the employer is not subject to Maine or federal medical leave laws. The prohibitions against sexual or sex-based harassment in the MHRA and Title VII of the Civil Rights Act of 1964 further may be applicable to situations involving domestic violence arising from workplace relationships. Such harassment may create a hostile work environment in violation of the MHRA or Title VII if it is so severe or pervasive that it alters the employee’s terms and conditions of employment. For example, a violation of either law may exist if an employer does not take prompt and sufficient action after an employee makes her employer aware that her ex-boyfriend, a coworker, has emailed sexually suggestive photos of her to other employees and has repeatedly subjected her to derogatory sexual comments. 2.Employee Social Media Privacy The second part of the Act addresses social media accounts. This portion of the Act will be codified at 26 M.R.S. §§ 615-619. These laws will have widespread day-to-day application because an employer’s ability to demand or even request access to an employee’s or applicant’s social media accounts is restricted. Social media accounts are defined broadly to include e-mail, videos, blogs, texts, text messages, podcasts, and websites. An employer cannot demand or request passwords or other access to any social media accounts and cannot make employment decisions based on an employee’s or applicant’s refusal to provide such

access. An employer likewise cannot require an employee or applicant to alter her settings so that a third-party is able to view the contents of a personal social media account. An employer further cannot require an employee or applicant to "friend" anyone (including the employer or its agent). However, the law does not limit the employer's ability to establish and enforce lawful workplace policies addressing the use of the employer's electronic equipment, including a requirement that employees disclose their user name, password, or other information to access the employer-issued electronic devices, such as cell phones and computers, or to access employer-provided software or e-mail accounts. The law does provide a few exceptions. Employers are allowed to require that employees disclose personal social media account information that employers reasonably believe to be relevant to an investigation of allegations of employee misconduct or a workplace-related violation of applicable laws, rules, or regulations. This provision applies only when not otherwise prohibited by law, as long as the information disclosed is accessed and used solely to the extent necessary for purposes of that investigation or a related proceeding. As to banking and securities laws, another exception provides that employers may comply with a duty to screen employees or applicants before hiring or to monitor or retain employee communications that is established by a self-regulatory organization as defined by the federal Securities Exchange Act of 1934. This exception applies to the extent necessary to supervise communications of regulated financial institutions of insurance or securities licensees for banking-related, insurance-related or securities-related business purposes. An employer who violates these new statutory provisions is subject to a fine imposed by the Department of Labor of not less than $100.00 for the first violation, not less than $250.00 for the second violation, and not less than $500.00 for each subsequent violation. All employers should review their personnel policies to ensure consistency with this new law and may contact employment counsel, including those at Norman, Hanson & DeTroy, for further guidance with these matters.