

Utah within shooting distance of social media content moderation law

By Dave Perera

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Social media companies the Utah attorney general believes have inconsistently moderated user content would face fines under a statehouse bill that barreled through the legislative process until it hit a roadblock today.

The bill went from introduction in the Utah Senate to a within sight of final passage by House lawmakers in just 10 days, leaving opponents — including national tech companies — scrambling to head off its passage.

Despite having reached the final phase of consideration in the House after overwhelming approval by the Senate Monday, House lawmakers put the bill on pause this morning. State representatives are under a deadline to act, brushing up against the Friday midnight scheduled adjournment of Utah's 45-day legislative session. Under normal statehouse procedure, the bill must secure passage in the House and the Senate by midnight today.

The bill's author, state Senator Michael McKell, told MLex that substitute language being written in the House that would delay the implementation date until July 2022 will secure the bill's passage in both chambers. That would allow lawmakers to address outstanding concerns about the bill during the next legislative session, he said.

As currently written, the bill would allow the state consumer protection agency to investigate residents' complaints that a social media company inconsistently applied its terms of service in a decision to suppress, remove, or flag online content.

Complaints with substantial evidence behind them would be referred onward to the attorney general, who could initiate a lawsuit resulting in civil penalties of \$1,000 per consumer affected by the law's violation (see here).

"The fact that these social media sites get to pick and choose what they want when at the same time they tell the public that they're a de facto a public forum, that's inconsistent," said McKell, a Republican who represents parts of the Utah Valley region.

The legislation would also require social media platforms to provide account holders notice, within 24 hours, of a content-moderation decision and the ability to appeal the decision within 30 days.

McKell's bill is one of a handful introduced mainly in Republican-dominated statehouses that take aim at online platform content moderation. The bills are a form of saber-rattling, said Carl Szabo, general counsel for industry association NetChoice, fueled by anger over alleged anti-conservative bias and then-President Donald Trump's campaign against Twitter and Facebook after they took actions to limit his online reach (see here).

Szabo, along with TechNet, the Internet Association and the Utah chapter of the American Civil Liberties Union, urged Utah lawmakers late last month not to proceed. Google has also told its Salt Lake City outside lobbyists to mobilize against the bill, MLex has learned.

One opponent speaking on condition of anonymity said lobbying lawmakers is more difficult this session than years past because of the novel coronavirus pandemic. "You're relying on technical means and phone calls to get a hold of legislators. Anybody can do that, and that makes things a little hard," the opponent said.

One talking point being used to dissuade legislators is the likelihood of lawsuits on First Amendment grounds, should the bill become law. The bill amounts to a "must carry" rule for social media firms, violating constitutional guarantees against government interference in editorial decisions, said Szabo.

If the bill's intent is to prohibit "inconsistent" content moderation, there's no way for a social media platform to ensure that inherently subjective decisions about speech find uniform support, he added. One person's politically motivated suppression of speech is another person's containment of incitement.

McKell said he believes the possibility of litigation "is actually fairly low." Any action by the Utah state attorney general would have to be based on a significant level of user complaints, he said. In any case, "We don't tell social media companies what they have to remove. We tell social media companies they have to be transparent when they do it," he added.

Asked whether Utah Republican Governor Spencer Cox would sign the bill, a spokeswoman demurred. "This bill is still being monitored. No further action has been taken that we can comment about," she said.