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Social Networking in Web 2.0: Time for Limits? Recent Developments and Policy Considerations



Bricker & Eckler
ATTORNEYS AT LAW

Presented By

Melissa Martinez Bondy

Bricker & Eckler LLP

Columbus · Cincinnati-Dayton · Cleveland · Marietta

www.bricker.com

100 South Third Street
Columbus, Ohio 43215
(614) 227-2300

9075 Centre Pointe Dr.
Suite 440
West Chester, Ohio 45069
(513) 870-6700

1001 Lakeside Ave. East,
Ste. 1350, Cleveland 44114
(216) 523-5405

258 Front Street
Marietta, Ohio 45750
(740) 374-2248

I. Introduction:

A. What Do We Mean When We Say “Social Networking?”

We could say – it is the use of “Social Media.”

B. But then, what is Social Media?

A group of Internet-based applications built on the Web 2.0 platform which allows for the creation and exchange of *user*-generated content.

Some history may assist: the “first” generation of the Web (now known as “Web 1.0”) was designed so that consumers passively used the information or content published on the Web and navigated via the use of hyperlinks. The “second” generation of the Web (“Web 2.0”) has been designed to transform people from content *consumers* into content *producers*.

Probably not coincidentally, Wikipedia is the ideal starting point for an official definition of Web 2.0. The entry begins: “A Web 2.0 site allows users to interact and collaborate with each other in a social media dialogue as creators of user-generated content in a virtual community, in contrast to websites where users (consumers) are limited to the passive viewing of content that was created for them.” Examples of Web 2.0 include social networking sites, blogs, wikis, video sharing sites, web applications, and folksonomies.” Wikipedia, Web 2.0, http://en.wikipedia.org/wiki/Web_2.0 (last visited July 26, 2012).

So, a Web 2.0 application allows a user to interact and collaborate with other users in a social media dialogue as a creator of user-generated content in a virtual community.

II. The Social Network.

SNSs include platforms such as:

- Facebook
- Twitter
- LinkedIn
- YouTube
- Vine
- Shutterfly
- Pinterest
- Instagram
- Blogs, aka “Weblogs” (personal or corporate)
- Edmodo

III. Why Is Any of This Relevant to You?

You are an employer.

A. Potential Employees.

POLL #1

How has the practice of Googling applicants affected the hiring process at your district?

- **[NOGOOGLE]** I have never Googled an applicant.
- **[NOTMAJOR]** I have Googled them, but I don't think it's ever been a major deciding factor in hiring.
- **[WASMAJOR]** I have Googled them, and what I found was a major factor in my hiring decision.

1. **Hiring and Background Checks.**

- *Time* magazine reported 70% of US HR officers have not hired a candidate because of the applicant's online social networking information.
- Many people make available significantly more information about their personal lives online than what they would otherwise share in a resume, application, or job interview.
- May limit liability the District could face for negligent hiring claims.

2. **Without Appropriate Controls, Searches May be a Risky Proposition.**

- You risk becoming "pregnant" with information that would be unlawful for you to use in making a hiring decision (e.g., religious beliefs, medical history, prior workers' compensation claims, etc.).
- In light of GINA, the Genetic Information Nondiscrimination Act, you could learn genetic information about the potential employee or their family members.
- You may obtain information about a candidate that is false or untrue, or have a case of mistaken identity.
- Is such use considered "commercial use," which is prohibited by Facebook, MySpace, and other SNS's user agreements?

3. **Tips for Handling Information.**

- Identify in writing which:
 - position(s) can perform searches or consider outsourcing the searches;
 - social media sites are to be searched; and
 - type of information is to be reported and **not** reported by the researcher to the decision maker.
- Limit searches to public information.
- Do not obtain user's or another person's password to obtain access to non-public data. To do so risks invasion of privacy claim and possible criminal violation of Stored Communications Act.
- Segregate the searchers from the employment decision-makers.
- Consider informing job candidates that the District's background check may contain an on-line component.
- Document and maintain information provided to the decision-makers.
- Base employment decisions on legitimate, non-discriminatory factors.

4. **Consider How You Are Using Social Networking in Your Recruiting?** One in every five employers report that they are using social media for recruiting.

B. Current Employees.

1. **Professional Misconduct:**

How many of you have ever said or asked:

- “I can't believe one of my teachers posted *that* on her Facebook page! Can I fire her?”
- How many of you have terminated an employee for material posted on a social media platform?
- “What, if anything, can I do about the fact that I know one of my teachers has “friended” a student on Facebook?”
- “What, if anything, can I do about the fact that I know one of my teachers regularly texts students?”
- In August 2013, a Broward County teacher in Florida was not only fired, but also arrested for on-line solicitation of a student. In one Facebook message, Stevie Glasspool wrote to her 17 year-old student, “I do not want you to fall in love with me, but I do not want you to hit it and quit it either.” In another post she told her student “you will be graded on your performance.”

- In March 2013, a teacher in Aurora, Colorado, Carly McKinney was fired after her “stay sexy...stay high...stay drunk” tweet was discovered by students. She also tweeted at 10:00 am on a Monday that she was high while grading papers. Her Twitter handle was “Carly Crunk Bear.”
- How many of you recognize the name Melissa Cairns? In January 2013, Ms. Cairns was fired for posting on Facebook a picture of several of her students with duct tape over their mouths; it was captioned: “I finally found a way to get them to be quiet!” She said it was meant to be a joke, but the Board of Education was not laughing.
- In August 2012 it was reported that a music teacher, Laura Urban, was reprimanded when it was discovered that, in a Facebook post, she had identified one of her 8 year-old students by his initials and remarked that he was “the evolutionary link between orangutans and humans.”
- In November 2011, in a largely African-American and Latino school district, a New Jersey administrative law judge ruled that Jennifer O’Brian, a first-grade teacher, should lose her job for a Facebook post where she referred to her job as a “warden for future criminals.” She argued she was just exercising her free speech rights.
- In August 2010, a Cohasset, Massachusetts teacher earning more than \$92,000 annually was forced to resign over comments she made on her Facebook page.

Sometimes it is not *what* is posted on Facebook, but *how* Facebook is used by an educator:

- In May 2012, Principal Louise Losos, resigned after it was discovered that she had set up a fictional profile and friended over 300 people, many of whom were her students. She wanted to monitor track student and parent commentaries about the High School.
- In March 2012, Angelica Cruikshank, was recommended for termination after a school district investigation revealed that she improperly gained access to students’ Facebook accounts to determine whether they had made negative comments about her.

And sometimes, it has nothing to do with Facebook.

- A transgendered music teacher in New Mexico, Christina Cracraft, often performed as a drag queen for GLBT benefits. When video of her performances surfaced on YouTube, the school district asked her to resign; she did.
- In 2008, Stephen Murmer was an art teacher in Virginia. He lost his job when a YouTube video of his painting technique went viral. In fact, he lost his job when school officials didn't agree with his method of creating his art – with his buttocks.

With Social Media, things happen fast; consider these examples:

- The “Naked Boot Leg”: In February 2012, Paul Withee, the head football coach at Oxford Hills High School in South Paris, Maine, intended to send a nude photograph of himself to his girlfriend, but inadvertently posted it to his public Facebook page. Although, it was *only up for 10 minutes*, it was long enough for a parent to see it. He resigned from his position as a coach and teacher.
- In Escambia, Florida, according to an Arbitrator's report addressing a veteran teacher's termination, William Aydelott (the teacher) and a student exchanged over 241 text messages in a nine day period. The misconduct was discovered in October and by the New Year, he was unemployed.

Under Ohio's Licensure Code of Professional Conduct for Educators, the board of education of each school district shall promptly submit a report to the Superintendent of Public Instruction whenever:

- The board of education, governing board, or chief administrator has *initiated termination or nonrenewal proceedings* against, has terminated, or has not renewed the contract of the employee because the board of education, governing board, or chief administrator *has reasonably determined that the employee has committed an act that is unbecoming to the teaching profession....*
- The *employee has resigned under threat of termination or nonrenewal for an act that is unbecoming to the teaching profession....*
- The *employee has resigned because of or in the course of an investigation* by the board of education, governing board, or chief administrator regarding *whether the employee has committed an act that is unbecoming to the teaching profession....*

Conduct unbecoming includes:

§ 1(g) Using technology to intentionally host or post improper or inappropriate material that could reasonably be accessed by the school community;

§ 2(i) Using technology to promote inappropriate communications with students.

In 2007, the Ohio Educational Association (OEA) issued a memorandum to its members after the adoption of the Code of Professional Conduct, strongly encouraging teachers not to use SNSs.

“These sites, when used appropriately, can be powerful tools for sharing information and building community around important issues, including public education. Nonetheless, the use of social networking sites may expose members to unintended consequences which could impact jobs and careers Members should not post, do, say or write anything on a social network that they would not want to see on the front page of the local newspaper or would not say or do in front of students, parents, or the board of education. Members should not post material to their sites that may be considered inappropriate or unprofessional, including pictures and links.”

2. Investigations & Imposition of Discipline/Termination.

- *E.g.*, employees disparaging their supervisors online, harassing a co-worker, posting personally identifiable information about a student, etc.
- Many of these situations can be and should be dealt with by policies that the District already has in place, including but not limited to the District’s anti-harassment and discrimination policies, and student records and confidentiality policies.
- The imposition of discipline, up to and including termination, may be made easier by the existence of a social networking policy.

POLL #2

Would you consider the act of clicking the “Like” button on Facebook a form of protected free speech?

- **[NOTPROTECTED]** I do **NOT** believe the mere act of clicking the “Like” button on Facebook is protected speech.
- **[PROTECTED]** I **DO** believe that pressing the “Like” button of Facebook is protected speech.

See, *Bland v. Roberts*, 2013 U.S. App. LEXIS 19268 (4th Cir. 2013).

- Remember, that although public employees have free speech rights (that employees in the private sector do not enjoy), generally, such rights are not as extensive as you might believe them to be. The speaker must be speaking on a matter of public concern. Threats are not protected speech, nor is speech that is disruptive to the educational process.

3. Consider the *Growing* Potential for an Unfair Labor Practice Charge.

- Section 7 of the National Labor Relations Act (NLRA) provides that employees “shall have the right ... to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...”
- Section 8 of the NLRA makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]”
- NLRB General Counsel issued a memorandum discussing its social media cases on August 18, 2011.
- The General Counsel issued another memorandum on January 25, 2012
- The General Counsel issued a third memorandum on May 30, 2012.
 - Prohibitions on sharing company information are too broad.
 - Protections for company trade secrets are lawful.
 - In the education context, protections of student information would be lawful.

- Prohibitions on sharing company photos and logos are too broad.
- Prohibiting statements that are “offensive, demeaning, abusive or inappropriate” are vague and overboard.
 - Prohibitions against postings that are “harassing, discriminatory, or violent” are lawful.
- Employees have always been permitted to complain about working conditions around the water cooler; now they are complaining on the internet. Social media is how employees are communicating; therefore, you can be certain that the NLRB will find that concerted activities are occurring on SNSs.

4. **Creating Legitimate Connections with Parents/Students.**

- Innovative teachers will want to meet their students where they are already spending much of their time.
- Many teachers create a “professional” page that is only used for communication with parents and students and is not linked to their personal pages.
- This is what the New York City Department of Education did in Social Media Guidelines it adopted in May of 2012. Teachers are required to have “Professional” social media accounts, and to register those with the Department, if they wish to communicate with students over social networks. The “Professional” social media accounts must be kept completely separate from “Personal” social media accounts. The Guidelines even provide a sample response for an educator to send to students who may request to “friend” an educator on their “Personal” social media account.
- Other possible acceptable SNSs include:
 - Edmodo
 - Shutterfly (students and teachers sharing pictures of what the students are doing in class); and
 - Various blogs (that foster thoughtful educational discourse).
- Educational connections/relationships may be acceptable and even advantageous, so long as they are, by definition, ***not*** social connections/relationships.
- Some School Districts have decided to create their own presence on Facebook and Twitter as an immediate method for communicating with parents and students.
 - *E.g.*, To communicate “snow days” or “public health warnings” (H1N1), or to celebrate team victories.

- District will need to consider how to manage its presence (will the site be “read only,” will it permit only designated persons to “post,” or will anyone be able to “post”?)
- Are the postings or tweets a “public record” that must be maintained/backed up/stored?
- The District will need to be sensitive to the fact that it may be creating an “open forum” under the First Amendment
- No action will ever eliminate the District’s responsibility to safeguard student privacy/ confidentiality.
- The focus should be on prohibiting unwanted behaviors, not outlawing the medium, which may be achieved via a policy.

C. Former Employees.

1. Recommendations.

How many of you have wondered: “Can I post a recommendation for one of my former teachers on LinkedIn?”

- LinkedIn provides your current supervisors and employees with a unique opportunity to make recommendations regarding current employees who may one day become former employees.
- Once posted, if poster is no longer employed, may be difficult to have the reference removed.
- Consider your existing policies relating to employee references (most provide only dates of employment and last job title).
- If the District only provides the above, then you will want to affirmatively prohibit employees from *commenting online* about the job performance or character of current or former employees.

IV. Does the District Need a Policy Governing the Use of Social Media? Absolutely!

School Districts should be considering whether it will use social media for instructional and educational purposes, as well as its employees’ potential non-educational use of social media.

There is no one-size-fits-all policy when it comes to the use of social media. To be of value, your policy must be as unique as your School District. Additionally, as technology progresses, and new issues will inevitably arise, the law will continue to change (albeit slowly), and your policy will need to change as well.

A. Key Policy Considerations.

- 1. Define "social networking."** The policy should include a broad definition of "social networking" (or whatever other term you choose to use). Once you define the term you have selected, use that term consistently throughout your policy, and be prepared to update it every year.
- 2. Consider the scope of the policy.**

POLL #3

Which of the following is true for your employees if they want to use social media for professional purposes?

- **[YESPERSONAL]** They are permitted to use their personal social media pages.
- **[YESPROF]** They are permitted to use only professional pages separate from their personal ones.
- **[YESDISTRICT]** They may use only the district's own social media pages.
- **[NOSNS]** They are prohibited from using personal social media for any purpose while at work.
- **[NOPOLICY]** Our District employees are not covered by any social media policy!

A total ban on the use of social media at work may not be realistic, as most employees are carrying a smartphone in their pocket. Also, you will want to consider, at a minimum, carving out exceptions for employees that may be performing background checks on potential hires.

Also, does a complete ban on texting or "friending" between students and District employees make sense?

- In the summer of 2011, the State of Missouri passed a law that banned the use of social media, including a provision that prohibited teachers from communicating with students on Facebook and Twitter out of concerns over inappropriate contact. The Missouri State Teachers Association filed a suit claiming that, among other things, the law violated teachers' free speech rights. A Court enjoined the enforcement of the social media law (the "Facebook" law), and Missouri legislature voted to repeal the law in the fall of 2011. The legislature recently revised the legislation and it now calls on all of the state's 529 school districts to pass a policy on communication via social media.

- Closer to home, in August 2011, Dayton Public School approved a policy that prohibits teachers from texting or sending any internet messages to students. It also prohibits teachers from responding to students' attempts at communicating with teacher through any medium *not approved by* the District.
- Some model policies are tailored more narrowly and are drafted to prohibit communications between students and educators via SNSs that are *not* related to a school-sponsored activity or event. Others address the employee's use of social media when the result is a substantial disruption to the school environment (and this may include conduct that occurs off school property, not during work time, and on the employee's personal computer).
- Best advice at this point: Do not target the medium, but the behavior and nature of the communication.

Thinking more broadly, does a complete ban on texting or "friending" between persons in supervisory positions and their subordinates also make sense?

3. **Address use of the School District's technology and tools.** It makes sense to affirmatively state that all District issued equipment, even the equipment that is routinely taken home (i.e., laptops, iPads, cellphones) are the property of the District, that there is no reasonable expectation of privacy while using any such tools, and that they may be confiscated for policy violations.
4. **Address use of District time to engage in social networking.** For some, a complete ban on all social networking activity while at school (even if using a personal device) might be appropriate. Indeed, your employees may already be subject to such a limitation under your existing Acceptable Use Policy, and there might be no legitimate business reason for anyone in your organization to use social media at work.

However, if a complete ban on the use of social media does not suit your District, then the policy should state whether only work-related social networking is permitted or whether some personal social networking is allowed. If you decide to allow it, the District may wish to note any time limitations on such activity, and instruct employees that such activity must not interfere with any employee's job duties or the operation of the District's computer system.

5. Identify conduct that is strictly prohibited, whether on or off duty.

Some of the most troublesome issues facing employers in this area arise out of off-duty social networking activity by employees using their own technology. Blogs, Facebook posts, or Tweets that have a direct and negative impact on the School District are a good place to start. At a minimum your policy should address these issues:

- Unauthorized disclosures of a student's confidential information;
- The posting of false or defamatory information about your School District or its employees;
- Engagement in inappropriate social media relationships with students (e.g., online flirting, bantering with sexual overtones, sharing of explicit, discriminatory, or obscene jokes, solicitation of a personal or sexual relationship with a student, invitations to parties, etc.);
- Posting of material that causes a disruption within the school setting or affects an employee's ability to perform his/her duties in the workplace.
- Social media use that violates the School District's other policies (discrimination, harassment, etc.);
- Use of School District e-mail addresses to register for social media sites;
- Requiring a student or employee to divulge a username or password to access on-line content, even in the context of an investigation. Maryland, Delaware, Illinois, Ohio and the U.S. House of Representatives have all introduced legislation that would prevent employers from seeking such information.

6. Be careful not to prohibit too much. If a teacher blogs a criticism of the school board, remember that it may be speech protected by the First Amendment (a private citizen speaking about a public matter).

Richerson v. Beckon (9th Cir. Aug. 27, 2009). Court upheld school's transfer of teacher who posted personal and negative comments about her employers, union representatives, and co-workers on her blog. The subject matter was of public concern, but the Court held the postings disrupted co-worker relations, eroded a close working relationship premised on personal loyalty and confidentiality, and interfered with teacher's performance of her duties.

Also, keep in mind that the NLRB and/or SERB may be examining your policy in the context of an ULP. An employer can increase the likelihood that its social media policy will survive the NLRB's scrutiny if the policy emphasizes the legitimate purposes that it seeks to achieve, such as protecting the District's students and reputation, and encouraging positive and professional communication between staff, students, and the public and is narrowly crafted.

7. **Obtain a signed acknowledgment of your employee's receipt of the policy.**
8. **Warn your employees of the consequences for policy violations.**
9. **Coordinate with Existing Policies.** The District already has a number of policies in place. For example, you may already have a policy that prohibits supervisors from providing references to subordinates, governs the disclosure of personally identifiable information about a student, prohibits inappropriate fraternization between student and teacher, and that prohibits harassment and intimidation.
10. Finally, keep in mind that guidance from the courts and administrative agencies, by their very nature, lags behind the pace of the technology.