Many employees will use social media, both personally and for work purposes. While Facebook, Instagram, and Pinterest are popular today, new platforms are developed constantly that your employees may want to use. Make it clear to your employees that their social media accounts are not entirely divorced from their role as an employee. And, while there are many benefits to social media, using it without caution can give rise to a whole host of legal issues. Because issues with social media use by employees can be complicated, we encourage districts dealing with this issue to contact an OSBA/PACE pre-loss attorney at 1-800-578-6722 or pacepreloss@osba.org.

Benefits and Risks of Social Media:

Social media is a valuable tool for many employees. They can use it for personal communications, like keeping in touch with friends and family and connecting with other people with similar hobbies and interests. They can use it for professional development, such as connecting with other teachers about innovative teaching technologies or communicating with their unions. Teachers can even use sites like Pinterest to encourage students to collaborate and bring ideas and sources into one place. Administrators can use social media to communicate quickly and easily with large groups.

Despite the benefits of social media, there are many areas that can be cause for concern. Regarding administrator use, big mistakes can be made very easily, and they are conveyed to the entire community. Plus, these embarrassing mistakes don’t just disappear! If there were subsequent litigation or public records requests, the communication could come back to haunt you.

Teacher use of social media is also complicated. In some cases, teachers may wish to use social media to communicate about academics and classroom related activities. However, even if an instructor is using a social media account for purely academic purposes, parents may read a teacher’s “friend request” as an inappropriate interaction. A teacher communicating privately with a student over a messaging application can easily be seen as crossing the line.

Employees are generally free to use their social media and other online accounts for personal use as they wish. However, employees should be aware that their Internet posts have the potential to cause a substantial disruption at school, and could give rise to a need for discipline. Additionally, if an employee is using a personal phone for work communications as well as personal, their text messages may be subject to public records requests. The same goes for email: if an employee uses an email account for both personal and work-related communication, emails on that account are subject to potential disclosure in response to public records requests.

Guiding Employees on Their Professional and Personal Use of Social Media:

School districts should have a policy in place about social media use by employees. This will make it more likely that well-meaning employees will think before they post something that could be disruptive. It will also serve to put employees “on notice” so if disciplinary issues arise, it will be easier to defend those actions. OSBA has a model policy to refer to as guidance (see resources below).

When advising employees on social media, there are several things to keep in mind. Make sure that employees know that while nobody is watching their every move online, there are clear limits on their activity that comes with working as a public employee. The limits exist to ensure that students feel safe and comfortable at school, and so parents feel confident their children are being educated by professionally responsible people.

1 Guidance for community colleges will be posted on the OSBA website in March 2017.
Things to consider when developing your social media policy:

- **Personal Use During Work Hours** – Establish limits regarding employees’ personal electronic devices at school during working hours. Do the devices need to be silenced always, or just during class time? Can employees take out their devices for academic use only, or for any reason that won’t disrupt their duties? If employees want to use the audio or video function of their PED, can they do so if they get authorized permission?

- **Off-Duty Use** – Clarify that some limits from the school day still apply when employees are off duty. If a teacher reveals any information about students that might indicate their grades, course enrollments, class schedules, etc., could be a violation of FERPA\(^2\). This includes posting pictures of school facilities, student work, and individuals at school. Remind employees that posts on personal profiles can easily be found by students and can cause a disruption at school.

- **Academic Use** – If teachers are going to communicate with students online for academic purposes, make it clear that the best way to do so is to send group messages to all students at once. Address whether teachers are allowed to use email and texting to communicate with students, and if so, if there are time and context restraints. You can prohibit communication with students online for personal use during work hours, and discouraging such communication outside of work hours is a good idea. Even good intentions by a teacher to reach out to a student can look suspicious. Also, keep in mind that academic social media communications between teachers and students should be maintained in accordance with your document retention policies. These records are protected under FERPA but are also considered public records which you cannot destroy except as allowed under state document retention laws.

- **Possible Discipline** – District policy should be clear that if an employee’s use of social media leads to a disturbance in the school community, the employee may be subject to discipline. This doesn’t require discipline in every situation, but it allows the option. Some examples of resulting “disturbances” are if a parent threatens to withdraw a student or if there is a negative impact on the learning environment. Define “disruption,” so employees know that not every adverse reaction to something they do online will lead to discipline, just serious ones. The policy should also include an exception for communications during an emergency situation.

**Disciplining Employees for Social Media Use:**

If discipline is necessary, consider whether the employee’s use of social media could be considered protected speech. Employees may be protected under the First Amendment, Title VII, the Americans with Disabilities Act, the Individuals with Disabilities Education Act, the Family and Medical Leave Act/Oregon Family Leave Act, state whistleblowing laws, relevant collective bargaining acts, and under an individual employee’s employment contract.\(^3\)

**A few things to think through before taking disciplinary action:**

- Could the action could be seen as discrimination against an employee because of their membership in a protected class (like race, gender, disability, ethnicity, religion, etc.)? Are similarly situated employees treated the same? Do other employees do similar things, and were there any other employees involved in the incident?

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\(^2\) The Family Educational Rights and Privacy Act (FERPA) gives students access to their educational records, an opportunity to have their records amended, and control (to some extent) over disclosure of any information from their educational records. 34 CFR 99.1.

• Could the employee’s speech be protected because they were speaking out on social media about a violation of the law, or because their post was related to union activities or workplace conditions? You cannot discipline an employee in retaliation for revealing a violation of the law or expressing thoughts on union activities or workplace conditions and using social media as a platform. Be sure to review the individual employee’s contract or collective bargaining agreement to ensure that discipline will not be a violation of those terms.

• Might the employee’s social media activity be protected under the First Amendment? Generally, a public school employee is protected if they are speaking as a private citizen (i.e., not during work hours) on a matter of public concern. However, if their speech causes a substantial disruption at school, or if the school has an administrative interest that outweighs the importance of the teacher’s free expression, discipline may be appropriate.

As discipline is considered, think about whether a different employee would complain if action was not taken against the employee who made the post. Also, if the social media post promoted or revealed discriminatory views, that may cause a substantial disruption at school. If other employees would complain, the District is likely more justified in taking action. Consider the effect of the teacher’s post on students and on other staff. However, keep in mind that not every communication that seems offensive should lead to discipline. Discipline is only appropriate for speech that causes an actual adverse, significantly disruptive situation at school. This will be a case-by-case analysis. Sometimes, one parent’s threat to take their child out of school will be enough, and other times it will not. Before taking any action or making promises to any parents or other staff, consider all the various ways in which the teacher’s speech might be protected.

Sample Social Media Discipline Cases Involving School Employees:

Munroe v. Central Bucks School District 805 F.3d 454 (3rd Cir. 2015) The school district fired an English teacher after her blog containing derogatory comments about her own students was discovered. The blog was public, and the teacher used a pseudonym and did not identify any students by name. In one post, the teacher posted comments she said would write on report cards if she were being truthful (e.g. “I hear the trash company is hiring,” “Dunderhead,” and “Nowhere near as good as her sibling.”). The school district did not have a policy about blogging at the time. Several parents emailed the school asking that the teacher blogger not teach their children any longer, and the principal described the students at school as “furious” and “livid.” The Circuit Court found that although the teacher’s blog touched on issues of academic integrity and therefore discussed matters of public concern, the teacher’s comments and the tone of her blog were so disruptive to the teacher’s duties that it diminished any legitimate interest in its expressions.

Takeaway: A teacher’s private blog may be protected because it only in part touches on matters of public concern. However, if the posts disrupt the teacher’s ability to perform his or her job, the school’s administrative interest is likely to outweigh protection of the speech.

Richerson v. Becko 337 Fed.Appx. 637 (9th Cir. 2009) A curriculum specialist/instructional coach was transferred to a new role as a classroom teacher because of her posts on a personal blog. The posts included personal and abusive comments about her coworkers and bosses. The employee alleged that the transfer was an adverse employment action taken because she was exercising her First Amendment rights. The court found that the transfer was an adverse action, but that the speech disrupted co-worker relations, eroded close working relationships and interfered with the employee’s job performance. Thus, the school’s decision to transfer did not violate the employee’s First Amendment rights because the school had a legitimate administrative interest that outweighed the value of the employee’s speech.

Takeaway: Posts on a personal blog that touch on matters of public concern may not be protected if they cause significant disruption in the speaker’s ability to work with others and do their job.

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Spanierman v. Hughes 576 F.Supp.2d 292 (D. Conn. 2008) A high school English teacher used MySpace to communicate with his students, both about academics and so that he could “relate to them” better. The teacher’s profile included images of naked men and he talked to students about personal issues. The teacher was placed on administrative leave and his contract was not renewed. The teacher accused the district of retaliating against him for exercising his right to free speech. The District Court found that the teacher’s speech was made as a private citizen, but that most of his MySpace posts did not touch a matter of public concern. The court determined that the MySpace interactions demonstrated an unprofessional rapport with students that was disruptive to school activities.

Takeaway: For a teacher to prevail on a claim of retaliation for their protected private speech, the protected speech must have been directly correlated with the employer’s reason for disciplining. Extensive interactions on social media platforms with students regarding personal, not academic, matters, is likely to cause a substantial disruption.

In re O’Brien 2011 WL5420-55 (N.J. Adm. 2011) An elementary school teacher with tenure was fired because of her negative Facebook posts about her students. For example, she wrote “I’m not a teacher — I’m a warden for future criminals!” The posts were shared throughout the community. Several parents expressed outrage and at least one parent threatened to pull their child from the school. The episode attracted media attention and parent protests. The teacher alleged that her posts were protected under the First Amendment because they involved the issue of student discipline, a matter public concern. The court disagreed, finding instead that her posts were more likely personal expressions of job dissatisfaction because the teacher did not indicate that she genuinely wanted the public to know more about the correlation between classroom behavior and academic performance. The court also found the district’s need to efficiently operate its schools outweighed the teacher’s need for protection of speech, especially because the “forum” of Facebook was a questionable place to begin such an earnest discussion, and the tone of the comments would not contribute to meaningful debate.

Takeaway: The tone, forum, and context of a teacher’s online posts will be taken into consideration when a court is deciding whether speech causes a substantial disruption.

Snyder v. Millersville Univ. 2008 WL 5093140 (E. D. Penn. 2008) A student teacher from Millersville University was assigned to a high school where she taught a full course load. In an orientation, student teachers were cautioned against referring to any students or teachers on personal webpages. The student teacher, however, discussed her personal MySpace page with her students. Her page included a photo of herself drinking alcohol out of a plastic cup, as well as references to a “problem” person at the school. The high school terminated the student teacher’s practicum because of the MySpace page and other professionalism issues. That meant the student teacher was unable to get her teaching certification. The student teacher alleged that she was terminated from the practicum for exercising her free speech rights through her MySpace posts. The court found her speech was not protected because the posts did not touch on a matter of public concern, but were purely personal speech.

Takeaway: A student teacher’s speech is protected like a regular teacher. Employment decisions made based on purely personal posts on the Internet are not prohibited under the First Amendment.

Resources:
OSBA Sample Policy: GCAB - Personal Electronic Devices and Social Media – Staff
Records Retention Schedule