

School Districts Should Have a Policy Governing the Use of Websites for Hiring

The common perception is that Employers are almost universally inspecting the social media backgrounds of their applicants.

Although it is reasonable for Employers to want to know as much information as they can possibly gather about a potential employee, there are pitfalls to using social media websites to do background checks on employees.

Everyone has heard warnings to employees about the safe and smart use of social media as well as its potential impact on the individual's employment or ability to gain employment. However, there is a serious danger faced by potential Employers as well when utilizing information contained on social media websites. As a result, it is important for Employers who are going to utilize social media websites for providing information to managers making hiring decisions that a policy be instituted to control and govern their use of these sites. These policies should contain guidelines reinforcing with managers that they cannot utilize protected information that is obtained through a social networking site search in hiring decisions, they should disclose the use of such a search, and should also inform managers that they need to verify information that they may find out about a candidate.

Social media sites may provide access to potential Employers of a great deal of information that cannot be used in making a hiring decision, such as an individual's race, marital status, religious beliefs, or family size. The access to this information opens

the door for potential discrimination claims. Thus, it is important that any policy provide that if the manager is going to conduct social media searches on applicants or potential employees, there should be a universal policy in place governing when and how these searches are conducted. For instance, the search could be conducted on each and every applicant, a randomly selected base of applicants, or perhaps even only to applicants that proceed to a second interview or a decision stage. However, it is of the utmost importance that this procedure be used universally and in a rational manner.

Also, there are issues that could arise with the Fair Credit Reporting Act. If an Employer uses a third party to conduct a background check, including a social media search, and the results of that background check conducted by a third party result in the denial of employment, the Employer must notify the prospective employee that the decision not to offer employment was made because of information discovered during this background check.

Employers must also be sure to verify information discovered through social networking websites about potential employees. It is not unheard of for applicants to falsely create websites portraying other applicants or potential applicants in a negative fashion in order to lessen that individual's chance of obtaining the position, thereby improving the odds of obtaining the position for other candidates. Further, it is possible that the "Steve Young" who

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District's Residency Rejection Upheld

In the case of *Behm v. Wilmington Area School District*, the Commonwealth Court considered the Appeal of a School Board where the Trial Court overturned the Board's adjudication after a residency hearing. In this case, the District received several inquiries from District residents regarding whether or not the Behm family actually resided in the District. As a result of these inquiries, the District requested the Behms to complete a residency affidavit, a request which they declined. The District followed the family's refusal to fill out the residency affidavit by conducting an investigation of the matter.

As a result of this investigation, the Administration determined that the Behms had not been residents of the District for at least three years and therefore their students were not eligible to attend school in the District. Due to the Administration's determination, the family requested a hearing before the School Board. As a result of the residency hearing, the Board of School Directors determined that the Behms did not reside in the District and therefore their children were not eligible to attend School in the District. At the residency hearing the District heard evidence from the Behms, a private investigator, their neighbors, and examined tax assessment and water usage records in order to make the determination. During the hearing, the District Solicitor served as the Hearing Officer while separate counsel was obtained to act in the role of prosecutor.

The Court of Common Pleas overturned the Board's adjudication reasoning that the Behms were denied due process because the District Solicitor

participated in both the collection of the evidence prior to the hearing and as Hearing Officer to the Board during the hearing. Thus, the Trial Court held that the Solicitor's action created the appearance of "comingling of prosecutorial and adjudutory functions."

The Commonwealth did not agree with the Court of Common Pleas' holding and instead concluded that the District Solicitor did not act improperly by both gathering evidence for the Administration and serving as Hearing Officer and advisor to the Board. The Commonwealth Court reasoned that the Administration made the initial decision regarding the residency status of the Behms, even though the District Solicitor assisted the Administration with gathering evidence. Further, the District obtained an outside attorney to serve in the prosecutorial role while the District Solicitor served as Hearing Officer, who ruled on objections of admissibility of evidence. Finally, the Commonwealth Court reasoned that the School Board served as the Fact Finder of the case and was given the responsibility of rendering the ultimate decision, not the Solicitor.

This case should serve to remind Districts of the proper procedure for determining the residency of a student and what rights students have after such a determination is made by the Administration. Where the District makes a determination that the student is not a resident because the family does not reside in the District, the District must remember that the student has a right to a residency hearing if requested pursuant to Section 1302 of the School Code. This hearing is subject to the dictates of the Local Agency Law and must be conducted in accordance with same. The District should retain separate attorneys to serve in both the roles of prosecutor for the Administration and as Hearing Officer/Advisor to the Board. It would behoove all Districts to keep close contact with their District Solicitor or special Counsel when these issues occur so that they do not conduct themselves outside the requirements of the Local Agency Law and the School Code.

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applied for a position with your District is not the same Steve Young who is a football star or the same Steve Young who lives down the street from you.

We strongly suggest that the District have a policy in place governing the use of these websites for hiring purposes.

Act 88 Governs Mid-Contract Bargaining Over Subcontracting

The Pennsylvania Commonwealth Court held that Act 88's impasse and dispute resolution process applies to both bargaining over successor agreements and also to mid-term bargaining regarding the privatization of bargaining unit work in *Central Dauphin School District v. Central Dauphin Bus Drivers Association*. In September of 2008, the District and the Association entered into a collective bargaining agreement for the provision of transportation services to the District for a three year term.

Then, in 2009, the District sought to privatize the transportation services. The District requested and received proposals to provide transportation services to the District and later voted to accept an offer from one of these providers. After the District voted to accept a proposal, the Association submitted the dispute to the Department of Labor and Industry. The District responded to this Complaint by informing the Department that it was the District's position that the dispute resolution procedures under Act 88 did not apply because the parties were not negotiating a new contract or a renewal of a contract. As a result of the District's position, the District sought to proceed under Act 195 and filed a notice with the Department seeking to proceed with mediation in accordance with Act 195.

The District and Association met and engaged in a mediation session within two weeks of the District's request. Shortly thereafter, the Association amended its unfair labor practice complaint to also allege that the current dispute should be resolved using the impasse procedures provided by Act 88, to which the District responded with a Motion to Dismiss.

While the unfair labor practice complaint was proceeding with the Pennsylvania Labor Relations Board, the District filed a Complaint in the Court of Common Pleas seeking a declaration that the impasse procedures of Act 88 do not apply to the privatization dispute. After hearing testimony, the Trial Court determined that Act 88 would apply because there is no ambiguity in the language of

the Act that limits the application of the Act to the negotiation of an initial or successor agreement. The Trial Court held that the purpose of Act 88 was to ensure that the school year was not disrupted through the prevention of mid-term termination of the collective bargaining agreements.

Before the Commonwealth Court this District argued that the Trial Court's determination against the District was in error because Act 88 only applied where the parties were entering into a new collective bargaining agreement, that Act 88 did not contain language making it applicable to privatization negotiations during the term of a collective bargaining agreement, that the Trial Court should have deferred to the decisions of the Labor Relations Board regarding contract disputes and that the Trial Court's interpretation of Act 88 would lead to absurd, illogical or impractical results.

As a review, Act 195 applies to all public employers and employees and governs the collective bargaining process, the resolution of bargaining impasses and disputes, and the filing and resolution of unfair labor practice complaints. Meanwhile, Act 88 exclusively governs the collective bargaining process between public school entities and public school employees who are able to bargaining collectively. Act 88 prescribes the strike and lockout procedures for these employees.

The Pennsylvania Supreme Court has already held that Act 195 is to be incorporated into Act 88; however, Act 195 is repealed where it is clearly inconsistent with Act 88.

After discussion of the history of Act 88 and Act 195, the Commonwealth Court stated that had the General Assembly wanted to restrict the scope of Act 88 in the way suggested by the District, so as to apply only to new or successor agreements, such a restriction would have been expressly provided for. Further, the Commonwealth Court held that their review of Act 88 led them to a conclusion that the express language of (Continued next page)

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Act 88 provides and applies to mid-contract disputes. Section 11-111-A of Act 88 governs the “performance of the mutual obligation of the employer or its representative and the representative of the employees to meet at reasonable times and to confer in good faith with respect to wages, hours, and other terms and conditions of employment or the negotiation of an agreement or any question arising thereunder.”

Thus, the plain language of Act 88 states that it applies to a dispute that arises under the governance of a current collective bargaining agreement. Further, the Commonwealth Court has determined that Act 195 also provides that privatization is an issue that arises under Act 195 and occurs within the context of an existing collective bargaining agreement. The Commonwealth Court has previously held that under Act 195, when a public employer seeks to privatize bargaining unit work, the public employer must bargain in good faith until the parties reach an impasse, at which point the bargaining must also have met the obligation of the employer to exhaust the impasse procedures of Act 195.

Thus, since Act 88 incorporated Act 195 and the matter of privatization of the bargaining unit work fell under the ambit of the Act 88 collective bargaining obligations, the impasse procedures and timelines established by Act 88 must be followed in resolving this dispute between the parties.

Act 88 requires that the parties use certain procedures for resolving impasses in a step by step manner. After a reasonable period of negotiation, Act 88 provides that if a dispute or impasse exists between the parties they may submit to voluntary mediation. If voluntary mediation fails to resolve these differences between the parties within 45 days of the beginning of negotiations and no later than 126 days prior to June 30 or December 31, whichever is the end of the school’s fiscal year, the parties must then submit to mandatory mediation if the parties have not already submitted to voluntary mediation. These time limits apply without regard to whether or not the collective bargaining agreement is about

to expire, but is related explicitly to the end of the public school entity’s fiscal year.

The Commonwealth Court observed that the General Assembly enacted Act 88 after it determined that Act 195 was not preventing public school employees from striking and impacting the school’s ability to provide the required 180 days of instruction period. Thus, the Commonwealth Court did not agree with the District’s argument that the Trial Court’s decision would require that School Districts only begin to bargain issues that could affect safety or economic issues in January of a given year or those issues would impact the employees’ bargaining rights. The Commonwealth Court reasoned that Act 88 does not place any limitations when a School District may “begin bargaining” with the employees, but instead, Act 88 works to ensure the public schools’ ability to provide 180 days of instruction. Act 88 provides the time limitations the parties must stop bargaining on their own and seek the assistance of mediators, fact finders and arbitrators in order to resolve a dispute or impasse. The Commonwealth Court simply found no language that requires that bargaining begin in January as suggested by the District.

The Commonwealth Court held that Act 88 governs the impasse procedures that must be used when the parties are addressing a dispute that arises within the context of the collective bargaining agreement or is a mandatory subject of bargaining under Pennsylvania Law. School Districts must recognize the importance of following Pennsylvania Law governing labor relations and should seek out experienced labor counsel when addressing these matters in order to best protect the Districts’ interests and avoid potential lawsuits whenever possible.

403(b) Bargaining Obligations Upheld by Arbitrator

In a recent arbitration case, handled by Andrews and Beard, a District Association grieved changes made to the employee 403(b) Tax Shelter Annuity Plan by the District as a result of new IRS regulations. Historically, the District in this case allowed employees to choose from a list of ten Tax Shelter Annuity vendors (hereinafter “TSAs”). In the previous practice, the District served simply as a conduit for the transfer of the funds between the employee and the selected TSA, as the employees themselves entered into individual agreements with the TSAs.

For a period of almost 40 years, the vendor list was capped at ten, even though the actual vendors on the list changed from time to time. This practice continued until 2007, when the IRS finalized new regulations covering 403(b) plans making them more similar to and subjecting them to stricter requirements such as those currently applied to 401(k) plans. Previously, 403(b) plans existed in a state akin to “The Wild Wild West,” as there was very little clear regulation governing their utilization and practices. The new regulations require that the District create and maintain a plan document containing specific notice requirements and that the District send out annual eligibility notices to employees. Further, the District was also required to enter into specific information sharing agreements with and among participating vendors.

In response to these new IRS regulations, the Association representative sent a letter to the District Superintendent demanding that the District bargain over any discretionary provisions of the 403(b) plan written document. The District met with the Association and presented a proposal to the Association regarding the new IRS regulations and their application to the 403(b) plan. As these negotiations continued on, the parties settled their collective bargaining agreement through a fact finding determination, but did not settle the issues surrounding the 403(b) plan and agreed to resolve them through the grievance process. During the negotiations process, the Business Manager

and advisory group containing various employee representatives, including members of the Association, vetted a number of 403(b) providers. Ultimately, the District selected a 403(b) provider based upon the fees incurred by the employees, choice provided to the employees and cost to the District. Another issue considered was whether or not the vendors themselves would agree to sign an information sharing agreement as part of a multivendor platform, a request that half of the vendors refused to comply with.

The new 403(b) regulations also impart additional costs on the District that would result from a multiple vendor platform, which was an issue for the District as well, as previously this benefit cost the District virtually no funds at all. The arbitrator determined that the appropriate question before him was whether or not the District violated the party’s collective bargaining agreement when it unilaterally entered into a single vendor rather than a multivendor 403(b) program for bargaining unit employees.

First, the arbitrator examined the payroll deduction provisions of the collective bargaining agreement and determined that the provision did not address whether or not employees were to be given a list of vendors from which to choose for their 403(b) deduction; thus, the District’s action did not violate the express language of the agreement. However, the arbitrator also determined that he must examine the past practice existing for almost forty years between the parties regarding the provision of ten options for the employees to consider whenever withholding their 403(b) contribution.

Ultimately, the arbitrator concluded that the record evidence demonstrated did not establish a past practice, and that the IRS changed the entire manner and process by which District employees could purchase 403(b) investments. The past practice of allowing employees to enter into direct contractual relationships with vendors or advisers was made illegal by the new IRS regulations. Further, these regulations shifted to the District’s responsibility for developing, (Continued next page)

Parties Settle Lower Merion Spycam Case

The Lower Merion School District reached settlement with two students who were suing over the District's access to and use of District owned laptops' webcam features to conduct surveillance over some District students. In this case, video of the students taken in their homes was taken over student webcams, and in one circumstance this video was referenced in a disciplinary investigation of a student regarding potential drug use. However, a conduct observed in the video was in fact not drug use, it was the student consuming candy at that time.

The District ultimately paid \$612,000.00 to settle lawsuits with these students. Of those funds, \$185,000.00 was paid to the two students with the majority of those funds, \$175,000.00, being put into a trust for one of the two students. Since the Plaintiffs' claims in this case were brought under certain federal statutes that provide for attorney's fees to be paid by the Defendant if the Defendant is found to have conducted acts in violation of the federal statutes, the District is also responsible for the students' legal fees, which amounted to \$425,000.00.

The District is also responsible for paying its own attorney fees which as of the end of July 2010 had amounted to over \$743,000.00. The District's careless actions in this case where they failed to disable the webcams on laptops they provided to District students have proven to be a costly mistake. This case should serve as a reminder to Districts across the state that they must take great care when utilizing the use of technological resources inside and outside of the classroom. Districts should have policies in place to prohibit these sorts of actions and should have an Acceptable Use Policy that provides the District with a mechanism for enforcing the inappropriate use or access of District technological resources.

403(b) Bargaining Obligations Continued from page 5

planning, administering and monitoring the compliance of 403(b) plans.

Although the Association clearly established existence of past practice, the Association failed to demonstrate that the District was attempting to change its practice under circumstances similar to those practices in the past. The District made changes to the 403(b) plan in response to new IRS regulations that substantially changed the circumstances and context in which the District could provide TSAs to its employees. The District demonstrated that it took reasonable steps to comply with these new regulations and involved the employees in the process. As a result of the IRS changes to the 403(b) regulations, an entirely new set of circumstances surrounded the performance of parties regarding the offering of a 403(b) program to the District employees.

Districts should be aware that there are bargaining obligations resulting from the changes imposed upon the District by the new 403(b) regulations. Further, if Districts have not already verified that their 403(b) plans are in compliance with new IRS regulations, they should do so immediately.

Employee Bankruptcies and the School District

According to the American Bankruptcy Institute, in the Third Quarter of 2010, almost 400,000 non-business bankruptcies were filed. As a result of the economic downturn, bankruptcy filings have increased dramatically over the lows of 2006 and 2007 by a significant amount. As employers, School Districts must be aware of their legal obligations when employees file bankruptcies.

Although employees are not obligated to inform their employers that they have filed bankruptcy, in many situations employers discover this information through public notices, wage withholdings, and even through water-cooler gossip. But Employers must remember that Federal law protects employees who have filed for bankruptcy.

Although School Districts may disapprove of an employee's personal financial difficulties, School Districts who take an adverse employment action against the employee as a result of the employee's bankruptcy may be making a costly mistake. Many employers are unaware, but the Federal Bankruptcy Code makes discriminating against an employee solely on the basis of a bankruptcy filing illegal. Under Section 525 of the Federal Bankruptcy Code, employers may not take an adverse employment action against an individual solely because that person has sought protection under the Bankruptcy Code, has been insolvent prior to seeking protection under the Code, or has not paid a debt that is dischargeable under the Code.

Arguably, the most important part of this law is the use of the word "solely." Generally speaking, Courts will uphold an adverse employment action where the action was taken with other factors being considered beyond the employee's bankruptcy. However, as public employers, School Districts must be aware that this standard is higher for public employers in Pennsylvania than it is for private employers.

Employers must also be aware that there are other legal obligations that may be implicated when taking an employment action based on bankruptcy

or other credit information. For current employees, School Districts should also be cognizant of the obligations imposed by any collective bargaining agreement. Regarding those who are applicants, employers should also be sure to comply with the reporting requirements of the Fair Credit Reporting Act if they make an employment decision based upon the information present in a credit report.

Before taking any action based on an employee's bankruptcy, the employer should strongly consider the costs and benefits of such actions. Further, the employer should review its past practices and ensure that adverse actions based on bankruptcies or credit information are not being applied in a racially discriminatory manner. There are a multitude of potential issues that adverse employment actions implicate generally, when adding the additional complications of the Bankruptcy Code, school districts should tread carefully and be sure to contact knowledgeable legal counsel before proceeding.

Andrews and Beard Education Law Focus

As solicitors, labor counsel and special counsel, Andrews and Beard represents more than 100 School Districts in Pennsylvania. The Firm has successfully negotiated hundreds of teacher and support staff contracts. Andrews and Beard is also one of the first firms in the state to pioneer Timed Mediation to successfully negotiate teacher-union contracts in a 48-hour process. This process can result in the settlement of the contract six months before expiration, at a large financial savings to the School District.

The Firm also represents a large area of the State for coverage of school board directors through their insurance carrier.

Our legal expertise includes: Negotiation of teacher and support staff contracts; Employment Discrimination; Special Education Litigation; Veterans' Preference Litigation; Teacher and Student Discipline Hearings; and Leaders in Timed Mediation Contract Negotiations.

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The Pennsylvania School Study Council (PSSC), a partnership between the Pennsylvania State University and member educational organizations, is dedicated to improving education by providing research information, professional development activities, and technical assistance to enable its members to meet current and future challenges. The PSSC offers professional development to the membership through colloquiums, workshops, study trips, consultation, publications, and customized services. For more information, visit the PSSC website, www.ed.psu.edu/pssc/ or contact the Executive Director Dr. James P. Hartman at jph19@psu.edu.

Subsequent Issues

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