2014

Here We Are Now, Entertain Us: Defining the Line Between Personal and Professional Context on Social Media, 35 Pace L. Rev. 398 (2014)

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Abstract

Social media platforms such as Facebook, Twitter, and Instagram allow individuals and companies to connect directly and regularly with an audience of peers or with the public at large. These websites combine the audience-building platforms of mass media with the personal data and relationships of in-person social networks. Due to a combination of evolving user activity and frequent updates to functionality and user features, social media tools blur the line of whether a speaker is perceived as speaking to a specific and presumed private audience, a public expression of one's own personal views, or a representative viewpoint of an entire institution. However, the intent of the speaker is frequently lost to the wide and diverse breadth of social media audiences or obscured due to the

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workings of the specific social media platform being used.

In this article, we ask the question: should the job of drawing the line between personal and professional speech lie with the individual? Should the divide be clearly determined by the functionality of the social media platform or by third party processes and procedures such as organizational social media policies or by state/federal law?

This issue of personal versus professional speech becomes increasingly relevant not only to public figures such as celebrities or athletes, but to anyone whose online or social media presence is directly or indirectly connected to a larger institution, such as a workplace or educational institution. As social media platforms and online culture encourage "transparency" and open sharing of personal details online, it is not always easy to determine when personal versus professional viewpoint is being represented via social media channels. When an individual shares a controversial opinion outside of work, it is not necessarily representative of their workplace, yet may be perceived as such. When does an employer have the right to monitor or dictate an individual's online communications?

The line is difficult for everyone to walk – from the perspective of both employers and employees, considering that employees generally want to remain employed and employers generally want to minimize anything negative reflecting back on the employer. In this article, we discuss the tenuous balancing act between the interests of a brand/employer with those of the individual/employee regarding social media communications.

We illustrate this tension through the example of the regulation of student-athletes within institutions of higher education, considering they now might be considered to be employees. However, we conclude that the challenges in developing law and policy around social media speech are due to a number of issues, including the rapid pace of development of social media platforms. Social media gives greater access into the lives of individuals due to emerging social norms that encourage open sharing of personal information online. At the same time, social media tools are used by companies to promote a curated brand identity for marketing purposes. Social media policies created both internally by employers and those established by law and policymakers focus almost exclusively on

the interests of companies regarding social media, rather than the individual interests of those who participate on social media to connect with peers.

We conclude that the present approach that federal financial regulators take regarding social media is the closest to a well-balanced test as presently available – in this test, whether an employer can take action against an employee is grounded on whether a statement could be seen as directed by or an official statement of the employer. A national standard following this overall approach would best balance the interests of both employers and employees.

I. Introduction

Social media platforms such as Facebook, Twitter, and Instagram allow individuals and companies with a unique online platform to connect directly, personally, and regularly with an audience of peers or with the public at large. These services combine the audience-building platforms of mass media with the personal data and relationships of in-person social networks.

Social media also creates new challenges and previously unheard of issues for both individuals and companies, including the gray area between personal statements intended for peers and commentary geared toward the public at large. Even before the advent of social media there have been examples of how this gray area impacts both individuals and business, most specifically when individuals post inappropriate or personally damaging personal information online. This information may range from evidence of crimes, confidential professional information, threats, racist or sexist statements, or ill-conceived statements of personal opinion.

There has been no shortage of examples of individuals sharing inappropriate or crude statements with the public at large. However, due to a combination of evolving user activity and frequent updates to the functionality and user features of social networking websites, these platforms often complicate the issue of who the perceived audience is: a selected group of peers, or the public.

On social media platforms, individuals often attempt to

define a line between conversation intended for a specific, limited audience, an outward expression of one's own views, or a representative viewpoint of an entire institution. However, that line is not always easily recognized by a wide and diverse breadth of social media audiences or shown by the social media platform being used. In this article, we ask the question: should the job of drawing the line between personal and professional speech lie with the individual? Should it be clearly determined by the functionality of the social media platform or by third party processes and procedures such as organizational social media policies or state/federal law?

This issue becomes increasingly relevant not only to public figures such as celebrities or athletes, but to anyone whose online or social media presence is directly or indirectly connected to a larger institution (workplace, school, church, etc.) As social media tools and culture encourage "transparency" and open sharing of personal details online, it is not always clear whose viewpoint is being represented via social media. When an individual shares a controversial opinion outside of work, it is not necessarily representative of their workplace, yet may be perceived as such. When does an employer have the right to monitor or dictate an individual's online communications?

The line is difficult for everyone to walk – from the perspective of both employers and employees, considering that employees generally want to remain employed and employers generally want to minimize anything negative reflecting back on the employer. In this article, we discuss below, the tenuous balancing act between the interests of a brand/employer with those of the individual/employee regarding social media communications. We illustrate this through several examples, most specifically focusing on the regulation of student-athletes within institutions of higher education, considering they now might be considered employees. However, we conclude that the challenges in developing law and policy around social media speech are due to a number of issues; the first being the rapid pace of the development of social media platforms. Other issues include the gray area that emerges from differing usage patterns between individuals and companies. Social media gives greater access into the lives of individuals due to

emerging social norms that encourage open sharing of personal information online. At the same time, social media tools are used by companies to promote a curated brand identity for marketing purposes. Social media policies created both internally by employers and those established by law and policymakers focus almost exclusively on the interests of companies with regard to social media, rather than the individual interests of those who participate on social media to connect with peers.

First, we explore the history of social media platforms and the evolution of these private, closed networks into audience-driven mass media tools. Then we give an overview of the history of social media and its relationship to employment. Next, we present an overview of the current law regarding social media and employment. Finally, we conclude that the approach that federal financial regulators take regarding social media is the closest to a well-balanced test as presently in the law – in this test, whether an employer can take action against an employee is whether a statement could be seen as directed by or is the official statement of the employer. A national standard following this approach would best balance the privacy interests of employees and "branding" interests of employers.

II. From "Social Networking" to "Social Media"

Early social networking websites such as Friendster and Myspace were intended to establish online networks among like-minded peers and friends. At the same time there was some debate within professional circles (primarily marketing, advertising, and technology startups) about exactly what to call this emerging online activity and the tools that make it possible. Several names were in regular usage: "social media," "social networks," and "social networking," for example. In 2007, researchers danah boyd and Nicole Ellison attempted to define the parameters of social networking websites with the following description:

> [Social networks are] web-based services that allow individuals to (1) construct a public or

> semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system.[1]

While boyd's and Ellison's definition of these platforms was an accurate reflection of this technology at the time, social networking platforms quickly evolved into something quite different than their initial description and usage. While searchable and static personal profiles were a defining characteristic of early social networking websites, in subsequent years, social networks began to introduce functionality that shifted the platform's focus from communicating with a select social network to a broad, presumably public audience. Among this functionality includes long-form status updates, publicly viewable content streams organized by keywords through so-called "hashtags," and paid advertising functionalities, made available to both individuals and companies. At the same time, individual users of these platforms continue to use these websites as networks – a service to connect with friends, and family, or to connect with those of like-minded interests.

After 2007, social networking websites became more formally established as audience-driven media services. Facebook's introduction of the "News Feed" functionality in 2006 made it possible for individuals (and businesses) within Facebook to update content regularly that could be viewed in real time by "friends" within the social network. In November 2007, Facebook rolled out specialized profiles for businesses (called business pages) that were intended to allow companies to market their services towards customers.[2]

On the other hand, Twitter's evolution into a corporate brand communication tool was not quite as intentional. Twitter

1. Nicole B. Ellison & danah m. boyd, *Sociality Through Social Network Sites*, *in* THE OXFORD HANDBOOK OF INTERNET STUDIES 151-72 (William H. Dutton ed., 2013).

2. Howard Greenstein, *Facebook Pages vs Facebook Groups: What's the Difference?*, MASHABLE (May 27, 2009), http://mashable.com/2009/05/27/facebook-page-vs-group/.

was originally conceived by co-founder Jack Dorsey as an SMS service that allowed people to communicate with a small group.[3] While the original concept of Twitter was intended for a limited audience, users quickly adapted the use of Twitter's functionality for more audience-centric communications. The 2007 South By Southwest Interactive Conference was another milestone event toward the evolution from social networking to social media, as the service was used as a public communication tool; the company placed two 60-inch plasma screens in conference hallways to show Twitter messages, and the service was used by conference attendees to report on the event in real time. During the conference, Twitter usage rose from 20,000 tweets per day to 60,000.[4]

As more marketing and advertising professionals began to use social media platforms to promote corporate brands, individual users themselves began to use social media as a platform for building a professional public identity, or "personal brand." While the concept of personal branding certainly did not originate with social media platforms, social media websites have become a common and popular tool for individuals to create and maintain a professional persona or demonstrate their area of expertise. Social network websites are comprised of a broad public audience in which an individual can develop a public persona through creating and sharing original online content, or curating the content of others.

Because of the importance of websites, social networks, and other online tools for corporate branding and identity, there is a history of tension between the use of these platforms as a tool for personal expression compared to the use as marketing/promotional tools for businesses and other organizational entities. The history of personal versus professional identity online, and more specifically, the threat of losing one's job due to online communication, started well before the advent of social media websites. One early and

3. Claire Cain Miller, *Why Twitter's C.E.O. Demoted Himself*, N.Y. TIMES, Oct. 31, 2010, at BU1.

4. Nick Douglas, *Twitter Blows Up at SXSW Conference*, GAWKER (Mar. 12, 2007, 8:25 PM), http://gawker.com/243634/twitter-blows-up-at-sxsw-conference.

notable example was web designer and blogger Heather Armstrong, who kept a personal website called Dooce for 13 years. Armstrong was fired in 2002 by her startup employer after writing satirical posts about her time there. Being "dooced" later came to be used by online users and the media as a euphemism for losing one's job because of a blog or website.[5]

Because businesses want to protect their interests, employers created policies regarding speech, especially policies targeted toward non-polite or harassing speech, disparagement of the company's services or products, disclosure of sensitive information (such as trade secrets), and criticism of workplace management. Sometimes employer policy creation makes sense in response to employees frequently using social media platforms to publicly discuss their workplace, people at their workplace, and their work itself. But policy creation by employers is also part of a larger trend by employers to increasingly control aspects of their employees' lives, ranging from compelled after-hours socializing to smoking restrictions.[6]

Therefore, social media's widespread usage has led to a number of cases of individuals being fired for statements made online.[7] But employers have also fired people based on actions,

5. Miles Klee, *A Very Personal History of Getting Fired Over a Blog*, DAILY DOT (Mar. 10, 2014), http://www.dailydot.com/lifestyle/fired-for-my-blog-dooced-personal-history/.

6. *See* Jessica L. Roberts, *Healthism and the Law of Employment Discrimination*, 99 IOWA L. REV. 571, 571 (2014) ("Recently, several employers around the country announced they would no longer hire applicants who use nicotine, even off the clock"); Stephen D. Sugarman, *"Lifestyle" Discrimination in Employment*, 24 BERKELEY J. EMP. & LAB. L. 377, 381 (2003) ("[S]hould society intervene--and if so, when and through what legal mechanisms--to preclude employers from making hiring, promotion, discharge, discipline and other job decisions based on off-the-job conduct?").

7. *See* Ryan Broderick and Emanuella Grinberg, *10 People Who Learned Social Media Can Get You Fired*, CNN (June 6, 2013), http://www.cnn.com/2013/06/06/living/buzzfeed-social-media-fired/; *See Spectrum Workers Fired Over Facebook Picture*, WZZM 13 (Aug. 29, 2013), http://www.wzzm13.com/story/news/local/metro/2014/02/05/1609120/ (writing that multiple hospital workers were fired when a photograph of the backside of an unknown women was posted on Facebook with the caption, "I like what I like"); *See* David Kaplan, *Francesca's CFO Fired Over Use of Social Media*, HOUSTON CHRONICLE (May 14, 2012), http://www.chron.com/business/article/Francesca-s-CFO-fired-over-use-of-social-media-3558203.php (noting that the CFO Gene Morphis was fired for improperly communicating information about the company through social

rather than speech. Social media can draw publicity to conflicting viewpoints between employers and employees, when employees are fired for legal activities outside of work of which the employer does not approve. Some examples include the seemingly never-ending stream of teachers who are fired for previous work in the sex industry[8] or marrying a same-sex partner.[9] However, encouraging social media use can benefit companies because of increased company exposure through employees' posts, tweets, or other social media use.

III. Overview of the Law's Relationship to Employers, Employees, and Social Media

With both technology and user behavior blurring the lines of acceptable and accepted social media use by individuals and companies, the law plays a confusing role in providing clarity. Some experts view the legal efforts to help solve the social media and employment conundrum as trying to reinterpret a

media.

8. *See* Eric Owens, *Teacher Fired Just Because She Was a Stripper Gets $45,000 Settlement*, THE DAILY CALLER (June 26, 2013), http://dailycaller.com/2013/06/26/teacher-fired-just-because-she-was-a-stripper-gets-45000-settlement/; Lee Moran, *Spanish High School Teacher Who Posed Naked for Playboy Is Fired*, NY DAILY NEWS (Oct. 16, 2013), http://www.nydailynews.com/news/national/spanish-teacher-posed-naked-playboy-fired-article-1.1487060; *see also* Tony Aiello, *Ex-Stripper-Turned-Teacher Petro Moves On*, CBS N.Y. (Feb. 10, 2011), http://newyork.cbslocal.com/2011/02/10/former-stripper-turned-teacher-is-moving-on-with-life/ (reporting that former Bronx elementary school art teacher was suspended for her previous work as an exotic dancer).

9. *See* Carol Kuruvilla, *Fired Gay Vice Principal Fighting Back Against Seattle-area Catholic School*, NY DAILY NEWS (Mar. 8, 2014), http://www.nydailynews.com/news/national/ousted-gay-vice-principal-fighting-back-catholic-school-fired-article-1.1715326 (stating that the Catholic school gave an employee an ultimatum, either divorce his husband or be fired); *Fired Gay Glendora Catholic Schoolteacher Sues St. Lucy's Priory*, SAN GABRIEL VALLEY TRIB. (Mar. 13, 2014), http://www.sgvtribune.com/social-affairs/20140313/fired-gay-glendora-catholic-schoolteacher-sues-st-lucys-priory (reporting that a former Catholic teacher thinks he was fired after marrying his partner after same-sex marriage became legal in California); Clare Kim, *Gay Teacher Fired After Applying for Marriage License*, MSNBC (Dec. 9, 2013), http://www.msnbc.com/the-last-word/gay-teacher-fired-marriage-license (stating that a foreign language Catholic teacher was fired after he applied for a marriage license to wed his partner of 12 years).

continuum into a simple binary. Eric Goldman argues that

> the law assumes that social media accounts have only two states: personal or not-personal. Instead, social media accounts fit along a continuum where the endpoints are (1) completely personal, and (2) completely business-related–but many employees' social media accounts (narrowly construed, ignoring the statutory overbreadth problem) fit somewhere in between those two endpoints. Indeed, employers and employees routinely disagree about whether or not a social media account was personal or business-related.[10]

However, attempting to use the creation date of a social media account as a dividing line between personal and professional use does not help. The usability functionality on several social media platforms such as Facebook, requires a business page to be tied to a personal account. If an employee is directed to create or use a social media account for their job, it is very likely to be tied to their personal social media account.

Law and policymakers have come no closer to finding a clear solution to the issue. In a statement announcing the failed federal Social Networking Online Protection Act bill, Representative Eliot L. Engel said:

> The lack of clarity in the law puts individuals in a position where they either have to give up vital, private information, or risk losing their job, potential job, or enrollment in school and involvement in the school's sports programs. Frankly, when there are no laws prohibiting institutions from requiring this information, it becomes a common practice. Social media sites

10. Eric Goldman, *Big Problems in California's New Law Restricting Employers' Access to Employees' Online Accounts*, FORBES (Sept. 28, 2012, 12:39 PM), http://www.forbes.com/sites/ericgoldman/2012/09/28/big-problems-in-californias-new-law-restricting-employers-access-to-employees-online-accounts/.

> have become a widespread communications tool – both personally and professionally – all across the world. It is erroneous to just say that if you don't want your information accessed that you shouldn't put it online.[11]

While social media and online monitoring of individuals by federal or state government has, and should, be analyzed through a Fourth Amendment lens, our concern is not specifically with government or non-government intrusion into social media use by employees, but instead with the individual's right to a private life and to represent themselves and their views publicly and independently outside of the workplace, regardless of employer. The following examples help to illustrate previous attempts to define the role of the law in determining the rights and responsibilities of an individual's communication and self-expression via social media.

A. *United States Supreme Court*

In a 2010 case*, City of Ontario v. Quon,* the U.S. Supreme Court attempted to determine the privacy expectations of an employee. SWAT Officer Quon claimed that when his employer searched the personal text messages he sent from his employer-provided pager, it was a violation of his privacy.

The Court did not want to make a premature legal rule regarding privacy and technology in the workplace, considering "[a]t present, it is uncertain how workplace norms, and the law's treatment of them, will evolve" regarding the interaction between these elements.[12] Technology and norms are not static; instead "rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior."[13] The Court admitted having "difficulty

11. Press Release, Eliot L. Engel, Reps. Engel, Schakowsky, Grimm Seek to Protect Online Content (Feb. 6, 2013), *available at* http://engel.house.gov/common/popup/popup.cfm?action=item.print&itemID=3352.

12. City of Ontario v. Quon, 560 U.S. 746, 759 (2010).

13. *Id.*

predicting how employees' privacy expectations will be shaped by those changes or the degree to which society will be prepared to recognize those expectations as reasonable."[14] However, the Court stated that "employer policies concerning communications will of course shape the reasonable [privacy] expectations of their employees, especially to the extent that such policies are clearly communicated."[15]

Some commenters thought this case had larger policy implications, arguing that "the equalization of privacy rights in the public and private sector down to the [lower] level [provided to] the private sector is mistaken."[16] On the other hand, Eric Goldman stated that he did not "see how this case's outcome has any implications for private-sector employees or employers."[17] We leave to others to determine whether Quon has direct implications for private sector employees, but there are other federal-level limitations on employer restrictions on employee use of social media.

B. *Federal Law*

Several government agencies have attempted to define the line between speech that represents an entire entity and speech that only represents that of individuals. The regulations range greatly in their scope – from the Federal Trade Commission's (FTC) concern about transparency in advertising, to the National Labor Relations Board's (NLRB) concern about limits on union organizing by employers, to the Securities and Exchange Commission's (SEC) concern about business communications regarding regulated industries.

1. Federal Trade Commission

The Federal Trade Commission has attempted to define

14. *Id.* at 759-60.

15. *Id.* at 760.

16. Paul M. Secunda, *Privatizing Workplace Privacy*, 88 NOTRE DAME L. REV. 277, 281 (2012).

17. Ethan Ackerman, *No Wrath in This Quon-Ontario v. Quon*, TECH. & MARKETING. L. BLOG (June 20, 2010), http://blog.ericgoldman.org/archives/2010/06/no_wrath_in_thi.htm.

the differentiation between an individual speaking independently or speaking on behalf of a corporate entity. The Federal Trade Commission revised rules for Internet reviews in the FTC's *Guide Concerning the Use of Endorsements and Testimonials in Advertising* ("the Guides"). The Guides are administrative interpretations of the law intended to help compliance with the Federal Trade Commission Act, but are not binding law themselves.

The purpose of the Guides is to protect consumers by creating a line between paid and consumer endorsements.[18] When the FTC analyzes statements made via social media:

> The fundamental question is whether, viewed objectively, the relationship between the advertiser and the speaker is such that the speaker's statement can be considered "sponsored" by the advertiser and therefore an "advertising message." In other words, in disseminating positive statements about a product or service, is the speaker: (1) acting solely independently, in which case there is no endorsement, or (2) acting on behalf of the advertiser or its agent, such that the speaker's statement is an "endorsement" that is part of an overall marketing campaign?[19]

Therefore, to have a lawful social media policy under the FTC mandate, employees must disclose any connection to their employers, plus use a clear and conspicuous disclaimer. An employer's social media policy must explain how to adhere to the FTC's new standards if an employee is using social media to endorse an employer's products or services.[20]

However, the FTC also thinks that the possibility of an employee "going rogue" is not a concern, as indicated in the Guide:

18. Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124, 53,124 (Oct. 15, 2009) (codified at 16 C.F.R. § 255).

19. *Id.* at 53,126.

20. 16 C.F.R. § 255.5 (2009).

> although the Commission has brought law enforcement actions against companies whose failure to establish or maintain appropriate internal procedures resulted in consumer injury, it is not aware of any instance in which an enforcement action was brought against a company for the actions of a single "rogue" employee who violated established company policy that adequately covered the conduct in question.[21]

Therefore, according to the FTC, if an employer has a known policy by employees, the possibility of an employee's actions on social media being used against the company in an action by the FTC is minimal.

2. National Labor Relations Board

Thoroughly discussing NLRB and its goal to prevent employers from limiting union organizing may seem like a step backwards; the NLRB's role is structured through an industrial-era framework of workers' rights and away from our present online era where unions are less relevant to the general population than they were in the 20th century. However, along with state laws limiting employer intrusion by requesting social media passwords, this federal government agency takes one of the most employee-protective approaches regarding separating personal (including union organizing) from the professional. Also, unlike the SEC (discussed *infra*), the NLRB's charge effects the majority of American employees.

Employees have increasingly been turning to social media platforms to publicly discuss their workplace, people at their workplace, and their work itself. For many, social media is added to earlier ways to engage in discussions about the workplace, like talking to others in person or on the phone. Social media interactions have been added to employer speech

21. Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. at 53136.

limiting policies that attempt to regulate what employees say, especially non-polite or harassing speech, disparagement of the company's services or products, disclosure of sensitive information (such as trade secrets), and criticism of workplace management. By enforcing these speech and social media policies against employees, some of these disciplinary actions made their way to the NLRB.

But the NLRB restrictions as discussed below are still difficult for both employers and employees to decipher. The NLRB's scope is focused not on what would be in the best interest of employees, but rather to ensure that the National Labor Relations Act (NLRA), which gives employees the right to "engage in . . . concerted activities for the purpose of collective bargaining or mutual aid or protection" is not violated.[22]

This article is not offering a critique of the NLRB, which is staying within the bounds of its administrative authority. Many other scholars do have critiques of the NLRB's recent actions regarding social media policies.[23] We are, however, of the opinion that law and policy makers have a narrow understanding of the range and scope of social media activities by Americans at work and at home. But because the NLRB's focus is on unionizing rather than the overall limitations of speech and behavior, it cannot improve social media policies for employees in a more global sense.

The Office of the General Counsel for the NLRB has issued several reports of investigations involving both the use of social media and employers' social and general media policies. After an increasing number of NLRB cases related to social media emerged, the NLRB's Acting General Counsel issued three reports during 2011 and 2012 outlining the NLRA's application

22. National Labor Relations Act, 29 U.S.C. §§ 151-69 (2012).

23. *See* Alexandra Hemenway, *The NLRB and Social Media: Does the NLRB "Like" Employee Interests?*, 38 J. CORP. L. 607 (2013); Christine Neylon O'Brien, *The Top Ten NLRB Cases on Facebook Firings and Employer Social Media Policies*, 92 OR. L. REV. 337 (2013); Robert Sprague & Abigail E. Fournier, *Online Social Media and the End of the Employment-at-Will Doctrine*, 52 WASHBURN L.J. 557 (2013); Rebecca Stang, *I Get by with a Little Help from My "Friends": How the National Labor Relations Board Misunderstands Social Media*, 62 DEPAUL L. REV. 621 (2013).

to employee social media postings and employers' policies.[24]

Read together, the reports mean that employer social media policies should not be so broad as to limit protected activities, such as discussing wages or working conditions among employees. Generally, the more vague and expansive an employer's social media policy's prohibitions regarding employee speech, the more likely they will be considered to be unlawfully overbroad. However, if the comments by employees are personal gripes disconnected from group activity among employees they are generally not protected. In simpler terms, the closer the action is to workplace organizing, the greater likelihood that firing the employee would violate the Labor Relations Act. But if the action is closer to simple griping, the greater the possibility that disciplinary action would be legal.

On January 24, 2012, the Acting General Counsel issued a second report, clarifying the NLRB's critique of general non-specific policies, expanding the types of policy terms that are disliked because they had an impermissible effect, whether or not they were actually enforced, of chilling employees' exercise rights. Policy terms that are disfavored include those prohibiting disparaging or inappropriate comments, disrespectful conduct, or the disclosure of sensitive or confidential matters.[25]

However, the report also included inconsistencies in establishing policy. For example, a policy that instead of

24. LAFE SOLOMON, ACTING GEN. COUNSEL, N.L.R.B. TO ALL REGIONAL DIRECTORS, OFFICERS-IN-CHARGE, AND RESIDENT OFFICERS, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES, N.L.R.B. (2012), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d4580a375cd; LAFE SOLOMON, ACTING GEN. COUNSEL, N.L.R.B. TO ALL REGIONAL DIRECTORS, OFFICERS-IN-CHARGE, AND RESIDENT OFFICERS, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES, N.L.R.B. (2012), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d45807d6567; LAFE SOLOMON, ACTING GEN. COUNSEL, N.L.R.B. TO ALL REGIONAL DIRECTORS, OFFICERS-IN-CHARGE, AND RESIDENT OFFICERS, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES, N.L.R.B. (2011), *available at* http://www.nlrb.gov/news-outreach/news-story/acting-general-counsel-releases-report-social-media-cases.

25. LAFE E. SOLOMON, ACTING GEN. COUNSEL, ACTING GEN. COUNSEL, N.L.R.B. TO ALL REGIONAL DIRECTORS, OFFICERS-IN-CHARGE, AND RESIDENT OFFICERS, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES, N.L.R.B. (2012), *available at* http://www.nlrb.gov/news/acting-general-counsel-issues-second-social-media-report.

prohibiting unfriendly language prohibits vulgar, obscene, threatening, or intimidating language and actions is acceptable, because prohibitions are sufficiently detailed. An overall restriction on disclosing personal or sensitive information, which could encompass working conditions, is not permitted. However, a policy requiring employees to follow securities regulations and other laws that prohibit disclosing confidential or proprietary information is permissible.[26]

Following the issuance of the first two reports in March 2012, the Acting General Counsel stated that a specific company's policy's rule against disclosure of "confidential, non-public information" was "so vague" that "without limiting language," employees could view it as preventing them from engaging in legally protected activities. The Acting General Counsel found, in one case, that even though Giant Foods had an interest in strongly protecting its trademarks, it could not forbid employees' noncommercial use of the trademarks while engaging in NLRA related activities. However, the policy's requirement that employees "not defame" or "otherwise discredit" the company's products or services, and that employees report others for violating the policy, was held to be lawful.[27]

On May 30, 2012, the Acting General Counsel released its third report, focusing on employer policies, including approving policies that prohibit the disclosure of attorney-client privileged information and also require employees to respect copyright and other intellectual property laws. The report examined employer policies, finding that Wal-Mart's social media policy prohibiting "inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct" was acceptable.[28] However, General Motors' policy with similar wording was not

26. *Id.*

27. Advice Memorandum from Barry J. Kearney, Associate General Counsel, N.L.R.B., Office of the General Counsel, to Wane Gold, Regional Director (March 21, 2012), *available at* http://op.bna.com/tpif.nsf/id/mlon-99ykxz/$File/Giant%20Food.pdf.

28. LAFE E. SOLOMON, ACTING GEN. COUNSEL, N.L.R.B. TO ALL REGIONAL DIRECTORS, OFFICERS-IN-CHARGE, AND RESIDENT OFFICERS, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA, N.L.R.B. 20 (2012) *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d4580a375cd.

acceptable: "We found unlawful the instruction that 'offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline."[29] This "provision proscribes a broad spectrum of communications that would include protected criticisms of the employer's labor policies or treatment of employees."[30]

Within the May 2012 report, the NLRB found acceptable language in a policy stating that employees may not represent "any opinion or statement as the policy or view of the [Employer] or of any individual in their capacity as an employee or otherwise on behalf of the [Employer]."[31] The policy language was viewed as acceptable because it referred to comments made from the perspective of the employer – not the employee. Also found acceptable was policy language stating: "postings are 'my own and do not represent [Employer's] positions, strategies or opinions' . . . . An employer has a legitimate need for a disclaimer to protect itself from unauthorized postings made to promote its product or services."[32]

3. Other Federal Agencies: Financial Institutions and Social Media

However, one of the more interesting elements regarding social media communications in this area is actually not directly about employees, but about helping to create a good dividing line between personal and professional in other contexts. The federal agencies that deal with financial institutions have the charge to make sure that those that work in these regulated industries behave appropriately regarding disclosing information that may impact investors. The Financial Industry Regulatory Authority (FINRA) and the Securities and Exchange Commission (SEC) require broker-dealers and registered investment advisers to monitor employees' use of social media, to ensure that employees do not

29. *Id.* at 8.
30. *Id.*
31. *Id.* at 16.
32. *Id.* at 17.

harm investors through their use of social media. Therefore, "[f]irms must adopt policies and procedures reasonably designed to ensure that their associated persons who participate in social media sites for business purposes are appropriately supervised . . . and do not present undue risks to investors."[33]

According to FINRA, the determination of what constitutes a business communication is solely based on its content.[34] The determination regarding whether the communication relates to "business as such" does not depend on whether the communication was made on a personal or business account meaning that if someone is on their personal Facebook, Twitter, or other social media account they still need to be cautious about talking about work.[35] The SEC also uses a content-based determination process,[36] aware that social media has "landscape-shifting" possibilities; the SEC suggests "adopt[ing], and periodically review[ing] the effectiveness of, policies and procedures regarding social media in the face of rapidly changing technology."[37]

The combination of the present federal regulations and state laws causes issues for those in these regulated industries and some have suggested that the

> optimal resolution would be the creation of a

33. FINRA, REGULATORY NOTICE 10-06, SOCIAL MEDIA WEB SITES, GUIDANCE ON BLOGS AND SOCIAL NETWORKING WEBSITES 7 (2010), *available at* https://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120779.

34. FINRA, REGULATORY NOTICE 11-39, SOCIAL MEDIA WEBSITES AND THE USE OF PERSONAL DEVICES FOR BUSINESS COMMUNICATIONS, GUIDANCE ON SOCIAL NETWORKING WEBSITES AND BUSINESS COMMUNICATIONS 2-3 (2011), *available at* http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p124186.

35. *Id.* at 3.

36. SEC Div. of Inv. Mgmt., *IM Guidance Update, Filing Requirements for Certain Electronic Communications* (2013), *available at* https://www.sec.gov/divisions/investment/guidance/im-guidance-update-filing-requirements-for-certain-electronic-communications.pdf.

37. SEC Off. of Compliance Inspections and Examinations, *National Examination Risk Alert, Investment Adviser Use of Social Media* 1-2 (Jan. 4, 2012), *available at* http://www.sec.gov/about/offices/ocie/riskalert-socialmedia.pdf.

> single federal regime that defers to FINRA, the SEC and other financial regulatory authorities wherever conflicts exist. Such a regime could be accomplished through a federal social media privacy statute with clear language exempting the monitoring of personal social media accounts if companies are required to do so under applicable law, and pre-empting any conflicting laws, including the NLRA and state laws.[38]

Creating a simplified regulatory regime where the default is privacy for social media accounts would help protect the interests of employees. Also, this default would better prompt the public to see statements from individuals on social media as reflecting only their own views rather than automatically as statements reflecting viewpoints of an employer.

C. *State Laws Related to Social Media Access by Employers or Educational Institutions*

Many states have enacted legislation this term regarding protecting social media accounts from prying eyes, whether from employers or educational institutions. However, some experts believe that all of the statutory solutions discussed do not address the proper issue involving intrusiveness into privacy. In a post entitled "The Spectacular Failure of Employee Social Media Privacy Laws," Eric Goldman states that

> a decent policy objective–prevent[ing] employers from inappropriately demanding employees' social media passwords–can be hard to convert into rigorous legislative drafting, especially in technology contexts. To me, the lesson is that if rigorous legislative drafting isn't likely, maybe

38. Richard J. Rabin et al., *CATCH-22.COM: Conflicting Social Media Regulatory Regimes and the Impact on Financial Institutions*, 03 SOC. MEDIA L. & POL'Y REP. (BNA) 9 (Mar. 2014), *available at* http://cdn.akingump.com/images/content/2/7/v2/27578/Catch-22-Article.pdf.

> the policy objective isn't worth pursuing in the first place.[39]

Most states have at least some legislation addressing social media and employees or higher education institutions (see Appendix *infra*). On August 1, 2012, Illinois Governor Pat Quinn signed H.B. 3782 (Public Act 097-0875), effective on January 1, 2013.[40] The new law amended the Right to Privacy in the Workplace Act,[41] providing that it shall be unlawful for employers to ask prospective employees information related to their social networking websites in order to gain access to such accounts or profiles.[42] This prohibition does not affect the usage or monitor the usage of the employers' electronic equipment, nor affect employees' information that can be obtained under other laws, such as information that is in the public domain.[43]

Similarly, on September 27, 2012, California enacted social media privacy laws affecting employers and postsecondary educational institutions.[44] One law prohibits employers from requiring or requesting social media related information from their employees or potential employees.[45] It also prohibits employers from retaliating against an employee or applicant for not complying with a request or demand by a violating employer.[46] The other California law prohibits employees and

39. Eric Goldman, *The Spectacular Failure of Employee Social Media Privacy Laws,* TECH. & MARKETING L. BLOG (May 31, 2014). http://blog.ericgoldman.org/archives/2014/05/state_laws_to_p.htm.

40. H.B. 3782, 97th Gen. Assemb., Reg. Sess. (Ill. 2012).

41. ILL. PUB. ACT. 097-0875 (2012); 820 ILL. COMP. STAT. 55/10 (2013).

42. 820 ILL. COMP. STAT. 55/10(b)(1) (provides that it shall be unlawful for any employer to ask any prospective employee to provide any username, password, or other related account information in order to gain access to a social networking website where that prospective employee maintains an account or profile); *see also* Ill. H.B. 3782.

43. 820 ILL COMP. STAT. 55/10(b)(2-3).

44. CAL. LAB. CODE § 980 (West 2014); CAL. EDUC. CODE §§ 99120-99122 (West 2014).

45. *See* CAL. LAB. CODE § 980(b); *see also id.* § 980(c)-(d) (these specify that section 980 does not affect "employer's existing rights and obligations to request an employee to divulge personal social media reasonably believe to be relevant to an investigation of allegations of employee misconduct or violation [of laws]" or "accessing an employer-issued electronic device").

46. *Id.* § 980(e).

representatives of public and private postsecondary educational institutions from requiring social media disclosure from their students, prospective students, or student groups.[47] It also requires that institutions ensure compliance with these provisions and post the social media privacy policy on their web site.[48]

IV. Contracts: Employment Contracts and Sponsorship Deals

The issue of employers and educational institutions asking for access to social media passwords is slowly being addressed by state legislatures. However, there are still several important trends within case law related to the interaction of social media and employment. One thread of this trend relates to the confusion that exists when an individual is the sole representative or social media "voice" to promote the services or work of an employer, or when an individual willingly shares personal social media profile information to an employer. Another thread relates to whose "voice" is speaking – whether it is that of the individual employee or of the employer as a whole.

A. *Employment Cases*

The cases we discuss below address varied litigated issues between employers and employees regarding social media accounts. Two cases, *PhoneDog v. Kravitz*,[49] discussed *infra*, and *Eagle v. Morgan*,[50] have been previously analyzed in law

47. *See* CAL. EDUC. CODE § 99121(a)-(b); *see also id.* § 99121(c) (provides exceptions similar to the ones provided in CAL. LAB. CODE § 980(c)).

48. *Id.* § 99121.

49. PhoneDog v. Kravitz, No. C 11–03474 MEJ, 2012 WL 273323 (N.D. Cal. Jan. 30, 2012).

50. Eagle v. Morgan, No. 11–4303, 2011 WL 6739448 (E.D. Pa. Dec. 22, 2011). In this case, it is not an employee who is accused of misusing the social media account of the employer, but rather the employer who is accused of incorrectly using the social media account of a former employee. Eagle v. Morgan, No. C 11–4303, 2012 WL 4739436 (E.D. Pa. Oct. 4, 2012) (citing Defendant's Motion for Summary Judgment and Response to Interrogatories No. 2). LinkedIn is generally viewed as a platform that bridges the divide between personal and professional information. It is intended for individuals to connect professionally with others, but also requires people to mention

review articles, either discussing the issues generally[51] or specifically regarding trade secret issues.[52] Additionally, there

their present and former positions and employers. Eagle created her LinkedIn account while at the employer, but the information in the profile was information about herself rather than specifically about work for her employer. Eagle was locked out of her LinkedIn page for two weeks by her former employer, possibly because during her time of employment she had provided her LinkedIn password to other employees that were assisting her with using the account. *Id.* (citing Plaintiff's Complaint). After her termination, continuing employees with access to her account, continued to use the account and also locked her out of it, by changing the password. *Id.* (citing Defendant's Motion for Summary Judgment and Response to Interrogations No. 2). The employer, Educomm, saw Eagle's page as a corporate asset, rather than as a personal page, changing the password, and scooping out Eagle's information and swapping in information about another employee. Eagle v. Morgan, No. C 11–4303, 2013 WL 943350, at *3 (E.D. Pa. Mar. 12, 2013); *see* Linda Eagle LinkedIn Page, LINKEDIN, linkedin.com/in/lindaeagle (last visited Dec. 22, 2014). This meant that those looking for Linda Eagle on LinkedIn would only find the Morgan information Eagle page. *Id.* Eagle argued that the LinkedIn page was a corporate asset rather than a personal page, despite the terms of service for LinkedIn, which limit sharing of passwords with others. *User Agreement*, LINKEDIN (Mar. 26, 2014), http://www.linkedin.com/legal/user-agreement. In the end, despite the court finding that Eagle proved several of her claims, including unauthorized use of name, invasion of privacy/misappropriation of identity and misappropriation of publicity, she lost because she encountered no economic damages.

51. *See* Kyle-Beth Hilfer, *Minimizing Legal Risks for Clients Using Social Media to Advertise and Market Their Brands*, 38 WESTCHESTER B.J. 35 (2012); Robert J. Kolansky, *Can We Really Ascribe a Dollar Amount to Interpersonal Communication? How Phonedog v. Kravitz May Decide Who Owns A Twitter Account*, 20 JEFFREY S. MOORAD SPORTS L.J. 133 (2013); Agnieszka A. Mcpeak, *The Facebook Digital Footprint: Paving Fair and Consistent Pathways to Civil Discovery of Social Media Data*, 48 WAKE FOREST L. REV. 887 (2013); Adam S. Nelson, *Tweet Me Fairly: Finding Attribution Rights Through Fair Use in the Twittersphere*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 697 (2012); Bethany N. Whitfield, *Social Media @ Work: #Policyneeded*, 66 ARK. L. REV. 843 (2013).

52. *See* David S. Almeling, *Seven Reasons Why Trade Secrets Are Increasingly Important*, 27 BERKELEY TECH. L.J. 1091 (2012); Zoe Argento, *Whose Social Network Account? A Trade Secret Approach to Allocating Rights*, 19 MICH. TELECOMM. & TECH. L. REV. 201 (2013); Francois Quintin Cilliers, *The Role and Effect of Social Media in the Workplace*, 40 N. KY. L. REV. 567 (2013); Hope A. Comisky & Tracey E. Diamond, *The Risks and Rewards of a Byod Program: Ensuring Corporate Compliance Without Causing "Bring Your Own Disaster" at Work*, 8 CHARLESTON L. REV. 385 (2014); Stephen McJohn, *Top Tens in 2011: Copyright and Trade Secret Cases*, 10 NW. J. TECH. & INTELL. PROP. 331 (2012); Tiffany A. Miao, *Access Denied: How Social Media Accounts Fall Outside the Scope of Intellectual Property Law and Into the Realm of the Computer Fraud and Abuse Act*, 23

are several other litigated cases, such as *Artis Health, LLC v. Nankivell*, that are not discussed in this article.[53] The following cases are not clear-cut about the line between an employer's social media presence and the employee's social media presence, due to both technological issues and user activity.

1. *PhoneDog v. Kravitz*

In *PhoneDog v. Kravitz*, a person working as the social media "voice" of a company claimed ownership over a social media account used by him, and only him, as the user.[54] In April 2006, Noah Kravitz started working at PhoneDog.com, a news and review site, where his job duties required him to regularly serve as the social media presence of the company, tweeting using the Twitter name @PhoneDogNoah.[55] During Kravitz's employment with PhoneDog, the @PhoneDogNoah amassed almost 17,000 Twitter followers.[56] He became a contributor to CNBC and Fox shows, where his employer was

FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1017 (2013).

53. While not the only issue at dispute between the parties, the part of the case related to employment and social media relates to an employee leaving without giving back passwords, but due to the written agreement regarding ownership of the accounts, the former employee lost. Artis Health, LLC v. Nankivell, No. 11 Civ. 5013, 2012 WL 5290326, at *4-5 (S.D.N.Y Oct. 23, 2012). Nenkivell worked for Curb Your Cravings, LLC ("CYC") as a "video and social media producer," where her work included producing videos, websites, blogs, and social media pages for CYC and the other two plaintiffs. Her responsibilities included maintaining passwords and other login information for websites, email accounts, and social media accounts." *Id.* at *1. In response to a claim for injunctive relief, the court states that because Nenkivell retained passwords, the plaintiffs have a claim of conversion that can move forward, and that plaintiffs' inability to access and update their site constitutes irreparable harm. *Id.* at *3. This case differs from the other cases discussed because there is an agreement between the parties regarding ownership of the accounts – but also that the accounts do not appear to be taken over by the former employee, instead she was just holding on to the passwords. In this case, the voice of the social media accounts was intended by all parties to be of the employer, so it makes sense that the former employee would not be allowed to hold on to the social media presence built while employed.

54. PhoneDog v. Kravitz, No. C 11–03474 MEJ, 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011).

55. *Id.* at *1.

56. *Id.*

listed as Phonedog.[57] In October 2010, Kravitz's employment with PhoneDog ended; PhoneDog requested that Kravitz turn control of the Twitter account over to the company.[58] Based on these facts, it seems like PhoneDog did not have any alternative users of the account, a situation that is not usual for present day corporate Twitter accounts, but was more common four years ago.

Kravitz had changed the Twitter handle to reflect his own name – @noahkravitz and continued to post regularly, promoting the products of his new employer.[59] He claimed that the Twitter name change removing PhoneDog from "his" Twitter name was with their knowledge; it claimed otherwise.[60] PhoneDog sued Kravitz for misappropriation of trade secrets, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, and conversion.[61] The court's initial order dismissed PhoneDog's claims for negligent and intentional interference with economic relationships, but did not dismiss PhoneDog's claims for conversion and misappropriation of trade secrets.[62]

In its amended complaint, PhoneDog claimed that it had an economic relationship with the followers of Kravitz's Twitter account, so Kravitz taking over the account disrupted the "relationship."[63] Also, PhoneDog argued that by continuing to appear on CNBC and Fox News while not being employed by them, Kravitz interfered with its economic relationship with these channels.[64] The economic relationship that PhoneDog had with the Twitter followers of the account was created through Kravitz's actions.

57. Counterclaims and Answer to Plaintiff's First Amended Complaint, ¶ 24, PhoneDog v. Kravitz (No. 11-cv-0347), 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011).

58. *PhoneDog*, 2011 WL 5415612, at *1.

59. Counterclaims and Answer to Plaintiff's First Amended Complaint, ¶ 22, PhoneDog v. Kravitz (No. 11-cv-0347), 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011).

60. *Id.* at ¶ 20.

61. *PhoneDog*, 2011 WL 5415612, at *1.

62. *Id.*

63. First Amended Complaint for Damages and Injunctive Relief, ¶ 35-36, PhoneDog v. Kravitz (No. 11-cv-0347), 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011).

64. *Id.*

In the initial order, the court stated that PhoneDog successfully pleaded negligence by alleging "Kravitz owed a duty of care to PhoneDog as an agent of PhoneDog."[65] The court did not address the issue of how long after employment ends does the duty as an agent continue. After a year and a half after filing, the case settled.[66]

In this case, Kravitz did create the Twitter account while working for PhoneDog and most of the tweets were about PhoneDog. While PhoneDog claims that the Twitter followers were as a result of relationship building, what is not acknowledged is that Kravitz was the singular catalyst for those relationships in the first place. Additionally, the use of Kravitz name within PhoneDog's Twitter name implies that those who follow the feed could potentially be interested in either content about PhoneDog or the content specifically created by Kravitz. That is to say, there is the possibility that Kravitz, rather than PhoneDog, may have been the primary draw for followers. This possibility is not acknowledged.

Kravitz's identity, including his persona and his image, was part of his work for PhoneDog, and the argument PhoneDog made regarding how their former spokesperson should not be allowed to participate on traditional media, such as Fox News, would be considered by almost anyone as a laughable one in other industries. After all, television pundits and commentators change their employment status frequently without it compromising the reputation of former employers. PhoneDog's argument regarding the Twitter account is analogous, considering that the account was in the "voice" of Kravitz.

In this case, most of the Tweets on the account were about technology rather than personal interactions with friends and family. However, the interactivity of Twitter does not separate the range of communications between professional and personal easily. But what if the account preceded employment by the company and then he wanted to leave with the account? Considering how social media accounts are actually used, the

65. *PhoneDog*, 2012 WL 273323, at *1 (citing Plaintiff's First Amended Complaint).

66. PhoneDog, LLC, v. Kravitz, No. 3:11-cv-03474-MEJ, 2013 WL 207773 (N.D. Cal. Jan. 7, 2013).

threads between personal and professional can became impossibly tangled, even if the stated purpose of the account is personal – not professional.

2. *Maremont v. Susan Fredman Design Group, Ltd.*

In *Maremont*, the employer used an employee's personally identified social media account for marketing purposes, speaking as the "voice" of the employee. In this case, we see the difficulty in drawing a clear line between employer and employee social media communications when technical functionality does not make such a distinction easy to execute. Maremont worked as an interior designer working for Susan Fredman Design Group (SFDG) as SFDG's Director of Marketing, Public Relations, and e-commerce.[67] Maremont had a personal Twitter (@jmaremont) and Facebook accounts that were nevertheless tied to her career and work,[68] where there did not appear to be a clear delineation between the two. Maremont also created a SFDG sub-blog "Designer Diaries: Tales from the Interior" hosted on SFDG's main blog.[69] Maremont's image appeared on each blogpost and tweet authored by her.[70]

As the court discusses, the difficulty in determining what was personal and what was related to her job is also based on the technological means of using social media:

> Maremont created a Facebook page for SFDG at Fredman's request. Maremont opened SFDG's Facebook page through her personal Facebook account on February 17, 2009. In order to administer SFDG's page, the page administrator had to log on through his or her personal Facebook account.[71]

67. Maremont v. Susan Fredman Design Grp., Ltd., 772 F. Supp. 2d 967, 969 (N.D. Ill. 2011).

68. Maremont v. Susan Fredman Design Grp., Ltd., No. 10 C 7811, 2014 WL 812401, at *1 (N.D. Ill. Mar. 3, 2014).

69. *Maremont*, 772 F. Supp. 2d at 969.

70. *Id.*

71. *Maremont*, 2014 WL 812401, at *2.

Access to Maremont-named account passwords became an issue between the parties:

> To keep track of the various social media campaigns she was conducting for SFDG, Maremont created an electronic spreadsheet in which she stored all account access information, including the passwords for her Twitter and Facebook accounts. . . . Laurice Shelven, an intern at SFDG from September 8, 2009 to December 30, 2009, states that Maremont provided her with the spreadsheet so she could assist Maremont in composing and publishing posts for the various SFDG social media campaigns.[72]

In September 2009, Maremont was severely injured and was in the hospital for an extended stay.[73] While Maremont was at the hospital, SFDG continued to access and post from the personal accounts of Maremont.[74] All of the posts and tweets showed Maremont's name and image, meaning that any followers would have the erroneous impression that Maremont was the author. Maremont asked SFDG to stop using her account. Because SFDG did not stop using her account, Maremont changed the passwords to her personal Facebook and Twitter accounts.[75]

Maremont was very close to bringing her Lanham claim to a jury, considering the court found that "the Twitter account was in Maremont's name, not SFDG's, and it would be reasonable to conclude that posts made on that account were made by Maremont herself."[76] But because Maremont did not claim any actual economic damages, a requirement for Lanham claims, her former employer won their summary judgment

72. *Id.*
73. *Maremont*, 772 F. Supp. 2d at 969.
74. *Id.*
75. *Id.*
76. *Maremont*, 2014 WL 812401, at *5.

motion on this issue.[77] However, her claim for a violation of the Stored Communications Act was allowed to continue, considering there was an issue that could not be determined by summary judgment: "Defendants admit that they accessed Maremont's Facebook account and posted Tweets to Maremont's Twitter account. The parties dispute whether Defendants' actions were authorized or exceeded the scope of Maremont's authorization."[78]

From the viewpoint of the employer, the use of the personal accounts was to only keep the social media presence of the company active during Maremont's injury. But from the perspective of the employee, prying into her personal accounts – even if she gave the passwords to others was a step too far in intruding into her personal life.

B. Sponsorship Deals: *Mendendall v. Hanesbrands, Inc.*

Another way to look at the issue of what types of limitations employers should have over the social media interactions of employees relates to the moral rights clauses included in brand sponsorship agreements. To enter into these agreements, entertainers, including professional athletes, have the opportunity to consult with attorneys and other representatives putting their interests first. The money gained through these deals is not their sole source of income – thereby allowing for the type of contracting most employees do not receive. In contrast to "at-will" employment or contracts of adhesion, these contracts when containing morals clauses, including limitations on the use of social media, are entered into with full knowledge of the consequences. Additionally, public figures can be sought out by brands specifically for their personas which is not generally the reason why average employees are hired.

Therefore, looking at a case where a brand sponsor took action against an athlete's "bad actions" on social media helps to demonstrate how those with more contracting ability than the vast majority of employees can speak openly – even if they

77. *Id.* at 4-5.
78. *Id.* at 6.

have a branding agreement that says otherwise. On July 18, 2011, NFL's Pittsburgh Steelers player, Rashard Mendenhall, sued Hanesbrands, Inc. claiming that Hanesbrands breached their talent agreement by terminating his exclusive endorsement contract based on several controversial tweets from his twitter account, @R_Mendendall.[79] Mendenhall used Twitter "to be himself, to express his opinions and [to] foster debate on controversial and non-controversial issues."[80] Hanesbrands had not taken any steps against previous potential polarizing tweets, but did act to terminate the contract a week after Mendenhall issued a series of tweets in May 2011 concerning the public celebrations of Osama bin Laden's death.[81] His tweets included:

> What kind of person celebrates death? It's amazing how people can HATE a man they never even heard speak. We've only heard one side . . .
> . . . .
> For those of you who said we want to see Bin Laden burn in hell and piss on his ashes, I ask how would God feel about your heart?
> There is not an ignorant bone in my body. I just encourage you to #think
> @dkller23 We'll never know what really happened. I just have a hard time believing a plane could take a skyscraper down demolition style.[82]

The termination was based on the morals clause of Mendenhall's contract:

> If Mendenhall commits or is arrested for any crime or becomes involved in any situation or occurrence . . . tending to bring Mendenhall into

79. Mendenhall v. Hanesbrands Inc., 856 F. Supp. 2d 717 (M.D.N.C. 2012).
80. *Id.* at 720.
81. *Id.*
82. *Id.*

> public disrepute, contempt, scandal or ridicule, or tending to shock, insult or offend the majority of the consuming public or any protected class or group thereof, then we shall have the right to immediately terminate this Agreement. [Hanesbrands'] decision on all matters arising under this Section . . . shall be conclusive.[83]

In a public statement, Hanesbrands elaborated on its position regarding their view of the breach of the morals clause:

> Champion is a strong supporter of the government's efforts to fight terrorism and is very appreciative of the dedication and commitment of the U.S. Armed Forces. Earlier this week, Rashard Mendenhall, who endorses Champion products, expressed personal comments and opinions regarding Osama bin Laden and the September 11 terrorist attacks that were inconsistent with the values of the Champion brand and with which we strongly disagreed. . . . Champion was obligated to conduct a business assessment to determine whether Mr. Mendenhall could continue to effectively communicate on behalf of and represent Champion with consumers.
>
> While we respect Mr. Mendenhall's right to express sincere thoughts regarding potentially controversial topics, we no longer believe that Mr. Mendenhall can appropriately represent Champion and we have notified Mr. Mendenhall that we are ending our business relationship.[84]

Mendenhall also released a blog post following his tweets where he said:

83. *Id.* at 725.
84. *Id.* at 721-22.

> This controversial statement was something I said in response to the amount of joy I saw in the event of a murder. I don't believe that this is an issue of politics or American pride; but one of religion, morality, and human ethics. . . . I apologize for the timing as such a sensitive matter, but it was not meant to do harm. I apologize to anyone I unintentionally harmed with anything that I said, or any hurtful interpretation that was made and put in my name.
>
> It was only meant to encourage anyone reading it to think.[85]

Hanesbrand viewed these tweets as causing a public scandal – and thereby Mendenhall was in breach of the contract. However, applying New York law to the Hanesbrands' motion for judgment as a matter of law, Chief District Judge James A. Beaty concluded that issues of fact remained regarding the public's response to the tweets and the reasoning of the contract termination.[86] Because the evidence presented was contradictory (supportive tweets presented by Mendenhall and negative news reports submitted by Hanesbrands), the case could not be resolved on a motion for judgment on the pleadings.[87]

Additionally, Steelers President Art Rooney II released a statement regarding Mendenhall's tweets:

> I have not spoken with Rashard, so it is hard to explain or even comprehend what he meant with his recent Twitter comments. The entire Steelers organization is very proud of the job our military personnel have done and we can only hope this leads to our troops coming home soon.[88]

85. *Id.* at 721.

86. *Id.* at 727.

87. *Id.* at 728.

88. *Rashard Mendenhall Doesn't Hold Back*, ESPN (May 4, 2011, 9:57 AM), http://sports.espn.go.com/nfl/news/story?id=6471433.

However, Mendenhall received no punishment from the Steelers organization or the NFL based on his tweets. The case was reported settled at mediation in December 2012.[89]

V. Student Athletes

Professional athletes may have limitations on their social media use placed on them by either the brands they contract with for sponsorship or by their teams, but these limitations are contracted. On the other hand, there have been a number of discussions about how student athletes have much more limited personal autonomy than either the general student population or professional athletes. Another limitation placed on student athletes that distances them from their peers are partial or complete bans on student athlete use of social media. Some law review articles have argued that these restrictions go too far,[90] though not all follow that viewpoint.[91] Based on the NLRB ruling (discussed *infra*) regarding student athletes, it is possible that students will be doubly protected both by this ruling and by state-specific social media password laws, if they are indeed considered both students and employees.

Student athletes, like most college students in their late-teens and early twenties, are in the process of figuring out who they are – and part of the learning process for many is communicating and socializing using social media. As danah

89. *See* Mendenhall v. Hanesbrands Inc., 856 F. Supp. 2d 717 (M.D.N.C. 2012) (more specifically, the docket, No. 1:11CV00570, which presents the case settled in December of 2012).

90. *See* J. Wes Gay, *Hands Off Twitter: Are NCAA Student-Athlete Social Media Bans Unconstitutional?*, 39 FLA. ST. U. L. REV. 781, 804 (2012) ("Under either the Tinker substantial disruption test or a narrowly tailored test, these team-wide and season-long social media bans are likely violations of the student-athletes' First Amendment speech rights."); Marcus Hauer, *The Constitutionality of Public University Bans of Student-Athlete Speech Through Social Media*, 37 VT. L. REV. 413 (2012); Frank D. LoMonte, *Fouling the First Amendment: Why Colleges Can't, and Shouldn't, Control Student Athletes' Speech on Social Media*, 9 J. BUS. & TECH. L. 1 (2014); Kayleigh R. Mayer, *Colleges and Universities All Atwitter: Constitutional Implications of Regulating and Monitoring Student-Athletes' Twitter Usage*, 23 MARQ. SPORTS L. REV. 455, 468 (2013).

91. Elizabeth Etherton, *Seen but Not Heard: Constitutional Questions Surrounding Social Media Policies Affecting Student-Athletes*, 11 WILLAMETTE SPORTS L.J. 41 (2014).

boyd discusses in the book, *It's Complicated: The Social Lives of Networked Teens*, teens and young adults learn through interacting with others on social media and through creating their identities.[92] An absolutist rule that restricts the use of social media prevents student athletes from learning how to use social media responsibly. Moreover, many of the restrictions for student athletes are based around banning the usage of specific inflammatory words.[93] The focus on specific words leaves out the overall responsible use of social media, or more specifically about behavior, interaction with others, or appropriate topics of conversation. Finally, the limitations are established under the working assumption that an individual student athlete is communicating on behalf of the university, or as a representative of a university, not as a private citizen.[94]

The focus of many of these regulations is on the impact on the school's brand rather than on the education of students. Some critics, such as Zak Brown, detail the focus on the brand, but also the difficulties in balancing speech rights and potential damage to the brand:

> Allowing a student-athlete to voice somewhat controversial political or academic views on

92. *See generally* DANAH BOYD, IT'S COMPLICATED: THE SOCIAL LIVES OF NETWORKED TEENS (2014).

93. Jack Dickey, *Don't Say "Colt 45" or "Pearl Necklace": How To Avoid Being Busted By The Facebook Cops of College Sports*, DEADSPIN (May 24, 2012), http://deadspin.com/5912230/dont-say-colt-45-or-pearl-necklace-how-to-avoid-being-busted-by-the-facebook-cops-of-college-sports; Jack Dickey, *"Ass Ranger" To "Zoomies": The Complete List Of Things College Athletes Can't Say on Social Media*, DEADSPIN (May 24, 2012), http://deadspin.com/5912832/ass-ranger-to-zoomies-heres-the-complete-list-of-what-college-athletes-shouldnt-say-on-twitter; Pete Thamel, *Tracking Twitter, Raising Red Flags*, N.Y. TIMES, March 31, 2012. at D1 (A social media tracking company for college teams uses "a computer application that searches social media sites that athletes frequent, looking for obscenities, offensive commentary or words like "free," which could indicate that a player has accepted a gift in violation of N.C.A.A. rules. … A company executive says these programs 'look for things that could damage the school's brand'").

94. Kayleigh R. Mayer, *Colleges and Universities All Atwitter: Constitutional Implications of Regulating and Monitoring Student-Athletes' Twitter Usage*, 23 MARQ. SPORTS L. REV. 455, 468 (2013) ("Student-athletes are still students; therefore, if only the student-athletes are subject to regulations and penalties for using Twitter and the rest of the student body is not, then the schools may not be treating those similarly situated alike.").

> Twitter or Facebook would be preferable to a First Amendment suit that could result in far worse press and litigation costs. If the student-athlete's statement is truly egregious and damaging to the program, it is likely that it would either reasonably be perceived to bear the imprimatur of the school or cause substantial disruption on campus. . . . But punishing speech because of a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" would be a questionable decision.[95]

Eric D. Bentley, the Senior Assistant General Counsel for the University of Houston System, has written a law review article that gives practical advice regarding social media policies for athletes from an institutional perspective including the following best practices:

> Best Practice Tip #1: Do Not Ban Athletes' Use of Social Media
>
> . . . .
>
> Best Practice Tip #2: Place Reasonable Restrictions on the Use of Social Media and then Educate the Athletes on the Dangers [and]
>
> . . . .
>
> Best Practice Tip #3: Evaluate the Content of Social Media Postings on a Case by Case Basis and with Extreme Caution.[96]

Most of the limitations suggested by Bentley fall within the types of restrictions that would be used for any student or employee acting as a public representative of an institution -

95. Zak Brown, Note, *What's Said in This Locker Room, Stays in This Locker Room: Restricting the Social Media Use of Collegiate Athletes and the Implications for Their Institutions*, 10 J. TELECOMM. & HIGH TECH. L. 421, 442 (2012).

96. Eric D. Bentley, *He Tweeted What? A First Amendment Analysis of the Use of Social Media by College Athletes and Recommended Best Practices for Athletic Departments*, 38 J.C. & U.L. 451, 458-62 (2012).

not just on social media. He suggests that an athlete can be disciplined based on the content of the posting, only within very specific categories, including for fighting words/true threats; defamatory statements; and postings that indicate violations of criminal law.[97] For potentially unprotected speech, an athlete can be disciplined based on the content of the posting after a detailed review of multiple factors, for engaging in harassing speech, or materially disruptive speech.[98] Bentley's only two categories that would not generally be covered by other types of student or employee limitations are obscenity and violations of "reasonable" team rules or NCAA rules.[99]

The issue of what exactly student athletes are legally – just students, players who happen to be students, employees, or some combination – has moved to the forefront recently. On March 26, 2014, Regional Director of the NLRB, Peter Sung Ohr, issued Decision 13-RC-121359, finding that Northwestern football players receiving grant-in-aid scholarships are employees under the NLRA.[100] The decision by the Regional Director is not one based on whether student athletes are employees within a larger picture regarding ethical issues, such as potential exploitation of students, or whether it is best for players to be considered employees over students. The post-hearing Brief of the College Athletes Players Association in the case demonstrates how student athletes' interactions with the public, including social media, are limited by Northwestern:

> Players are required to make media appearances as directed by the University. The Players are also subject to a social media policy, separate from the policy applicable to students, which is enforced by the Athletic Department. . . . Violations of this policy can result in dismissal from the football program and loss of the Player's

97. *Id.* at 463-67.

98. *Id.* at 469-73.

99. *Id.* at 466-69.

100. Nw. Univ. v. Employer & Coll. Athletes Players Ass'n, 2014 N.L.R.B. Lexis 221 (Mar. 26, 2014), http://mynlrb.nlrb.gov/link/document.aspx/09031d4581667b6f.

> athletic scholarship. . . . Players must give access to their Facebook and Twitter accounts to coaches who monitor what the Players say or post online. . . . The Players are prohibited from using certain swear words . . . and can be suspended if they "embarrass [the] team" [sic] . . . . The University also prohibits a Player from providing any media interview unless arranged by the Athletic Department communications staff.[101]

Instead of making a decision based on political grounds or the larger social implications, the decision follows the usual NLRB checklist regarding whether players statutorily behave as employees. In the *Northwestern* case, the players are considered employees because they perform monetarily valuable services for a revenue-generating university sports program. The student athletes are recruited for and granted scholarships because of their skills in football rather than academics, and receive scholarships as compensation for their athletic services. They are required to sign agreements that serve as an employment contract with detailed information regarding length-of and conditions-for receiving compensation and are dependent on their scholarships to pay for basic necessities (considering they are limited regarding outside employment). These student athletes' scholarships are tied to their actions as football players; their scholarships may be immediately canceled if team rules are violated.[102] Much of the *Northwestern* decision concerned the complete picture of the controlled lives of athletes, whom "nearly every aspect of the players' private lives" is controlled including where they live, any employment, off-campus travel, and interaction with the larger world, including social media posts and dealings with media.[103] At the time of publication, this decision is being

101. Post-Hearing Brief of the Petitioner, Coll. Athletes Players Ass'n, Nw. Univ. v, Employer & Coll. Athletes Players Ass'n, 13-RC-121359, 2014 WL 1922054 (Mar. 17, 2014) (citations omitted).

102. *Nw. Univ.*, 2014 N.L.R.B. Lexis 221.

103. *Id.* at 16.

appealed.[104]

The NLRB decision included discussions about social media activity, reworking the language from the post-hearing brief almost exactly:

> The players must also abide by a social media policy, which restricts what they can post on the internet, including Twitter, Facebook, and Instagram. In fact, the players are prohibited from denying a coach's "friend" request and the former's postings are monitored. The Employer prohibits players from giving media interviews unless they are directed to participate in interviews that are arranged by the Athletic Department. Players are prohibited from

104. Nw. Univ. v. Employer & Coll. Athletics Players Ass'n, 2014 WL 1653118, at *1 (Apr. 24, 2014) (review granted); Nw. Univ. v. Employer & Coll. Athletes Players Ass'n, 13-RC-121359, 2014 WL 1881179, at *1 (May 12, 2014) (Notice and invitation to file briefs, asks Briefs to answer the following questions: "1. What test should the Board apply to determine whether grant-in-aid scholarship football players are "employees" within the meaning of Section 2(3) of the Act, and what is the proper result here, applying the appropriate test? 2. Insofar as the Board's decision in Brown University, 342 NLRB 483 (2004), may be applicable to this case, should the Board adhere to, modify, or overrule the test of employee status applied in that case, and if so, on what basis? 3. What policy considerations are relevant to the Board's determination of whether grant-in-aid scholarship football players are 'employees' within the meaning of Section 2(3) of the Act and what result do they suggest here? 4. To what extent, if any, is the existence or absence of determinations regarding employee status of grant-in-aid scholarship football players under other federal or state statutes or regulations relevant to whether such players are 'employees' under the Act? 5. To what extent are the employment discrimination provisions of Title VII, in comparison to the antidiscrimination provisions of Title IX of the Education Amendments Act of 1972, relevant to whether grant-in-aid scholarship football players are 'employees' under the Act? 6. If grant-in-aid scholarship football players are 'employees' under the Act, to what extent, if any, should the Board consider, in determining the parties' collective-bargaining obligations, the existence of outside constraints that may alter the ability of the parties to engage in collective bargaining as to certain terms and conditions of employment? What, if any, should be the impact of such constraints on the parties' bargaining obligations? In the alternative, should the Board recognize grant-in-aid scholarship football players as 'employees' under the Act, but preclude them from being represented in any bargaining unit or engaging in any collective bargaining, as is the case with confidential employees under Board law?").

> swearing in public, and if a player "embarrasses" the team, he can be suspended for one game. A second offense of this nature can result in a suspension of up to one year.[105]

It is unclear whether this ruling will stand. However, even if the national NLRB overturns this decision, the fact that student athletes generally face more regulations of social media than other students and non-student athlete employees has now officially been noted. Some commentators have begun to theorize solutions benefiting student athletes, assuming that the ruling stands.[106]

VI. The Next Battleground

After student-athletes, the professoriate is the next category of employees whose jobs are affected by a blurred line between the personal and professional use of social media. The Kansas Board of Regents recently revised its university personnel policies making improper use of social media grounds for discipline up to and including termination for both faculty and staff. [107] Social media is defined as "any online tool or service through which virtual communities are created allowing users to publish commentary and other content, including but not limited to blogs, wikis, and social networking sites such as Facebook, LinkedIn, Twitter, Flickr, and YouTube" – those that still use email and listservs will be glad to hear the policy does not apply to them.[108]

The policy does have a First Amendment saving clause, "recogniz[ing] the First Amendment rights as well as the responsibilities of all employees, including faculty and staff, to

105. Nw. Univ. v. Employer & Coll. Athletes Players Ass'n, 13-RC-121359, 198 L.R.R.M. (BNA) 1837 (N.L.R.B.), 2014 WL 1246914, 2014 N.L.R.B. Lexis 221 (Mar. 26, 2014).

106. *See* M. Tyler Brown, *College Athletics Internships: The Case for Academic Credit in College Athletics*, 63 AM. U. L. REV. 1855 (2014).

107. *Use of Social Media by Faculty and Staff,* KAN. BD. OF REGENTS (policy effective December 18, 2013), *available at* http://www.kansasregents.org/policy_chapter_ii_f_use_of_social_media.

108. *Id.* § 6(b)(1).

speak on matters of public concern as private citizens, if they choose to do so, including through social media."[109] However, what defines a "private citizen" is not articulated, but rather is based on institutional identity and branding:

> The Board supports the responsible use of existing and emerging communications technologies, including social media, to serve the teaching, research, and public service missions of the state universities. These communications technologies are powerful tools for advancing state university missions, but at the same time pose risks of substantial harm to personal reputations and to the efficient operation of the higher education system.[110]

The policy also does not reference how people often include their job title as part of their identity as a common practice within professional circles, including academia, or include references to their alma mater or school of employment through fan participation:

> When determining whether a particular use of social media constitutes an improper use, the following shall be considered: academic freedom principles, the employee's position within the university, whether the employee used or publicized the university name, brands, website, official title or school/department/college or otherwise created the appearance of the communication being endorsed, approved or connected to the university in a manner that discredits the university, whether the communication was made during the employee's working hours and whether the communication was transmitted utilizing university systems or

109. *Id.* § 6(a).
110. *Id.* § 6(b).

equipment.[111]

If one was an employee of a university in Kansas, looking at the disciplinary standard above, would one be able to refer to one's job title within a personal blog, or display their participation as a fan at sporting events, such as wearing team merchandise?[112] Based on this definition, any personal identifier shared online, even casually (i.e. career/place of employment, favorite sports team, participation in a performance or talk) could be grounds for employment termination. Considering that the default of social media cultural norms is the open sharing of personal information to define an individual's online identity, the law and online culture continue to be at odds.

VII. Conclusion

In this article, we have explored the question of who gets to determine when an individual's online speech represents - or hurts - a company or brand. For professional athletes and employees with true negotiated contracts, restricting or monitoring an individual's "free time" speech could theoretically be an acceptable response (ex. a "moral contracts" provision.). After all, when both parties have true economic power to either enter into the contract – or not, with lawyers representing both sides, interference by courts or policymakers seems unnecessary.

However, when most employees either have contracts of adhesion or instead are at-will employees, employers should not have social media policies that unfairly restrict their employees' social media usage when not on the job. Creating a simplified national regulatory regime where the default is privacy for social media accounts would help protect the

111. *Id.* § 6(b)(4).

112. Richard E. Levy, *The Tweet Hereafter: Social Media and the Free Speech Rights of Kansas Public University Employees*, 24 KAN. J.L. & PUB. POL'Y 78, 106 (2014) ("[T]he original Social Media Policy would appear to authorize the University to revoke my tenure and dismiss me for the publication of this article using social media if it determined that my analysis or conclusions are contrary to its interests.").

interests of employees. Also, this default would better allow the public to see statements from individuals as reflecting only their own views rather than automatically as statements reflecting viewpoints of an employer. Moving to the point where the public views social media from an individual in their "private" space as reflecting upon them, rather than also on their employer will take time – and adjustment.

Using the example of student athletes, many had social media accounts before their athletic vocations became of interest to the potential financial interest of educational institutions that might also be their employer. And like any other student – or employee, they may indeed interact on social media in a way that others wish they had not. There are much more important issues and structural problems regarding student-athletes, including how students are impacted by concerns over with maintaining team image and profitability (e.g. the University of North Carolina-Chapel Hill eligibility academic fraud scandal[113]) not to mention potential crime cover-ups. Focusing on social media use prioritizes "low-hanging fruit" over systemic problems in academic policy.

On the other hand, executives, human resource professionals, and others who have direct control over hiring and firing, based on their relationship to other employees, have a demonstrated obligation to not engage in discriminatory practices. The conundrum is that evaluating an individual's work based on what they say on social media is only reflecting a small segment of an individual's daily life or opinions. Someone could be acting in a legally indefensible manner in regards to hiring, regardless of their social media presence; focusing on social media is the wrong nexus – or at the very least, the easy nexus. For now, the approach that federal financial regulators take regarding social media, whether a statement could be seen as directed by or standing in for the viewpoint of the employer, is the closest to a well-balanced legal test as presently available.

However, social media technology and online cultural norms now make the lives and the speech of employees public

113. Jack Stripling, *Widespread Nature of Chapel Hill's Academic Fraud Is Laid Bare*, CHRON. OF HIGH. EDUC. (Oct. 23, 2014), https://chronicle.com/article/Widespread-Nature-of-Chapel/149603/.

in ways that were previously obscured. Additionally, social media technology and online cultural norms blur the line between who is considered an audience versus a friend, or an individual versus a brand. With this in mind, there should be limitations to the ability for an employer to control or monitor the social media activity and speech of an employee that has no direct impact on the public perception of the company.

In the end, the question remains – how intrusive do we want employers to be in the lives of their employees? Most employers have a list of characteristics that they do not make employment decisions about, some required by law. During the time of employment, an employer may seek to restrict employee speech that may negatively impact a company's bottom line, such as union organizing.

While many individuals participate in social media platforms intending to connect with peers or families, there is an unacknowledged public-facing role assumed as well, due to the functionality of these services. Current law and policy about social media and employees approach social media websites primarily as a platform for marketing or professional discussion, but do not fully address the issue of *social networking*, that is – the activity and behavior that drives the activity of social media websites. Future focus should more closely observe the ever-changing and reciprocal impact of online behavioral activity, technology functionality, and business use that drive how social media websites are used, and impact how people work, live, and play online, often at the same time.

Appendix: State Laws Regarding Employer and Educational Institution Regulation of Employees and Higher Education Students
(as of May 2014)

State	Bill #	Status	Type of Limitation
Arkansas	H.B. 1901[114]	April 22, 2013; Signed by Governor, Act 1480	Prohibits an employer from requiring or requesting a current or prospective employee from disclosing his or her username or password for a social media account.
Arkansas	H.B. 1902[115]	April 8, 2013. Signed by Governor, Act 998.	Prohibits an institution of higher education from requiring or requesting a current or prospective employee or student from disclosing his or her username or password for a social media account.

114. H.B. 1901, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).
115. H.B. 1902, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

California	A.B. 1844[116]	September 27, 2012. Signed by Governor, Chapter 618.	Prohibits an employer from requiring or requesting an employee or applicant for employment to disclose a user name or password for the purpose of accessing personal social media to access personal social media in the presence of the employer, or to divulge any personal social media. Prohibits an employer from discharging, disciplining, threatening to discharge or discipline, or otherwise retaliating against an employee or applicant for not complying with a request or demand by a violating employer.

116. Assemb. B. 1844, 2012 Assemb., Reg. Sess. (Cal. 2012).

California	S.B. 1349[117]	September 27, 2012. Signed by Governor, Chapter 619.	Prohibits public and private postsecondary educational institutions, employees and representatives from requiring or requesting a student, prospective student, or student group to disclose personal social media information. Prohibits such institutions from threatening or taking certain actions for refusal of a demand for such information. Requires certain actions by such institutions to ensure compliance with these provisions. Requires such institution to post social media privacy policy on its web site.
Colorado	H.B. 1046[118]	May 11, 2013. Signed by Governor, Chapter 195.	Concerns employer access to personal information through electronic communication devices.

117. S.B. 1349, 2012 S. Reg. Sess. (Cal. 2012).
118. H.B. 1046, 2013 Gen. Assemb., Reg. Sess. (Colo. 2013).

Delaware	H.B. 309[119]	July20, 2012.Signed by Governor, Chapter 354.	Makes it unlawful for a public or nonpublic academic institution to mandate that a student or applicant disclose password or account information granting the academic institution access to students' or applicants' social networking profile or account. Prohibits academic institutions from requesting that a student or applicant log onto a personal social media account.
Illinois	H.B. 3782[120]	August 1, 2012. Signed by Governor. Public Act 97-0875.	Amends the Right to Privacy in the Workplace Act. Provides that it shall be unlawful for any employer to ask any prospective employee to provide any username, password, or other related account information in order to gain access to a social networking website where that prospective employee maintains an account or profile.

119. H.B. 309, 146th Gen. Assemb., Reg. Sess. (Del. 2012).
120. H.B. 3782, 97th Gen. Assemb., Reg. Sess. (Ill. 2012).

Illinois	H.B. 64[121]	Aug. 2, 2013. Signed by Governor, Public Act No. 129.	Creates the Right to Privacy in the School Setting Act. Defines "school" as an institution of higher learning as defined in the Higher Education Student Assistance Act, a public elementary or secondary school or school district, or a nonpublic school recognized by the State Board of Education. Provides that it is unlawful for a school to request or require a student or prospective student or his or her parent or guardian to provide a password or other related account information in order to gain access to the student's or prospective student's account or profile on a social networking website or to demand access in any manner to a student's or prospective student's account or profile on a social networking website.

121. H.B. 64, 98th Gen. Assemb., Reg. Sess. (Ill. 2013).

Illinois	S.B. 2306[122]	Aug. 16, 2013. Signed by Governor, Public Act No. 501.	Amends the Right to Privacy in the Workplace Act; provides that the restriction on an employer's request for information concerning an employee's social networking profile or website applies to only the employee's personal account; defines terms; provides that employers are not prohibited from complying with the rules of self-regulatory organizations.

122. S.B. 2306, 98th Gen. Assemb., Reg. Sess. (Ill. 2013).

Louisiana	H.B. 340[123]	May 22, 2014. Signed by Governor, Act No. 16.	Creates the Personal Online Account Privacy Protection Act; prohibits employers and educational institutions from requesting or requiring individuals to disclose information that allows access to or observation of personal online accounts; prohibits employers and educational institutions from taking certain actions for failure to disclose information that allows access to personal online accounts; limits liability for failure to search or monitor the activity of personal online accounts.
Maine	H.B. 838[124]	May 1, 2013. Enacted, Chapter 112.	Directs a study of social media privacy in schools and the workplace.

123. H.B. 340, 2014 Reg. Leg. Sess. (La. 2014).
124. H.B. 838, 126th Leg., 1st Reg. Sess. (Me. 2013).

Maryland	H.B. 964[125] S.B. 433[126]	May 2, 2012. Signed by Governor, Chapter 232/233.	Prohibits an employer from requesting or requiring that an employee or applicant disclose any user name, password, or other means for accessing a personal account or service through specified electronic communications devices.
Michigan	H.B. 5523[127]	Dec. 27, 2012. Signed by Governor, Public Act 478.	Prohibits employers and educational institutions from requiring certain individuals to disclose information that allows access to certain social networking accounts. Prohibits employers and educational institutions from taking certain actions for failure to disclose information that allows access to certain social networking accounts.
Nevada	A.B. 181[128]	June 13, 2013. Signed by Governor. Chapter 548.	Makes various changes to provisions governing employment practices.

125. H.B. 964, 2012 Reg. Sess. (Md. 2012).
126. S.B. 433, 2012 Reg. Sess. (Md. 2012).
127. H.B. 5523, 96th Leg., 2012 Sess. (Mich. 2012).
128. A.B. 181, 77th Reg. Ses. (N.V. 2013).

New Jersey	A.B. 2879[129]	December 3, 2012. Signed by Governor, Chapter 75.	Prohibits requirement to disclose user name, password, or other means for accessing account or service through electronic communications devices by institutions of higher education.
New Jersey	A.B. 2878[130]	Aug. 28, 2013. Signed by Governor, Chapter No. 2013-155	Prohibits requirement to disclose user name, password, or other means for accessing account or service through electronic communications device by employers.
New Mexico	S.B. 371[131]	April 5, 2013. Signed by Governor, Chapter 222.	Relates to employment; prohibits prospective employers from requesting or requiring a prospective employee to provide a password or access to the prospective employee's social networking account.

129. A.B. 2879, 215th Leg. (N.J. 2012).
130. A.B. 2878, 215th Leg. (N.J. 2012).
131. S.B. 371, 2013 Reg. Sess. (N.M. 2013).

New Mexico	S.B. 422[132]	April 5, 2013. Signed by Governor, Chapter 223.	Relates to education; prohibits public and private institutions of post-secondary education from requesting or requiring a student, applicant or potential applicant for admission to provide a password or access to the social networking account of the student or applicant for admission.
Oklahoma	H.B. 2372[133]	May 21, 2014. Signed by Governor, Chap. 315.	Relates to labor; prohibits employer from requesting or requiring access to social media account of certain employees; prohibits an employer from taking retaliatory personnel action for failure to provide access to social media account; authorizes civil actions for violations; provides for recovery of attorney fees and court costs; defines terms; provides for codification; provides an effective date.

132. S.B. 422, 2013 Reg. Sess. (N.M. 2013).
133. H.B. 2372, 54th Leg., 2d Sess. (Okla. 2014).

Oregon	H.B. 2654[134]	May 22, 2013; Signed by Governor. Chapter 204.	Prohibits an employer from compelling employee or applicant for employment to provide access to personal social media account or to add employer to social media contact list; prohibits retaliation by employer against employee or applicant for refusal to provide access to accounts or to add employer to contact list; prohibits certain educational institutions from compelling student or prospective student to provide access to personal social media account.
Oregon	S.B. 344[135]	June 13, 2013; Signed by Governor. Chapter 408.	Provides that a public or private educational institution may not require, request or otherwise compel a student or prospective student to disclose or to provide access to a personal social media account.

134. H.B. 2654, 2013 Reg. Sess. (Or. 2013).
135. S.B. 344, 2013 Reg. Sess. (Or. 2013).

Tennessee	S.B. 1808[136]	May 16, 2014. Signed by Governor, Chapter 826.	Creates the Employee Online Privacy Act of 2014 which prevents an employer from requiring an employee to disclose the username and password for the employee's personal internet account except under certain circumstances.
Utah	H.B. 100[137]	March 26, 2013. Signed by Governor, Chapter 94.	Modifies provisions addressing labor in general and higher education to enact protections for personal Internet accounts; enacts the Internet Employment Privacy Act, including defining terms, permitting or prohibiting certain actions by an employer; provides that the chapter does not create certain duties; provides private right of action; enacts the Internet Postsecondary Education Privacy Act.

136. S.B. 1808, 108th Gen. Assemb. (Tenn. 2014).
137. H.B. 100, 2013 Leg., Gen. Sess. (Utah 2013).

Vermont	S.B. 7[138]	June 3, 2013. Signed by Governor, Act 47	Relates to social networking privacy protection.
Washington	S.B. 5211[139]	May 21, 2013. Signed by Governor, Chapter 330.	Relates to employment practice; requires an employer cannot require any employee or prospective employee to submit any password or other related account information in order to gain access to the individual's personal social networking website account or profile.

138. S.B. 7, 2013-14 Gen. Assemb., Leg. Sess. (Vt. 2013).
139. S.B. 5211, 63d Leg., Reg. Sess. (Wash. 2013).

Wisconsin	S.B. 223[140]	Jan. 22, 2014. Signed by Governor, Act 208.	Relates to employer access to, and observation of, the personal Internet accounts of employees and applicants for employment; relates to educational institution access to, and observation of, the personal Internet accounts of students and prospective students; relates to landlord access to, and observation of, the personal Internet accounts of tenants and prospective tenants; provides a penalty.

140. S.B. 223, 2013-14 Leg., Gen. Sess. (Wis. 2014).