

#EpicFail: How to Avoid Social Media Disasters in the Hiring Process

Can school districts use social media to vet candidates?

By Chase Potter and Amanda Costello

No longer are social networking sites like Facebook and Twitter the domain of only the young. Most of us—children, teenagers, adults, teachers, administrators, and even Chase’s 92-year-old grandfather—use some type of social media. In fact, according to an ongoing study by the Pew Research Center (2014), 74% of adults who are online use some type of social media networking site. In February 2005, that number was only 8%.

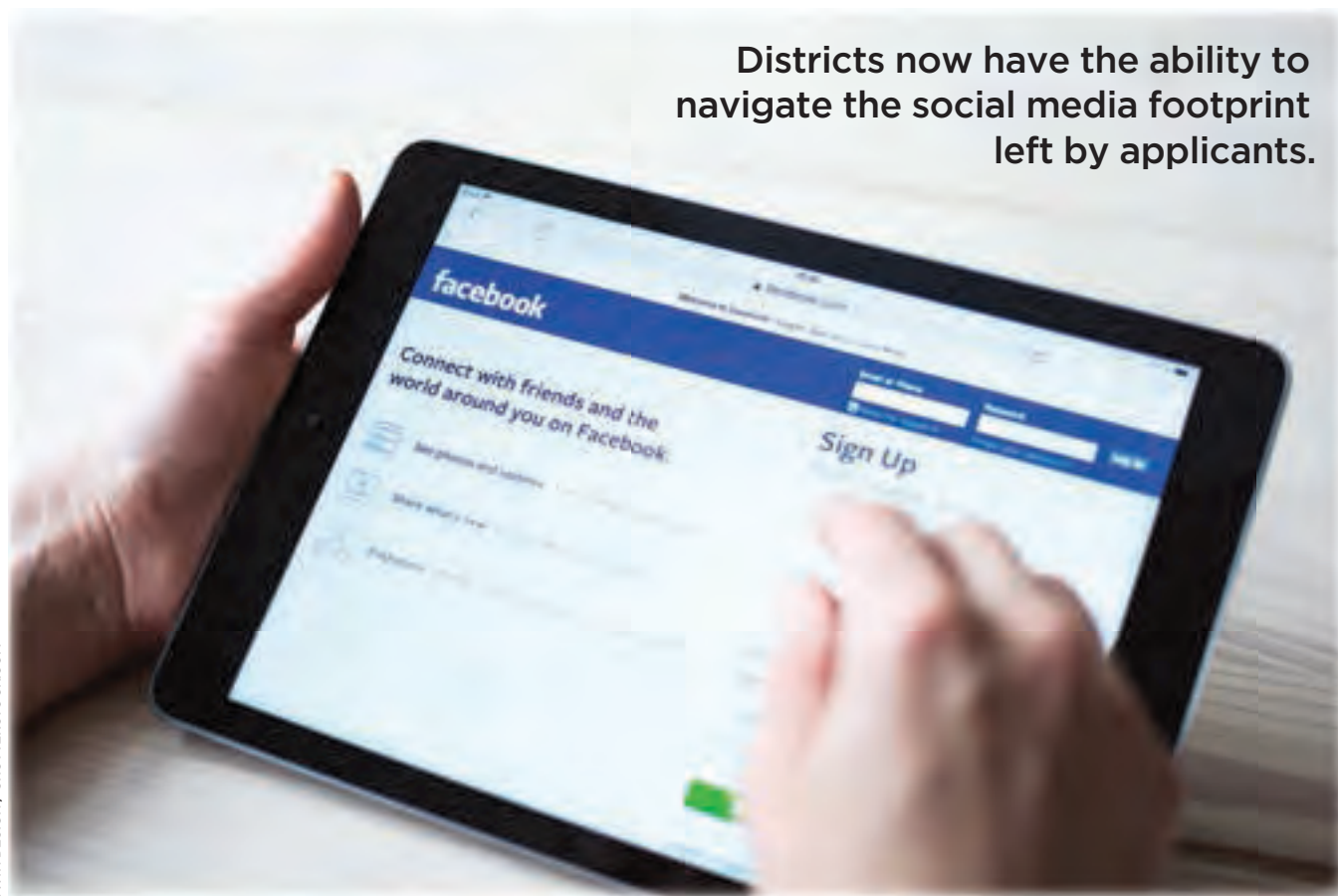
The rapid increase in social media use affects school districts in a variety of ways. Districts now have the ability to navigate the social media footprint left by

applicants—thus providing districts with access to an abundance of information that does not appear on the applicant’s résumé. Although social media can be an effective tool for vetting candidates, it is imperative that districts are aware of the potential pitfalls caused by such practice. This article will help ensure that your district uses social media effectively in the hiring process without exposing itself to liability.

Concern 1: The Applicant’s Right to Privacy

An applicant is under consideration for a teaching position. Before the interview, the person in charge of hiring

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wants to run an Internet search to investigate the candidate. Can the district run the search without violating the candidate's right to privacy? Generally, the answer is yes.

The Fourth Amendment provides individuals the right to be free from *unreasonable* searches and seizures. For a search to be considered unreasonable, a person must exhibit an actual expectation of privacy that is objectively reasonable.

At Facebook's 8 Conference in April 2010, Facebook founder Mark Zuckerberg said that "we are building a web where the default is social." In other words, when you decide to post personal information to your Facebook page, such information can and will be distributed far and wide without your further consent. Therefore, when an applicant posts information on Facebook or other social media sites, he or she surrenders any reasonable expectation of privacy with regard to that information—thereby eliminating any Fourth Amendment concerns.

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But what about password-protected sites or social media pages that have privacy settings that allow only certain individuals (e.g., friends and family) to view the information? Can a district require applicants to provide their password or login ID for the site during the interview? It depends (a lawyer's favorite answer). Some states have passed "social media privacy laws" outlawing that practice. But others have not.

Two years ago, California enacted legislation barring employers from requiring job applicants to provide social media passwords. But many California legal agencies have interpreted the law as applying only to private employers and have continued to require applicants to disclose their passwords when asked to do so. A representative for the California Teachers Association called it "an outrageous invasion of privacy that could be extended to educators and school district applicants" (Gutierrez 2014).

In 2014, a bill was proposed in California to clarify that the state's privacy law applies to all employers (both private and public), but the bill stalled. It will be interesting to see how California and other states address the issue moving forward.

Before requiring applicants to disclose their social media passwords, school districts should consider the following: (a) Is this practice allowed in our state, and (b) if so, is it worth doing? Even if the practice is legal in your state (for now), a number of practical concerns remain.

For example, what kind of message does it send to the applicant? Once word gets around that your district

requires applicants to disclose their social media password or login ID to their password-protected site during the interview, will it decrease the number of quality applicants? If your district decides to implement the practice, the interviewer will need to be prepared to answer the following question from the applicant: "Is there something in particular you're looking for that isn't on my résumé? I'm happy to discuss anything that relates to my qualifications and employment history with you while I'm here."

Such concerns may outweigh the potential benefits of any information you may obtain from a password-protected site—but that is a decision for your district to make. The primary concern is ensuring that such practice is legal in your state.

Concern 2: Too Much Information

When a district performs a social media check, it is in danger of discovering information that cannot be used in the hiring decision. For example, the "About" section of an individual's Facebook profile often reveals the person's age and religion. Social media checks may also reveal information regarding the applicant's race, disability, and military status, and whether the applicant is pregnant. Once a district sees that unusable information, it cannot "unsee" it. Having seen that information exposes districts to potential "refusal to hire" claims under Title VII or other antidiscrimination laws.

So how does a district go about searching an applicant's social profiles? On April 25, 2012, the U.S. Equal Employment Opportunity Commission issued updated guidance on the consideration of an applicant's arrest and conviction records in the hiring process. That guidance focused on preventing discrimination on the basis of applicants' and employees' race and national origin, recognizing the disparate impact on minority applicants and employees from neutral policies and practices regarding arrest and conviction records.

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To address that impact, the guidance recommended that consideration of such information must be related to the job and must serve a business necessity. Focusing on job relatedness and business necessity helps prevent consideration of unnecessary information that should be ignored in the hiring process.

One way for districts to address that issue is by hiring an independent investigator (or appointing someone within the district who will not be involved in the hiring decision) to conduct the social media check and filter out unusable information. The person making the hiring decision, then, would be screened from the search

and—importantly—would not be privy to any unusable information.

Finally, any information found through online searches should always be vetted for accuracy. Oftentimes, an Internet search of one person's name yields information about an entirely different individual. For example, when you google Chase Potter, one of the first results is a YouTube video of Chase Potter playing the guitar and singing. Trust us, nobody wants to hear this Chase Potter play the guitar or sing. Moral of the story: be sure to confirm that any information discovered from an online search actually relates to the applicant in question.

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Safe Navigation

It is imperative that school districts develop and implement policies for the use of information found through online searches of applicants. Privacy concerns, the danger of discovering too much information, and potential

liability resulting from those factors should be considered in developing such policies and guidelines. Armed with a strong policy, school districts will be able to effectively and safely navigate the potential pitfalls of social media as they relate to the hiring process.

References

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