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# Guest Article: Labor Negotiations in the Age of Social Media

*[Editor's Note: From time to time, we publish guest articles that we think inform readers on timely and relevant issues related to employer-employee relations and negotiations. This guest article by Jordan Bilbeisi, Partner, Fagen Friedman & Fulfrost (F3), sheds light on negotiation communications in the age of social media.]*

In recent years, the traditional means by which school employers and their unions have communicated with staff and the public largely have been replaced by electronic communications and social media. The speed, reach, and efficiency, of electronic communications offer considerable benefits, as well as challenges. For example, a union might post an update to its public Facebook page mere minutes after negotiations, which can be immediately viewed by its entire membership. The post can also be viewed by anyone else following that page, including parents and students. The urge to be the first to post can result in factual errors and the rapid spread of misinformation. Individuals may post inflammatory comments based on emotion rather than fact. All of this can occur before the other party has had a chance to get back to the office.

For California public school employers and unions, the law is only now starting to catch up with the significant legal issues raised by electronic communications, which have been prevalent in the workplace since the early 2000s. For example, in 2018, the Public Employment Relations Board ("PERB") held that, under the Educational Employment Relations Act ("EERA"), a union's right to access an employer's "other means of communications" includes email systems. (*Los Angeles Unified School District* (2018) PERB Decision No. 2588-E.) In another case, PERB went further, overruling longstanding precedent by holding that individual employees have a presumptive right to use their employer's email to communicate with each other during nonwork time regarding the terms and conditions of their employment. (*Napa Valley Community College District* (2018) PERB Decision No. 2563-E.) And in another case, PERB clarified that content of an employees' email is protected unless it meets the high bar of being "maliciously false," meaning that (1) it is demonstrably false, and (2) the employee knew the speech was false or acted with reckless disregard for whether it was false. (*Chula Vista Elementary School District* (2018) PERB Decision No. 2586-E.)

In the context of negotiations, the essential takeaway from these cases is that unions and employees have broad rights to access their employers' email systems to discuss and share information with each other regarding negotiations. School employers, on the other hand, are still restricted to ensuring their communications with employees are factually accurate, not made for the purpose of derogating the union's authority, and do not evidence an attempt to avoid or frustrate the negotiations process. (*Temple City Unified School District* (1990) PERB Dec. No. 841.)

Although these newly established rights present some challenges to school employers, they were largely anticipated. The use of social media, on the other hand, is proving to be more complex and the law continues to evolve. For example, in the union Facebook page example above, how should an employer respond if it believes the union posted incorrect information, or if commenters are then spreading that information in the "comments" section? Due to the speed and reach of the post, the employer might conclude that it is too late to respond effectively. As a consequence, employees, parents, and students could misunderstand the employer's negotiating positions.

In another example, what if a teacher independently chooses to use a classroom application to share student progress with parents and students, and the teacher then uses that same application to share information

regarding negotiations? The teacher might view this as exercising his or her right to communicate as a private citizen on a matter of public interest, whereas the employer might see this communication as a misuse of district resources. Parents and students might also be annoyed at being pulled into a labor dispute when all they wanted to receive were school-related updates. This type of communication implicates not only protected rights under the EERA, but also the right to freedom of expression under the First Amendment of the U.S. Constitution.

These are only two examples of the many scenarios school employers are required to address. Until the law catches up, school employers and their legal counsel will have to use existing legal standards and good judgment to determine not only how best to respond, but also how to use these new means of communicating to get *their* message out effectively. The following practical tips can help school employers when dealing with this new legal landscape:

- School employers should review their current email use policies to ensure they do not unreasonably restrict a union's or employee's right to communicate with other employees during nonworking time about the terms and conditions of their employment. If they do (e.g., by limiting email use to school-related matters only), the employer may need to revise that policy, which may also require giving the affected unions notice and an opportunity to negotiate.
- If a union or employee uses employer email to discuss negotiations with other employees, and the employer believes that is an inappropriate use of its email, consult with legal counsel before responding. Responding in error may expose the employer to an unfair practice charge.
- If unions or employees are using social media or classroom applications to share information with parents and students about negotiations, look out for disruptions to the district's educational services. For example, are parents or students complaining? Are they opting out of receiving school-related updates from a teacher because they do not want to view information about negotiations? Evidence of actual disruption can put the employer in a better position to respond.
- If unions or employees are using email or social media to communicate about negotiations, the employer should consider what it is doing to get *its* message out through those and other means, rather than merely responding to the unions or employees. A best practice is to develop a communications plan prior to starting negotiations. Communications plans should be tailored to each district's needs, but, at a minimum, they should include providing negotiations updates to the full school community, including how and when those updates will be distributed.

Many public employers are entering difficult phases of negotiations with their employee unions. Modern means of communication may be a help—or a hindrance—to effective bargaining. Local educational agencies are encouraged to work with legal counsel in navigating these complex, emerging issues and in developing an effective communications plan.

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