

Social Media and Impact on Employment

Best Practices

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Agenda

- What services are out there (this week)
- Drafting, implementing social media policies
- Coordinate with computer use policy
- First Amendment issues for public Employers
- Public Records Act issues
- Handling problematic posts
- Handling “official” social media accounts
- How to monitor lawfully
- Background checks of Applicants



Social Media, Generally

- What is “social media”?
 - The term describes a broad range of services that *facilitate the easy sharing of information, pictures, videos, news articles, etc.*
- Social media services change constantly.
 - Most services can be accessed by any smartphone.
 - Some can *only* be accessed on a smartphone.
- Used by almost everybody.
 - Currently over 1.2 *billion* Facebook users worldwide.



Social Media Services

The five you should be concerned about most (at least today--this may change tomorrow):

- Facebook
- Google+
- Twitter
- Instagram
- Vine



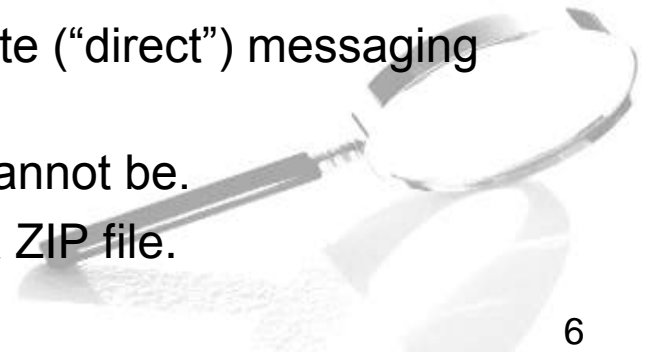
Social Media Services

- Facebook and Google+
 - Both services have essentially the same features.
 - Web- and mobile-based. Built into some phones.
 - Share status, pictures, videos, news, location.
 - Contains a private text and video messaging service.
 - Users can download most of their own data.
 - Data persists until a user deletes it.
 - Users control privacy settings of each post.
 - Posts typically default to “public” view.



Social Media Services

- Twitter
 - Short 140-character posts (“tweets”).
 - Web or mobile access. Built into some phones.
 - Tweets can reveal location, and can include links to pictures and videos (displayed inline).
 - All tweets are public, but there is a private (“direct”) messaging feature.
 - Tweets can be deleted, but “retweets” cannot be.
 - Users can download all prior tweets to a ZIP file.



Social Media Services

- Instagram
 - Mobile only. Owned by Facebook.
 - Posting of images, short videos. Public by default.
 - Images/videos can be “liked” and commented on, but not shared.
 - Can cross-post to Facebook, Twitter, Tumblr, Flickr, and Foursquare. Images can include location data.
 - New private messaging services.
 - No easy way to search or download posts.



Social Media Services

- Vine
 - Mobile only. Owned by Twitter.
 - Posting of short 6-second videos. Public by default.
 - Videos can be “liked”, commented on, and “revined.”
 - Can share to Facebook and Twitter.
 - No private messaging service.
 - No easy way to search or download videos.
 - Pornography is pervasive.



Social Media Services

Other services that you might see (in no particular order):

- Flickr: photo hosting, sharing, owned by Yahoo! Lots of pornography.
- 500px: photo hosting and sharing. Nude photos are pervasive.
- Tumblr: blogging platform. Lots of pornography.
- Pheed: mobile-only photo, video sharing, similar to Instagram, Vine.
- foursquare: mobile-only location sharing.
- Circle: mobile-only “local” event and status sharing.
- Yelp: consumer and product review sharing.
- Spotify: music streaming and playlist sharing.
- Myspace: almost nobody uses this anymore.
- Web-based forums: thousands of these. Employee activity on these forums is usually covered in social media policies.



Employer Social Media Policies

- What they typically do
 - Clarify ownership of “official” accounts
 - Clarify who can create, use “official” accounts
 - Prohibit on-duty social media use
 - Prohibit dissemination of non-public confidential information through social media
 - Prohibit threatening, harassing, unlawful behavior
 - Put employees and public on notice of monitoring
 - Standard for deletion of off-topic, confidential, date or inappropriate posts or materials
 - Reference Records Policy for Deletion of Records

Drafting the Employer Social Media Policy

- Common drafting mistakes
 - Purporting to ban protected conduct
 - Reserving “rights” that don’t exist
 - Unrealistic, overly-aggressive prohibitions
 - Inconsistency with other policies
 - Not addressing official employer account use and ownership
 - Not covering the right services
 - Not checking the current state of the law



Drafting the Employer Social Media Policy

- Social Media Polices, Sources
 - Public Records – Ohio Historical Society Website:
http://ohsweb.ohiohistory.org/ohioerc/index.php?title=Guidelines#Social_Media
 - Other Employers
 - Research sites:
 - personnelconcepts.com
 - socialmediagovernance.com/policies.php
 - Examples:
 - Roanoke County, Virginia
 - Hamilton County, Ohio



Employee Conduct on Social Media

- Can Employers discipline employees for off duty social media comments, posts, etc. on Non-Employers social media sites?
- What standards apply for employee off-duty conduct?
- How “freely” may employees “speak”?



Protected Conduct on Social Media

First Amendment - Speech by employees outside the workplace

- Social media activity is generally “speech” that can be protected by the First Amendment.
- Highly fact specific, Depends upon the content and the audience for the post (i.e., whether it was public, or only shared with limited groups of “friends”)
- Sweeping bans on discussing employer business on social media might be viewed as an unlawful prior restraint
 - i.e., a risk of Section 1983 liability *merely for implementing the policy.*



Protected Conduct

Concerted Activity

- NLRB has been very active on this front in the private sector.
 - Section 7 of the NLRA protects employee right to engage in “concerted activity” for purpose of “mutual aid and protection”
 - NLRB: Section 7 protects the right of private sector employees to grouse amongst each other online about their jobs.
- R.C. 4117.03(A)(2) mirrors the language of Section 7 of the NLRA.
- Ohio courts, SERB have not followed the NLRB’s lead...yet.
- No apparent reason why they couldn’t do so.
- Very dangerous for public sector employers to include sweeping bans on discussing “city or county business,” or “employee matters,” or “information damaging to the city,” etc.

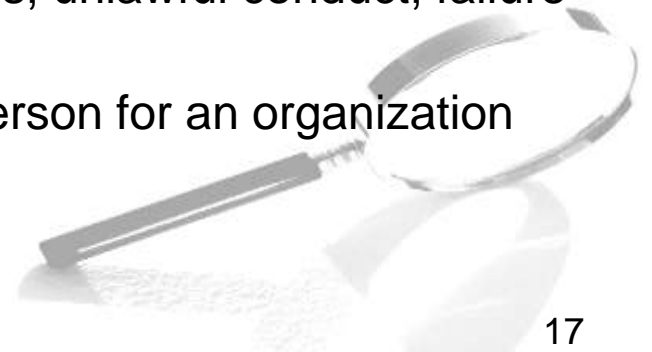
Reserving Problematic “Rights”

- Employers should never reserve a “right” to:
 - Demand an employee’s login credentials.
 - Use an employee’s login credentials.
 - Become an employee’s “friend.”
 - Confiscate employees’ personal devices.
 - Shut down an employee’s social media account.
- These are all either unlawful, or create a serious risk of civil liability.



First Amendment Considerations

- Social media speech examined the same as other forms of speech
- Speech is a matter of “public concern” when it enables the public to make informed decisions about government operations or raises or identifies issues of interest to the public.
- Public Concern may outweigh governmental interests.
- Examples: Unsafe conditions, policy decisions, unlawful conduct, failure to follow law, funding decisions.
- Whether employee is speaking as a spokesperson for an organization e.g. union.



First Amendment Considerations

- Speech is not protected when the efficiencies in public service outweighs the public concern, e.g. morale, efficiency of operations.
- If speech was an internal matter, employee's job (Garcetti).
- Whether internal reporting system exists such as discrimination policies.
- Examples: Claims of harassment; negative, derogatory or inflammatory comments about coworker.
- Confidential information may not be disclosed.
- If speech was a matter of personal concern.
- If speech suggests or promotes illegal conduct/activity.



Debord v. Mercy Hospital U.S. App. Ct., 11/26/13

Facts:

- Employee terminated for disruptive behavior, being untruthful.
- Employee claimed sexual harassment and retaliation.
- Internet postings negative of supervisor.
- Posting occurred while at work.
- Inflammatory material that supervisory was a “snake” who “needs to keep his creepy hands to himself.”
- Termination affirmed.



Debord v. Mercy Hospital

Holding:

- Employer's reporting system, for harassment claims, not followed therefore procedural defense.
- Company investigation policy provided for confidentiality and employee's text messages not seeking information.
- Employee terminated for inappropriate and disruptive behavior and dishonesty.



Sheperd v. McGee U.S. Dist. Ct., 11/7/13

Facts:

- Children's Services Worker.
- Facebook postings.
- Negative comments about people on public assistance.
- Assertion that clients on public assistance buy luxury items.
- Comment that people on public assistance should not have more children.
- Employee terminated for unbecoming conduct.



Sheperd v. McGee

Holding:

- State's administrative interest outweigh 1st Amendment rights.
- Negative comments would impair worker's ability to do her job.
- Negative comments potential adverse impact in testimony of social worker in a trial.
- Termination affirmed.



Gresham v. Atlanta U.S. App. Ct. 12-12698, 10/17/13

Facts:

- Police department policy requiring complaints about fellow officers be submitted internally.
- Police Officer Facebook page set to private, unknown number of friends.
- Comment criticized another officer of unethical behavior.
- No actual disruption of legitimate government interest.
- Officer alleged promotion denied, retaliation.



Gresham v. Atlanta

Balancing Test:

- Did speech involve a matter of public concern?
- Did speaking interest outweigh government interest in efficient public service?
- Speech played substantial part in employment decision.
- Then, if first 3, would government have made same decision absent protected speech.



Gresham v. Atlanta

Holding:

- Maintaining discipline and good working relations is an legitimate government interest.
- Actual disruption in the workplace not required.
- Issues of public concern not raised.
- Not a violation of freedom of speech.



Bland v. Roberts U.S. App. Ct., 9/18/13

Facts:

- Sheriff's Office employees (unprotected).
- Not reappointed following reelection of Sheriff.
- Employees "liked" Facebook page of opponent candidate.
- One employee wrote on campaign page and employee photo added to page of candidate.



Bland v. Roberts

Holdings:

- Show of support was the “Internet equivalent” of a political yard sign.
- Conduct constitutes “speech.”
- The “like” is a substantive statement warranting 1st Amendment considerations.
- Governmental interest does not outweigh 1st Amendment protections.
- Officers 1st Amendment Rights violated.



Arbitration: OCSEA and Ohio Dept. of Rehab. And Correction, Arb. Pincus (2013)

Facts:

- Corrections Officer posting on Facebook following death of Bin Laden “ok, we got Bin Laden . . . Let’s go get Kasich next . . . who’s with me?”
- Seventeen people “liked” the post, 4 employees of DRC.
- Posting open to public.
- C.O. terminated.



Arbitration: OCSEA and Ohio Dept. of Rehab. and Correction

Holding:

- Arbitrator noted conduct only “empty words”.
- Arbitrator noted threat not potentially dangerous to Governor.
- Off-duty conduct subject to discipline.
- Sufficient cause for discharge not present.
- 14 month suspension, reinstatement.



Social Media Policies - Content

- Reference internet and computer policies.
- Employees may not use employer computers, smartphones or other devices to access private mail or social media.
- Clearly indicate employees may not comment/post on behalf of or as an employee of the city/county/company.
- Employees may not disclose any confidential information.
- Employees must report critical posts of other employees.



Social Media Policies - Content

- Employees may not disclose any records except through records policy procedures.
- Employees are to utilize discrimination/harassment policy and procedures for reporting alleged misconduct.
- Employees may not post negative or derogatory comments about co-workers, supervisors, managers, public, customers, clients etc.
- Employee acknowledgement.
- Potential discipline.
- Records policy considerations.



THANK YOU!

If you have questions concerning this presentation, please contact:

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