



ZASHIN & RICH

Social Media Challenges For Public Employers

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Agenda

- Maintaining “official” social media accounts
- Core principles to avoid social media liability
- Handling problematic posts
- Drafting, implementing social media and computer use policies
- Social Media and BYOD
- Background checks of Applicants
- First Amendment issues for public Employers
- Disciplining Employees for social media use
- Employee responsibilities for on and off-duty social media use



Key Elements of the Presentation

- Hosting of Social Media Sites
- Social Media in the Hiring Process
- Special Issues for Public Employees Freedom of Speech
- Public Records
- Employee Conduct Standards for On and Off-Duty Conduct
- Employee Conduct Cases



SOCIAL MEDIA EXPLOSION OF INFORMATION



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 an 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 online).
 - 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”, commented on, and 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

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 forums is usually covered in social media policies.



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.



EMPLOYER HOSTED SOCIAL MEDIA



Employer Hosted Social Media - Policies

- Hosting Sites that allow third parties to post on site
 - Clarify ownership of “official” accounts
 - Clarify who can create, use “official” accounts
 - Inform public site is monitored and posts may be deleted
 - Prohibit dissemination of non-public confidential information through social media
 - Prohibit threatening, harassing, unlawful behavior
 - Standard for deletion of off-topic, confidential, date or inappropriate posts or materials
 - Reference Records Policy for Deletion of Records



SOCIAL MEDIA AND RELATED POLICIES FOR EMPLOYEES



Social Media Policies - Employees

- Reference internet, computer use, and phone 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
- Consider prohibiting use of employer computers or cell phones except for limited personal use, which can be monitored



Social Media Policies - Employees

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



Drafting the Employer Social Media Policy

Identify Prohibited Employee Conduct –

- Use of Employer logo
- Use of Employer uniforms or equipment
- Posts that affect morale or reputation of Employer
- Etc. – see sample policies



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

ADDITIONAL POLICIES TO CONSIDER FOR EMPLOYEE CONDUCT

- Email
- Internet
- Computer equipment
- Work hours
- Harassment/discrimination reporting
- Hiring
- Workplace conduct
- Off-duty standards
- Public records
- Discipline



Drafting the Employer Social Media Policy

- Social Media Policies, Sources
 - Sample Policies handout
 - Public Records – Ohio Historical Society Website:
[http://ohsweb.ohiohistory.org/ohioerc/index.php?title=Guidelines#Social Media](http://ohsweb.ohiohistory.org/ohioerc/index.php?title=Guidelines#Social_Media)
 - Research sites:
 - personnelconcepts.com
 - socialmediagovernance.com/policies.php



Social Media in the Hiring Process



Social Media in the Hiring Process

Pre-employment use of Social Media

- Job postings on social media
- Background checks
- Criminal records (special issues)
- Discrimination law considerations



Social Media in the Hiring Process

Cautions and problems in the use of social media in hiring process

- Perception vs. actual
- Accuracy of information
- False profiles
- Protected categories under discrimination laws



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.



EMPLOYEE CONDUCT ON SOCIAL MEDIA



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.*



NLRB Guidance on Social Media Policies

- NLRA Section 7: right to engage in “concerted activity” for bargaining or other mutual aid, e.g. communications.
- Test: Could a rule/policy be reasonably construed to chill an employee’s exercise of his Section 7 rights under the NLRA.
- Rule must not be ambiguous to its application.
- Rule should contain language that limits its application to specific prohibited activity (e.g. confidential information disclosure).
- NLRB Memorandum OM 12-59, May 30, 2012.



NLRB “Overbroad” Prohibition on Policies

- Prohibition on release, discussion of information about employees wages, hours, etc. is overbroad.
- Prohibition on friending co-worker is overbroad.
- Prohibitions on criticism of company is overbroad.
- Requirement that personal posts receive prior approval is overbroad.
- Strict prohibition on use of copyrighted materials.
- Unlimited prohibition on contact with media.



Permissible Policy Provisions under NLRB

- Discussion regarding safety systems or components.
- Trade secrets, confidential or attorney-client privilege information.
- Requirement to report unlawful or discriminatory posts as long as a policy describes the impermissible conduct.
- Urge employees to respect copyrighted materials.
- Prohibition on bullying or online harassment.
- Posting material, non-public information if term is narrowly defined.
- Prohibition on unauthorized postings on company website or in the name of the company if policy identifies authorized personnel



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.



PUBLIC RECORDS ACT AND SOCIAL MEDIA



Public Records R.C. 149.43

“...which serve to document the organization, functions, policies, decisions, procedures, operations or other activities of the office.”

1. Clearly identify who is authorized to release public records
2. Amend retention policy to include transient nature of social media sites
3. Archive websites
4. Identify on website that posts may be removed



SOCIAL MEDIA AND EMPLOYEE CONDUCT CASES



Debord v. Mercy Hospital U.S. Appeals Ct.

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 by employee 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.

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.



Facts:

- Police department internal 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.
- Internal matters.
- Standards of conduct.



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 U.S. Appeals Ct.

Holding:

- Maintaining discipline and good working relations is a 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. Appeals Ct.

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.



OCSEA - Ohio Dept. Rehab and Correction

Arbitration under collective bargaining agreement

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.
- Corrections Officer terminated.



OCSEA - Ohio Dept. 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.



THANK YOU!

If you have questions concerning this presentation, please contact:

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