Public Employees and Social Media

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Disclaimer

- As an Assistant Attorney General, I advise only state agencies, not local agencies or individuals. This presentation is not intended as legal advice. Please consult your city or state’s attorneys for legal counsel when needed.
The Law of Social Media

• Caselaw and statutes regarding the use of social media in employment decisions is evolving.
• Many issues have not yet been addressed by courts, in part because technology continues to change rapidly.
• In many cases, balancing tests have to be applied, and there are not always clear answers.
• There are several federal statutes that we won’t have time to address today but that may apply to employment decisions involving social media. It is always a good idea to consult your attorney and have legal assistance when developing policies on social media.
What do we mean by social media?

- Social media are services that allow individuals to exchange myriad types of information (words, pictures, videos, news, etc) and are constantly evolving.

- Some examples:
  - Facebook
  - Twitter
  - Instagram
  - LinkedIn
  - Vine
  - Flickr
  - and hundreds of others...
Employer Accounts vs. Employee Accounts

• Public employers need to consider how public employees use social media – both government accounts and personal accounts – and develop policies providing guidance for employees

• Government agencies’ online accounts (website, Facebook, others)
  • Employees develop and maintain these as part of work duties
  • Employees may comment or exchange information on these during or outside of work hours

• Employees have accounts on a wider array of social media
  • Use of these accounts at work – both on smart phones and work computers
  • Use of these accounts outside of work hours
First Amendment

• Social media posts (words and images) on any type of account are “speech” subject to First Amendment analysis

• The level of protection that speech has under the First Amendment depends on several factors

• The First Amendment doesn’t give you the right to say whatever you want, whenever you want
First Amendment Analysis

• First, determine what kind of speech is at issue
• “Citizen Speech” -- Speech that is (1) off-duty, (2) unconnected to the workplace and (3) related to issues of public concern has the most protection
  • Matters of public concerns can be anything related to a matter of political, social or other community concern – hard to define – depends on context – do not include internal workplace grievances
• “Employee Speech” -- Speech that is made as part of the employee’s official duties is not protected
  • Employee speech includes speech in furtherance of an employee’s work responsibilities, even if that speech is not required by the job or made in response to a supervisor’s request
Examples

• Teacher’s social media post that she is a “warden of future criminals” is a job complaint, not a matter of public concern
• Teacher’s social media post of a photograph of her appearing drunk with a pirate’s hat and a cup saying “drunken pirate” is not a matter of public concern
• Teacher’s blog questioning education assessment policies is most likely a matter of public concern
• Public employee’s clicking the Facebook “Like” button on a Facebook page for a political candidate’s campaign is a matter of public concern
• Police officer’s complaints about working conditions and wages in an online blog may be a matter of public concern (and are also likely protected by other federal laws)
First Amendment Balancing Test

• If speech is “citizen speech,” then use a balancing test
  • Balance employee’s right to free speech with public employer’s interests in ensuring public services are performed effectively and efficiently

• Consider the employer’s interests in
  • Avoiding disruptions in regular operations
  • Maintaining good working relationships among coworkers
  • Avoiding erosion of working relationships dependent on loyalty and confidentiality
  • Maintaining discipline and supervisory control
  • Avoiding obstructions in employees’ abilities to perform their work duties

• DO NOT consider
  • Whether you or political officials personally approve of or like the content
Examples

• County social worker, Betty, made negative comments on Facebook about people on public assistance, including comments that they should not have more children and that they use public assistance to buy high-end items. Betty can be terminated because her comments would impair her ability to do her job and disrupt the functions of her employer.

• Fred, an administrative assistant for a city water department, tweeted that he thinks a certain state legislator is a fraud and bully. Fred has no work-related interactions with the legislator. The head of the water department likes the legislator, however, and fires Fred for embarrassing him. The decision to fire Fred is most likely unlawful.
First Amendment cont.

• Courts will generally favor an employee’s right to speech if the balance is close.
  • BUT, the more closely connected to work the speech is, the more the balance tips to the employer

• When considering employer’s interests, you do not have to show that the interests have already been harmed – just that there is a reasonable prediction of substantial risk of harm to those interests.
First Amendment cont.

- Employees do not have the right to post on behalf of public agencies or in their official capacities unless given the authority to do so.

  - Agencies can discipline employees for implying they are speaking on behalf of an agency or in their official capacity when they are not authorized to do so.

- Employees do not have the right to use social media for non-work purposes during work hours, even if the content would be protected if the post were made on private time.
First Amendment & Govt Accounts

• Public entities’ social media sites
  • Often considered to be “limited forums”
  • Restrictions on public input/comments must be:
    • “reasonable in light of the purpose served by the forum” and
    • “viewpoint neutral”

• Very important to have a well-crafted policy on social media and a well-trained employee responsible for managing and monitoring sites to ensure consistent compliance with the policy
  • Ad hoc determinations about posts/comments are a really bad idea!
Examples of types of comments that may be removed from a public entity’s social media sites under the “limited forum” analysis:

- That are unrelated to the subject matter of the particular article being commented upon
- That campaign for or against the nomination or election of a candidate or the qualification, passage, or defeat of a ballot question
- That may tend to compromise the safety or security of the public or public systems
- Whose main purpose is to sell a product or solicit commerce
- That infringe on copyrights
- That contain profanity or obscenity
- That contain sexual content, links to sexual content, or nudity in a profile picture
- That are defaming
- That are spam
- That promote, foster, or perpetuate discrimination on the basis of race, creed, color, age, religion, gender, marital status, national origin, physical or mental disability or sexual orientation
- That constitute or encourage illegal activity
- Other comments that the public entity deems inappropriate
Fourth Amendment

- Fourth Amendment generally protects us from unreasonable searches
- For the Fourth Amendment to apply to social media, there would have to be a “reasonable expectation of privacy”
  - Generally not an issue if you can access social media posts online without passwords
  - However, this is an issue if you ever want to access an employee’s protected social media content or mobile device. Always contact legal counsel in such cases.
Stored Communications Act

• “Unauthorized” and intentional access to stored electronic communications (such as password-protected social media posts) is prohibited by this federal law.
• Employers cannot condition employment on providing authorization to view private media or on providing passwords to social media
• Courts may find that an employee authorized access to private accounts, however, if the employee used an employer-provided computer or device to access the accounts and the employer has a policy stating that use of the computers and devices will be monitored
Workplace Harassment

• Employers may have a responsibility to take action when social media are used to harass employees.
  • Example 1: If a supervisor openly tweets negative comments about an employee’s work performance, the employer should take action to stop the harassment. If the harassment does not stop, the employer needs to consider disciplinary measures.
  • Example 2: Public Agency A hires Cheryl to manage its website and Facebook accounts, which allow public comment. Members of the public who dislike Public Agency A find out Cheryl is a Latina and start posting racially-charged comments about her on the agency’s social media sites. Cheryl informs her supervisor, Donna, that the comments interfere with her ability to perform her work functions. Donna has a responsibility to act and possibly turn off the comments sections.
Workplace Harassment cont.

• Example 3: Mike, an employee of Public Agency B, believes John is having an affair and posts a photo of John at a bar with a woman other than his wife on Instagram. Mike and John work for the same agency but do not have any need to interact for work purposes. Some of John’s friends see the photo, and a rumor about the supposed affair gets started. What, if anything, does Public Agency B have to do?
Confidential Information

• Employees do not have a right to post confidential employer information to social media accounts.

• Employers should ensure employees understand what information is considered confidential. If employees post confidential information online, they can face disciplinary actions.
Open Records

• Govt social media accounts are most likely records subject to open records laws.
• If the public is allowed to post comments on govt accounts, those comments also become open records.
• Social media records must be retained in accordance with records retention policies
  • Many govt agencies maintain copies of deleted comments in case they are sued, however

• Employees’ work-related social media posts on their own accounts are often open records as well.
  • Raises questions about disclosure and retention
  • Employees can be disciplined for not producing requested open records
Discussion Question

• The state legislature passes a bill allowing private companies to refuse service to LGBT individuals. Mark, the Communications Director for a county library, has a sister who is gay. He opposes the law and writes a blog post saying the law is unconstitutional and the bill’s supporters are bigots. Most of the county commissioners approve of the new law but did not take a public stand on it. A legislator who voted for the bill calls a county commissioner and demands that Mark be fired because he “embarrassed” the legislator. He said he received a copy of the blog post from an anonymous source. In the meantime, several other county employees have commented on Mark’s blog in support of him and his sister. If Mark is disciplined for the blog post, does he have legal recourse?
Additional Questions?