



Social Media and Municipal Employees: *Tweet Them Right*

By Lori Lein, General Counsel, Alabama League of Municipalities

In the past, when city employees communicated their opinions, thoughts and insight about their jobs outside of the workplace, the primary issues of concern for their employers were the placement of political signs in their front lawns, letters to the newspaper or bumper-stickers on their automobiles. With the explosion of Facebook and Twitter in the social media age, these issues seem almost charming in comparison. Now, almost every public employee has access to the world, and all their “friends”, through the use of PCs, tablets and SmartPhones. These devices provide them with instant access to platforms such as Facebook, Twitter, Instagram, LinkedIn, YouTube and Pinterest. They can project themselves, through words and pictures, across town, across the country and across the globe in a matter of seconds – without ever having to leave their desk.

In addition to the organized social media outlets such as Facebook and Twitter, many people use the “blogosphere” to communicate to the world. Blogs are sometimes overlooked as a source of on-line buzz as compared to other social networking sites. There are an estimated 31 million bloggers in the United States alone, so – in addition to snippets shared on a feed – many employees are posting what amounts to personal editorials on all aspects of their lives, including their work lives.

So what is a city or town to do now that social media has impacted so many aspects of the average municipal employee’s daily life, including their work routine? The shift in technology and social media in the public workplace gives rise to many legal issues for public employers and, although many of these legal issues aren’t “new”, they do manifest themselves in some unique factual scenarios not previously considered by employers or by the Courts. In fact, the Court system is a bit of a dinosaur and struggles to keep up with the rapid developments in the day-to-day life of employees and

their use of technology. This article will attempt to outline some of those legal issues and the options available to cities and towns when it comes to developing social media policies.

Social Media Use by Employers and Employees: What’s the Big Deal?

It’s not just employees who use social media. Employers also access social media for a variety of purposes. Most commonly is the use in the hiring process. Many cities and towns use social media sites to post job openings. Some also use social media as part of the screening process for job applicants and in the on-going monitoring of existing employees. Screening and monitoring may consist of a simple Google search of the applicant’s or employee’s name to requesting or requiring access to personal social media accounts. Public employers should be extra cautious when using information gathered in this fashion and avoid using information found online against an applicant or employee when that information cannot otherwise be used in the hiring or employment process. Regardless of where the information comes from, an employer cannot base hiring or employment decisions on race, religion or marital status – to name a few.

As of June 1, 2013, nine states have passed legislation limiting in some way an employer’s ability to demand access to an applicant or employee’s personal social media information. Arkansas, California, Colorado, Illinois, Maryland, Michigan, New Mexico, Utah and, most recently, Washington have all passed legislation on this issue. Some of the laws provide that employers cannot require applicants or employees to turn over account information and cannot retaliate against those who do not and others contain unique language, such as Washington’s, providing that an employer may not “compel or coerce an employee or applicant to add a person, including the employer, to the list of contacts associated with the



employee's or applicant's personal social networking account". Basically, employers in Washington cannot require that job applicants and employees become "friends" on social media.

So what's the big deal with employees using social media? The first thing that usually comes to mind is lost productivity. The simple argument is, every minute an employee is accessing social media, he or she isn't "working". With over 600 million daily users of Facebook, it would be naïve at best for employers to assume their employees are not updating their status or checking the status of their friends during work hours. There are conflicting studies as to the effect, if any, that social media has on productivity in the workplace but it is a commonly held perception that it decreases work productivity. Yet there is also an emerging perception that social media, for businesses with customer interaction, can actually improve productivity under the theory of "virtual co-presence" – the ability to collaborate and communicate with customers/others over long distances in relatively short, productive sessions to resolve problems, accomplish tasks or communicate to a larger audience at one time.

Completely banning social media in the workplace isn't realistic in this day and age. First, many would argue that it is a complete morale killer and second, it's impossible to enforce given the fact that most employees who have been banned simply resort to using their mobile devices to access social networks. It also begs the question: Is social media really more detrimental to productivity than other more traditional workplace activities such as the water cooler, standing in offices discussing the latest episode of a favorite TV program or taking a smoke break? Rather than jumping to a complete ban on social media usage for fear that it's interfering with productivity, employers should consider focusing more on the work that's getting done and address productivity concerns as they arise. While social media use may contribute to a productivity problem, the decline in the productivity of a particular employee may be more than just a social media problem.

Some other areas that can come up with regard to employee use of social media include content-based concerns such as potential damage to employer reputations by virtue of association, potential violations of anti-discrimination or harassment policies, release of confidential information and the potential for criminal conduct. With regard to criminal conduct, not only is there the risk of employees using municipal equipment to access illegal or inappropriate material, but also the risk of potential ethics law violations for using public property for personal gain.

First Amendment Issues

One of the first areas of the law that comes to mind when looking at public employees and their use of social media is the First Amendment to the United States Constitution.

"Free Speech" in the world of employment law is a loaded phrase. Private employers don't have the First Amendment "free speech" concerns that public employers, such as municipalities, have because there is no constitutional duty for a private employer to accommodate, much less tolerate, the "free speech" of their employees. Public employers, however, do not have that same luxury. The First Amendment to the United States Constitution, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" has been held to apply not only to the United States Government but to state and local governments as well.

Action on the part of public employer which "chills or curbs" an employee's freedom of speech may be found unconstitutional as violating an employee's First Amendment right to free speech. One of the most "chilling" things that an employer can do to an employee is to retaliate against him or her for personal expression. In order to establish a claim for retaliation under the First Amendment, an employee must show three basic things:

- First, that their speech can be fairly characterized as speech made as a citizen (rather than as an employee) relating to a matter of public concern;
- second, that his or her interests as a citizen outweigh the interests of the public employer in promoting the efficiency of providing public services through its employees; and
- third, that the speech played a substantial or motivating role in the public employer's decision to take adverse employment action against the employee. *See generally Pickering v. Bd. Of Education*, 391 U.S. 563 (1968).; *Connick v. Meyers*, 461 U.S. 138 (1983); *Garcetti v. Caballos*, 547 U.S. 410 (2006).

Whether it is speech made on the street or on Facebook, courts will evaluate cases by asking a series of questions relating to the balancing test between the employee's and the employer's interests. Arguably, the most important question is "what is the nature of the topic the employee spoke (Tweeted?) about?" If the nature of the matter involves issues of "public concern" relating to a political, social or other community concern, then all kinds of red flags should go up before even considering adverse employment action against an employee.

While there is not a standard "test" for what is a matter of public concern, some courts look to whether the information shared by the employee helps the community make informed decisions about the operation of government. One court has held that "unlawful conduct by a government employee or illegal activity within a governmental agency is a matter of public concern." *Thomas v. City of Beaverton*, 379 F.2d 802, 809 (9th Cir. 2004). Not of public concern are issues relating to individual personal disputes and grievances that are not

relevant to the public employer's operations or performance. See *Connick, supra*.

First Amendment analysis in the area of public employee communication is not an exact science and if there is any take-away for the public employer it is that before taking any action against an employee for comments they have made through social media (or traditional media outlets), the employer should consult with its attorney to carefully evaluate whether the speech is protected speech under the First Amendment.

Other Legal Issues

In addition to the First Amendment, social media use by public employees also touches on other areas of the law that municipal employers need to be mindful of.

First is the issue of privacy, which touches on the Fourth Amendment to the United States Constitution. The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated ..." Many people associate the Fourth Amendment with criminal searches and seizures; however, it goes beyond the sphere of criminal investigations and applies when the government acts in its capacity as an employer. As such, public employees are protected by the Fourth Amendment.

The U.S. Supreme Court has not settled on a clear standard by which we can judge when a search is unreasonable in the employment context. The plurality in the leading case, *O'Connor v. Ortega*, 480 U.S. 709 (1987), instructs that courts should first determine whether, in light of the "operational realities of the workplace," a public employee has a reasonable expectation of privacy. If not, then the Fourth Amendment would not apply. On a very specific set of facts following the *O'Connor* case the U.S. Supreme Court held that a police officer did not have a reasonable expectation of privacy when sending messages on a government issued pager. *City of Ontario v. Quon*, 130 S.Ct.2619 (2010). Even with this holding, however, the Court provided no helpful guidance for similar cases in the future, declining to decide whether the Fourth Amendment provides any reasonable expectation of privacy in the technological context. The advisable route is to have a policy making it clear to employees that they do not have an expectation of privacy when using publicly issued equipment such as computers and cell phones.

Another area of the law for municipal employers to be aware of as it relates to employees and social media is the Stored Communications Act found 18 U.S.C. §§2701-2711, which prohibits the unauthorized and intentional access of stored electronic communications, including unauthorized access to third party email service and unauthorized viewing of a password protected website. An exception to this prohibition is where access is authorized by the provider or by the user of the website. The fact that the employee uses an employer-provided computer, in and of itself, does not amount to consent

or authorization. As such, it is advisable for public employers to adopt a clear policy providing that personal business on public equipment is prohibited and that activity on public equipment will be monitored.

Municipal employees seeking to monitor employees should also be aware of the Fair Credit Reporting Act which imposes notice and disclosure requirements on employers who seek consumer reports from third party agencies that assemble information on a person's "credit worthiness ... character, general reputation, personal characteristics or mode of living." 15 U.S.C. §1681a, subdiv.(d)(1). What this means is that before utilizing such a third party service to evaluate employees or new job applicants, an employer must disclose that it is seeking a report and must seek the employee's or applicant's consent to seek the report. Further, if an employer takes an adverse employment action as a result of such a report, it must provide a copy of the report to the employee or applicant upon their request. Websites which compile personal information about individuals from public records and social media outlets may fall within the Fair Credit Reporting Act's coverage.

And last, but certainly not least, employers, public and private, need to be aware of the National Labor Relations Act (NLRA) and the enforcement activities of the National Labor Relations Board (NLRB) in the area of regulating employees and their social media access and use. Under the NLRA, employees who act in concert with each other to "address the terms and conditions of their employment" may not be disciplined or discharged for their activity. The NLRA applies to union and non-union employees.

Recently, the Office of General Counsel for the NLRB issued memoranda reports on social media cases dealt with by the board. It is the NLRB's position that social media policy that prohibits any references to "terms or conditions" of employment violates an employee's rights to engage in protected activity under the NLRA. Very broadly drafted policies will likely run afoul of the NLRB's view of the protections provided by the NLRA. For example, the NLRB has found that a policy which provides that social media posts regarding the employer must be "completely accurate and not misleading" is overbroad because it would reasonably be interpreted by an employee to apply to discussions about, or criticisms of, the employer's policies and its treatment of employees. Extreme care must be used when developing social media policies and public employers need to be aware of the current guidance from the NLRB.

Do We Have a Policy For That?

So it's fairly well established that employees are most likely going to access some form of social media in the course of their employment – either personally or professionally. This then begs the question: "Do we have a policy for that?" A social media policy for city employees should go beyond

“play nice” and “don’t post anything that would cause your mother to blush.” Municipalities should start the process of developing a policy by giving consideration to how social media will be used:

- Official Use, for the express purpose of communicating the municipality’s interests;
- Professional Use, for the purpose of furthering specific job responsibilities or professional duties; and
- Personal Use, for the personal interests unrelated to job duties for the municipality.

First and foremost, a social media policy must make it clear to employees that they have no expectation of privacy or confidentiality when they use any public equipment, including computers and cellphones. A policy should include language that the employer has the right to access and monitor its computers, equipment and systems without warning or any specific notice to the employee. Employees must understand that what they say and do on public equipment may be subject to disclosure and that the employer has the right to back up anything, even if deleted by the employee. Employees need to understand that this can include any personal emails sent using public equipment, even if they are encrypted.

As with any employee policy, it should be clear and understandable. It should include definitions which are broad enough to cover future expansion and include specific examples of devices covered by the policy (cell phones, computers, tablets, pagers, etc.) and make it clear that any device provided by the employer to the employee is intended to be covered by the policy. Along these same lines, a policy should include specific examples of social media outlets and activities that are covered but, again, it should be worded to allow for other social media outlets which may come on the scene after adoption of your policy. Some other important considerations include:

- Encourage the use of good judgment;
- Make it clear that other employment policies apply in the context of social media use (such as policies against discrimination and harassment);
- Consider requiring a request for access to social media from employees who have official or professional need to utilize social media on behalf of the public employer.

As with any employee policy, public employers should provide training on the policy – and the training should be mandatory. And, perhaps most importantly, any policy should exercise the appropriate amount of control without appearing, in words or in practice, to go beyond the public employer’s legitimate interest. A policy should also have a savings clause relating to the protected activity of the NLRA such as “nothing in this policy will be interpreted or applied in a manner that

interferes with employee rights to organize, form, join, or assist labor organizations, to bargain collectively through representatives of their choosing to the extent allowed by law, or to engage in other concerted activities for the purpose of addressing the terms and conditions of employment.” While it might not completely save your policy should it be challenged, it is important to make the effort to alert employees that the social media policy is not attempting to restrict their rights.

What’s the Bottom Line?

The bottom line is that social media policies are loaded with danger for employers and should be approached with extreme caution and care and certainly shouldn’t be established without the advice and assistance of the city attorney. After adoption, it is also vital that the city attorney be consulted and involved in any enforcement of a social media policy. The totality of the circumstances surrounding the social media communication must be carefully evaluated before deciding on any action under the policy. The city attorney will be able to advise whether or not an employee has engaged in protected conduct or speech. And lastly, it will be vital to enforce any policy in a consistent manner from one incident to the next. ■

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