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Work Session VII:
The Future of Employment Law:
New Trends in Workplace Discrimination and Expansion of Protected Classes
and
Employee Social Media and Computer Use

Employee Social Media and Computer Use: Selected Issues

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Work Session VIII
The Future of Employment Law
Employee Social Media and Computer Use: Selected Issues

Materials by Attorney Daniel D. Crean

Introduction. These materials present a potpourri of issues in the continuing triangular saga of local government employment, social media, and computer use. As such, it is not intended to be exhaustive or inclusive of all current concerns. Instead, the materials are those viewed by the author as appropriate for mention at this time and place. The topics include selected risk-management issues that arise in employee use of social media, computers and electronic communications with respect to employer regulation and use of employee social media comments and public records and public access to records and proceedings.

I. SOCIAL MEDIA & EMPLOYMENT PRACTICES LIABILITY. Municipal employees, like everyone else – or so it seems – are addicted to use of social media.[1] Risks long have been evident in several areas including harassment, defamation, violation of privacy, noncompliance with public records laws, disclosure of confidential or privileged information, and more. As social media use continues to grow and change, risks will grow and change. One area in which risks can be expected to emerge and expand is that associated with employment practices liability (including variations on the above-listed risk areas, and employee rights of expression, religion, assembly and petition, as well as statutorily protected interests, such as whistleblower protection laws, and more).

(A) To Regulate or Not. A continuing key question is whether a restriction on a government employee's use of social media is permitted or limited by the First Amendment or state constitutional analogs.[2] In general, of course, public employees possess First Amendment rights. Thus, at least at the outset, public employer regulation of employee social media use is limited. Rights protected by the First Amendment include religion, assembly, and petition, as well as speech. Though details may vary and case law still is developing in the area of public employees and these other rights, analysis of them applying that used in the context of speech appears appropriate at this time.[3]

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[1] Without having a standard "legal definition," the following, taken from a notice from the NLRB (see note 17), may suffice: "Social media include various online technology tools that enable people to communicate easily via the internet to share information and resources. These tools can encompass text, audio, video, images, podcasts, and other multimedia communications."

[2] Though state constitutional language varies, the federal constitution provides the minimum protection, and state courts may use federal speech jurisprudence as guidelines for state protections. Hence, this paper uses "First Amendment" broadly to denote state constitutional protections, as well.

[3] *Borough of Duryea, Pennsylvania, et al. v. Guarnieri*, 564 U.S. ___ (2011).

The free speech framework for a public employer's ability to address public employee speech involves analysis, sometimes called the "*Pickering*" or "*Pickering-Connick*"[4] test:

- Does the speech involve a matter of public, not private, concern?
- If so, the courts will balance the employee's right to engage in speech against the government's interest in promoting the efficiency and effectiveness of the public services it performs through its employees.
- Did the employee suffer some sort of meaningful adversity presumably resulting from the comment?
- If so, did the employer have other *bona fide* reasons for discipline or discharge of the employee.

- A modification, or perhaps additional prong, of the now traditional test arose when the court recognized that employers have a stronger interest in controlling or addressing employee speech when it is part of the employee's official duties.[5]

Thus, in the context of public employee social media use involving some form of protected expression, the first step is to determine if the speech involves a public or private issue and then proceed to analyze the other factors.

Adding complexity to the standard speech situation is the nature of social media. If the medium is one provided by the local government (e.g., blogging on a municipal website), First Amendment analysis must consider if the platform for the speech constitutes a private, limited, or public forum. Forum analysis will not supplant traditional public employee speech analysis. Yet, if a local government creates an open platform for discussion, e.g., posting comments on its website, it may encounter a higher level of examination should it seek to control public employee posts to what likely will be a public or limited public forum.

A strictly internal email system, when limited by policy to work-related material and when practice follows that policy, would be deemed a non-public forum. Though this forum is subject to the greatest degree of control, employers should not view the framework as being without some degree of protection for employee expression, particularly if employer controls are content based.

The opposite end of this spectrum will occur when employee expression occurs outside the workplace, in some form of private social medium, and when the employee expression is conducted personally, and not as a public employee. However, clear identification of the poster as being a public employee may alter the context so as to

[4] *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983).
[5] *Garcetti v. Ceballos,* 547 U.S. 410 (2006).

provide the employer with greater rights of access[6] or control. Suffice it to say, at this point, that local government employers seeking to control comment by employees need to tread cautiously.

This caution applies not just to imposition of discipline but also to the crafting of policy language. It is not sufficient merely to state in a social media/electronic communications/computer use policy or policies that the employer recognizes (and perhaps even encourages) employee rights to use social media. The regulatory and "advisory" language in the policy must be examined to determine whether that "recognition" is overshadowed by limits that infringe on the scope of protected privacy and expression.

(B) Is there anything new under the sun? Of course there is, we are dealing with technology. Here, though, are a couple of developments to consider.

(1) Legislation Regarding Employee Communications. In addition to considering matters such as the Stored Communications Act, right-to-know or freedom-of-information laws, and records-retention requirements,[7] legislative bodies may broaden the expressive rights of public employees.

In New Hampshire, for example, RSA 98-E states that any person employed in any capacity as a public employee (originally limited to state employees, now including local government employees) has "a full right to publicly discuss and give opinions as an individual on all matters concerning any government entity and its policies." It also bars any person from interfering "in any way with the right of freedom of speech, full criticism, or disclosure by any public employee." An exception is provided with respect to privileged or confidential communications or records by stating that this chapter does not "suspend or affect any law relating" thereto. The law contains none of the employer protections under the standard First Amendment analysis discussed above. This law remained relatively "undiscovered" until recently, but it likely will provide a fertile field for plaintiffs' lawyers to plow.

(2) Record-Keeping and Access to Records Regarding Social Media Use. It is probably fair to conclude that state laws, like federal legislation, generally provide little if any express guidance as to whether social media use creates "public records." As the public and the press demand more and more access to this type of information, legislative responses may expand, not narrow, public access to information about emails and social

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[6] Public employees also have privacy rights to an extent not enjoyed by private employees. Ability to look at private electronic communications was raised, but not fully reviewed or decided, in *City of Ontario v. Quon*, 560 U.S. ___ (2010). Opinions differ as to how the current court might view employee privacy in this context, and even in general.

[7] The SCA, 18 U.S.C. §§ 2701–2712, along with retention, disclosure and non-spoliation standards for electronically stored information, must be considered in drafting policies. State laws regarding public access to, and availability of, records pertaining to employee electronic communications also, as discussed in section 2 of this paper, are continuing matters of concern.

media postings. FOIA or right-to-know laws may deem this information to be "records" which are required to be disclosed. However, local governments may not have the information in a format that can be produced without significant time and effort.

Local government responses to the likelihood of expanded access to this type of information should include guidance (directives) for employees as to the manner in which data relating to electronic communications, including social media content, are to be retained, deleted, and archived. These responses, in the form of policy amendments or adoption, need to be forward looking, and likely will have to delicately balance legislative and judicial protections for employee privacy and expression and the public's right-to-know.

Another potential problem arises when social media or electronic communication is used by local government boards or officials in a manner that might be construed as constituting the conduct of business that is subject to public access. Some open meetings laws now address the use of electronic communication by, for example:

- Barring the use of concurrent or sequential email communications among a quorum without complying with notice and access[8] standards.
- Permitting an absent board member to participate electronically (subject to requirements such as ability for attendees to hear the member and to know who else may be present with the absent member).

Chat rooms or postings to social media by a quorum of board members would appear to be an inappropriate means of conducting business, even with some form of notice, as not every member of the public might be able to "view" the proceedings. Providing some form of video "replay" might be tried as an acceptable alternative, depending on whether a state's laws require "live" access.

As technology changes over time, the use of televised or other video presentation may become more acceptable, particularly in an era when interactive transmission is possible. At the present time, though, "crystal ball" gazing suggests that legislatures will insist that the public have the right to attend meetings in person, i.e., authority to conduct a completely "virtual" meeting won't be granted in the very near future.

(3) Employer Access to Employee Social Media Passwords. According to the National Conference of State Legislatures, Maryland and Illinois have enacted legislation that prohibits requesting or requiring an employee or applicant to disclose a user name or password for a personal social media account. Delaware enacted legislation prohibiting higher education institutions from requiring students to disclose social media passwords or account information. A total of 14 states considered legislation in 2012 that would

[8] If electronic communications exclusively are used to conduct a meeting, one must question how such a meeting could be conducted with public access.

restrict employers from requesting access to social networking usernames and passwords of applicants, students or employees.[9]

(4) *Clicking a "Like" Button on Facebook: Speech or Not.* U.S. District Court Judge (E.D. Virginia) Raymond Jackson said apparently not, at least in a case asserting retaliatory termination for just such actions.[10] In a much discussed and criticized[11] decision, the court repeated the familiar test for determining if an adverse employment action violates public employee First Amendment right to freedom of speech:

> Thus, to determine whether a public employee has stated a claim under the First Amendment for retaliatory discharge, we must determine (1) whether the public employee was speaking as a citizen upon a matter of public concern or as an employee about a personal matter of personal interest; (2) whether the employee's interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public; and (3) whether the employee's speech was a substantial factor in the employee's termination decision.

Former employees of the Hampton County Sheriff's office (sworn deputies and unsworn, non-uniformed civilian employees) filed suit after being terminated by Sheriff Roberts. They claimed that the sheriff:

- Used his authority to bolster his reelection efforts, including using employees to manage his political activities, using prisoners to set up campaign events, and forcing his employees to sell and buy tickets to campaign fundraisers;
- Learned that a number of his employees were actively supporting one of the sheriff's opponents in the election; and
- Learned that each of them affirmatively expressed their support for that opponent by informing other individuals of their support, attending a cookout which his opponent also attended, and "liking" his opponent's Facebook page.

They claimed that, after learning of their support of his opponent, the sheriff called a meeting in which he informed his employees that they should get on the "long train" with him rather than riding the "short train" with his opponent.

After the sheriff won re-election, he decided not to retain the plaintiffs as well as six other employees. The sheriff claims he did not reappoint three sworn deputies based on a reduction in the number the Compensation Board allocated to him, and he wanted to replace the civilian employees with sworn deputies. The sheriff also declined to retain the remaining four deputy plaintiffs and five other deputies for unsatisfactory work

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[9] For a summary, see http://www.ncsl.org/issues-research/telecom/employer-access-to-social-media-passwords.aspx.
[10] *Bland v. Roberts,* (USDC, E.D., VA, April 24, 2012, Civil Action No. 4:11cv45).
[11] Hudson, "*'Like' is Unliked*," ABA Journal, September 2012, at 23.

performance or for his belief that their actions "hindered the harmony and efficiency of the office."

One plaintiff was found not to have spoken on a matter of public concern.[12] Three plaintiffs were found not to have engaged in expressive conduct, producing no evidence of actually stating anything on Facebook, showing instead that they merely clicked "Like" on the sheriff's opponent's page. While acknowledging that the sheriff was aware of the Facebook "Likes," the court said:

> . . . his "knowledge of the posts only becomes relevant if the court finds the activity of liking a Facebook page to be constitutionally protected. It is the court's conclusion that merely 'liking' a Facebook page is insufficient speech to merit constitutional protection. In cases where courts have found that constitutional speech protections extended to Facebook posts, actual statements existed within the record."

Citing two cases in which Facebook posts actually included statements, the court would "not attempt to infer the actual content of . . . posts from one click of a button on . . . Facebook page. For the Court to assume that the Plaintiffs made some specific statement without evidence of such statements is improper. Facebook posts can be considered matters of public concern; however, the court does not believe paintiffs . . . have alleged sufficient speech to garner First Amendment protection."

The opinion dealt with several other issues, including freedom of association[13] and qualified and eleventh amendment immunity.

Though this decision rightly requires that some form of expression must be present to trigger free speech analysis, Hudson's *ABA Journal* piece includes criticism asserting that it does not represent mainstream thought, e.g., comparing a "Like" click to sporting an "I Like Ike" button. At the time of the writing of this paper, a notice of appeal to the Fourth Circuit has been filed, but no action has yet occurred.

II. *SOCIAL MEDIA AS PROTECTED CONCERTED EXPRESSION.* The right of employees to opine on public issues and issues regarding access and records are not the sole issues that may cause concern among local government employers with regard to employee speech and expression. State laws may bar employer conduct that interferes with employee rights to organize or otherwise join forces to address terms or conditions

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[12] The court concluded an assertion "that he made some statement at some time is insufficient evidence for the court to adequately evaluate his claim."

[13] Claim was premised upon a view that the plaintiffs were terminated for associating themselves with the sheriff's opponent. Though the court mentioned the traditional *Elrod-Branti* political/policy-making employee analysis [*Elrod v. Burns*, 427 U.S. 347(1976); *Brand v. Finkel*, 445 U.S. 507 (1980)], it characterized any evidence of the termination being based on association as "mere speculation."

of employment.[14] Even where states do not allow public sector collective bargaining, protections may exist for employees to engage in some form of concerted or collective action.

On the federal level, at least at the present time, laws do not expressly address collective bargaining or employee expression related to "concerted activity" for employment relations in the public sector. The National Labor Relations Board does not have express authority over local government public sector labor-management relations.[15] Notwithstanding this limited jurisdiction, local government employers have noted a continuing interest on the part of the NLRB in aspects of public employment. This interest, along with legislative proposals that could bring at least some local government employees within the ambit of NLRB jurisdiction, suggest that some attention should be paid to the NLRB's view on employment, including social media as a form of protected concerted expression with which employers may not interfere and for which discipline or discharge may not be imposed.

(A) NLRB AND SOCIAL MEDIA. Accordingly, local governments may wish to take note of recent "guidance" and enforcement by the NLRB relating to what it describes as "impacts on employee rights protected by the NLRA."[16] Even though the NLRB's jurisdiction currently does not include local government employment, state public employee relations boards, in administering their state laws, may treat NLRB guidance and rulings as providing advice, and perhaps precedent.

In August 2011, the NLRB issued a "*Report of the Acting General Counsel Concerning Social Media Cases*." The report was updated via a memo dated May 30, 2012.[17] This memo provides perspective for municipal employers on how social media use may be viewed in judicial or administrative review of employment practices (even though, as noted above, the NLRB presumably has no, or only limited, jurisdiction over local government).

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[14] E.g., **NHRSA 275:1 Union Membership**. No person shall coerce or compel, or attempt to coerce or compel, any person into an agreement, either written or verbal, not to join or become a member of any labor organization, as a condition of securing or continuing in any employment.

[15] The NLRB itself states: The Board has statutory jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level. . . . As a practical matter, the Board's jurisdiction is very broad and covers the great majority of non-government employers with a workplace in the United States, including non-profits, employee-owned businesses, labor organizations, non-union businesses, and businesses in states with "Right to Work" laws. . . . The following employers are excluded from NLRB jurisdiction by statute or regulation:
Federal, state and local governments, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations. From http://nlrb.gov/rights-we-protect/jurisdictional-standards.

[16] National Labor Relations Act, 29 USC § 141, *et seq*.

[17] See http://www.nlrb.gov/search/simple/all/social%20media.

This part of the paper reviews several cases and results in proceedings reviewed in the NLRB Acting General Counsel's Report.

(1) Facebook Discussion as Protected Concerted Activity. Employer was a non-profit social services provider. Five employees posted comments on Facebook relating to allegations of poor job performance previously expressed by one of their coworkers, a domestic violence advocate. After email interchanges with the advocate and one worker, a meeting with the executive director was scheduled. To prepare for this meeting, the worker who had communicated with the advocate posted on Facebook that the advocate felt that her coworkers did not help the employer's clients enough and asked her coworkers how they felt about it. The four coworkers and the advocate responded on Facebook. That evening, the advocate reported the Facebook conversation to the executive director, indicating that she considered her coworkers' Facebook comments to be "cyber-bullying" and harassing behavior. On the next workday, the worker tried to meet with the executive director, who said she was busy, but would call when she was available. A few hours later, the worker was called to the executive director's office and was terminated. The same day, the employer terminated the four other employees who had posted Facebook responses. The NLRB found the Facebook discussion to be "textbook" concerted activity, and its conduct via the internet did not alter its character, so the employer violated the rights of those employees.

(2) Internet and Blogging Standards; Discharge for Facebook Posting. Here the employer was an ambulance service. An employee was asked by her supervisor to prepare a report concerning a customer complaint about the employee's work. The employee asked for a union representative while she prepared the report, but did not receive union representation. Later that day, from her home computer, the employee posted a negative remark about the supervisor on her personal Facebook page. That drew supportive responses from her coworkers, and led to further negative comments about the supervisor from the employee. The employee was suspended and later terminated for her Facebook postings, and because the postings violated the employer's internet policies. The employee handbook contained a blogging and internet posting policy which prohibited employees from making disparaging remarks when discussing the company or supervisors, and from depicting the company in any media, including but not limited to the internet, without company permission.[18]

The first challenged portion of the policy prohibited employees from posting pictures of themselves in any media, including the internet, which depict the company in any way, including a company uniform, corporate logo, or an ambulance. NLRB concluded that this language violated NLRA § 8(a)(1) because it would prohibit an employee from engaging in protected activity. For example, an employee could not post a picture of employees carrying a picket sign depicting the company's name, or wearing a t-shirt portraying the company's logo in connection with a protest involving terms and

[18] Public sector employers likely recognize the limits to such policies inherent in public employee speech rulings; see *Pickering, Connick, and Garcetti. supra.*

conditions of employment. It also concluded that the portion of the policy prohibiting employees from making disparaging comments when discussing the company or the employee's superiors, coworkers, and/or competitors was unlawful, noting that the policy contained no limiting language to inform employees that it did not apply to Section 7 activity. Also challenged was the employer's standards-of-conduct policy which prohibited the use of language or action that was inappropriate or of a general offensive nature, and rude or discourteous behavior to a client or coworker. NLRB concluded that this prohibition of "offensive conduct" and "rude or discourteous behavior" proscribed a broad spectrum of conduct and contained no limiting language to remove the rule's ambiguity in prohibiting Section 7 activity.

(3) Facebook Postings About Tax Withholding Practices Were Protected Concerted Activity. The employer, a sports bar and restaurant, discharged and threatened to sue two employees who participated in a Facebook conversation initiated by a former coworker about the Employer's tax withholding practices. The employer's internet/blogging policy prohibited "inappropriate discussions." NLRB found that the discharges, threats of legal action, and the internet policy were unlawful. While the policy, included in the employer's employee handbook, provided that the employer supported the free exchange of information and camaraderie among employees, it went on to state that when internet blogging, chat room discussions, e-mail, text messages, or other forms of communication extend to employees revealing confidential and proprietary information about the employer, or engaging in inappropriate discussions about the company, management, and/or coworkers, the employee may be violating the law and is subject to disciplinary action, up to and including termination. NLRB said an employer violates NLRA § 8(a)(1) through the maintenance of a work rule if that rule would "reasonably tend to chill employees in the exercise of their Section 7 rights." The two-part test to determine if a work rule would have such an effect asks (1) if it explicitly restricts Section 7 activities; (2) if not, then it is unlawful only upon a showing that: (a) employees would reasonably construe the language to prohibit Section 7 activity; (b) the rule was promulgated in response to union activity; or (c) the rule has been applied to restrict the exercise of Section 7 rights. NLRB concluded that the policy stating that employees are subject to discipline for engaging in "inappropriate discussions" about the company, management, and/or coworkers could reasonably be interpreted to restrain Section 7 activity. This policy utilized broad terms that would commonly apply to protected criticism of the employer's labor policies, treatment of employees, and terms and conditions of employment. Moreover, the policy did not define what was encompassed by the broad term "inappropriate discussions" by specific examples or limit it in any way that would exclude Section 7 activity. Absent such limitations or examples of what was covered, employees could reasonably interpret the rule to prohibit their discussion of terms and conditions of employment among themselves or with others.

(*4) Employee Who Posted Offensive Tweets Was Not Engaged in Protected Concerted Activity.* A newspaper did not violate § 8(a)(1) when it discharged a reporter for posting unprofessional and inappropriate tweets to a work-related Twitter account. In the spring of 2009, after the employer encouraged employees to open Twitter

accounts and to use social media to get news stories out, the employee opened a Twitter account, picked a screen name, and controlled the content of his tweets. In the biography section of his account, he stated that he was a reporter for the employer's newspaper, and he included a link to the newspaper's website.

In early 2010, the employee posted a tweet critical of the paper's copy editors. The tweet was in response to his concerns about sports department headlines, but there is no evidence that he had discussed his concerns with any of his coworkers. About a week after that tweet, the employer's human resources director asked the employee why he felt the need to post his concerns on Twitter instead of simply speaking to people within the organization, and whether he thought it was appropriate to post these types of tweets. The employee asked if the newspaper had a social media policy. The HR director replied that the policy was being worked on. About a week later, the employee was told that he was prohibited from airing his grievances or commenting about the newspaper in any public forum. He replied that he understood, but continued to tweet and use other social media to post about various matters, including matters relating to his public safety beat. He did not make public comments about the newspaper.

In August and September, he posted various tweets about homicides in the city, as well as several with sexual content. On September 21, the employee posted a tweet that criticized an area television station. The next day, a web producer for the television station took issue with the tweet and emailed the paper about it. Thereafter, the employee emailed the web producer and apologized. During the afternoon of September 22, the employee was called into a meeting with the managing editor, the city editor, and his team leader. The managing editor referred to the tweet about the television station and then asked the employee why he was tweeting about homicides, stating that it was not okay to make these types of tweets and that they would meet again when the executive editor and HR Director were present. Until then, the employee was told he was not allowed to tweet about anything work-related. The employee asked whether the paper had a social media policy and was told it had not yet been established, but was almost complete. Two days later, the employee was suspended for three days without pay. When he returned to work, he was terminated. The termination letter said he had disregarded guidance to refrain from using derogatory comments in social media that could damage the goodwill of the company and that the employer had no confidence that he could meet its expectation of professional courtesy and mutual respect.

Finding that the tweets involved no protected concerted activity, the NLRB had concerns that the warnings about tweeting in the absence of a written policy could have amounted to orally promulgated overbroad rules, but concluded that the discipline here was in response to specific inappropriate conduct and did not seek to communicate with other employees.

(5) YouTube Video About Working Conditions. The employees, all immigrants from El Salvador, learned they were building concrete foundations at a former Superfund site and worried that the soil they were handling was contaminated with arsenic and other

toxins. They also said they were required to wear badges indicating they'd been trained to handle hazardous materials. The badges belonged to other workers and these employees had never been trained.

Three employees took their concerns public in a YouTube video posted in July 2008. Speaking in Spanish, they hid their faces in shadow in an attempt to avoid retaliation. However, within 10 days, the three who appeared in the video and two others who were close to them had all lost their jobs. Through the ensuing months, according to charges filed with the NLRB, the employer continued to threaten and interrogate other employees, warning them not to talk about working conditions with outsiders.

The NLRB ruled the YouTube video was protected because the employees voiced concerns about safety in the workplace. Their airing in public did not lose the Act's protection because they accurately described their concerns about working conditions. Eventually, the employer agreed to settle the case, giving all five workers full back pay for the period from their discharges to the settlement date. The workers declined reinstatement.

(5) Non-Protected Conduct. Several cases found no NLRA violation of protected speech for employer actions in response to:

- Facebook messages about an employer's tipping policy.
- A medical transportation service employee posting on the "wall" of the senator who represented her state of residence.
- Facebook comments about mentally disabled clients of her employer (a facility for homeless people).
- A grocery store chain's media relations and press interview policy in its employee handbook, under which (a) its public affairs office was responsible for all official external communications; (b) employees were expected to maintain confidentiality about sensitive information; and (c) it was imperative that one person should speak for the employer to deliver an appropriate message and avoid misinformation.

Importantly, in these findings, the question at issue was not necessarily whether the discipline or policy basis for the employer action was right, wrong, justified or not; but, instead, whether the employee's posting was concerted speech.

(6) More Examples. In several cases, possibly relevant to local government employer policies, the NLRB found the following social media policy requirements to be overbroad restrictions on protected concerted speech:

- Rules in a hospital's policy that: (a) prohibited employees from using any social media that may violate, compromise, or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity; (b) prohibited any communication or post that constituted embarrassment,

harassment or defamation of the hospital or of any hospital employee, officer, board member, representative, or staff member; and (c) contained a similar prohibition against statements that lack truthfulness or that might damage the reputation or goodwill of the hospital, its staff, or employees. (The complaint involved a nurse posting about another employee's frequent absences.)

- A social networking policy prohibited employees on their own time from using micro-blogging features to talk about company business on their personal accounts; from posting anything that they would not want their manager or supervisor to see or that would put their job in jeopardy; from disclosing inappropriate or sensitive information about the employer; and from posting any pictures or comments involving the company or its employees that could be construed as inappropriate. It also cautioned that one inappropriate picture or comment taken out of context could fall into the wrong hands and cost an employee his or her job.

- A supermarket chain's policy's bar on pressuring coworkers to use social media was lawful, but prohibitions (barring employees from revealing personal information regarding coworkers, company clients, partners, or customers without their consent or using employer's logos or photographs of its store, brand, or product, without written authorization) were too broad.

(B) APPLICABILITY TO LOCAL GOVERNMENT. As noted, these NLRB cases do not constitute binding precedent on local governments. However, they may provide guidance for municipal employers seeking to adopt or modify social media, electronic communication, or computer use policies, including:

- ✓ Be wary of overly broad proscriptions against employee speech.
- ✓ Do not rely on expression of support for employee speech – that then is overridden by policy prohibitions.
- ✓ Language that alerts employees to the array of issues and problems they may encounter in using social media is a plus – but should not be used as a camouflaged deterrent.
- ✓ Policy language must not be written in stone, never to be reviewed.
- ✓ Flexibility may be a good thing, but not if the flexibility is "content-based."

Employees will use social media whether it is allowed, regulated, or not. Private usage that is unrelated to local government, but focused on a matter of public concern is likely within the protection of free speech accorded to public employees under *Pickering-Connick* rationale, unless the speech can be regulated as part of the employee's official duties under *Garcetti*.

III. CONCLUDING COMMENTS AND SUGGESTIONS. Difficulties arise even when social media "comments" may seem extreme, as suggested by the NLRB examples. Perhaps more perplexing, at least in terms of frequency if not severity of the problem, is

employee use that tangentially involves local government social media or that can be seen as somehow relating to their local government employers. The second prong of the standard *Pickering* test should be viewed as requiring a firm demonstration that it has a true adverse effect on the workplace and the efficient conduct of governmental service.

A social media or (to use an antiquated term "blogging") policy may help both local governments and employees avoid situations that lead to confrontations, disputes, and possibly discipline, termination, and litigation. A number of references exist from which to draw guidance, though the fast and ever-changing nature of social media use makes yesterday's policies or guidance of questionable utility for today and particularly for tomorrow.

Given these caveats, here are some ideas derived from several sources[19] that may be worth considering as springboards for discussion:

- Have a clear organizational communications strategy and determine how social media fits into this strategy.
- If a local government decides to use a form of social media, it first should set up boundaries for using the service by users, including officials, employees, and the public.
- Designate someone who is "in charge," but make sure that the person understands the limits of his or her authority, how policies are developed and implemented, and how to resolve disputes.
- Create and enforce "Terms of Use."

Though some employees will bristle at the notion that their employer has an interest in their social media use, employees should, and likely will, appreciate guidance regarding the need to protect identity and privacy, including passwords, particularly any that provide access to local government social media.

With respect to employees' personal usage of social media, consider the following guidance to include in policy language:

- Keep personal and professional (occupational or job) accounts separate. Be mindful of blurring the distinctions.
- Clearly state that the employer does not restrict employees from having personal social media presence, but it should be used for personal purposes, unless the employee is authorized to use for employment-related purposes. Be wary of attempting to restrict <u>any</u> comments about work, even those that may be negative.
- Employees never may use government email or internet access in conjunction with their personal social media use.

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[19] See listing in appendix and North Carolina Department of Cultural Resources, Best Practices for Local Government Social Media Usage in North Carolina, April 2010, available at http://www.records.ncdcr.gov/guides/bestpractices_socialmedia_local_2010412.pdf.

- Be wary of policy language that can improperly limit – or be viewed as improperly limiting – employees' protected speech.
- Train supervisors and officials to understand and respect the limits of employer control over employee social media use.

Where employees have job-related social media usage, employer policies are key and should stress:

- Mandatory professional style in use, and compliance with computer use, communications, and other relevant policies and conduct guides.
- No use for political or private purposes.
- Advise that privacy may not exist under right-to-know or freedom-of-information laws, and employees ought to make those with whom they communicate aware that the public may see their communications.
- Develop, require use of, and monitor compliance with records retention and electronically stored information requirements.
- Educate users about the concept and consequences of spoliation.

Appendix

Some on-line resources for guidance on social media use and policies include:

Best Practices for Local Government Social Media Usage in North Carolina, April 2010, North Carolina Department of Cultural Resources available at http://www.records.ncdcr.gov/guides/bestpractices_socialmedia_local_2010412.pdf.

15 Commandments for Government Agencies on Twitter & 12 Commandments for Government Employees on Twitter, available from Govloop at *http://www.govloop.com/resources*.

Building Local Government Social Media Policies, National League of Cities, http://www.nlc.org/documents/Utility%20Navigation/About%20NLC/SML/NLC-RISC/RISC-2011-Social-Media-Policies.pdf.