First Amendment and Social Media: Keeping it Legal

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ILLUSTRATION:TRUJILLO DESIGN

Introduction

Although it's hard to believe, social media is a relatively new method of electronic communication – Facebook has only been around since 2004 (that's just 15 years!), Instagram since 2010, and Snapchat since 2011. Social media has significantly changed how many of us communicate with each other. Without Facebook, how would we know that Aunt Mo returned back from Hawaii, cousin Amy had twins, and one of our former co-workers rescued another puppy?

Government agencies have fully embraced social media. Public works is using Twitter to let residents know about street closures, police departments are posting videos on Facebook seeking crime tips, and cities are establishing their own YouTube channels to post meeting videos. Planning departments are also using social media to inform the public about pending development projects, and to solicit public input about proposed zoning and plan amendments, among other topics.

The growth of social media applications in the government context has an impact not only on government officials who use social media, but also the increasingly information-hungry general public, who expect local, state, and even the federal government to use these technologies to more effectively disseminate information and allow a forum for comment. In fact, social media provide the public sector a wealth of opportunity to communicate with the public, with interested stakeholders, and with each other about new proposals and ideas. Additionally, social media may be used by all parties interested in public sector decision making, including developers, applicants, individual advocates, non-profit organizations, and governmental entities.

However, the general benefits of the use of these fairly new technologies—which include the promise of greater transparency and greater public participation— must be weighed against the potential drawbacks, such as truthfulness and accuracy of posted information, the source of the posted information, and the longevity of inaccurate information in cyberspace. Additionally, there are a number of issues to consider when public officials and employees choose to utilize social networking tools, as well as a host of legal issues when organizations choose to create and host these sites. So, while government social media is a great way to disseminate information in real-time and to engage residents who might not otherwise attend meetings or otherwise participate in government, it is important that agencies understand the potential legal risks in using social media.

I. Public Records Laws

Social media posts and comments are just another form of electronic communication, and under most state public records laws will be considered a public record subject to release under FOIA and retention under records retention laws. It is important that an agency using social media to communicate about public business complies with applicable public records laws.

II. Open Meetings Laws

Social media posts may also trigger compliance with state open meetings laws. Agencies should remind their elected and appointed officials (including plan commissioners and ZBA members) to avoid engaging in contemporaneous communications on social media about public business with other members of the body that would violate applicable open meetings laws.

III. Discrimination

While more than two-thirds of us have at least one social media profile, that still leaves a lot of us who have no social

media presence. As a result, agencies need to remember to use social media as a *supplement* and not a substitute for other communications. Agencies should still use traditional sources of communication (mailings, publications, newsletters, and even websites) to inform and engage the public in planning and development activities so those without a social media presence receive the same information as those on social media.

IV. First Amendment

The First Amendment provides individuals with the right to engage in protected speech without government interference. If an agency has established a social media site to communicate with the public about agency business, the First Amendment will apply to the comments and posts made by others on that site. So, the moderator of the agency page cannot simply delete, hide, block, or ban posts or people based solely on the content of the message that was posted.

That does not mean that "anything goes" on government social media sites. Agencies can adopt rules on public comments so long as the rules do not implicate protected speech. For example, agencies might ban commercial advertising on its site, prohibit discriminatory comments, and ban all links to third party sites. However, removing posts that are simply critical of the agency or its activities could be subject to challenge as a violation of the First Amendment. Many agencies find it helpful to look at social media moderation along the same lines as moderation of comments at a public meeting – while it is acceptable for the public to criticize and disagree with agency actions, if the speech becomes disruptive, agencies will enforce "rules of decorum."

Agencies should put their comment policies in writing and post them on their social media sites (or provide links to the policies on their website) to put the public on notice of the type of comments that will be subject to removal.

V. Copyright Protections

Just because you find it on the Internet does not mean it's free to use. One lawyer learned that the hard way (to the tune of an $8,000 settlement) after he used stock photos on his page without first obtaining the owner's consent. If you aren't sure whether you can use a photo or other content, you might consider creating and using your own. So, for example, if you are posting about a new park project, instead of using photos you find online, use photographs of your own agency's parks.

VI. Employee Use of Social Media

No article about the legal risks in social media would be complete without a discussion of employee use. Public employees have the right to exercise their First Amendment speech rights, to comment on working conditions, and to speak on matters of public concern. As a general rule, however, social media posts that fall more into the category of an "individual gripe" about the employee's job or supervisor will not be considered protected and could result in discipline and even termination. As a result, agency employees (like anyone else) should always think before they post!

Government employers continue to walk a tightrope when regulating the use and content of the electronic communications of its employees and when taking employment action based on the use or content of its employees' electronic communications. The law is well settled that public employees have limited or no expectation of privacy in their office, desk, locker or even their telephone calls at work. Unfortunately, the law moves slowly and is far from addressing the balance of rights of employees and employers in the context of electronic communications.

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A. Constitutional Protections

Public employees do not surrender all of their First Amendment rights, particularly their speech rights, merely because they are employed by the government. However, the speech of public employees can be subject to certain restrictions by the government, because it has a different—and more significant— interest in regulating the speech of its employees than the general public.

The U.S. Supreme Court has outlined a two-step analysis for determining whether the speech of public employees is protected by the First Amendment. First, it must be determined whether the employee spoke as a citizen on a "matter of public concern." If the speech is a matter of public concern, then the court must engage in the *Pickering* balancing and decide whether the government was justified for treating the employee's speech differently from the general public.

Courts decide whether speech is a matter of public concern based on "the content, form, and context of a given statement, as revealed by the whole record." Of these three factors, the content of the statements have generally been acknowledged to be the most important, although the form and context can help make a statement one of public concern if the speech at issue occurs in an unconfined space. Matters that have been found to be of "public concern" include speech relating to public safety and policy protection, governmental wrongdoing and misconduct, or speech which seeks to expose wrongdoing by government officials.

Pickering balancing has been used in Internet postings. In *Curran v. Cousins*, 509 F.3d 36, 49 (1st Cir. 2007), a corrections officer was terminated for postings he made on a union

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website. This website was owned and controlled completely separately from the public employer and featured a public discussion board which allowed registered users to "post comments and statements. Any person with access to the Internet—whether a member of the union or not—could register, post, and read messages." The officer, who had been suspended a week earlier for "threatening and menacing" co-workers, posted messages to the website that made unfavorable comparisons to the current sheriff, and his personnel decision- making to Adolf Hitler and the Nazis during World War II. The employee was thereafter fired due, in part, to his posting on the website. The First Circuit did note that although most of the content of the posting was not a matter of public concern, a part of the posting which addressed the sheriff making personnel decisions based on political affiliations rather than merit was a matter of public concern. However, in balancing the speech of the employee and the later actions of his employer to fire him, the court found that the government was plainly justified in firing the employee. In the posting, the employee referenced the plot of Hitler's generals to kill him and urged a similar plot by analogizing the current sheriff to Hitler. Further, the court found that "[s]peech done in a vulgar, insulting, and defiant manner is entitled to less weight in the *Pickering* balance."

An interesting case that dealt with the issue of whether employee activities on social media were protected under the First Amendment involve political activities by employees of a sheriff's department. That case involved employees of the local sheriff who supported the sheriff's opponent in the election. To the employees' misfortune, their supported candidate lost the election, and the sheriff terminated them. The employees sued, claiming that the sheriff retaliated against them in violation of their First Amendment rights by terminating them for engaging in protected speech activities - in this case, clicking "like" on the candidate's Facebook page. The district court judge ruled in favor of the sheriff, finding that the mere action of clicking "like" on Facebook was not "speech."

The employees appealed to the U.S. Circuit Court of Appeals, Fourth Circuit. That court issued its opinion reversing the district court and finding that the employees did engage in protected speech activities in their conduct on the sheriff's opponent's Facebook page. *Bland v. Roberts* (U.S. Court of Appeals, 4th Cir. September 18, 2013).

First, the court reviewed the Supreme Court political speech retaliation cases in determining which of the employees were protected and which employees were exempt as occupying a "policymaking or confidential position." Under the Supreme Court's decisions in *Elrod v. Burns* and *Branti v. Finkel*, a public employee who has a confidential, policymaking, or public contact role has substantially less First Amendment protection than a lower level employee. The purpose of the Elrod-Branti test is to ensure loyalty with employees in certain policymaking or confidential positions. In this case, the court determined that the plaintiff deputy sheriffs were not in policymaking positions where their political allegiance to the sheriff was a job performance requirement.

Second, the court looked at the conduct of the employees to determine whether their activities (supporting the sheriff's opponent on the opponent's Facebook page) were a substantial motivation for the sheriff's decision not to reappoint the employees. The court looked at the sheriff's conduct as well, including his statements to employees that those who openly support his opponent would lose their jobs, and specifically referencing his disapproval of the decision of some employees to support his opponent's candidacy on Facebook.

Third, the court addressed the question whether the employees' activities were speech. As noted above, the district court had ruled that merely clicking "like" on Facebook was not speech. The appellate court disagreed, however, stating that "clicking on the 'like' button literally causes to be published the statement that the User 'likes' something, which is itself a substantive statement." Particularly in this context, clicking "like" on a candidate's Facebook page sends a message that the user approves the candidacy. The court found this to be pure political speech, as well as symbolic expression - a "thumbs up" symbol that the user supports the campaign by associating the user with it. As the court noted, liking a candidate's campaign page "is the Internet equivalent of displaying a political sign in one's front yard."

The lesson from the *Bland* case is that employers must be cautious in taking disciplinary action against an employee for the employee's social media activities that might be protected First Amendment speech. In this particular case, the comments and "likes" on Facebook were considered protected political speech.

B. Hiring Decisions

Never has so much information about so many been available with the click of a mouse. Every prospective employer is interested to know everything that they can about a job applicant. And every employer knows that they might find something on the Internet which the applicant is reluctant to divulge in an interview. It may not be a matter of finding out "dirt" on the candidate, but just learning more about their likes, dislikes, lifestyle, thoughts and beliefs which may provide greater insight into their potential suitability as an employee. Nevertheless, the question arises as to what information from the Internet an employer can use when making hiring decisions.

Reliance on Internet information has become so common that we often forget that not all information obtained in Internet searches is completely accurate. Anyone can post information on the Internet and no assurance exists that it is all truthful. We have all heard about altered photos and intentionally planted misinformation which causes problems for an individual, to say nothing of the problems of those with common names or the same name as someone with a negative reputation. If searching for information on job candidates on the Internet, always remember that the information may not be truthful, accurate or reliable.

While it is not illegal to review public information about job candidates, it is advisable that candidates know of this possibility ahead of time. If candidates are aware that searches of social network and other Internet sites is part of the candidate review process, a decision based in whole or part on this information will not be inconsistent with their expectations. Thus,

they will be less likely to claim that an adverse decision was the product of discrimination or other illegal basis.

Prospective employers can make employment decisions on any basis that is not illegal. Examples of illegal considerations are those such as race, gender, and religion. Off duty conduct can be a relevant job qualification depending on the position for which the employee applies. For example, it may be relevant to the qualifications of a police officer whether that individual posts pictures of himself or herself in situations which depict illegal activity. Evidence of gang affiliation may also disqualify a candidate from employment with law enforcement. Whether information gathered from electronic sources, or any other, serves to disqualify a candidate from public employment depends largely on the position which is sought and the type of behavior which is disclosed. On the other hand, public employers must take great care to avoid decisions based on social network information related to religious affiliation, ethnic or racial information gathered only from these searches and other information which, if used, as a basis to deny employment would violate the law.

Finally, given the potential for inaccurate information gathered from social networks or other Internet sites, it is advisable to allow a candidate to provide explanation to any information gathered from these sources to ensure that a decision is not based on false information.

C. Discipline of Current Employees

Evidence of misconduct related to work performance that is gathered from social network sites may be an appropriate basis for action against current employees. Like pre-employment considerations, the misconduct must impact, or have a nexus, to the reputation of the employer or the employer's ability to deliver services to the citizens. So, for example, the police officer or teacher who posts obscene pictures of himself or herself on their Facebook page, or photos of obvious illegal conduct, likely serves as an appropriate basis for disciplinary action.

Government employers, like other bosses, are struggling with critical social media posts by employees. Can an employer terminate or discipline a worker for complaining about his or her boss or company on Facebook? Will social media policies protect an employer? The answers to these questions are not yet clear, because there is little case law on this issue. However, the National Labor Relations Board (NLRB) has been active in this area recently. While the National Labor Relations Act does not apply to government employers, the NLRB rulings can provide government employers with some guidance.

In one case, the NLRB ruled that a nonprofit employer unlawfully discharged five employees who had posted comments on Facebook relating to allegations of poor job performance that had been previously expressed by one of their coworkers. The workers were found to be engaged in "protected concerted activity" because they were discussing terms and conditions of employment with fellow co-workers on Facebook. The NLRB cited the *Meyers* ruling that an activity is concerted when an employee acts "with or on the authority of other employees, and not solely by and on behalf of the employee himself." In this case, the discussion was initiated by one worker in an appeal to her coworkers on the issue of job performance, resulting in a "conversation" on Facebook among coworkers about job performance. The NLRB ruled similarly in a number of other cases.

Two recurring themes have come out of the NLRB rulings. First, individual gripes or venting by employees is not protected and employers can discipline, and even terminate, employees for this conduct. Second, the NLRB is taking a very narrow view of social media policies and striking down a number of policies for being overbroad where the policies could be interpreted to prohibit protected conduct.

In another case, however, the NLRB ruled that a reporter's Twitter postings did not involve protected concerted activity. Encouraged by his employer, a reporter opened a Twitter account and began posting news stories. A week after the employee posted a tweet critical of the newspaper's copy editors, the newspaper informed the employee he was prohibited from airing his grievances or commenting about the newspaper on social media. The reporter continued to tweet, including posts about homicides in the City and a post that criticized an area television station. The newspaper terminated the reporter based on his refusal to refrain from critical comments that could damage the goodwill of the newspaper. The NLRB found that the employee's conduct was not protected and concerted because it (1) did not relate to the conditions of employment and (2) did not seek to involve other employees on issues related to employment. The NLRB issued a similar ruling in a case involving a bartender who posted a Facebook message critical of the employer's tipping policy, finding the posts mere "gripes" that are not protected.

Two recurring themes have come out of the NLRB rulings. First, individual gripes or venting by employees is not protected and employers can discipline, and even terminate, employees for this conduct. Second, the NLRB is taking a very narrow view of social media policies and striking down a number of policies for being overbroad where the policies could be inter-

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preted to prohibit protected conduct.

What does this mean for government employers? First, employers must be cautious in disciplining or terminating employees for critical posts on social media sites. An employer should ask itself whether the posts are "protected and concerted activity" or merely constitute "gripes" about an employer that are not protected? Second, an employer should review its social media policy to make sure it is not overbroad in prohibiting protected activities. Finally, an employer should be careful not to enforce social media policies in an arbitrary or discriminatory manner.

D. Employer Requests for Social Media Passwords.

It has become common practice for public and private employers to review the publicly available Facebook, Twitter and other social networking sites of job applicants as part of the vetting of candidates in the hiring process. However, because many social media users have privacy settings that block the general public (or non-friends or followers) from viewing their complete profile, some employers are asking candidates to either turn over their passwords or log on to their social media accounts during the interview.

Because an applicant can decide not to apply for a particular job, some employers have argued that it is neither an invasion of privacy nor a violation of constitutional rights to ask for this information during the hiring process and if applicants refuse to provide the requested information, employers are free to drop their consideration for hire. Nevertheless, the ACLU and others argue that this practice violates a candidate's right to privacy.

Until a few years ago, there was no federal or state law expressly prohibiting this practice, although a few states have proposed or enacted legislation. Maryland became the first state to pass a law on the practice. Under this law, employers are prohibited from requiring employees and job applicants to "disclose any user name, password, or other means for accessing a personal account or service" electronically. Employers are also prohibited from refusing to hire an applicant for not providing access to this information. Similarly, employers are not permitted to terminate or discipline an employee for refusing to provide this information.

In addition to protecting the privacy of current and prospective employees, the Maryland law also provides employers with some protections. For example, employees are prohibited from downloading "unauthorized employer proprietary information or financial data" to personal accounts or to websites, and the law allows employers to investigate these activities to ensure "compliance with applicable securities or financial law or regulatory requirements." Additionally, employers are permitted to require employees to provide passwords and login information for non-personal accounts that are part of the employer's own systems, such as company e-mail accounts.

The second state to pass a similar law is Illinois. Illinois P.A. 97-0875 prohibits public employers from seeking job applicants' social media passwords. The legislation allows candidates to file lawsuits if they are asked for access to sites like Facebook. Employers can still ask for usernames to view public information and monitor employee usage of social media on employer devices. Many states have since enacted or proposed legislation similar to the Illinois and Maryland laws.

Employers should be cautious in using social media to discipline current employees. Unless there is an actual need to review an existing employee's social media profile, it may be difficult to find a connection between social media usage and the employee's right to hold their job.

VII. Importance of a Social Media Policy

Governments participating in social networking sites must start with the realization that what is posted on social networking sites is public information. That means that government employees and officers should not post information that neither they nor the government would want everyone to know. By realizing the public nature of the information being published, confusion, lawsuits, and other problems can be more easily avoided.

All governments that use any form of online communication should develop, implement, and enforce a website and social networking policy. That policy should include a well-defined purpose and scope for using social media, identify a moderator in charge of the site, develop standards for appropriate public interaction and posting of comments, establish guidelines for record retention and compliance with sunshine laws, and include an employee access and use policy. The government should also post express disclaimers on its websites reserving the right to delete submissions that violate the comment policy, so long as that policy does not prohibit protected speech. Finally, the government should train employees regarding appropriate use of social networking and how use might impact the employer.

In crafting a social media policy, an employer should be careful not to implicate the First Amendment rights of its employees nor violate any applicable federal or state employment laws protecting employees. An example of this type of situation involved a settlement between the National Labor Relations Board and an ambulance service in Connecticut that fired an employee in 2009 for venting about her boss on Facebook. The ambulance company argued that the employee's Facebook criticism violated the company's social media policy barring workers from disparaging the company or their supervisors. The NLRB argued that the National Labor Relations Act protects an employee's discussion of conditions of his or her employment with others, and that co-workers' comments on the employee's Facebook page implicated those protections. As part of the settlement, the company stated it would change its policy so it did not restrict employees from discussing work and working conditions when they are not on the job.

As discussed above, the NLRB has struck down a number of social media policies for being too broad, so employers should take care in crafting a social media policy that avoids these issues.

A government might also consider providing examples of acceptable or unacceptable conduct in both employee and public usage of social media to illustrate the type of conduct that is regulated and why a particular regulation is in place. In addition, all employees should be required to sign a written acknowledgement that they have received, read, understand, and agree to comply with the social media policy.

A checklist for drafting a social media policy follows on Appendix A. A sample Facebook comment and terms of use policy follows on Exhibit B.

Appendix A

Checklist for Drafting a Social Media Policy
A government considering establishing a Facebook, Twitter, or other social networking site should first adopt a social media policy to govern the administration and monitoring of site content, set ground rules for public input and comments, and adopt policies for employee usage of social media.

PURPOSE
The policy should contain a statement that the use of social media by the government entity is for the purpose of obtaining or conveying information that is useful to, or will further the goals of, the government.

APPROVAL AND ADMINISTRATION
The policy should provide for an administrator to oversee and supervise the social media networking sites of the government. The administrator should be trained regarding the terms of the policy and his other responsibilities to review content to ensure that it complies with the policy and furthers the government's goals.

COMMENT POLICY
The policy should identify the type of content that is not permitted on a social media site and that is subject to removal. This policy must be carefully crafted so that it does not prohibited protected speech, and only limits speech that does not implicate the First Amendment, such as obscenity; discriminatory content; threats; content that violates a copyright or trademark; and any content in violation of federal, state, or local law. The policy should also contain a disclaimer that any comment posted by a member of the public is not the opinion of the government. Finally, the policy should include language that reserves the right of the administrator to remove content that violates the policy or any applicable law.

COMPLIANCE WITH LAWS
The policy should include language regarding compliance with applicable federal, state, and local laws, regulations, and policies. It should be made clear that content posted on a government site is subject to freedom of information and record retention laws. In addition, content posted on social media sites may be subject to e-discovery laws. Finally, information that is protected by copyright or trademark should not be posted or maintained on a social media site unless the owner of the intellectual property has granted permission.

EMPLOYEE USAGE POLICY
A social media policy should clearly establish guidelines and boundaries to enable employees to anticipate and understand company expectations and restrictions regarding social media usage. Although each employer should create a social media policy tailored to the particular employer's workplace, the following are some suggested employee usage provisions:

A. The policy should clearly communicate to employees whether social media use in the workplace will be prohibited, monitored, or allowed within reasonable time limits. The policy should be careful not to excessively restrict the content of employee social media postings to the extent that protected speech among the company's employees would be prohibited. For example, a social media policy should not ban "inappropriate discussions" about the company, management, working conditions, or coworkers that would be considered protected speech in another form or forum.

B. The policy should also caution employees that they have no expectation of privacy while using the Internet on employer equipment. If employees will be monitored, the policy should inform employees of such monitoring.

C. The policy might also require employees who identify themselves as employees of a particular government or company to post a disclaimer that any postings or blogs are solely the opinion of the employee and not the employer.

D. The policy should also address the protection of confidential and sensitive government information, as well as personal information relating to government officials and employees, customers, or residents.

E. Prior to taking any adverse employment action against an employee on account of the content of the employee's social media posting, consider whether the employee's comments (1) were posted on a public site accessible to a large number of people; (2) disclosed confidential information about the employer, its employees, residents, or others; or (3) were directed at coworkers in a serious effort to discuss working conditions or were simply a venue for the employee to vent personal frustration. Any decision to take adverse employment action against an employee on account of social media use should be made in consultation with legal counsel.

F. Finally, all employees should be required to sign a written acknowledgment that they have received, have read, understand, and agree to comply with the social media policy.

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APPENDIX B

Sample Facebook Comment and Terms of Use Policy
Comments containing any of the following inappropriate content will not be permitted on the Government's social media sites and are subject to removal and/or restriction by the Administrator or his/her designees:

1. Obscene, sexual, or pornographic content and/or language
2. Content that promotes discrimination on the basis of race, age, religion, gender
3. Content that violates a legal ownership interest (copyright or trademark)
4. Threats to any person
5. Conduct that violates any federal, state, or local law or encourages illegal activity
6. Promotion of any commercial activities not related to Government business
7. Spam or links to malware/viruses

A comment posted by a member of the public on any Government social media site is the opinion of the poster only, and publication of a comment does not imply endorsement of, or agreement by, the Government, nor do the comments necessarily reflect the opinions or policies of the Government.

The Government reserves the right to deny access to Government social media sites for any individual who violates the Government's social media policy, at any time and without prior notice.

All comments posted to any Government Facebook site are bound by Facebook's terms of use and the Government reserves the right to report any violation of Facebook's terms of use to Facebook with the intent of Facebook taking appropriate and reasonable responsive action.

Users who enter private or personal information on Government social media sites do so at their own risk, and the Government is not responsible for any damages resulting from the public display of, or failure to remove, private or personal information. This policy and terms of use may be amended from time-to- time, without further notice.

(This sample policy is provided for educational and illustrative purposes only. Please consult with your own attorney before adopting, implementing, or using this sample policy to ensure it is consistent with applicable state and local laws.) ML

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