



## Social Media: Frequently Asked Questions

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Dear Reader:

The following document was created from the MTAS website ([mtas.tennessee.edu](http://www.mtas.tennessee.edu)). This website is maintained daily by MTAS staff and seeks to represent the most current information regarding issues relative to Tennessee municipal government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

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Reference Number: MTAS-1623

**Q: Shouldn't candidates know that their online information could be viewed by a potential employer? Why should I have to provide a written release of this at time of application?**

A: Not all social networking users prescribe to the same rules and precautions by making sure their information stays private. It is recommended that you provide a release along with the application that tells the applicant that you will be conducting a background check which may include social networking and online searches. This also provides the applicant with the requisite time to make changes to their privacy settings. In other words, let applicants know up front that a social media background check will be made and indicate how that information will be used.

**Q: I had an employee call in sick, but was reported to be posting on her social media profile that she was at an amusement park for the day. Can I terminate the employee for this?**

A: It is not recommended that you jump to any conclusions. Social media sites now have the option of backdating posts, as well as future scheduling the timing of posts, so there is no reliable way to know if someone was really at the park when they were supposed to be sick. Additionally, social media sites such as Facebook are notorious for being inaccurate when reporting location or status update via GPS technology (see location-based reporting [1] and time stamps). However, if your municipality has conclusive evidence that an employee is abusing their sick leave, and that information is obtained legally and ethically, there would be no reason not to move forward with disciplining an employee for such behavior.

**Q: I have an employee out of work on workers' compensation. He posted pictures of himself doing physical activities that would conflict with his injury report. What should I do?**

A: Such information, if obtained legally and ethically, should be forwarded to your municipality's workers' compensation provider (e.g., Tennessee Municipal League Risk Management Pool) or an attorney that specializes in workers' compensation fraud.

Attorneys Gregory M. Duhl and Jaclyn S. Millner (William Mitchell College of Law) produced a detailed legal study on "Social Networking and Workers' Compensation Law at the Crossroads" in September 2010. Their study can be downloaded from <http://ssrn.com/abstract=1675026> [2].

**Q: I have an employee that complained of being harassed by another employee online during and after working hours. What is my legal obligation to investigate? How do I handle the investigation if the profile/messages in question are private and not generally accessible?**

A: Workplace harassment can occur at or outside of the workplace. If an employee is harassing a coworker online or elsewhere, the municipality has a duty to investigate upon becoming aware. The harassed employee has the duty to provide copies or transcripts of the alleged harassment if contained in private messages or profiles.

**Q: Can we restrict all access to all social media sites during work hours?**

A: A municipality, via an internet acceptable use policy/social media use policy, can prohibit or allow whatever internet access it deems in the best interest of the municipality. This includes banning employees from accessing the sites on their breaks and at lunch. Be aware, however, that most employees can access the internet and their social media profiles through a handheld device or a cell phone.

**Q: We have an employee making negative comments under our social media stories and announcements. This is reflecting negatively on us as an employer. Should we delete those comments? What about free speech?**

A: The municipality's social media site should contain clear posting guidelines which include criteria for removing obscene or inappropriate posts. When an employee is posting in his or her official capacity, the content can be more heavily regulated. However, when the employee is not holding himself out to be an employee, he should receive the same free speech protections as any other citizen. It is also recommended that the municipality not allow free commenting and posting and that all correspondence, comments, and questions (including complaints) be directed to the municipality's email address, website, or office for appropriate handling. The municipality should focus on making its social media site

more informational as opposed to interactive, unless there is a way to closely manage daily interactions or disruptive content.

**Q: We have police officers who posted pictures of themselves in an official uniform drinking and partying. What can the municipality do about this? What if he/she was not wearing their uniform but their pictures are still accessible?**

A: Such situations should be addressed by the department's policy on off-duty conduct unbecoming an officer. The municipality should also evaluate their social media policies to determine if this conduct is addressed appropriately. The department may want adopt a separate social media policy to address off-duty social media behavior. It is important to note, while the conduct may be viewed as unbecoming, there may be no legal basis for discipline.

**Q: Can social networking be considered campaigning on the job, and therefore illegal?**

A: Yes, if the activities engaged in on social media meet the legal definition of campaigning, then such activity could be illegal while on duty. However, true networking without political endorsement is not likely campaigning.

**Q: What is MTAS' stance on using social media in the hiring process? Should we or shouldn't we?**

A: MTAS' role as an advisory agency is to make you aware of the implications of such a practice. It will be up to your municipality to determine what role social media plays in your hiring process and background checks.

**Q: We have a long-time employee that has cancer. She has authorized us to do a charity dinner on her behalf. Can we put this on our social profile?**

A: It is not recommended that you discuss an employee's health condition except for what is included in the scope of business necessity (i.e., FMLA paperwork, ADA etc). An employee's health status and genetic information should be considered confidential and protected information. This health condition should not be advertised by the employer, even if the employer is attempting to do good will.

**Q: We have an employee that talks on his personal blog about a serious health condition, but he has never come to us to request an accommodation under ADA. What should we do?**

A: Nothing. Under ADA the employee would need to have direct dialogue with the employer (assuming the issue was not obvious). While the employee is not required to use the words "ADA or accommodation," they should be able to articulate a work issue or work barrier before the employer can evaluate the situation and determine if a reasonable accommodation can be made.

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#### Links:

- [1] <http://www.mtas.tennessee.edu/reference/social-media-disciplining-employee-online-activity>
- [2] <http://ssrn.com/abstract=1675026>

*DISCLAIMER: The letters and publications written by the MTAS consultants were written based upon the law at the time and/or a specific sets of facts. The laws referenced in the letters and publications may have changed and/or the technical advice provided may not be applicable to your city or circumstances. Always consult with your city attorney or an MTAS consultant before taking any action based on information contained in this website.*

**Source URL (retrieved on 10/15/2019 - 7:30pm):** <http://www.mtas.tennessee.edu/reference/social-media-frequently-asked-questions>