Social Media as a Tool for Government

Dear Reader:

The following document was created from the MTAS website (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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Table of Contents

Social Media as a Tool for Government

Reference Number: MTAS-1601

This section will provide your city with information relative to the use of social media for purposes of communicating with employees, interacting with your community, and making hiring decisions. Before we move into "defining social media", it is important to note that you should proceed carefully when considering your social media strategy and include your information technology department and legal department in any decisions made about the use of social media in order to ensure technical capability and policy compliance.
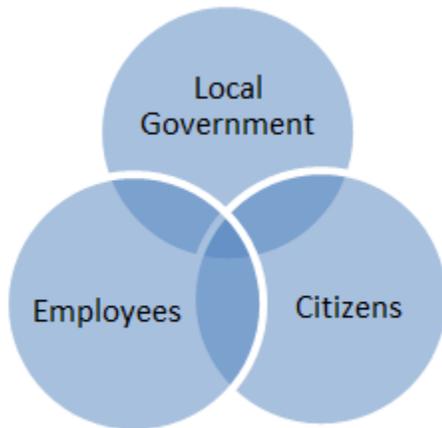
Social media is a way to use the internet and applications to communicate with people, groups, and other entities using an interactive process. These communication systems (typically accessed via the web with, computers, tablets and mobile devices) allow people to receive and share information quickly and efficiently for various purposes. Social media is a technology that supports a two-way exchange of communication.

Today, social media is a conglomeration of web based tools, forums, websites and other applications that encourages communication between the users of the social media platforms. Common social media programs are: Facebook, Twitter, Skype, LinkedIn, Tumblr, Instagram, Pinterest, Wikipedia, Yammer, YouTube, Snapchat, Xing, Mix, Xanga, Reddit, Yelp, Delicious, Classmates and Wordpress. The social media programs change and evolve with each year, but the concept of interactive web communication is here to stay.

Use of Social Media

Reference Number: MTAS-1602

Social media is a way for people to share information. An account can generally represent an individual, a company, municipality, or a group. While the three primary uses for social media are networking, socializing, and marketing, social media is also used to provide the public with information about city events, schools, traffic, new businesses, weather-related incidents, and new initiatives.

Social Media Statistics

Social media growth has appeared to level off somewhat since 2016 statistics were reviewed. Facebook is still the most popular site. In the United States, Facebook reaches 68 percent of the adult population with three-quarters of those users access Facebook on a daily basis.[1] The newest site to see a surge is YouTube which is not a traditional social site but does have many social element. YouTube is now used by 73 percent of U.S. adults and 94% of 18- to 24- year olds. The 18- to 24- year old segment

stands out for using multiple Social Media platforms with 78 percent using Snapchat, 71 percent using Instagram and 45 percent using Twitter multiple times per day.[2] Other popular Social Media sites in the United States are Twitter, LinkedIn, Instagram and Pinterest each with a respective adult internet users proportion of 24 percent, 25 percent, 35 percent, and 29 percent.[3]

As of February 2018, 69 percent of the U.S. public uses some type of social media platform.[4] We are in an age where grandparents, while sitting in the comfort of their homes, are able to visit their grandchildren who live 500 miles away over FaceTime or Skype. Children today do not think twice about sending a video of themselves doing a hand stand to all their friends at school using SnapChat. Our workforce is adapting to the changes brought about by social media in their personal lives and we must help them adapt professionally in our workplaces and our communities.

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[1] http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/ [1]

[2] Ibid.

[3] Ibid.

[4] http://www.pewinternet.org/fact-sheet/social-media/ [2]

Trends in Social Media

Reference Number: MTAS-1754

The trends in social media include a continued spread across demographics, some consolidation of services, as well as the number of users continuing to rise. Social media continues to add users with greater diversity, especially across age and income demographics. As the numbers have increased this has helped the user base grow more representative of the broader population. Young adults were the earliest adopters of social media but usage by older adults has increased in recent years.[5] Some consolidation has occurred among the different tools. Facebook acquired Instagram in the spring of 2012 for $1 billion dollars in cash and stock.[6] Facebook has continued to operate Instagram as a separate entity allowing the tools to integrate with one another. In the United States, Facebook is by far the most popular social media site. LinkedIn, Pinterest, Instagram, and Twitter are all very close in the rankings with one another. However, the most significant change for users has come in the form of mobile use. Over the last few years it has become clear that the future of social networking is via mobile devices. Smart phones, iPads, iPods, tablets and other mobile devices make connecting with one another much more accessible than being on a desktop computer tethered to a desk.

The number of registered users for each service has continued to climb. Facebook reports 2.2 billion, YouTube has 1.9 billion, Instagram has 1 billion, LinkedIn has 562 million, Twitter has 336 million, and Snapchat has 255 million active users.[7]

The following sections will explore a few popular social media tools but is not all inclusive, as new tools are emerging daily. Before deciding which social media tool will be of most use to your city, you will need to do some research about the demographics in your community. Since the city's goal is to reach as many citizens in the city as possible, it is important to know which social media platforms citizens are using. After your city implements the use of social media, you will want to stay involved in the evolution of social media and continuously look for new ways of doing business through social media, while at the same time remaining cognizant of and being vigilant about not falling into the many pitfalls that come along with the use of social media.

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[5] http://www.pewinternet.org/fact-sheet/social-media/ [2]

[6] http://dealbook.nytimes.com/2012/04/09/facebook-buys-instagram-for-1-billion/?_r=0 [3]

[7] http://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/ [4] & https://www.linkedin.com/about-us [5]

Facebook

Reference Number: MTAS-2071

Facebook is a social media site that was started by Mark Zuckerberg in 2004.[8] It was launched at Harvard University. Facebook allowed students to create a profile containing personal information and then find other students in an online location. It started at a single university and then spread to other US colleges and universities. US high school students were the next target audience. Facebook then began spreading worldwide in the education market. In September 2006, the network extended beyond educational institutions to anyone with a registered email address.[9] The founder Mark Zuckerberg is the chairman and CEO for Facebook.[10] He has turned down very lucrative offers from companies wanting to purchase Facebook and continues to maintain a hands-on approach with the company.

Facebook describes itself as the place for people to share and discover.[11] If you want to share the message of your city with as many users as possible, then Facebook is a good place to start. It is a great marketing and communication tool. Facebook covers the widest number of users across all demographic areas, including age, ethnicity, income, education, etc.[12] Facebook also allows you to post most types of information, including text, pictures, short videos, and links to web sites. While Facebook allows you to post lengthy text, it is best to keep your message short and eye-catching. When using any of the social media tools, it is important to keep your post fresh and up-to-date in order to drive activity to your page.

To create a page for your organization, select the "create a page" option. Click the "Get Started" button under "Business or Brand" which will activate the "Name your Page" and "Add a category to describe

your Page" fields. After naming the page, start typing "Government" in the category field. Next select "Government Organization" as your category unless one of the other government options is a better fit for the Facebook Page you are creating. This option will allow you to be under the "Amended Pages Terms [6]" for State and Local Governments.[13] The National Association of State Chief Information Officers (NASCIO) (http://www.nascio.org [7]) worked with Facebook in order to get terms that would work better for local and state governments. This option will also give you the benefit of using the publishing tools.

The most important thing to remember when creating the page is to have more than one administrator. In case something happens to one of the page administrators, the other can still perform as the admin for the page. Page roles will allow you to assign users as Admin, Editor, Moderator, Advertiser, or Analyst. The help file in Facebook [8] details what tasks each role is able to perform.

Each individual within your organization who has rights to make changes on the page must first have his/her own individual page and then must be given access to the organization's page and assigned a role. The person who first creates the page will automatically be given the Admin role.

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[8] https://www.facebook.com/facebook/info?tab=page_info [9]

[9] http://www.theguardian.com/technology/2007/jul/25/media.newmedia [10]

[10] https://investor.fb.com/corporate-governance/?section=board [11]

[11] https://www.facebook.com/facebook/info?tab=page_info [9]

[12] http://www.pewinternet.org/2015/01/09/demographics-of-key-social-networking-platforms-2/ [12]

[13] https://www.facebook.com/terms_pages_gov.php [6]

Twitter

Reference Number: MTAS-2072

Twitter is an online social networking service that allows users to send and read short 280-character messages called Tweets.[14] People who use Twitter want to consume information quickly and to stay informed. The information you see on your timeline page/feed comes from other accounts that you follow. Following someone on Twitter means you are subscribing to their tweets and when they tweet something you will see it on your home tab. Essentially, you search for and look for feeds that contain information you want. These other pages could be people, businesses, organizations, news outlets, or other accounts you find interesting. A tweet can contain text, links or a picture. Tweets typically contain small text bites with a link that sends you somewhere else to get additional information, much like an electronic billboard. A successful Twitter administrator is someone who is creative and passionate about getting the word out or circulating the message you want to distribute. Twitter accounts must be fresh and active to engage your audience and to attract new readers.

Twitter has different standards and rules and you should read through them prior to creating an account. Here is a link to Twitter policies and guidelines: https://support.twitter.com/categories/56#category_237 [13].

Twitter is always evolving. Twitter users have found creative ways to shorten tweets and to help people follow them or to easily locate a topic of interest. An example is placing the hashtag symbol (#) before a relevant phrase or keyword within your tweet. Twitter users were the first to use the hashtag, which has now been incorporated into Facebook and other social media tools. When the subject of a hashtag becomes really popular, those tweets are identified as "Trending Topics."

The hashtag of a Twitter post should identify the topic of your tweet to help others find your topic through a search. A city can search a hashtag to find out what topics people in the community are talking about or searching for information on. Keep in mind that you do not have exclusive rights to a hashtag, you should never use too many hashtags (best practice is no more than two), and whatever hashtag you are using should be relevant to your tweet.

In addition to tweets, Twitter allows subscribers to send direct messages. When you follow someone on Twitter, you will see their tweets on your home tab. That person is also able to send you a direct

message. Your followers are the people who receive your tweets and they can send you direct messages.

Direct messages are similar to emails or group conversations that are only sent to and received by select individuals, whereas a tweet is information and can be seen by anyone worldwide in in a matter of seconds. Direct messages are, by default, only allowed to and from your followers. However, there is a setting you can turn on that allows anyone to direct message you.

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[14] https://support.twitter.com/articles/215585 [14]

Instagram

Reference Number: MTAS-1756

Instagram is an online social media networking service that allows individuals a place to share pictures and short videos. You are able to tag other users, apply filters and hashtags. People who follow you are allowed to like the content and comment on it. Like Twitter, Instagram has a system of Followers and Following options. You can make your account public or private. If you make your account private, then only the people you allow to follow you will see your content. Lots of Twitter users also have Instagram accounts and use it as the photo/video repository for their Twitter accounts. This is partly because Twitter initially allowed only text in tweets. Since Twitter now allows photos, using an Instagram account as a Twitter repository is a matter of personal preference.

LinkedIn

Reference Number: MTAS-2073

LinkedIn is an online social media networking service designed to connect professionals. Some unique features of LinkedIn are that it can be used as a recruiting tool, a marketing tool, or a sales tool.

Microsoft completed its acquisition of LinkedIn in December 2016.[15] When you create your presence on LinkedIn, you have two options: creating a Company page or a Group page. The person tasked with creating and managing either type page must create a personal LinkedIn user account and complete the profile for that user. The Company page has additional requirements that must be met before the page becomes active. The personal profile must be at least 7 days old and have a profile strength of intermediate or higher. The person in your municipality tasked with creating the Company page will need to make several connections to other users on his/her personal profile, must be a current company employee with his/her current position listed in the experience section, and the municipality's email address must be added to the page and then confirmed by LinkedIn. Finally the municipality's email domain must be unique to the municipality.[16] If you are not able to meet all of the criteria required to establish a Company page, you can create a Group page instead. With a Group page, you can choose to make it an open group or a members-only group. Whether you create a Company page or a Group page, set more than one person as the administrator in order to have a backup for administrative duties for the page.

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[15] https://about.linkedin.com/ [15]
[16] https://help.linkedin.com/app/answers/detail/a_id/1594/related/1 [16]

Employers & Social Media Passwords

Reference Number: MTAS-1393

A number of national trends related to the use of social media and employment practices have surfaced in recent years. Most notably, employers across the country have asked applicants to provide their social networking account information and passwords on job applications. Several states have made this practice illegal through legislation.

Tennessee joined the fray in 2014, passing legislation dealing with this ongoing issue in the form of the 'Employee Online Privacy Act of 2014 [17].' Effective January 1, 2015, the act prohibits employers from asking employees for their user names and passwords to social media sites and personal email accounts, as well as prohibiting the employer from compelling the employee to add the employer to their personal contact lists, or accessing personal internet accounts in the employer's presence.

Your city should be aware that improper use of social media information on applicants and employees may result in claims alleging discrimination, negligent hiring, violation of privacy, and open record conflicts.

In light of several federal laws including, but not limited to, GINA (Genetic Information Non-Discrimination Act) it is critical that employers not seek out information via social media that is not applicable to the essential functions of the job. In some cases, an employer simply viewing protected information about an applicant can have illegal implications.

If an employer elects to use social media profiles as part of the background check it is recommended that the employer get signed consent from the applicant that outlines exactly what information the city is looking for, and how it will be used in the hiring/employment process. In addition, employers should have a designated trained professional (one who is not involved in making hiring decisions) review this information, and should only pass on information to the hiring authority if it is essential to the job (i.e., poor communication skills, conflict in resume, etc.).

All other non-job-related information that is ascertained should not be shared with hiring authorities and must be redacted. This will help to ensure that personnel decisions are not based upon non-work related or discriminatory information such as disability status, genetic history, ethnicity, age, etc.

Here are a few guidelines:

- Employers should never ask for an applicant/employee's social media user name or password.
- Employers should never ask that applicants/employees log into their accounts during the interview process.
- Employers should avoid asking the applicants/employees if they use certain social media sites, unless the question is job related.
- Employers and hiring authority should not "friend" an applicant or an employee unless the accounts are both job related (i.e., city business) and of a non-personal nature.
- Employers should not create social media accounts for the purpose of searching for information that is not intended to be public or that is a violation of the social media site's terms and conditions.
- Employers should never try to bypass or manipulate a user's privacy settings for the purpose of gaining information and access to an applicant/employee's information.
- Employers should not use technology or third-party applications to draw out information from applicants/employees profiles for purposes of gaining access to the individual's information.
- If an employer elects to use social media searches as part of the hiring/employment process a policy stating exactly what information will be searched for and eventually used must be in place.

What is Fair Game?

- Employers may have a policy that restricts access to social media sites while on the job.
- Employers may have a policy that allows them to use public social media profiles in their applicant screening.
- Employers may follow their own policies and make employment decisions based on job-related discoveries on public social media sites.
- Employers have the right to prohibit use of city logos, uniforms, photos, etc. from employees' personal social media sites.
- Employers have the right to investigate claims of harassment or misuse of city property via social media.
- Employers have the right to prohibit behavior that is harmful to the city or its employees, and may interfere with the city's operation, the employee's job, or department's function.

Other Concerns
Workplace harassment can take place on or off the clock, and happens frequently via social media avenues. Employees should be aware that potentially harassing activity (on or off the clock) may be subject to open records laws and court subpoenas.

First Amendment Rights
Employers may not infringe on employees' or applicants' First Amendment rights. Employees may have the right to express personal opinions on their personal social media pages when off the clock, even if the employer doesn't agree with them. It is important to note that not all personal views on social media are protected from impact on an employee/applicant's job status.

In summation, employer policies should not be overly broad in that they prohibit activity allowed by federal laws such as the discussion of working conditions, wages, and other concerted activity. While the laws are still being deliberated on in many jurisdictions, most legal and human resource professionals agree: spying on applicants and employees sends a poor message that violating applicants'/employees' privacy is an acceptable business practice.

Social Media: Legal Issues

Reference Number: MTAS-1609

Inaccuracies and Context
Employers should exercise caution when looking for information about a person online. Some of what is posted online is not controlled by the applicant or the employee. Additionally, there is always the possibility you are not looking at the correct person's profile or that someone is impersonating an individual. A joke or comment posted on someone's profile by a "friend" in bad taste may not accurately reflect the character of your candidate or employee. A remark taken out of context may appear much more severe than its intent. Most users protect themselves by setting their privacy settings so that their profile is not open to the public. While privacy settings are meant to protect a user's personal information, the settings do not protect applicants and employees against fraud, impersonation, harassment, photo tagging, and photo editing. Employers must develop social media hiring policies that outline exactly how social media will be used in the hiring process. This information should be provided to candidates upfront and before an application is submitted. *Again, employers should use a trained human resources professional to screen candidates based on social media policy. Only job related information should be forwarded to the hiring manager.*

The following topics in this section include more details regarding social media legal issues.

Social Media: Fair Credit Reporting Act

Reference Number: MTAS-1610

An applicant may claim to have legal causes of action if he or she has been turned down for a job as a result of online information. Pursuant to certain provisions of the Fair Credit Reporting Act (hereinafter "FCRA"), an invasion of privacy lawsuit could be established and some experts suggest social networking sites themselves may be vulnerable to lawsuits under the FCRA. Employers should provide a written notice that explains your city may obtain a consumer report for employment purposes. Employers are also required by the FCRA to obtain the applicant's signature before performing a background check and releasing the information This signature should be on a stand-alone FCRA notice and acknowledgement. A job application is not considered sufficient notice under the FCRA. If an adverse employment decision is made based on information discovered through a background check, the applicant should be notified as described in FCRA regulations.

Social Media: Discrimination

Reference Number: MTAS-1611

Discrimination Based on Protected Classes
Most social networking sites show an employer a person's gender or gender identity, race, age, sexual

orientation, neighborhood, family members, religious views (or absence thereof), family status, pregnancy status, and political views. In some cases a person's profile may yield direct or indirect information about medical information, genetic issues, and health status. If potential employers have access to this information, how can they guarantee they will not use any of this information to make hiring or employment decisions? Once the information is viewed, there is no way to go back and undo what the employer has learned. This is perhaps, the largest employment risk associated with reviewing online profiles on candidates.

Potential liability arises when an employer uses the information found via social media to affect hiring and or employment decisions. For example, an employer is getting ready to make Sarah an offer, and suddenly finds Sarah's online profile and clearly sees she is pregnant. The employer may change the hiring decision based on the online information, which is illegal. In addition, the employer may have been able to determine Sarah's relative age, marital status, race and even religious and political affiliation. Employers making employment decisions based on information related to protected classes may be a violation of state, local, and federal laws.

Conversely, if the employer makes a poor hiring decision, the city could be accused of being negligent for failing to properly conduct background and pre-employment screening. With court dockets and other public information online, information on potential candidates is easier to obtain. For this reason, every city should have a policy on social networking and its use in the hiring process. Additionally, you should include in your policy if and when social media will be used in background checks and employee discipline and harassment investigations.

Discrimination laws prohibit employers from seeking out information that would disclose protected status information. If you will not ask a candidate if she/he has children in an interview, then it is not relevant to your online search either. Those with hiring or firing authority should be careful in accessing any profile that could reveal age, gender, relationship status, national origin, disability status, pregnancy status, health status etc. Employers should be following their social media policies and only consider legitimate job related information when hiring or making a decision that will impact someone's livelihood. Employers should always have a trained human resources professional administering social media background checks. Information not related to the job should not be forwarded to the hiring manager.

For human resource managers it is appealing to have a wealth of information on candidates. Viewing social media profiles can be a quick way to identify poor communication and grammar skills, offensive photos and remarks, and an exaggerated resume. However, a city must keep in mind that viewing an applicant's social media profiles may put them at risk for violating: GINA, Title VII of the Civil Rights Act, American's with Disabilities Act, the Pregnancy Discrimination Act, and the Age Discrimination in Employment Act. In addition, a city can open itself up to disparate impact and disparate treatment claims.

Social Media: Disparate Impact

Reference Number: MTAS-1613

General Employment Discrimination

In 1971 the Supreme Court formally recognized two primary types of employment discrimination, disparate treatment and disparate impact. Cities using information obtained on social media sites to make hiring decisions may be vulnerable to disparate impact and disparate treatment claims.

Disparate impact involves an employer with a practice that has an unintended, but unfair impact on a protected class. An example of disparate impact would be an employer who relies heavily or solely on social media for recruitment which will exclude certain segments of the applicant pool (i.e., older applicants) that may not use social media in the same manner as another group of applicants.

Employers who solely use social networking as a means to hire or recruit applicants may be vulnerable to a disparate impact claim. Disparate impact can occur when a city uses social media as a sole means to evaluate candidates or a when a city only considers applicants who use social media. It can also become an issue when a city shows preference for those applicants who have a more favorable online status as opposed to those who have a limited presence on social media. Perhaps the most concrete risk of disparate impact is that the population on social media networks is not representative of the real applicant pool that exists. This means this practice may be unintentionally excluding certain classes of applicants such as males, minorities, or older Americans. When using social media as a tool for

recruiting and hiring, municipalities must be mindful of the fact that there is a marked difference in social media use in varied demographic groups, and even within those demographic groups there is a difference in the types of users that access different social media sites.

Social Media: Disparate Treatment

Reference Number: MTAS-1614

Disparate treatment involves intentionally different, and often adverse, treatment of individuals based upon their membership in a protected class. An example of disparate treatment may be the evaluation of applicants in a particular protected class through social media and others through another process. This may happen when a city lacks a recruitment plan and neglects other forms of job advertising. Employers should not use the information found on social media sites in an inconsistent way, or in a different way, for applicants applying for the same job. In other words, if you are going to use social media to make judgments about one candidate class, you should look at the same information for all applicants and document this process.

Social Media: Federal Employment Laws

Reference Number: MTAS-1615

As employers, applicants, and employees increasingly use social media for employment purposes it should be noted that cities must consider all applicable local, state, and federal laws in using these media forms. Remember, employment laws are currently the same for an employer who uses social media for any hiring procedure as an employer who does not use social media in the hiring process.

Here are applicable employment laws:

- USERRA / State Military Laws
- TITLE VII
- ADA
- ADEA
- PDA
- GINA

Federal Employment Laws

- **Title VII of the Civil Rights Act** prohibits discrimination based on race, color, sex, national origin, or religion. This federal law applies to local government with at least 15 employees. Additional protections have been extended to include pregnancy discrimination and sexual harassment.
- **Americans with Disabilities Act of 1990 (ADA)** prohibits employment discrimination based on disability. Also requires employers to make reasonable accommodations to persons with disabilities.
- **Age Discrimination in Employment Act of 1967** (ADEA) prohibits employment discrimination based on age forty and up. This applies to applicants as well as employees.
- **Pregnancy Discrimination Act of 1978** prohibits discrimination on the basis of pregnancy, childbirth, or related medical conditions.
- **Genetic Information Nondiscrimination Act (GINA)** This legislation prohibits employers from using individuals' genetic information when making hiring, firing, job placement, or promotion decisions. It also prohibits improper use of genetic information for purposes of health insurance and employment decisions. GINA broadly defined genetic information to include family members of employees which initially left employers concerned about the implications of using social media to interact with employees.

Social Media: Invasion of Privacy

Reference Number: MTAS-1617

You should be familiar with local, state, and federal rules concerning invasion of privacy. Under no circumstances should a city ask for log on identification or passwords, or use someone else's passwords to access employees' or applicants' social networking accounts. A popular restaurant chain found itself in court after asking employees for this information on a private "group" designed for the purpose of venting about work. The employees won the case because the employer gained unauthorized access to the social network by forcing employees to provide their user credentials.

In another situation, a city in Montana found itself on the front page after asking applicants to provide their user names and passwords as part of the hiring process and background check. The news of this went viral, and city officials promptly retracted their stance. Surprisingly, this was not an isolated incident that only occurred in this municipality.

The courts have stated that employers should not attempt to gain unauthorized access to private social networking profiles/groups for the purpose of spying on employees. Employers should be reminded that there is a risk in attempting to access employee/applicant content that is unauthorized or intended to be private.

Social Media: Off-Duty Behavior

Reference Number: MTAS-1618

A legal grey area exists when it comes to a public employer's ability to regulate an employee's use of social media when he/she is off-duty. In some instances, an employee's social media presence off-duty may be problematic and even dangerous for a municipality. An example of this is when police officers post inappropriate photos of themselves online while identifying themselves as public safety officers or undercover officers or post information that could comprise the integrity of a law enforcement investigation. These issues have prompted many police and fire departments to adopt a department-specific social networking policy.

A municipality may want to consider the following in creating their social media policy:

- Authorized use of uniforms, insignia, emblems, municipal logos and anything related to munici-pal business
- Anonymous "blogging" or information sharing regarding municipal business
- Discussing work issues or personal thoughts about municipal strategies online
- Protection of sensitive information
- Security of undercover public safety work (present and future) such as an employee's future capacity to move into an undercover position

A municipality should have clear policies in place to address certain off-duty online activity of employees. In public service, the off-duty behavior standard may be set high, particularly for public safety employees.

Because the test for determining whether an employee's off-duty use of social media can result in discipline, or is truly speech that is protected under the first amendment, is fact specific, it is important for you to consult legal counsel and your human resources professional before disciplining an employee for this type of conduct.

Social Media: Disciplining Employees for Online Activity

Reference Number: MTAS-1619

While each case is different and you should rely on the advice of your legal counsel, here are some questions that you should ask before disciplining or terminating an employee for their social media activity.

- Do we have a policy on social media?

- Did this employee's conduct relate to his/her job?
- Is the speech in question protected by law?
- What do we have that constitutes as "proof" of employee misconduct?
- Did the employee admit to the behavior?
- What valid policies, or local, state, or federal laws did the employee violate?
- How have we treated other employees in similar situations?
- Did you consider the issue of location-based services and time stamping (creation/modification time)?

MTAS has received a fair number of questions concerning Workers' Compensation claims and employees use of social media while on approved Workers' Compensation leave. A common issue that arises is the conflict between an employee's activities shown via social media and the employee being out on leave due to what has been reported as an illness or workplace injury. Before your municipality approaches an issue related to social media and workers' compensation consider the following.

Workers' Compensation

- Did the municipality obtain the information about the employee ethically and legally and within the social media site's term of use and within city policy?
- How will this action affect the current workers' compensation claim?
- If the employee is on workers' compensation, did the claims administrator deny claims based on this information?
- If the employee is on workers' compensation, is the employee being formally charged with fraud?
- Is the municipality using the time stamp or the date and time posted as their primary concern or is the content itself a violation of policy?

While some conduct may be viewed as frowned upon, there may be no legal basis for discipline. Before disciplining an employee for off-duty behavior on social media, or behavior observed on social media that conflicts with claims filed by or leave taken by the employee, review your personnel policies as well as your social media policy.

Location-Based Reporting and Time Stamps

The municipality should be mindful that the time stamp (creation/modification time) that appears on social media sites is not an accurate account of what the person was doing at that time. Most social media sites now let users control and often pre-set the time and date that a post is made and user settings can dictate incorrect times based on time zones. In addition, social media sites that use a GPS tracking or location based reporting are commonly incorrect.

Harassment

Social networking provides yet another vehicle for workplace harassment and bullying. Workplace harassment can take place via the internet just as it can in person or in writing. If a municipality is using social networking to promote its own interests, the social media venues should be closely monitored for harassment and potential acts of violence.

Upon discovering an employee is using social media to harass another employee, the municipal employer has a legal duty to address the situation within a reasonable period of time. Employers should treat these incidents just as seriously as an in person harassment situation.

Recordkeeping

If a municipality is accessing social media profiles as a means to make hiring decisions, the information retained is subject to the municipality's record-keeping policies and practices and may be subject to the Tennessee Public Records Act. If a municipality prints a profile, it is likely to contain information that should not be considered in the hiring process. The EEOC's current guidance is for employers to continue to structure non-discriminatory recruitment and selection processes and consistently focus on the job qualifications of all applicants, regardless of the information available to the employer about the applicant through social media. However, if you are using social media profiles as a means of screening applicants, that information should be maintained as a part of your record keeping until such time as it can be destroyed pursuant to the municipality's records retention schedule.

Politics and Social Media

Reference Number: MTAS-1763

Social media is being widely used in political campaigns at all governmental levels. Social media accounts provide news, information on candidates, discussion of the campaign issue, and voter outreach. It is important for your municipality to remain mindful of the fact that the municipality's social media site and all "political platform" sites are to be separate. Employees should be aware that any form of campaigning while on the job is in the majority of cases a violation of public policy.

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http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/ [18]

Social Media: Frequently Asked Questions

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 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 [19] 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 [20].

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.

Links:
[1] http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/
[2] http://www.pewinternet.org/fact-sheet/social-media/
[3] http://dealbook.nytimes.com/2012/04/09/facebook-buys-instagram-for-1-billion/?_r=0
[4] http://www.statista.com/statistics/272014/
global-social-networks-ranked-by-number-of-users/
[5] https://www.linkedin.com/about-us
[6] https://www.facebook.com/terms_pages_gov.php
[7] http://www.nascio.org

[8] http://www.facebook.com/help/289207354498410
[9] https://www.facebook.com/facebook/info?tab=page_info
[10] http://www.theguardian.com/technology/2007/jul/25/media.newmedia
[11] https://investor.fb.com/corporate-governance/?section=board
[12] http://www.pewinternet.org/2015/01/09/demographics-of-key-social-networking-platforms-2/
[13] https://support.twitter.com/categories/56#category_237
[14] https://support.twitter.com/articles/215585
[15] https://about.linkedin.com/
[16] https://help.linkedin.com/app/answers/detail/a_id/1594/related/1
[17] http://www.capitol.tn.gov/Bills/108/Bill/SB1808.pdf
[18] http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/
[19] https://www.mtas.tennessee.edu/reference/social-media-disciplining-employee-online-activity
[20] http://ssrn.com/abstract=1675026

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