

Social Media: Disciplining Employee for Online Activity

Dear Reader:

The following document was created from the MTAS website ([mtas.tennessee.edu](https://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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Table of Contents

Social Media: Disciplining Employee for Online Activity	3
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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.

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.

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