



Social Media: Legal Issues for Municipalities

*Ohio Municipal Attorneys Association
December 2, 2011*

**Sara J. Fagnilli
Patricia F. Weisberg
Walter & Haverfield, LLP**

**Walter &
Haverfield** ^{LLP}
attorneys at law



Agenda

- **Background and Benefits**
- **First Amendment Implications**
- **Public Records/Open Meetings**
- **Employment Law Issues**
- **Police Dept. Facebook Sites**
- **Litigation-Related Concerns**



facebook

@



**Facebook, MySpace,
YouTube and Twitter ...**

Oh My !

You Tube



Coach K on social media:

***“Nobody cares that you went
to the mall today.”***







Role of Technology

- **"I want to meet Mark Zuckerberg one day and thank him ... I'm talking on behalf of Egypt. This revolution started online. This revolution started on Facebook. This revolution started in June 2010 when hundreds of thousands of Egyptians started collaborating content. We would post a video on Facebook that would be shared by 60,000 people on their walls within a few hours. I've always said that if you want to liberate a society just give them the Internet."**
 - Wael Ghonim on Egypt's overthrow of Mubarek

It's Not Just for Kids and Geeks

- *Facebook* – over 120 million users between 25 and 64
- *LinkedIn* – over 80 million professionals worldwide (over 35M in US)
- 91% of the fastest-growing privately-held companies will incorporate some form of social media as part of development strategy (*Inc.* magazine survey)
- *Blog readers in 2011, 122.6 Million and growing (*emarketer.com*) More than 177 Million out there (*The Nielsen Co.*)*

Social Media: What's the Big Deal?

- Facebook added 100 million users in less than 9 months
 - Now over 600 million users
- Facebook just became the most frequently-accessed Website
- YouTube is the second largest search engine (Google)
- Skype for viewing and/or attending meetings

Facebook Facts

- 70% of Facebook users are located outside of the US
- 30B pieces of content shared per month
- 20M Facebook apps installed each day

Facebook Facts

- Over 85% of social media activity occurs on Facebook
- Allows anyone who declares themselves to be 13 to become a registered user
 - In recent survey, 41% of 11 and 12-year olds are on Facebook

YouTube

- Just as much potential for trouble, if not more
- 2 billion videos watched per day
- 35 hours uploaded every minute
- Avg. adult watches 186 online videos per month
- Believe it or not, not all of these videos are educational!

Social Media: Benefits

- Free and easy way to communicate
- Widespread, instantaneous exchange of information (RSS feeds)
- Increase problem-solving capabilities – survey residents, pulse of the community assessment
- Provide live feed meetings without local cable access (Ustream)
- Advance tourism/local business interests

Social Media: Benefits

- Forum for ideas on how to improve government, administration or community relations
- Facilitate meetings without travel
- Potential to increase time and improve focus upon mission
- Increase information flow to and from government
- Increase community involvement (local businesses, residents, etc.)
- Assist law enforcement efforts

Twitter

- Over 100 million people actively use Twitter
- Over 175 million registered users
- 140 million tweets are written per day

First Amendment Issues

Social Media: Legal Concerns

- First Amendment and City-sponsored Facebook page
 - Threshold issue: are you going to permit third parties to post?
 - Can go with just a “Fan” page
 - Information disseminated
 - No solicitation or receipt of responses or comments

Social Media: Legal Concerns

- First Amendment and City-sponsored Facebook page
 - If you open page to comments from third parties, posts may be protected by First Amendment (including posts of employees)
 - If an employee, it may be protected if a topic of public concern

Policy Considerations

- This needs to be well-planned, not just thrown up quickly
- Need to consider:
 - What sites are going to be used?
 - Who will be permitted to post?
 - Specific delineation of what is permitted to be posted

Policy Considerations

- Need to consider (cont'd):
 - Statement of monitoring/no privacy
 - Deletion timeframes
 - Notification that posts may be public records
 - Disclaimers (“...posts do not reflect the opinions or positions of the City ...”)

Public Records and Open Meetings Laws

Public Records Issues

- Law requires kept records to be made available when documenting organization, functions, policies, decisions, procedures, operations or other activities of the office
 - ORC 149.011 and 149.43

Public Records Issues

- Is the site “kept” by the public office?
 - Does it need to be?
- Is it a record?
- Content-based assessment
- Do you need to adjust your retention schedule?

Open Meetings Law

- What about “serial” posts on social media and responses?
- Can Council, Board or Commission members attend meetings via Skype
- Ohio Open Meeting laws ORC 122.22 before Skype – will it prompt a change?

Employment-Related Legal Concerns

Background Checks/Hiring Issues

- Creating problems where they would not exist?
- Consistency is key
 - Adopt a specific method and follow it for each applicant
- Services now available to screen Internet for material and tailor responses to avoid potential claims

Background Checks/Hiring Issues

- Facebook access as a condition?
 - City of Bozeman, MT and Maryland Dept. of Corrections required applicants to turn over social networking passwords
 - ACLU didn't care much for this requirement
 - “A frightening and illegal invasion of privacy”

To “Friend” or Not to “Friend”

- Should supervisors/managers friend subordinates/employees?
- What could possibly go wrong?
 - How to respond to policy violations?

LinkedIn Referrals

- What's the big deal if a supervisor recommends a former employee?

Employee Discipline for Posts

- So prevalent that the Chamber of Commerce has done a survey of the cases pending before the NLRB
- First Amendment issues
- Collective bargaining agreements

Regulation of Employee Posts

- Policies need to be carefully scrutinized
 - Broad prohibition may violate First Amendment
- Florida Teachers' Union sues over social media policy claiming free speech violation

Constitutional Challenges

- Missouri law challenged and enjoined
 - “No teacher shall establish, maintain or use a non-work-related internet site which allows exclusive access with a current or former student”
- Missouri lower court enjoins the law, stating it has a “chilling effect” on speech

Ownership of Posts

- Employer or individual?
- *Maremont v. Susan Fredman Design Group*
- Policy should discuss specific ownership of postings and publicity

CONCERTED ACTIVITY

- Under the National Labor Relations Act, employees who act in concert with each other to address the **terms and conditions of their employment** may not be disciplined or discharged for such activity
- Applies to union and non-union employees

- NLRB's position is that social media activity that references any "term or condition" of work violates employees' rights to engaged in protected activity
- Analyze the facts of each situation

Examples

Violations

- Terminating an employee who referred to the owner of the company as an “asshole.”
- Terminating an employee who called her supervisor a “scumbag.”
- Policy prohibiting employees from suing the employer’s name, address, and other information in their personal profiles in social media sites


- In finding that an employee did not lose the NLRA's protections after calling her supervisor a "scumbag," the General Counsel relied on the following facts: (a) "the Facebook posts did not interrupt the work of any employee because they occurred outside the workplace and during nonworking time;" (b) "the comments were made during an online employee discussion on supervisory action;" (c) "the name-calling was not accompanied by verbal or physical threats;" (d) "the Board has found more egregious name-calling protected;" and (e) "the employee's Facebook postings were provoked by the supervisor's unlawful" conduct.

No violation found

- Policy prohibiting employees from pressuring their co-workers to “friend” or “connect” with them on social media
- Disciplining a retail employee who complained about “tyranny” from his store management, used a derogatory term to describe his assistant manager, and complained about being “chewed out” for mispricing or misplacing merchandise
- Terminating a bartender who posted a comment on Facebook about the employer's tipping policy in response to a relative's question about how his night was. The employee also called customers “rednecks” and wrote he hoped they would choke on glass when they drove home drunk


Case:

- The NLRB concluded that the Employer--a luxury automobile dealership--violated Section 8(a)(1) when it discharged an employee--a salesperson--for posting on his Facebook page photographs and commentary that criticized a sales event held by the Employer.



The NLRB found the comments and pictures were neither disparaging of the Employer's product nor disloyal. The postings merely expressed frustration with the Employer's choice of food at the sales event. They did not refer to the quality of the cars or the performance of the dealership and did not criticize the Employer's management.

The NLRB found it irrelevant that the postings did not clearly indicate that they were related to a labor dispute given that they were neither disparaging nor disloyal.

- 
- According to the NLRB's report, the NLRB may view as unlawful (often because the Board viewed them as overly broad) social media policies that:
 - Prohibit employees from posting pictures of themselves in any media, including the Internet, which depict the company in any way, including posting featuring a company uniform or corporate logo;
 - Prohibit employees from making disparaging comments when discussing the company or the employees' superiors, coworkers or competitors;
 - Generally prohibit, in the application to social media, offensive conduct and rude or discourteous behavior;
 - Prohibit inappropriate discussions about the company, management or coworkers;
 - Prohibit any communications or posts that constitute embarrassment, harassment or defamation of the employer or its employees, officers, board members, representatives or staff members;

Ownership of Contacts

- Employer or individual?
 - *Microsoft* tries to force former employee to turn over all LinkedIn contacts
 - Moves into solicitation/competition issues as well

Police Department Facebook Pages

Police Dept. Facebook Pages

- What is the purpose of the page?
 - Obtain info from citizens
 - “Market” the Department
 - Disseminate alerts
 - Community resource for traffic or other information
- Who will be posting?

Police Dept. Facebook Pages

- Linking to other sites
 - If you link, you may need to link to other less desirable sites as well
- Disclaimers
 - Not monitored 24/7; call 911
 - Not intended to be a public forum
- Retention/public records issues

Police Dept. Facebook Pages

- Ability to disable immediately
 - In event of crisis situation to avoid information getting out
- Need to follow investigation protocol to not jeopardize process or prosecution

Police Dept. Facebook Pages

- Public comments
 - Do you really want to go there?
 - May not be able to require citizens to register prior to comments due to potential to “chill” speech
 - Citizen vs. employee capacity
 - Profane, vulgar, hate speech

Litigation-Related Concerns

Litigation Related Issues

- Facebook Presence in the Courtroom
 - Juror tries to “Friend” defendant
 - Michigan juror posts “Guilty” prior to verdict announced



Litigation Related Issues

- What about “Friending” judges?
 - Ohio Board of Comm. on Grievances & Disc. concludes that it is not an ethics violation
 - Still need to be cautious not to “erode confidence” in the system through content posted
 - No comments on pending matters; no legal advice; stay vigilant of postings
 - Florida has concluded “no”

Litigation Related Issues

- Are “Private” Posts Discoverable?
 - *Romano v. Steelcase, Inc.* – NY Sup. Ct.
 - Employer entitled to non-public social media content
 - Court refused to “condone Plaintiff’s attempt to hide relevant information behind self-regulating privacy settings”
 - Also, *Zimmerman v. Weis Markets, Inc.* (Pa. C.P. Northumberland Cty., 5/19/11)

Litigation Related Issues

- Discovery holds for electronically-stored information
 - Does it apply?
 - How to manage?



Questions?

Sara J. Fagnilli

sfagnilli@walterhav.com

Patricia F. Weisberg

pweisberg@walterhav.com