

Municipal Best Practices for Social Media in a Hyper-Connected World

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Introduction

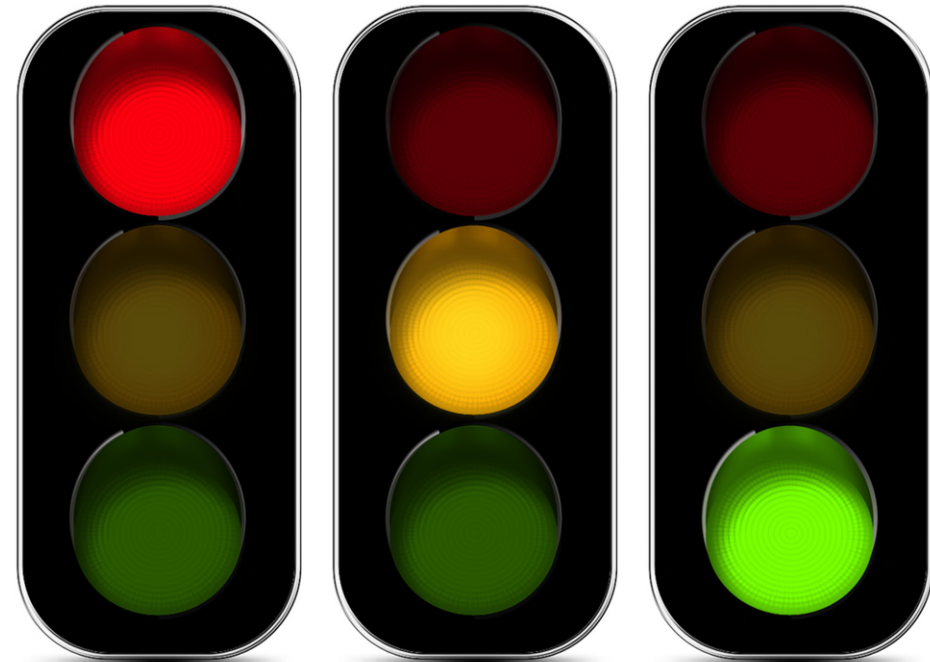
GUIDELINES FOR MANAGING
SOCIAL MEDIA FOR MUNICIPAL
MANAGERS

UTILIZATING THE STOP LIGHT AS GUIDANCE

In this presentation we will examine:

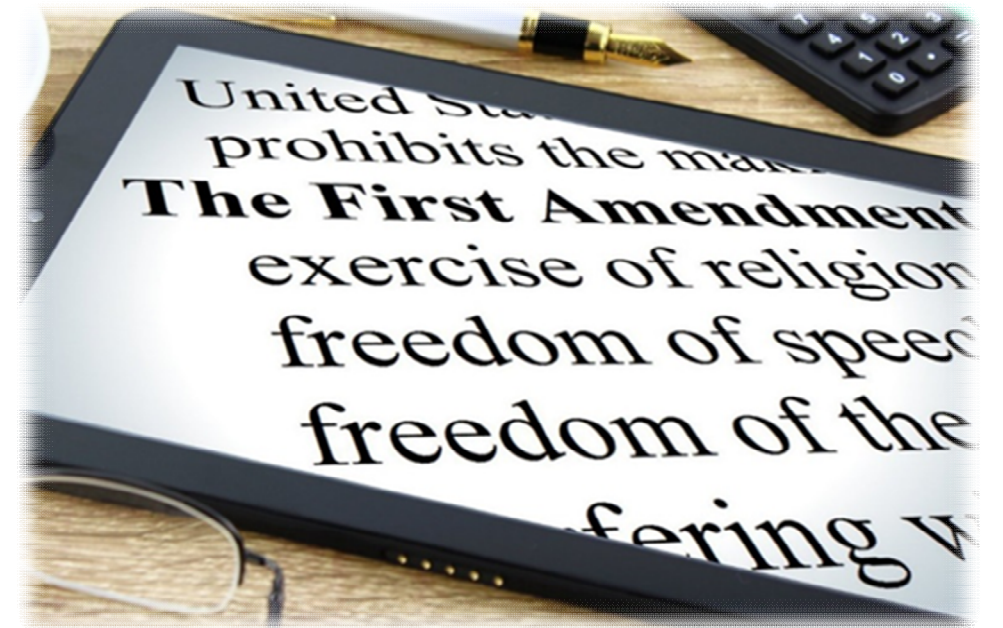
- * Permissible uses of Social Media (Green)
- * Questionable uses of Social Media (Yellow)
- * Impermissible/problematic uses of social media (Red)

Download more graphics at www.psdgraphics.com



THE FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.



THE FIRST AMENDMENT

Not all speech gets the protection of the First Amendment!

- What is protected speech?
- When is a public employee's speech protected?
- Can a post on a public employee's personal Facebook page or Instagram account be used for employee discipline?

SPEECH THAT IS NOT PROTECTED BY THE FIRST AMENDMENT

- Obscenity, fighting words/threats, fraudulent misrepresentation, advocacy of imminent lawless behavior, and defamation.
- A public employee's speech at work is generally not protected.**
- Outside of work, the employee must generally be speaking as a citizen on a matter of public concern to receive constitutional speech protections that would defeat an adverse employment action.

SPEECH THAT IS PROTECTED BY THE FIRST AMENDMENT

When is a public employee's speech protected?

- 1) When they are speaking as a citizen on a matter of public concern; and
- 2) The reason for treating the employee differently from other members of the general public does not outweigh the employee's free speech rights.

DETERMINING PROTECTED SPEECH: SPEAKING ON A MATTER OF PUBLIC CONCERN

Q: When is a public employee speaking as a citizen on a matter of public concern?

A: When the public employee is not speaking as a representative of the employer and the “content, form, and context establish that the **speech involves a matter of political, social or other concern to the community.**”

YOU MAY STILL BE ABLE TO DISCIPLINE THE EMPLOYEE OR TAKE ACTION EVEN IF IT IS PROTECTED SPEECH!

Q: When can a government employer justify treating the employee differently from other members of the general public even if they are speaking on a matter of public concern?

A: When the speech has the potential of disrupting the operation of the governmental entity or the employee's ability to do his/her job and the disruption or negative impact on the workplace outweighs the employee's interest in engaging in free speech.

WEIGHING YOUR OPTIONS

Some factors courts consider when weighing the employer's interest:

- Whether, because of the speech, the municipality is prevented from carrying out its responsibilities.
- Whether the speech impairs the employee from carrying out his/her responsibilities.
- Whether the speech interferes with essential and close working relationships.
- The manner, time, and place in which the speech occurs.
- Whether the employee was in a position requiring confidentiality even for completely accurate public statements.
- Whether complaints were specifically required to be made to supervisors before taking them to the public.
- Whether the statement was knowingly or recklessly false.



THE ORIGINAL EMPLOYEE SPEECH CASES

- *Pickering v. Board of Education*, 391 U.S. 563 (1968) – school employees have a right to speak out so long as they do not cause a substantial disruption in the workplace (the balancing test).
- *Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976) – recognized public employees’ rights to speak simultaneously as *citizens* and as *public employees*.
- *Connick v. Myers*, 461 U.S. 138 (1983) – revised the *Pickering* balancing test, which now only applies if the speech is a “public concern” and reinstates the public employer’s authority to prohibit speech and impose discipline in order to maintain efficiency and harmony in the workplace.
- *Garcetti v. Ceballos*, 547 U.S. 410 (2006) – further clarified that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communication from employer discipline”

EMPLOYEE SPEECH MEETS SOCIAL MEDIA

- *Shepard v. McGee*, 986 F.Supp.2d 1211 (D.C. Oregon 2013) – Court upheld DHS decision to terminate case worker for making derogatory comments about welfare recipients on her personal FB page.
- *Buker v. Howard County*, 2015 WL 3456750 (D. Maryland 2015) – Fire Department had just cause for terminating employee after he made offensive FB posts regarding liberals and subsequent posts regarding the investigation and the department’s social media policy.
- *Munroe v. Central Bucks S.D.*, 805 F.3d 454 (3d Cir. 2019); lower court decision at 34 F.Supp.3d 532 (E.D. Pa. 2015) – District had just cause to fire teacher for private blog posts criticizing the school, co-workers and students; the court found that her posts were sufficiently disruptive so as to diminish any legitimate interest in their expression, and thus her expression was not protected.

Carr v. PennDOT



COMMONWEALTH COURT DECISION: EMPLOYEE WINS

Carr v. Com. Dept. of Transportation, 189 A.3d 1 (Pa. Cmwlth. 2018) –

Department of Transportation fired an employee after she made a post on Facebook about how terrible school bus drivers are and made other comments disregarding the safety of children. The Civil Service Commission upheld her termination and she appealed to the Commonwealth Court.

The Commonwealth Court reversed and held that her comments were protected speech because they were on a matter of public concern and did not weigh in favor of any of the factors (governmental interests) that would support termination.

THE PA SUPREME COURT DECISION: EMPLOYER WINS

Carr v. Com. Dept. of Transportation, 230 A.2d 1075 (Pa. 2020) -

The PA Supreme Court reversed the Commonwealth Court's decision which overturned the firing of the employee by the Civil Service Commission for a series of profanity laced Facebook posts threatening harm to school buses due to the drivers' poor driving.

CARR DISCUSSION

There are several caveats:

- Civil Service case, not arbitration
- Court was very broad in the projected harm test
- PennDOT did not challenge Commonwealth Court's finding that Carr's speech was on a matter of public concern

THE PENNSYLVANIA WHISTLEBLOWER ACT

- Prohibits public employers from discriminating or retaliating against an employee because the employee has made a “good faith report” of “wrongdoing” or “waste” to an appropriate authority.
- Public employers include the executive branch of State government; city, township, regional governments or school districts; any body created by the Commonwealth and funded by the Commonwealth.
- Employer may be liable, even if the accusations were meritless, if they were nevertheless asserted in good faith.
- Remedies include compensatory damages, reinstatement, attorneys’ fees.

SOCIAL MEDIA = PUBLIC SQUARE



MUNICIPAL WEBSITES, FB PAGE, ETC.

- Does your municipality sponsor a website/Facebook page/Twitter account?
- Who is responsible for the site/account?
- What training have you provided to the employee responsible for account administration?
- Does the website/FB page allow citizens to add comments/content?
 - Is the content monitored/regulated?
 - When would a post be removed or deleted?

CAN A MUNICIPALITY DELETE POSTS BY USERS OR BLOCK USERS ON ITS OWN SITE/FEED?



CAN A MUNICIPALITY DELETE POSTS BY USERS OR BLOCK USERS ON ITS OWN SITE/FEED?

- 2017 U.S. Supreme Court decision, Packingham v. North Carolina. Justice Kennedy described social media as "the modern public square" and as one of the most important places for the exchange of views.
- 2019, Fourth Circuit Court of Appeals, Davison v. Randall. The Court held that a County Supervisor, administering her Facebook page as Chair of the County Board of Supervisors, violated the First Amendment when she blocked a constituent Facebook user.

ELECTED OFFICIALS AND SOCIAL MEDIA



Social media fight: Elected officials can't block their critics

Jay Lindemuth
@J_TheRepublican

This is what a coward does... [@FettermanLt](#)

John Fetterman ✓
@JohnFetterman

Not followed by anyone you're following

You are blocked from following @JohnFetterman and viewing @JohnFetterman's Tweets. [Learn more](#)

11:59 AM · Feb 13, 2020

3 See Jay Lindemuth's other Tweets

PITTSBURGH COUNCILWOMAN AND SOCIAL MEDIA



ACLU presses Pittsburgh councilwoman to unblock people on Facebook

KNIGHT FIRST AMENDMENT INSTITUTE V. TRUMP

- 2019, Second Circuit Court of Appeals held that President Trump violated the First Amendment by blocking those critical of his policies on Twitter
- Did not address circumstances of wholly private social media account
- Fact specific inquiry

CAN AN ELECTED OFFICIAL MAKE RACIAL SLURS IN A PUBLIC MEETING?



MICHIGAN OFFICIAL DEFENDS USE OF RACIAL SLUR



Rep. O'Malley urges Tom Eckerle to resign due to racist comments

CAN A PUBLIC EMPLOYEE USE A FAKE TWITTER ACCOUNT TO ADDRESS THE PUBLIC?



BURLINGTON, VA

Dec. 2019 – Burlington, Vermont Scandal

- Chief Brandon del Pozo created a fake Twitter account “Winklewatcher” which taunted police critic Charles Winkleman.
- Chief del Pozo resigned and was replaced by Deputy Chief Jan Wright.
- Wright created a fake Facebook account using the name “Lori Spicer” and “Abby Sykes”
- Many of Wright’s posts defended the police department

WRIGHT'S POSTS

June 7, 2019

VTDigger Facebook post: Wounded firearms instructor 'frustrated beyond words' charge dropped against shooter



Lori Spicer I'm not sure what information Sarah George has to make the determination that these three violent people were insane at the time they killed/trued to kill innocent people; but it appears what we need is a closer look at why these violent people are in Vt, how to keep them off our streets and get them the help (involuntary) they need. A number of our systems have failed. One affects the other.

[Like](#) · [Reply](#) · [Message](#) · 33w

WRIGHT'S POSTS

June 11, 2019

VTDigger Facebook post: Fall trial for state police sergeant facing stalking charge



Lori Spicer Everyone else is innocent until proven guilty.....except on Facebook OR if you're a cop, apparently.

[Like](#) · [Reply](#) · [Message](#) · 32w

WRIGHT'S POSTS

June 25, 2019

Seven Days Facebook post: Burlington City Council Appoints Three Black Men to Police Commission



Abby Sykes The commission is now 6/7th black. Is this representative of the Burlington community?

Like · Reply · 31w



WRIGHT'S POSTS

June 19, 2019

VTDigger Facebook post: GMT fires driver who kicked Burlington students off his bus



[Name] Does anyone know why the City Council was involved? It was a special school route....probably some control of GMT that is probably a not-for-profit with a board.

[Like](#) · [Reply](#) · [Message](#) · 32w



Abby Sykes **[Name]** because that's apparently the new norm. Get our elected officials embroiled in a disaster they shouldn't even be talking about, waste taxpayer time, energy and money and still get nothing accomplished.

[Like](#) · [Reply](#) · [Message](#) · 31w

WRIGHT'S POSTS

July 5, 2019

Seven Days Facebook post: Photo of Burlington Cop's T-Shirt at Lynching Memorial Triggers Criticism



Abby Sykes [redacted] fake, fake, fake. Professor Seguino isn't using the correct data and refuses peer review on her documentation.

Like · Reply · 29w



CAN A PROSECUTOR MAKE POLITICAL AND/OR RACIST POSTS?



SAN BERNARDINO COUNTY, CA





Michael Selyem

That [redacted] bag got exactly what he deserved. It's really simple. If the cops give you a directive then follow it. Excellent police work sir!

22h Like Reply



[redacted] bag? Do you even know the story? That couple wasn't even the people they were looking for.

20h Like Reply



Michael Selyem

[redacted] yes [redacted] bag. Had he stopped being a complete [redacted] douche and listened to the police he wouldn't have gotten shot. You reap what you sow. And by the way go [redacted] your self you liberal [redacted] bag...

20h Like Reply



Shut up Michael Selyem

20h Like Reply



Michael Selyem

[redacted] you too cop hating [redacted] bag.

IS IT OK FOR A PUBLIC EMPLOYEE TO COMMENT ON CURRENT EVENTS?



MARYLAND OFFICIAL – DEPUTY DIRECTOR OF COMMUNITY INITIATIVES

Delegate Eric Luedtke @EricLuedtke · Aug 29, 2020

This is one of the FB posts by Governor Hogan's Deputy Director of Community Initiatives.

Who oversees - I'm not kidding - the Commission on African American History and Culture.

Fire him, @GovLarryHogan, and issue the Exec Order on use of force you should've issued months ago.

Mac Love



30 mins Like More

Delegate Eric Luedtke @EricLuedtke

Update: He's been fired, as he should have been. Still no response from Hogan on the demands for an executive order on police use of force.

2:29 PM · Aug 29, 2020

225 89 people are Tweeting about this

TWITTER POSTS FROM SELF-IDENTIFIED “POLICE OFFICER”



➤ ..in Democrat-run cities who have seen an influx of Black Lives Matter protests, police officers should “do nothing but the minimum that is required to not get sued or fired”

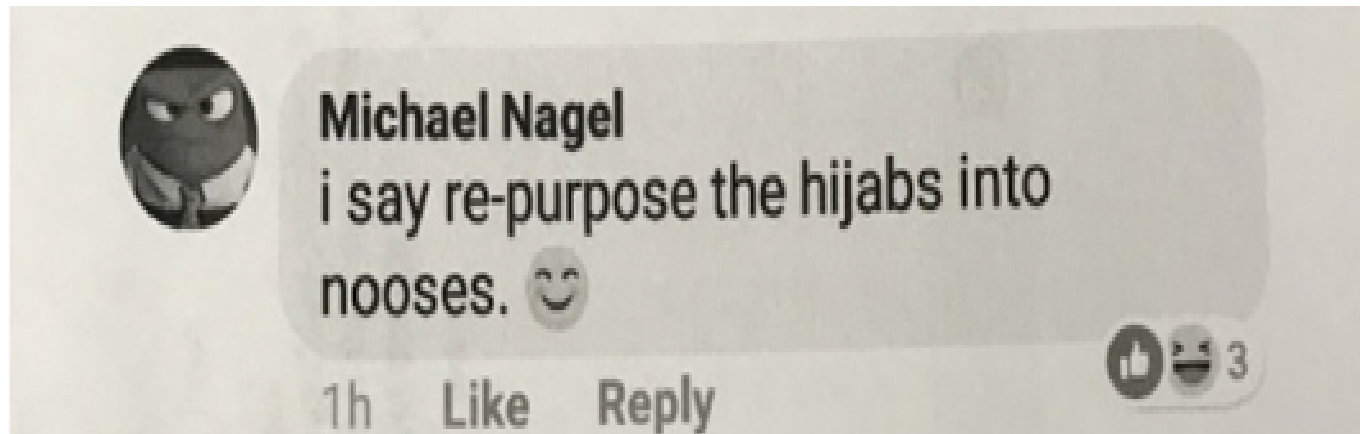
➤ “Let it burn”

➤ Banner image of President Donald Trump with the caption “my president”

IS IT OK FOR EMPLOYEES TO BELONG TO A PRIVATE FB PAGE TO EXPRESS THEIR “REAL FEELINGS”?



SAN JOSE POLICE DEPARTMENT



PERMISSIBLE VS. IMPERMISSIBLE SOCIAL MEDIA

Permissible

- Purely private posts where the employee has not identified him/herself as public employee through words or pictures
- Innocuous posts about employee's family/friends
- Innocuous posts about hobbies, sports, etc.



Impermissible

- Public posts expressing ideas or opinions that would compromise the ability of the employee to perform his/her job
- Public/private posts of information that could only be obtained by virtue of the employee's job
- Complaints about employee's supervisor or internal functioning of the municipality/government entity he/she works for





BEST PRACTICES

BEST PRACTICES FOR SOCIAL MEDIA

Municipalities should be proactive in implementing the below recommended steps:

1. Policy Review/Update: Review and update your social media and technology usage policies. If your municipality does not have these necessary policies then these policies should be promptly drafted. The policies should highlight the higher standard of conduct for uniformed personnel and inform all employees, particularly uniformed personnel, that offensive social media posts are prohibited and can lead to discipline.
2. Re-publish the Policy: You should send out a memo to all employees and especially police officers re-publishing your policy and reminding law enforcement personnel that any offensive posts that show bias or a proclivity for the use of lethal force or violence or vigilantism will result in appropriate discipline.

BEST PRACTICES FOR SOCIAL MEDIA

3. Updated Harassment/Sensitivity/Social Media Training: The need for updated social media/technology usage training and Harassment and Sensitivity Training is apparent based upon continuing social media scandal press coverage and the numerous calls received on a daily basis regarding offensive social media posts by police officers and other public employees. It is not enough for your chief just to instruct officers to keep social media pages private when pages express offensive views. Offensive views must be dealt with through training.
4. Proactive Review: Periodic review of the public social media posts of all of your employees is also advisable. This can be done by using internal resources or a third-party contractor. This review should be limited to public posts so that your municipality does not run afoul of privacy laws. The press is conducting such reviews, as are plaintiff and criminal defense attorneys in cases involving your officers. It is preferable that your municipality discover and correct any social media abuse first.

BEST PRACTICES FOR SOCIAL MEDIA

5. Investigate Incidents Promptly: Whenever a municipality receives information connecting one of its employees with an inappropriate social media post, it should be promptly investigated. This can be a nuanced investigation due to potential privacy issues and the different levels of offensive speech/posts. The investigation should be prompt, thorough and act as the basis for any necessary corrective disciplinary action. While the actual post or posts are a focus of the investigation, retweets and reposts and comments relating to a post by fellow officers or the officer who made the post can be just as problematic. It is also not enough just to focus on the posts, but also to do update sensitivity/harassment training.
6. Corrective Action: Municipalities should review any offensive social media posts with labor counsel so that a thorough review can be conducted, and the appropriate remedial and corrective action taken.

BEST PRACTICES FOR SOCIAL MEDIA

7. Consider Adopting Hiring Process to Screen Potential Social Media Bad Actor

In the hiring process, a candidate's public social media posts may be reviewed. This will possibly reveal a problem individual before he or she is hired. The timing of such a review is important – it is best to conduct the review before the individual is interviewed or even notified for an interview. This review should be limited to public posts so that your municipality does not run afoul of privacy laws.

QUESTIONS?
