

**Fahey Schultz
Burzych Rhodes**

EXPERT COUNSEL



REAL SOLUTIONS

Managing Employee Tweets, Facebook Live, and Snap Chats: Social Media in the Workplace

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Social Media: It's the New Watercooler!

- 69% of U.S. adults use at least one social media site.
- 88%(!) of adults under 30 use social media.
- 77% of employees reported using social media, irrespective of workplace policy.



The Good and the Bad

THE GOOD:

- Allows townships to stay engaged with their citizens.
- Valuable source of connectivity for employees.
- Recognizing reality that employers and public use it.

THE BAD:

- Excessive use interferes with job duties and production.
- Poor regulation can lead to public relations incidents.
- Over regulation can lead to legal liability (and poor morale).



The Risks of Regulating Social Media Use

- Employee use of social media is protected by state and federal law.
 - National Labor Relations Act (NLRA), enforced by National Labor Relations Board (NLRB)
 - Michigan Public Employment Relations Act (PERA), enforced by Michigan Employment Relations Commission (MERC)
 - Constitution (state and federal)
- But that doesn't mean you can't (or shouldn't) have some regulation...



Social Media Regulation 101: What's Protected by Federal Law?



- Employees have the right to engage in certain “protected concerted activities” under the NLRA (and PERA). 29 USC 157.; MCL 423.210.
- Protected rights:
 - The right to address work related issues such as pay, benefits, hours, and working conditions with their employer ***and their coworkers***.
 - The right to bargain about those issues, or to criticize them.
- Note: To be protected, the employee must be acting with, or with the authority of, other employees.



Can We Ever Discipline?

Absolutely: carefully, and in the appropriate circumstance.

Employers will have less, or no, protection if:

- The employee makes an intentional appeal to the general public that refers to a labor dispute;
- The employee is disparaging beyond the intended protection of the right to criticize;
- The employee actually interferes with his or her own work, the work of others, or the township's operations.





Deborah

I cannot STAND the new Township Clerk! He thinks he knows EVERYTHING, but he can't possibly function without us. Newsflash: Talking to us like we're children doesn't help! He really needs to figure out how to communicate!!!!!!

Like · Comment · 9 minutes ago · 🌐



4 people like this.



Beth I AGREE! What. A. Jerk! He thinks he is just being direct, but it's totally hurting morale. He needs to be way nicer when he gives direction. He needs a communications class.

11 minutes ago · Like · 🍷 2



Write a comment ...

What's the Rule?

The NLRB uses a “totality of the circumstances” test, evaluating:

- Evidence of anti-union hostility
- Provocation
- Impulsive or deliberate conduct
- The location of the conduct
- The subject matter of the conduct
- The nature of the conduct
- Similar content considered offensive
- Specific rule(s) prohibiting the content at issue
- Similarity of discipline issued for similar violations or proportional offense(s)





James

I cannot STAND the new Township Clerk! Just because those of us in AFCSME are pushing for better hours, he thinks he can treat us like children! That ***** is on a crusade against labor! I hope that he and his family get in an "accident" while he is out on vacation so we don't have to deal with him anymore! Citizens, you need to recall this clown!

Like · Comment · 9 minutes ago ·

4 people like this.



Morgan Wow. I can't believe you posted that! The Clerk may not be great, but that's way over the line. Looking forward to seeing how HR handles this one.

11 minutes ago · Like · 15



Write a comment ...

Social Media Regulation 201: What's Protected by Michigan Law?

- Protected Concerted Activity still applies!
- But with a twist:
 - A public employee's right to engage in union activities and other concerted activities may be violated, even if the absence of unlawful employer motive, if the employer's conduct is "inherently destructive" of these rights.
- This is a *broad* protection for public employees, designed to limit (eliminate) the use of discipline or discharge to discourage union organization, bargaining, etc.



What does MERC look for?

1

Union or other protected or concerted activity

2

Employer knowledge of that activity

3

Anti-union animus or hostility to the employee's protected rights; and

4

Suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action



Social Media Regulation 301: The First Amendment

- A public employee cannot be disciplined for his or her speech if the employee's speech:
 - Is about a matter of public concern;
 - Is made as a private citizen; and
 - Interests outweighs the township's interest in operating efficiently and effectively.



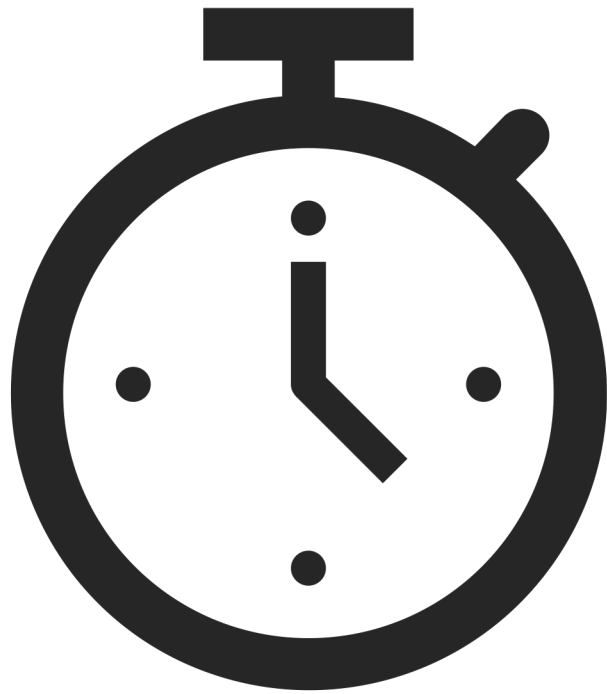
Matter of Public Concern

“Any matter of political, social, or other concern to the community.”

Not carte blanche for personal griping.

Example:

- A public school teacher posted on Facebook, “I’m not a teacher—I’m a warden for future criminals!”
- This was considered “a personal statement, driven by dissatisfaction with her job and conduct of some of her students;” *not* a matter of public concern.



Timing of the Speech

- When the speech occurs matters!
 - A public employee speaking as part of his or her official job duties can be disciplined.
 - Public employees speaking as private citizens, on the other hand, may be engaging in protected speech.

Examples

A teacher who wrote a newspaper article criticizing the local school board could not be disciplined, since the conduct (1) was not part of his official job duties, (2) was about a matter of public concern, and (3) any interference with the work relationship would be minimal.

A police officer posting online commentary about a city's decision to remove certain rifles from service could not be disciplined. He was speaking as a private citizen on a matter of public concern on his own time.



Interest Balancing

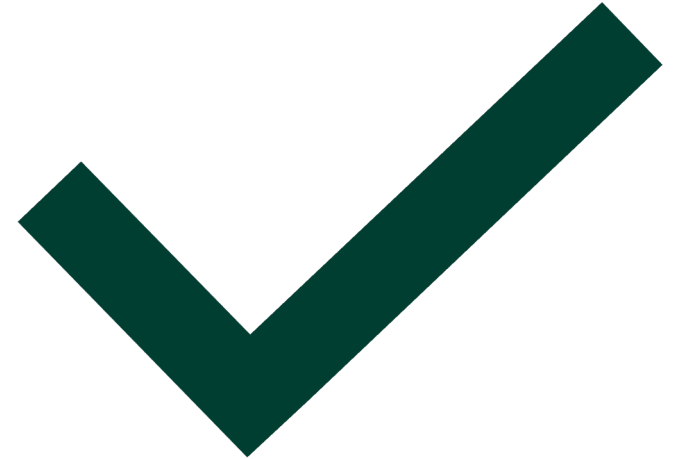


- Does the employee's interest in free speech outweigh the township's interest in operating efficiently?
- Watch for interference with:
 - Work
 - Personal relationships
 - The speaker's job performance
 - The effective functioning of the township's enterprise.



Considering Discipline?

- Be sure you aren't violating the First Amendment. Ask yourself:
 - Is the employee speaking about a matter of public concern?
 - Is the employee speaking as a private citizen?
 - Does the employee's speech outweigh the Township's interest in operating efficiently and effectively?



Don't Forget the Labor Laws!

- Be sure to consider:
 - Whether the discipline is based on an employee's union activities or affiliation;
 - Whether the speech is protected concerted activity;
 - Whether the speech was so extreme so as to lose protection;
 - Whether the speech occurred on-duty or off duty; and
 - Whether the timing of discipline would be suspicious or appear to be due to bias.



NLRB announced a new standard in *Boeing Co and Society of Professional Engineering Employees in Aerospace*, IFPTE Local 2001, 365 NLRB 154 (2017).



Old rule: A social media policy violates the federal labor law if it could be “reasonably construed” by an *employee* to violate his or her labor rights.



New Rule: A social media policy that, *when reasonably interpreted*, would potentially interfere with labor rights.

Social Media Policy Standards

Require

employees to identify themselves as not speaking on behalf of the Township and to post an appropriate disclaimer.

Require

employees to avoid sharing trade secrets or internal reports.

Forbid

certain behaviors such as threats of violence, harassment, bullying, racism, sexism, or other discrimination against a protected class.

Key Components of a Good Social Media Policy: Part I

Key Components of a Good Social Media Policy: Part 2

1

Remind employees they can share concerns with their supervisor directly, rather than on the internet (and cultivate an environment that allows them to do so without retaliation!)

2

Clarify that employees who report a violation of the policy will be protected from retaliation.

3

Give specific examples of each type of prohibited communication, and clarify what is allowed when possible.



Testing Your Knowledge!



Questions

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