

MCIT

Social Media and the Workplace

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The information contained in this document is intended for general information purposes only and does not constitute legal or coverage advice on any specific matter.

Overview

- Employee Personal Use of Social Media
- Employee Professional Use of Social Media
 - Professional networking
 - Using social media and internet searches when making hiring decisions
 - Social media employment references
- Government Entity Social Media Use

What Is Social Media?

- **Social Networking**
 - Facebook
 - Twitter
 - Google+
- **Blogging**
 - Blogger
 - Tumblr
 - WordPress
- **Professional Network**
 - LinkedIn
- **Video/Photo Sharing**
 - YouTube
 - Flickr
 - Instagram
- **Online Forums**

Social Media and the Workplace

EMPLOYEE PERSONAL SOCIAL MEDIA USE

Is Employee Social Media Use a Concern?

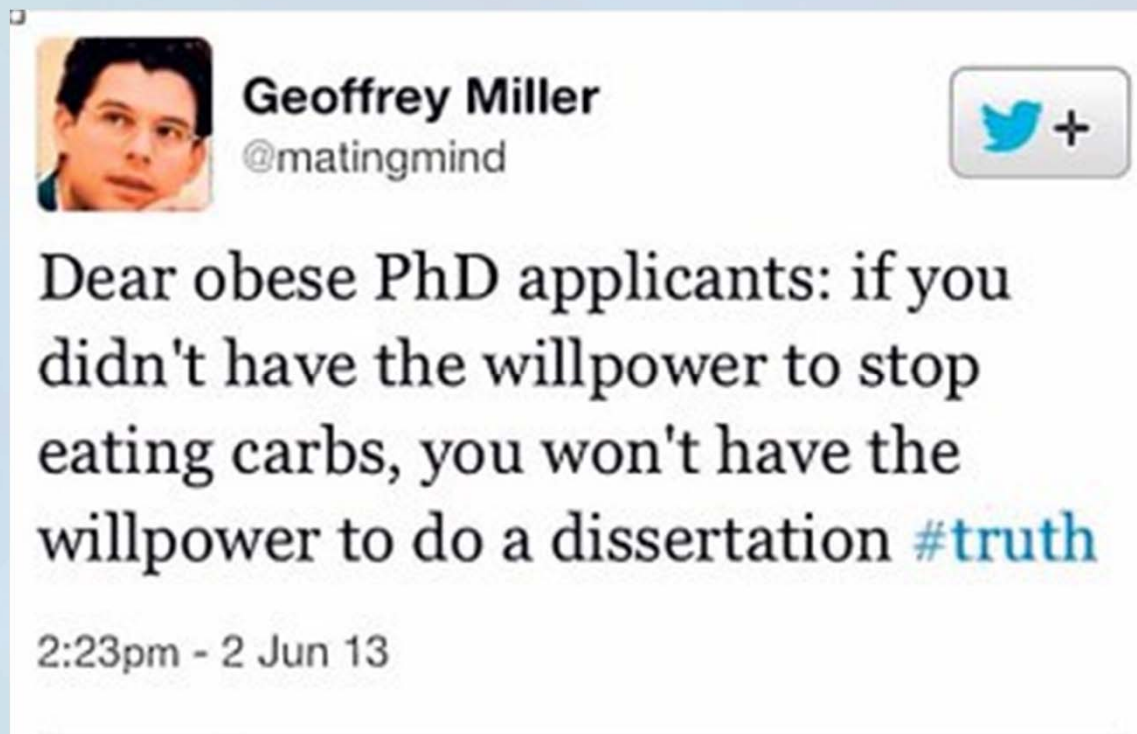
- Public has higher expectations for public employees, especially those with higher profiles or involved in critical public services
- Public employees need to maintain credibility with the public
- Public employees have greater access to sensitive information

Examples of Employee Blunders

Walmart employee David Noordewier posted on Myspace that the country's average IQ would increase if bombs were dropped on all the company's stores. Noordewier was terminated. A Walmart spokesperson wouldn't confirm whether the Myspace post was the cause.

- http://www.ragan.com/Main/Articles/12_outrageous_job_losses_due_to_mishandling_social_44055.aspx

Examples of Employee Blunders



Examples of Employee Blunders

Connor Riley was offered a position at Cisco in 2009, but was torn about the commute. She tweeted:
"Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating work." Guess who didn't get the job? (Riley claims she turned down the offer first.)

- http://www.ragan.com/Main/Articles/12_outrageous_job_losses_due_to_mishandling_social_44055.aspx

Examples of Employee Blunders

An employee of Nationale Suisse called out sick one day, claiming her work computer would aggravate her migraine. Of course, she was later "seen" posting messages to a friend's Facebook page. A termination notice was added to her Facebook's wall—so her migraine wouldn't be affected by reading it at work.

- http://www.ragan.com/Main/Articles/12_outrageous_job_losses_due_to_mishandling_social_44055.aspx

Examples of Employee Blunders

June Talvitie-Siple was forced by community pressure to resign her \$92,000-per-year position as math and science supervisor at a Cohasset, Mass., high school after calling residents "arrogant and snobby" on her Facebook page.

- <http://today.msnbc.msn.com/id/43690002/ns/today-money/t/omg-cost-social-media-blunders/>

Risks and Concerns

- Employee postings could be harmful to public entity's reputation or credibility
 - Employee personal comments could be misinterpreted and attributed as official statements
 - Could negatively affect employee's standing in the eyes of the public

Risks and Concerns

- Social media postings have evidentiary value
- Employee postings could negatively affect employee's credibility as a witness

Negative Impact with the Public

- "Let someone, homeless or not, try and stab me with a pen, knife, spoon, etc., not only will he fail, he'll probably end up shot. These people should have died when they were young anyway, I'm just doing them a favor."
- On duty posts:
 - "[Trooper] is NOT working in the rain."
 - "It's cold AND snowing?!?! I can't possibly work in these conditions."
 - "[Trooper] is keeping the mean streets ... safe and free of trash."

Negative Impact with the Public

- Occupation: “garbage man” because “I pick up trash for a living”



<http://www.wthr.com/Global/story.asp?S=1006607>

Risks and Concerns

- Could be used as evidence of discrimination in the provision of public services or employment discrimination
- Social media postings could create a hostile work environment

Examples of Employee Blunders

The racist EMT

- A FDNY EMT regularly used the derogatory term “shwoog” when referring to black people, and once tweeted, “I like jews about as much as hitler.” His Twitter account has since been suspended.

Risks and Concerns

- Posting of not public data could violate applicable data privacy statutes and internal policies
 - Employees may unintentionally release not public data through seemingly harmless postings

Risks and Concerns

- Invasion of Privacy: publication of private facts
 - Could create direct liability if within course and scope of employment
- Defamation:
 - Employer could be held liable for defamatory statements made by employee if within the course and scope of duties

Risks and Concerns

- Access at the workplace could lead to:
 - Lost productivity
 - Increased exposure to computer viruses (if on entity computer system)
 - Greater argument that action done within course and scope of employment

Considerations in Regulating Employee Social Media Use

- First Amendment: freedom of speech
 - Public employee speech is generally protected if
 - The employee is speaking as a citizen on a matter of public concern; and
 - The employee's interest in the speech outweighs the public employer's legitimate interest in delivering efficient government services

Considerations in Regulating Employee Social Media Use

- Postings regarding the terms and conditions of employment may be protected under labor relations laws
- Certain federal and state laws provide anti-retaliation protections for exercising rights
 - Example: Family and Medical Leave Act (FMLA)

Considerations in Regulating Employee Social Media Use

- Accuracy and Context:
 - Not all information on the Internet is complete or reliable
 - Posting could be taken out of context or not made by employee

Considerations in Regulating Employee Social Media Use

- Accessing a private social media site without authorization or in excess of authorization could raise claims under:
 - Federal Stored Communications Act
 - Minnesota Privacy of Communications Act
 - Invasion of privacy
 - Fourth Amendment unlawful search and seizure

Risk Management Suggestions

- Consider blocking or restricting all personal use of social media or social networking Web sites through the public entity's computer systems or equipment
- Educate employees regarding the potential risks for social media use and the possible consequences for misuse

Risk Management Suggestions

- Consider whether a social media use policy or guidelines are desirable
- Encourage supervisors to be thoughtful about friending or following employees
- Consult with legal counsel

Social Media and the Workplace

SOCIAL MEDIA, THE INTERNET AND HIRING

Social Media, the Internet and Hiring

- Using the Internet or social media to “check out” or evaluate an applicant for employment
- Do the benefits outweigh the risks?

Potential Risks and Concerns

- Accuracy and Context of Information
 - May be difficult to find the correct individual
 - Not all information on the Internet is accurate, complete or reliable
 - Not all applicants may have an Internet presence
 - Savvy applicants have cleaned up their Internet identities

Potential Risks and Concerns

- Discrimination/Retaliation
 - Discrimination on the basis of protected class status
 - Retaliation for exercising First Amendment rights
 - Discrimination/retaliation under other state/federal laws

Social Media Use

- Based upon survey projections:
 - Estimated 150 million Facebook users in USA
 - 39.3 million identified a family member in their profile
 - 20.4 million included a birth date and year
 - 7.7 million “liked” a page pertaining to religious affiliation

(Source: Consumer Reports State of the Net Report 2012)

Social Media Use

- Based upon survey projections:
 - 4.7 million “liked” a page about health conditions or treatments
 - 2.3 million “liked” a page regarding sexual orientation
 - 25% said they falsified information in their profiles to protect their identities

Potential Risks and Concerns

- Background checks requirements apply to social media/internet searches
- Accessing private social media sites without or exceeding authorization could create issues

Requesting Passwords or Access to Private Social Media Accounts

- Raises additional questions and concerns
 - Is this against MHRA/civil rights laws
 - Is this a violation of the federal Stored Communications Act
 - Is this a violation of the Fourth Amendment
 - Is this an invasion of privacy
 - Is this a violation of the Terms of Service, i.e. breach of contract
 - Could this lead to identity theft

Risk Management Suggestions

- Consider whether the benefits of Internet and social media searches outweigh the risks
- Consult with legal counsel regarding the legal implications of conducting searches prior to conducting or using any information received from the searches

Risk Management Suggestions

- If using Internet/social media searches, develop policies and procedures:
 - Prohibit conducting searches outside of established procedures
 - If doing, conduct search in conjunction with official background check
 - Searches should be uniform in format and in application

Risk Management Suggestions

- Shield the hiring authority from any protected information discovered
- Limited searches to publicly available sites and to job related information

Risk Management Suggestions

- If searching private social media sites:
 - Get permission/waiver, but note cannot waive discrimination claims
 - Update the Tennessen Warning
 - Beware of checking personal messages or private communications that may have greater protection
 - Do not exceed authorization granted by candidate

Risk Management Suggestions

- Keep records of information reviewed in the search
- Be able to articulate a nondiscriminatory, job-related reason before disqualifying a candidate based upon the information found

Social Media and the Workplace

SOCIAL MEDIA EMPLOYMENT REFERENCES

Social Media Employment References

Professional networking sites may permit former employees to request and receive recommendations from former supervisors and co-workers.

Social Media Employment References

- Risks to the Public Employer:
 - Could be used as evidence of pretext in a lawsuit
 - Violation of MGDPA if based upon performance evaluation data and no written consent given
 - Minn. Stat. § 181.987 protections may not apply

Risk Management Suggestions

- Consider prohibiting supervisors or managers from providing professional recommendations on professional networking sites
- If permitting professional recommendations, obtain a written release under MGDPA

Risk Management Suggestions

- Apply any existing post-employment reference policies to recommendations on professional networking sites
- Require employees providing personal recommendations to include a disclaimer

Social Media and the Public Entity

PUBLIC ENTITY SOCIAL MEDIA SITES

Social Media and the Public Entity

- Social media is an emerging and dynamic form of communication.
 - social and professional networking
 - blogging (web logs or journal)
 - video and photo sharing
 - podcasts or webcasts
 - online forums

Considering Social Media

- Do the benefits outweigh the risks?
- A thoughtful consideration of the potential risks and challenges involved with social media use will help to manage potential losses.

Developing and Posting Content

LEGAL CONSIDERATIONS

Similar Consideration to Those Involving Employee's Personal Use

- Minnesota Government Data Practices Act (MGDPA) and other data privacy laws apply to social media.
- Invasion of Privacy or Defamation

Accessibility

- ADA and Section 504 provide that qualified individuals with a disability must have equal access to programs, services and activities, unless doing so would fundamentally alter their nature.
- Minnesota Human Rights Act imposes comparable requirements.

Common Accessibility Features

- Adjustable text size
- Skip navigation
- Tagging
- Text-based formatting
- Open captions (video format)
- Providing access to content through alternative means

Copyright Issues

- Generally, only an author or owner has legal right to reproduce, distribute copies, and display a work.
- Posting copyrighted material without permission or exception could be infringement.

Records Retention

- Data posted on an entity's website or social media site may be official records subject to the records retention schedule.

Minnesota Statute § 10.60 – Public Web Sites and Publications

- Prohibits the use of public websites and publications to promote individuals in public office and for campaign purposes

Accuracy

- Restrictions regarding who can publish data
- Safeguard to protect against inadvertent personal posts on public site

Example-Chrysler Autos

- "I find it ironic that Detroit is known as the #motorcity and yet no one here knows how to ****ing drive,"
- The F-bomb was uncensored.



Example-American Red Cross





@riaglo
Gloria Huang

Rogue tweet frm @RedCross due to my inability to use hootsuite... I wasn't actually #gettingslizzard but just excited! #nowembarassing

4 hours ago via [HootSuite](#) ☆ Favorite ↻ Retweet ↩ Reply

We've deleted the rogue tweet but rest assured the Red Cross is sober and we've confiscated the keys.

about 11 hours ago via ÜberTwitter
Retweeted by 86 people



RedCross
American Red Cross

Interactive Communications and the Public

PUBLIC COMMENTS

First Amendment Concerns

- “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.”
- A government entity’s ability to restrict public speech depends on the type of “forum” at issue.

First Amendment Concerns

- Social media/social networking may be a designated or limited public forum.
 - If so, may limit ability to regulate speech
 - Only viewpoint neutral, reasonable time, place and manner restrictions are permissible
 - May be prohibited from removing or refusing to post content that is protected by the 1st Amendment
- Argument: Requiring registration arguably may have a “chilling effect” on speech

Other considerations

- Defamation or invasion of privacy by third parties
- Open Meeting Law (public officials)

Liability Limitations for Third Party Postings

- Section 230 of the Communications Decency Act of 1996
 - Immunity from claims related to regulating interactive communications on websites or social media and from torts by third party users
 - Uncertain if applies to government regulation of internet speech
- Title II of the Digital Millennium Copyright Act of 1998
 - Limits liability for copyright infringement by third party users

Social Media for Public Entities

MANAGING THE RISK

Developing a Strategy

- What are the business reasons for using social media?
- Who are you are trying reach?
- What resources can you dedicate?
- Can you generate enough new content to maintain a dynamic presence?
- Do the benefits outweigh the risks?

Choosing Social Media

- Who is your audience and where are they?
- What is your goal for social media use?
- What resources can you dedicate to social media?
- Which social media platform meets your needs?

Terms of Service

- Contract between government entity and social media site
 - Authority to contract
- Provisions to be aware of:
 - Choice of law and jurisdiction
 - Waiver and indemnification language
 - Ownership and licensing of content

Implementing Social Media

- How will you implement social media and social networking?
 - Centralized or decentralized
 - Level of oversight
 - Establishment of standards and guidelines

Developing Policies, Procedures and Guidelines

- Incorporate mission and goals for the entity's use of social media
- Outline responsibilities for the entity's social media presence
- Establish guidelines and/or editorial controls for employees managing and implementing social media

Developing Policies, Procedures and Guidelines

- Address confidentiality and privacy concerns
 - Require compliance with MGDPA and data privacy policies
 - Post only public data
 - Get consent prior to posting anything that may be considered not public data

Developing Policies, Procedures and Guidelines

- Consider how content posted may be accessible to persons with disabilities
- Consider records retention issues
 - How will you store, maintain and preserve these records
 - Who will have the authority to change or remove content and how will that be integrated into the process
 - Does your records retention schedule need to be updated

Developing Policies, Procedures and Guidelines

- Address copyright law and limitations
 - Unless covered “fair use,” public domain or other exception, written consent should be obtained prior to posting.
- Provide training to employees responsible for implementing the entity’s social media plan
- Consult with legal department as needed

Additional Resources

- www.MCIT.org
 - MCIT Resource Briefing “Social Media for Public Entities”
 - January 2013 MCIT Bulletin article “Website Accessibility for Individuals with Disabilities”

Ask Questions and Share Experiences

DISCUSSION

You're Invited:

MCIT's 2014 Regional Risk Management Workshops

Plan Now to Attend

- Rochester: Sept. 4
- Marshall: Sept. 10
- Mankato: Sept. 11
- Crookston: Sept. 17
- Grand Rapids: Sept. 18
- St. Cloud: Sept. 24
- Fergus Falls: Sept. 25

It's for You!

- Commissioners
- Department heads
- Supervisors
- Human resources professionals
- Risk managers/safety coordinators

Sessions cover: issues related to claims/coverage, human resources, risk control and governance.

Registration begins May 1. Check MCIT.org/training.aspx for details.