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Introduction



- How many of you read the newspaper today?
- How many of you have checked your Facebook, Twitter, or Instagram, TikTok (not the game) account today?

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Introduction



Stat of the Day

County	Population
China	1,425,887,337
India	1,417,173,173
United States	338,289,857

Social Media Platforms

Platform	Users
Facebook	2,936,000,000
YouTube	2,560,000,000
Instagram	1,480,000,000
TikTok	1,000,000,000

Introduction	
• Pros:	
 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 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.)	
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1st Amendment (non-employee)	
Forbids the Government from engaging in unlawful censorship	
Example: A city cannot prohibit certain views from being expressed in one its public parks (think Alt-Right, Antifa, Etc.) How to analyze:	
What type of forum is it? Traditional Public Forum (City Park) Designated Public Forum (Government space opened up to be used for expression)	
3. Non-public Forum (Government owned space not used for expressive purpose, like warehouses or offices) 4. Limited Public Forum (Government employee message boards) • U.S. Supreme Court has held that it is difficult for the government to	
restrict speech in traditional or designated public forums, but easier on balance to restrict speech in limited public forums and non-public forums	
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1st Amendment (non-employee)	
Even in limited public forum and non-public forums the U.S.	
Supreme court has held that restrictions on speech must be reasonable and "view point neutral." "View Point Neutral" means that the government cannot	
suppress some viewpoints but allow others on a particular topic.	

1st Amendment (non-employee)	MAKS-WELSON	
Designated Public Forum Example:		
 2012 Honolulu Police Department was challenged in it decision to remove to local residents' comments from Department's Facebook page. 		
 Residents alleged that the it was a public forum and the removal was illegal censorship. 		
 Department rules described the page as "forum open public" 	to the	
 Result – Department settled for attorney's fees and an agreement to revise its social media police 	1	
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1st Amendment (non-employee)	MAKS-HELSON	
Vice President Mike Pence (as Indiana Governor)		
 A post on his Facebook page expressing disappointment in Supreme Court's Defense of Marriage Act (DOMA) decising attracted a thousand comments in the first 24 hours, a num increased exponentially in a short matter of time. 	on hber that	
 Big numbers equals social media success worth bragging al right? Not this time. The exact number of comments is un because staff in the governor's office deleted some comme initially defending the action on the basis of the office's po 	clear ents,	
prohibiting obscenity, vulgarity and personal attacks. It pro apology the next day from the governor. "On careful revier appear [sic] that this was not always the case and some con were being deleted simply because they expressed disagreer	ompted an w, it nments	
my position," wrote Pence. "I regret that this occurred and apologize to all those who were affected."	sincerely	
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1st Amendment (non-employee)	WORRENCOM	
Vice President Mike Pence (as Indiana Governor)		
 In Indiana, social media policies were in place but wer narrowly construed and overzealously applied. 	re too	
 The actions also risk touching a constitutional third ra attempting to limit speech in what may have become a 	•	
designated public forum, where government restriction subject to severe court scrutiny.		
 When you find yourself explaining, you're losing. The winners—if there are any—are the people whom the 		
governor's office sought to limit. Government actions critics larger than they are and embolden them in opp	make	

What do Employers Do?	
Have a policy	
 Vet policy by counsel Policy should specifically identify what comments are authorized and what are not. For example, the policy can specify that obscene, defamatory, and 	
other similar types of comments are not permitted. The policy can also specify that comments have to relate to the matter originally posted	
 Policy itself presumably must be designed to satisfy the stringent demands of forum analysis, including that the policy be "viewpoint- neutral," and the agency must be able to justify its restrictions on certain types of comments in a way that will satisfy forum analysis 	
requirements	
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What do Employers Do?	
Clarify ownership of "official" accounts	
Clarify who can create, use "official" accounts	
Inform public site is monitored and posts may be deleted Prohibit dissemination of non-public confidential information	
through social media Reference Records Policy for Deletion of Records	
*Practice Point – If a government controlled social media site doesn't permit any public comment there is little to no risk because	
the site is the Government "speaking" not establishing a "forum."	
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Social Media & Employees	
 Can Employers discipline employees for off-duty social media comments, posts, etc. on 	
Non-Employers social media sites?	
 What standards apply for employee off-duty conduct? 	
• How "freely" may employees "speak"?	

Defining the Pr	oblem
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- Employees making disparaging comments about their employer, or discriminatory or defamatory comments about coworkers.
- Employees posting information that reflects badly on them, or the agency.
- 3) Employees posting, or emailing confidential information.
- 4) Misuse of employer equipment.
- 5) Employees being cross-examined for bias about matters that they included in online profiles, or about comments posted online. (consider what happened to Mark Fuhrman in the O.J. Simpson trial...)
- 6) Employers using material from an applicant's social media site as a basis for hiring or not hiring.

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Barriers to Fixing the Problems



Governmental employment is different. At the outset, public employees often have either civil service protection or collective bargaining agreements. Beyond that, however, governmental employers must honor an employee's constitutional and statutory rights.

Sources of Rights

- 1) First Amendment
- 2) Fourth Amendment
- 3) Federal and State Wiretap Laws/
- Stored Communication Act

These provisions shape "what process is due," (or not due), under various laws and the $14^{\rm th}$ Amendment.

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Fourth Amendment: Accessing Employee's Phones and Computers

- Policies must reinforce the notion that the workplace, and all of its equipment, are the property of the employer, who can make rules about use and inspection.
- O'Connor v. Ortega, 480 U.S. 709 (1987) public employees can have a "reasonable expectation of privacy" unless the employer cuts it off.
- · Two Part Analysis under the 4th Amendment:
 - 1) Employee must have a subjective expectation of privacy
 - 2) Expectation must be objectively reasonable under the circumstances
- City of Ontario, California v. Quon, (Slip Opinion No. 08-1332.) Argued April 19, 2010 – decided June 17, 2010.

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	The state of the s	
	deral and State Wiretap Laws Employers sometimes want to "get the goods" on a bad worker. On the	
	other hand, some employees (and a few unions) sometimes want some "intelligence" information to use against the employer. It is not uncommon for unethical people to leave a voice recorder "on" in	
	It is not uncommon for unerthical people to leave a voice recorder on an empty room to "catch" its next user. Indeed, some of the devices listed above allow microphones, cameras, and recorders on cell phones to be turned on from a safe distance away	
•	One federal law to watch is 18 USC 2511 (wiretaps — intentional interception of any wire, oral, or electronic communication).	
•	Another is the "Stored Communication Act," (USC) 18 USC 2701. The latter forbids the intentional and unauthorized accessing of stored communication, and has broader exceptions than the Wiretap Act because it excludes those with "authorized access."	
•	Rescribes with authorized access. See Pierrylo v. Hillstone Restaurant Group, Docket No. 2:06-CV-05754 (D.N.J. 2008)	
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Fir	st Amendment: Can We Punish Them for What They Said?	
•	Courts look to a four-part test to determine if an individual's right to free speech has been violated by the government, in cases where some adverse employment action results from the speech in question. The test is as follows:	
	1) Whether the speech touched on a matter of "public concern."	
	If so, whether the employee's interests in the speech outweigh the employer's interest in promoting efficient operations.	
	 Whether the speech played a substantial role in leading to the adverse employment action. 	
	4) Whether the government can show, by a preponderance of the evidence, that it would have taken the same employment action absent the protected speech.	
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	atters of Public Concern	
Me	Connick v. Myers, 461 US. 138 vers prepared a questionnaire that was distributed throughout the office concerning the office sister pokey, office morale, the need for a grievance committee, confidence in supervisors, and sure to work campaigns. Meyers was terminated for refusal to accept transfer and for being	
Wh	bordinate by distributing questionnaire. Meyers alleged wrongful termination because she cisced her 1st amendment rights. at did the Court hold?	
The con Fur	Court held that because the questionnaire only touched on one question which was of public cern that the questionnaire (considered a work-related gripe) was not protected free speech. thermore, the Supreme Court stated that the "public concern" analysis shall focus on the tent, form, and context of the speech, with emphasis being placed on the content.	
	Garcetti v. Ceballos, 547 U.S. 410 (2006)	
wh	en public empbyrees make statements pursuant to their official duties, they are not speaking as ens for First Amendment purposes, and the Constitution does not insulate their imunications from employer discipline."	

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Balancing of Interests:	
If the Court does find that the speech is a matter of public concern, the balancing test is applied.	
 Pickering v. Board of Education, 391 U.S. 563 (1968) 	
Pickering is the landmark case that established the balancing test that courts look to when analyzing whether the government has infringed upon one's right to free speech. The Court stated that one should give deference in the analysis to whether the speech impairs working relationships for	
which loyalty and confidentiality are important or whether it impedes the performance of duties or impairs discipline or harmony among coworkers.	
The Court further stressed that an employer does not have to wait to see if actual harm from the speech has taken place before taking action, but may act upon reasonable predictions of disruption.	
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Using Social Media	
 Now that we've covered the plethora of issues surrounding social 	
media in the workplace – how can employers use social media in a crisis, often unrelated to any employment matter?	
• First, what are the benefits?	
IMMEDIACY AND TIMELINESS	
2. Continuous	
3. Interactive	
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Using Social Media	
	
Before Communicating via Social Media employers need to:	
Implement Policies to address potential vulnerabilities Designate a single employee as the Public Information Officer	
 we do not want to many cooks in the kitchen 	
Policy should outline permitted and prohibited conduct Understand the response ability of social media.	
 Understand the response-ability of social media Social media has reduced the window at which an organization 	
has to respond in moments of crisis. Facebook has cut down crisis response time to around 12 hours; however on Twitter a	
crisis can spread in minutes. How do we address this? Preparedness is crucial. This	
includes setting up a system for monitoring and responding to incidents beyond the traditional 9 to 5 workday.	

Using	Social	Media
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- 3. Establish a framework
 - Who will be responsible for making decisions and communicating directive.
 - Make sure all passwords to accounts are readily accessible to a designated team and in the hands of responsible partners.
- 4. Create a response toolkit
 - Whether it is a press release or prepared statement, an effective toolkit will include templates that the organization can use instantly.
 - Templates need to be preapproved, standardized and in sync with the rest of your response efforts.

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Using Social Media



- 5. Know where to respond
 - If a story breaks out and word is spreading on Facebook

 the first response should not be a press release to your local paper that gets published once a week.
 - In the social media age this is more important than ever.
- 6. Be honest
 - Continued transparency and communication will help keep the public informed and updated. Even sharing bad news will be appreciated for its honesty and will help reestablish long-term trust.

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Biggest Benefits



- 1. Engagement
 - • Whether you focus efforts on TikTok, Twitter, Facebook, or a different platform entirely, social media will always be a solid place to keep the general public informed and updated about important issues and engage with an audience on a deeper level.
- . Show people who you really are
 - leveling with you here... government doesn't exactly have the greatest rep'. There's an opportunity to shift perceptions by using social media for government communications and building a personal brand that is built on transparency.
- 3. Recruitment
- 4. Public Service Campaigns
- Stream Live Events
 - Another great tool is Facebook Live. This can be used by all sorts of Government and Public bodies to
 host many events. Things like a town hall or council meetings, or of course a PR launch event.
- 6. Crisis Management
 - whether your role is to manage the timeline of a crisis or reassure the public that they can still use your services; Twitter, Facebook and even Instagram can be invaluable here.
- 7. Real Time News Bulletins

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YOU WILL GET CALLED OUT....

Here's a brilliant example from congressman Eric Swalwell, who Tweeted a photo of a Pride flag with the caption, "I fly these flags 365 days a year." Unfortunately, Swalwell's followers quickly pointed out that the flag still had creases from being unpackaged moments earlier. Better luck next time, Eric.

Rep. Eric Swalwell
@RepSwalwell

Follow I fly these flags 365 days a year.



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Questions?



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