

IMHO, the FYI on BYOD:

Employment Law Update on Technology in the Workplace

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OVERVIEW OF NEW CONSIDERATIONS RE: TECHNOLOGY IN THE WORKPLACE

- SB 944 and Employer Duties under the Texas PIA and Record Retention Act.
- New First Amendment case law, public employers' ability to regulate employees' personal social media use, and policing speech on public entity's social media accounts.
- Federal Communications Act and access to employees' personal social media accounts during workplace investigations.
- Other employment law considerations when using technology in the workplace.



Employee Use of Personal Devices for Public Business

- It is convenient to allow employees to use personal devices for business purposes, BUT business records/information on personal devices are property of the public employer and can trigger legal obligations under:
 - Texas Public Information Act
 - Record Retention Act
 - Litigation Discovery Process
 - Workplace Investigations/HR Issues

SB 944: Employers' Responsibility under PIA

- Confirmation that communications and other information contained on privately-owned devices are public records if they concern public information.
- Employees do NOT have a personal or property right to public information created or received while acting in official capacity.
- Outlines procedures for both current and former employees on the preservation of records on personal devices:
 - Employee designated "temporary custodian" and must forward or transfer the information to the entity's custodian of records to be preserved **within 10 days** of request.
 - Document must also be preserved on the personal device if necessary to preserve the metadata and other information about the document (you can't just take a screenshot of the text and email it to the entity).
 - Governmental entity has affirmative duty to locate and gather public information held on personal devices, whether from current or former employees.
 - Temporary custodian's failure to comply with a request is grounds for disciplinary action by the governmental body or any other applicable penalties under the law.

SB 944: Employers' Responsibility under Record Retention Act

- Confirmation that Government Code Chapter 441 (Libraries and Archives) and Local Government Code Title 6 (Records) apply to records held by temporary custodian.
- Destroying records on personal devices is a **Class A misdemeanor**.
 - Beware of automatic deletion of text messages, emails, etc.
- Exception to record retention laws for transitory information
 - Examples: routing slips, confirmation of transmittal, internal meeting notices, text arranging lunch plans, etc.
 - Beware, communications regarding tardiness or absence are NOT transitory.

- Update/Add Policy– “Records on Personal Devices”
 - Prohibit or strongly discourage texting.
 - Mention criminal penalty for deleting or hiding public records.
 - If work email accessible, require use of email for remote communication, should automatically be stored in server. But, be cautious of properly counting working hours for non-exempt employees.
 - If texts/photos unavoidable, establish procedures for regular transfer (weekly?) to system, consider methods to preserve metadata, unless message truly “transitory” without usefulness.
- Employee training on legal obligations and practical guidance on saving information/metadata)
- Consider software programs that assist in saving and transferring work-related messages:
 - Internal Messaging Software that mirrors text messages: Microsoft Teams; Slack; Google Voice
 - Software allowing transfer of data/messages on personal device: Coolmuster
- Consider issuing City cell phones that provide central access to texts and pictures



Employers' Ability to Regulate Online Speech

Public employees have the right to speak out as private citizens on matters of public concern, so long as the speech does not unduly disrupt the operations or mission of the employer.

- Q1: Is the employee speaking as a private citizen or public employee?
- Q2: Is the employee speaking as a citizen on a matter of public concern, rather than a personal grievance?
- Q3: Does the employee's speech create an unreasonable disruption?
 - The importance of and effect on harmony in workplace
 - The time, place, and manner of the speech
 - The context in which the dispute arose
 - The degree of public interest in the speech
 - Whether the speech impedes the employee's ability to perform duties.

- Restrictions to include in Employers' Social Media Policy
 - Employees may access personal devices only during designated meal times and scheduled breaks. May not otherwise use personal devices/post on social media during business hours.
 - No right to privacy in any information accessed on employer's devices/internet; Employer reserves right to monitor any communication or information created on, received through or sent from their system.
 - Posts about government-related topics should clearly identify that views are their own and not the governmental entity.
 - Should not use official logo/insignias when posting on personal social media sites.
 - Other policies on harassment, bullying, discrimination, confidentiality, fully apply to social media posts – Do not be overbroad on negative speech
 - Put in **bold** that nothing is intended to interfere with employees speaking on matters of public concern as private citizens, if no undue disruption to operations

- Public employers should generally not regulate employees' off-duty social media activity, BUT exception when speech creates an actual and unreasonable disruption to the employer's mission or operations.
- Factors to consider when analyzing whether unreasonable disruption:
 - employee's position;
 - type of social media activity;
 - content of posting and whether it indirectly relates to employee's employment;
 - social media platform used; and
 - privacy settings/who is able to view the posting.
- Have a thick skin on criticism of management or operations

Regulating Employees' Online Speech – Case Law Examples 1st Amendment

- Sergeant terminated after posts on personal Facebook page and Mayor's public Facebook page criticizing Chief's failure to send PD officers to funeral for officer killed in line of duty.
 - "This is totally unacceptable" . . . "Dear Mayor, can we please get a leader that understands that a department sends officers to the funeral of an officer killed in the line of duty?"
 - [W]e had something then that we no longer have ... LEADERS. . . " "If he suddenly decided we "couldn't afford the gas" (how absurd . . .) he should have let us know so we could have gone ourselves. Also, you'll be happy to know I will no longer use restraint when voicing my opinion on things. Ha! "If you don't want to lead, can you just get the hell out of the way." "seriously, if you don't want to lead, just go."
- Holding: Not Protected Speech.
 - Police Officer's First Amendment interest in posting critical statements on social media concerning the police chief's leadership did not outweigh the police department's interest in preventing insubordination and preserving loyalty and close working relationship.
 - Court also held speech was not a matter of public concern, but instead a "rant" and "**primarily motivated by and primarily addressing her displeasure with Chief Cannon** for his perceived lack of leadership." A "scintilla" of public speech does not "plant the seed of a constitutional case."

Regulating Employees' Online Speech – Case Law Examples – 1st Amendment

- If speech involves both private and public concerns, determine which concerns dominate the speech.
 - Fire Captain comments on Facebook post about local incident involving teacher being removed from a school board meeting:
 - all of this going on with this poor teacher being treated so unfairly makes one thing perfectly clear... These “boards” everywhere, ruled by good old boy politics need to be dissolved ASAP..!! We.. have the same exact problem at our fire department... A board of clueless idiots making the decisions that affect many including the very employees who actually do the job.. It’s a joke.. I hope this teacher makes them pay....and pay big time.!!
- Holding: Not Protected Speech.
 - “Although Moreau began his Facebook post by commenting on a publicized school board incident, his speech “devolved into his personal criticisms” and he was “**primarily motivated by and primarily addressed his personal displeasure.**” On balance his speech was predominantly of private concern.

Regulating Employees' Online Speech – Case Law Examples 1st Amendment

- Battalion Chief alleged free speech retaliation after posting on Facebook:
 - While watching gun control debate: “My aide had an outstanding idea .. lets all kill someone with a liberal ... then maybe we can get them outlawed too! Think of the satisfaction of beating a liberal to death with another liberal ... its almost poetic ...”
 - Paramedic responded : “But.... was it an “assault liberal”? Gotta pick a fat one, those are the “high capacity” ones. Oh ... pick a black one, those are more “scary”. Sorry had to perfect on a cool idea!”
 - BC “liked” and commented back: “Lmfao! Too cool!”
 - Later BC : “Free speech only applies to the liberals, and then only if it is in line with the liberal socialist agenda. County t recently published a social media policy - suitably vague enough that any post is likely to result in disciplinary action, including termination. All it took was one liberal to complain ... sad day. To lose the First Amendment rights I fought to ensure.”
 - Firefighter posted picture of elderly woman with her middle finger raised, text across picture: “THIS PAGE, YEAH THE ONE YOU’RE LOOKING AT ITS MINE. I’LL POST WHATEVER THE FUCK I WANT.” Above photo “for you Chief.”
- Holding: Not Protected Speech: Certain comments amounted to protected speech, but employer’s interest in efficiency and preventing workplace disruption outweighed free speech interest.

Regulating Employees' Online Speech – Case Law Examples First Amendment

- Internal investigation into tip from Facebook profile “Dominic” to TV station falsely claiming misuse of governmental property by Sheriff’s Deputy.
 - Police officer, union president, confirmed he used FB alias, knew of the jet ski picture, but denied sending tip.
 - Told several he know who sent it, but refused to identify
 - Then participated in TV interview to “clear his name”
 - Story created “great disharmony” between PD and SO, (across the hall) and Nagle banned from SO; public complaints about working relationship between law enforcement agencies operating out of same courthouse
- Holding: Not Protected Speech
 - Not speaking as private citizen, stated he was rep of police union, identified himself as officer, had his gun and handcuffs visible, and identified by TV station as rep of PD.
 - Not speaking on a matter of public concern, but to distance himself from the matter of public concern.
 - **Police department “has a more significant interest than the typical governmental employer in regulating the speech activities of its employees** to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence.” Judicial deference to PD that speech caused disruption.

Regulating Public Speech on City's Social Media Pages

- Depending on the intended purpose of page, official pages are either Public Forums or Limited Public Forums. Courts look to “the policy and practice of the government.” Opening page for “indiscriminate use by the general public” creates a public forum.
 - Trump’s Twitter page is a public forum, blocking social media users on Twitters because they criticized policies/expressed contrary views was unconstitutional viewpoint discrimination. *Knight First Amendment Inst. v. Donald J. Trump*, 928 F.3d 226 (2nd Cir. 2019).
- If limited public forum -- can restrict speech, BUT restrictions cannot be based on a particular viewpoint AND must be reasonable in light of the forum’s purpose. Examples of reasonable restrictions:
 - Repetitive or off-topic comments.
 - Obscene, harassing, discriminatory comments or hate speech.
 - Comments suggesting illegal activity.
 - Comments endorsing services and products, advertisements, or spam.
- Be careful with restrictions on “personal attacks”
 - Public has First Amendment right to criticize public officials, when criticism concerns performance of public duties.



Workplace Investigations and Use of Employee Social Media

- Employers CAN review communications in their system when:
 - Policy provides no expectation of privacy AND
 - Employer has a right to view *Watch out for portals to private accounts
- *Smith v. City of Pelham* (N.D. Ala., 2019).
 - Employer searched city employee's work computer, found backup copies of personal cell phone with nude photos. Terminated for violations of internet policy and "conduct unbecoming"
 - Holding: no invasion of privacy for finding personal docs on work computer
- Federal Stored Communications Act: does not allow employers to look into private pages of social media accounts.
 - Authorized User Exception: someone with "friend" or "follower" status can provide employer screenshots
 - Lose exception if access is coerced (easy test – don't ask unless offered)
 - Beware of "Surreptitious Friending" – don't use third party to engage in pretext
 - A portal on work computer does not give consent to view private email or social media accounts



Other Workplace Technology Considerations

- Notify ASAP employees/former employees whose “sensitive personal info” was subject to breach.
 - “Sensitive Personal Information” = an individual’s name plus one or more of the following:
 - SSN
 - DL number or government-issued identification number; OR
 - Account number or credit/debit card number in combination with any required security code, access code, or password permitting access to financials; OR
 - Personal health information
 - Can delay notice for limited purpose of determining scope of breach or restoring data system following breach.
 - Don’t have to notify ALL employees, just those whose information was reasonably believed to be acquired by an unauthorized person. Notice can be sent via email or letter.
 - Enforced by AG’s Office (significant penalties for failure to notify relevant employees of breach).

Consider Policy on Cell Phone Etiquette

- Use at meetings
- Silencing
- Disrupting work of self or others



THANK YOU!



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