SOCIAL NETWORKS AND PUBLIC SAFETY EMPLOYEES

The Good, The Bad, and The Ugly!

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At the Legal and Liability Risk Management Institute (LLRMI) we have been receiving requests from various law enforcement agencies, insurance pools and individual officers regarding social network usage. We have developed a model policy to guide agencies in reasonable and necessary methods to use in the creation of their own approaches to this emerging issue. LLRMI fully supports an approach to ensure that public safety agency employees know that their use of the social network could be subject to review by the agency during background and administrative investigations.

Why should we be concerned? In February the issue continued to become pronounced in current events. The Maryland Department of Public Safety and Correctional Services, who had requested access to a social network site for a returning employee, temporarily suspended its social network policy when confronted by the ACLU. In Texas two incidents were reported. One instance was where an Assistant Police Chief had KKK and racially derogatory photos and comments on his personal MySpace page including a replica of his agency badge. A female officer from another police agency wrote on her Facebook page that she used unreasonable force on a hospital worker and made racially derogatory comments. Unfortunately, these are not isolated incidents concerning public safety employees.

Public safety employees are held to higher standards of conduct, both on and off the job than employees in private companies. The IACP Code of Ethics was adopted in the late 1950s and is still incorporated in most law enforcement agency policies and training. The second paragraph of that industry standard states, “I will maintain an unsullied personal life as an example to all.” This was specifically referenced in the 11th Circuit Court of Appeals decision in affirming the termination of a Palm Beach County deputy who participated in a group sex video.

Public employees, specifically law enforcement officers, have been singled out by the courts as being different than employees of non-governmental agencies. They can be compelled to answer questions during administrative investigations by their public agencies when these questions are
“specifically, directly and narrowly related” to their performance or ability to perform their duties. iii Other cases continue to hold law enforcement agency employees to high standards of conduct, both on and off duty, when that conduct has the potential to adversely affect the employee’s performance or ability to perform, or the potential to adversely affect the morale, operations or efficiency of the agency.

In 2004 the U.S. Supreme Court, in a case involving an officer selling videotapes of himself masturbating in a non-specific police uniform, stated:

“Roe's expression was widely broadcast, linked to his official status as a police officer, and designed to exploit his employer's image. The speech in question was detrimental to the mission and functions of the employer… A government employee does not relinquish, just by reason of his or her employment, all speech rights under the Federal Constitution's First Amendment that are otherwise enjoyed by citizens. However, a governmental employer may properly impose on the speech of its employees some restraints that would be unconstitutional if applied to the general public." iv

In a subsequent 9th Circuit Court of Appeals case, involving an officer who filmed himself and his wife engaging in sex and then sold the tapes to an adult film distributor, the Court found, …it can be seriously asked whether a police officer can ever disassociate himself from his powerful public position sufficiently to make his speech (and other activities) entirely unrelated to that position in the eyes of the public and his superiors. Whether overt or temporarily hidden, Ronald Dible’s activity had the same practical effect -- it "brought the mission of the employer and the professionalism of its officers into serious disrepute." v

Public safety agencies repeatedly find disturbing items on the social network sites of employment candidates and agency employees. Commonly found on these sites are photographs depicting gun horseplay; sexual misconduct; derogatory comments concerning race, ethnicity, religion and sexual preference; bragging about uses of force and discriminatory arrests; and graphic photographs of crime scenes including dead bodies. These are actions demanding closer scrutiny by any public service agency.

**Employment candidates and employees returning from extended absences:**

LLRMI recommends that agencies use social network sites during any background investigation of prospective employees and employees returning from extended absences. We suggest that the agency use an affidavit that requires these persons to acknowledge whether they are or have used a social network and, when requested, that they assist in any review of the site during the background investigation.

Public safety agencies employ persons for jobs that entrust those employees with enormous authority over other members of the community. There certainly is a public safety policy interest in making sure that these employees are competent to fulfill this task. The background examination of prospective employees is considered one of the most important parts of the selection process. Law enforcement continuously has found that prior performance is a key indicator to future performance as a public safety employee. We do credit checks, criminal, court record and driver history checks, medical examinations and medical history reviews, and interviews with past employers, co-workers, educational persons, and others who may have had some contact with the prospective employee.
Any use of a social network by an employment candidate is a necessary and valuable source to review and, when warranted, to use to further this required background investigation.

Users of social network sites become aware that there is very little protection from disclosure. These sites are like putting “a personal prospectus on a public restroom” or “advertising in the middle of Times Square.” Requesting a prospective employee to assist the background investigator in reviewing a social network site is no different than asking the myriad of other detailed, personal questions normally involved during a reasonable background investigation. Issues that might otherwise be of concern or that might be misinterpreted can be clarified during this joint interview process. Of course, a candidate’s refusal to cooperate would be considered similar to a candidate’s refusal to provide employment releases or failure to clarify obvious omissions from employment history.

Current employees and social network sites:

LLRMI recommends that all public safety agencies adopt a written policy concerning the use of social network sites by its employees. This policy should require the employee to advise the agency when the employee intends to use the indices of the agency or references to the agency in the site. This policy further places the employee on notice should the agency conduct an administrative investigation. The employee will be required to assist the agency in the review of the site when its content is “narrowly, directly and specifically” related to matters that have the potential to adversely affect the employee’s performance or ability to perform, or have the potential to adversely affect the morale, operation or efficiency of the agency.

Just this year the National Labor Relations Board settled a case concerning a private ambulance worker’s termination for rantings she made concerning her supervisors and the company. The Board was concerned that these could be interpreted as a discussion of “working conditions” by a member of a unit represented by a bargaining group. While this may have some influence to public safety agencies that have a collective bargaining agreement, it is not directly applicable to those without this type of employee/management arrangement. The Board, even in this settlement, acknowledged that this was a new area, did not now provide free rein for employees, and the ultimate boundaries were neither exact nor known.

LLRMI recommends that administrative investigations be conducted whenever the agency receives from any source an allegation that, if true, would constitute misconduct. Public safety agencies can compel its employees to cooperate with any administrative investigation that concerns the employee’s performance or ability to perform. The historical practice and case law allows the public safety agency wide latitude to investigate conduct of its employees whether it occurred on or off duty.

Examples throughout the country reflect that on and off duty misconduct is constantly being documented in various social network sites and other public sites such as YouTube®. Take a moment and do a web search on “police/deputy/correctional officer misconduct or sexual misconduct” and you’ll be given daily responses of case after case throughout the country.

Any public safety agency could be accused of being deliberately indifferent to the potential of employee misconduct if it did not alert its employees to the negative aspects of social network sites and if it did not use these sites to ferret out potential employee misconduct. Of course, like any other supervisory intervention, the use of this investigative tool must be fair and reasonable.
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CITATIONS:

1 International Association of Chiefs of Police, “Police Officers Code of Ethics,” 1957
2 Thaeter v. Palm Beach County Sheriff’s Office, et al., 449 F.3d 1342; 2006 U.S. App. LEXIS 13308
5 Dible v. City of Chandler, 2008 U.S. App. LEXIS 2249 (9th Circ.)

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