

# SOCIAL MEDIA MADNESS: LEGAL EXPOSURES FOR YOUR ORGANIZATION

By Michael McCall, J.D.

- + Pervasive Social Media Use
- + My Co-Worker Posted What?
- + Public Expectations for Workplace Behaviors
- + Current Controversial Topics May Lead to Increased Risk
- + On-Duty Violations
- + Off-Duty Conduct and First Amendment Questions
- + National Labor and Relations Board (NLRB) Exception
- + Job/Position Candidate Screening and Social Media

Work-related harassment, discrimination, retaliation and wrongful termination claims have dramatically changed with the fast-paced advancements of information technology. Because of being highly visible within their communities, emergency services organizations (ESOs) and their members are particularly vulnerable to negative media coverage and litigation.

Many ESOs have been forced to discipline and even terminate the employment or volunteer relationship because of a member's misuse of social media or other forms of technology.

## **Pervasive social media usage**

Social media and technology is changing how we communicate with each other, which can be both good and bad. It is impossible to debate that more Americans are using social media today than ever before. According to the Pew Research Institute, in 2005 only



5% of Americans were accessing social media sites. In 2017, 69% of Americans are using at least one social media platform. Statistics indicating frequency are also remarkable, such as nearly  $\frac{3}{4}$  of Facebook users visit daily and 55% access the site multiple times per day.<sup>1</sup>

## **My co-worker posted what?**

The number of ESO members' social media posts isn't the only problem. The subject matter and content of these communications can be the main reasons behind increased exposure to lawsuits, public relations nightmares and careers ending prematurely.

## **Public expectations for workplace behaviors of local heroes**

Emergency services professionals have earned reputations in their communities as heroes. First responders are willing to risk their own lives to care for whomever needs assistance, regardless of race, gender, religion, national origin, citizenship, age, sexual orientation, gender identity or expression. The public expects the same high levels of ethical and non-discriminatory behaviors on and off the job. As a result, ESOs must be particularly aware of any damage that can be done by their members' social media communications which could be considered discriminatory, harassing, disparaging, inappropriate, offensive, unprofessional or defamatory.

## **Current controversial topics may lead to increased risk**

Today, there are many divisive and controversial topics debated and discussed on social media. People airing their political and personal views run the risk of offending those who disagree with their positions. It is not uncommon for an organization's leaders to be made aware of employee's or

volunteer's social media postings about issues involving race, religion, national origin, sexual orientation and gender identity.

## **On-duty violations**

An ESO has a much clearer path to coaching, counseling, disciplining or terminating an employee or volunteer who posts comments, pictures or other materials while on-the-job which may be considered offensive, discriminatory, harassing or derogatory. It should be made clear that there will be ramifications for sending or posting inappropriate materials on ESO-owned computers, smartphones or other devices. Similarly, an ESO may take corrective action against members who use their own personal devices to communicate what may be considered offensive materials while on ESO property or logged on the organization's network.

## **Off-duty conduct and First Amendment questions**

Perhaps the greatest risk posed by ESO members' social media activities may involve communications made while off-duty from personal, non-ESO owned devices. While away from work and off-the clock, people have a tendency to let their guards down and/or mistakenly think their First Amendment right to freedom of speech is limitless.

The U.S. Constitution's First Amendment allows individuals freedom of expression or speech without governmental interference, but doesn't grant limitless free speech rights in private or public sector work environments. In other words, an individual may have the First Amendment right on social media to disparage an individual or group based on race, gender, religion, national

origin, age, sexual orientation or gender identity, but that person may not have his or her job the next day.

With a few exceptions, an ESO cannot be held hostage and forced to retain an employee or volunteer whose social media communications or speech is offensive to the ESO, coworkers or community members. ESO leaders are encouraged to contact their locally retained legal counsel for specific advice before taking corrective action against a current member of the organization.

## ESOs SHOULD BE AWARE OF POSSIBLE **LEGAL EXPOSURES** ASSOCIATED WITH PEERING INTO A **CANDIDATE'S SOCIAL MEDIA SITE.**

### **National Labor and Relations Board (NLRB) exception**

The NLRB is the independent federal agency that protects the rights of private sector employees to join together, with or without a union, to improve their wages and working conditions. Using social media can be a form of “protected concerted” activity, meaning employees may use social media platforms to take group action, prepare for group action or bring a group complaint to the attention of management.<sup>2</sup> However, an individual simply complaining or ranting on social media about some aspect of work or a fellow coworker is not typically considered legally “protected concerted” activities.

### **Job/position candidate screening and social media**

It isn't uncommon for ESOs to review a prospective employee's or volunteer's social media sites as part of a background check. While it is true that it can be insightful to see whether a candidate has posted inappropriate or offensive material in a public forum, ESOs should also be aware of possible legal exposures associated with peering into a candidate's social media site. For instance, an ESO could be sued for failing to hire an employee or select a volunteer for membership because of sensitive personal information gained by the ESO about the candidate's

religion (or lack thereof), ethnicity, race, sexual orientation, marital or familial status, medical history, or political affiliation and views. An ESO should weigh the probative value of considering information found on candidates' social media platforms against the potential legal risks posed by the background screening.

### **Conclusion**

Compared to other work environments, emergency services professionals are more frequently in the public and media spotlight. Community members

care about the people that enter their homes to care for and potentially save the lives of their loved ones. Through training and education, ESO professionals should be reminded about risks and boundaries associated with social media and other electronic communication usage.

ESOs are also under an obligation to maintain a safe and productive work environment, free from wrongdoing like harassment and discrimination. Thus, ESO leaders must be prepared to take appropriate corrective action to stop inappropriate social media communications made by their personnel, even if the activity occurred off-duty and on personal devices.

ESOs' interests in maintaining a productive and respected work environment must always be balanced with their workers' expectations for privacy and fairness. ESOs are under a legal mandate to prevent, identify and appropriately respond to work-related misconduct, which, in today's era of communication, may likely involve responding to members' social media communications.

1. Pew Research Center; Internet & Tech; Social Media Update 2016, November 11, 2016

2. National Labor Relations Board; NLRB.gov; The NLRB and Social Media

