



# Risk Management Solutions



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## Social Media, Free Speech and the Government Employee

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When properly used, social media is a great tool for law enforcement; however, government employees – especially law enforcement personnel – must be aware of pitfalls and legal considerations. This article will address some misperceptions concerning the use of social media as it relates to the First Amendment rights of government employees.

**“Twitter is a great place to tell the world what you’re thinking before you’ve had a chance to think about it.” ~ Chris Pirillo**

Erik Qualman probably said it best in his quote: “We don’t have a choice on whether we do social media, the question is how well we do it.” How well we do social media includes being responsible as government employees representing our various entities. When addressing free speech of government employees, it’s important to distinguish the government as a *sovereign* versus the government as an *employer*. The government’s ability to regulate a private citizen’s speech requires the highest level of judicial scrutiny. The government as an *employer*, however, may limit speech with a lower level of legal scrutiny.

In order to protect employees and the municipalities they serve; sound written policy must be implemented. A good social media policy should at a minimum address these 5 areas:

1. Make it clear to employees that they have no expectation of privacy or confidentiality when using public equipment including computers and cellphones. Employees must understand that what they say and do on public equipment may be subject to disclosure and that the employer has the right to back up anything, even if deleted by the employee. Employees need to understand that this can include any personal emails sent using public equipment, even if encrypted.
2. Contain a warning regarding the misuse of electronic media while on “employer-provided” computer systems.
3. Include restrictions on the use of city/agency name, uniform, logo and marked vehicles.
4. Prohibit disclosure of confidential information **to include** information officers acquire during the course of their duties.
5. Caution regarding comments/postings on personal or government computers/equipment that impair working relationships, impact morale and impact community relations.

An excellent Social Media policy can be downloaded at [www.losscontrol.org](http://www.losscontrol.org) under “Reference Documents.”

### First Amendment and Government Employees

Next, to avoid pitfalls we must address the issue of the First Amendment and the government employee. As the First Amendment relates to social media, we should consider two important U.S. Supreme Court Cases.

**First:** *Pickering v. Board of Education*, 391 U.S. 563. *Pickering* addressed the balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employers. This case established that public employees do not surrender their right to free speech because they have accepted government employment. This important case resulted in the “Balancing Test” also referred to as the “Pickering Test”.

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# How to Deal with Cold Stress

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The winter months often bring a distinct change in temperatures that can lead to “cold stress” for workers exposed to cold or who work in cold environments. Cold weather is dangerous and health concerns increase for people who work outside or in poorly heated areas – and because people react to cold weather differently depending on age, weight and general health.

## Types of Cold Stress

**Trench Foot**- a non-freezing injury of the feet caused by prolonged exposure to wet and cold conditions. Symptoms are reddening skin, tingling, pain, leg cramps, numbness and blisters. First Aid for Trench Foot:

- Remove wet shoes/boots and wet socks.
- Dry the feet and avoid working on them.
- Keep affected feet elevated and avoid walking. Get medical attention.

**Frostbite**- caused by the freezing of the skin and tissues. Frostbite can cause permanent damage to the body, and in severe cases can lead to amputation. Frostbite typically affects the extremities, particularly in the face, ears, fingers, and toes. First Aid for Frostbite:

- Protect the frostbitten area. Wrap the area loosely in a dry cloth and protect the area from contact until medical help arrives.
- Do not rub the affected area; rubbing causes damage to the skin and tissue.
- Do not apply water. Do not break blisters.
- Do not try to re-warm frostbitten area before getting medical help.

**Hypothermia**- occurs when the normal body (98.6 degrees F) drops to less than 95 degrees F. Hypothermia is most likely at very cold temperatures, but it can occur even at cool temperatures (above 40 degrees F) if a person becomes chilled from rain, sweat or immersion in cold water. There are three types of hypothermia: mild, moderate and severe. Mild hypothermia symptoms: alert but shivering. Moderate to severe hypothermia symptoms: shivering stops; confusion; slurred speech; heart rate/breathing slow; loss of consciousness. First Aid for Hypothermia: Call 911 immediately in an emergency! To prevent further heat loss:

- Move the worker to a warm place.
- Change to dry clothes.
- Cover the body (including the head and neck) with blankets, and with something to block the cold.
- Do not cover the face.
- **If medical help is more than 30 minutes away:**
  - Give warm, sweetened drinks if alert (no alcohol).
  - Apply heat packs to armpits, sides of chest, neck, and groin.

## Additional Suggestions

- Wear appropriate clothing.
- Wear several layers of **loose** clothing. Layering provides better insulation. Tight clothing reduces blood circulation. Warm blood needs to be circulated to the extremities. When choosing clothing, be aware that some clothing may restrict movement resulting in a hazardous situation.
- Make sure to protect the ears, face, hands and feet in extremely cold weather.
- Boots should be waterproof and insulated.
- Wear a hat; it will keep your whole body warmer. (Hats reduce the amount of body heat that escapes from your head.)
- Move into warm locations during breaks; limit amount of time outside on cold days.
- Carry extra cold gear such as gloves, socks, hats and jackets.
- Include hand warmers in your first aid kits.
- Monitor your physical condition and that of your coworkers.

## Conclusion:

Working in cold weather can be hard on a body and can put extra stress on you and those you work with. We know that cold weather can turn into serious situation when dealing with trench foot, hypothermia, and frostbite. Being able to identify these risks and preventing them can be the difference in staying warm and safe or dealing with a serious issue. Thinking and having a plan in place so you can be prepared to work in cold weather will help you get home at the end of the day. **For additional information, visit [cdc.gov](http://cdc.gov), [osha.gov](http://osha.gov) and [ehs.research.uiowa.edu](http://ehs.research.uiowa.edu).**

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## It's Time for Workers Comp Payroll Audits

It is time for the annual payroll audits to be processed for 2019. Some MWCF members will be subject to an independent audit from Overland Solutions, and those members will be contacted to set up an appointment. Members who are not subject to the independent audit will be receiving an Audit Request Form in the mail. Please fill in this form according to the instructions provided and return as soon as possible to our underwriters at Millennium Risk Managers.

**All audit information is due by March 31, 2020. If you have not received a request by 1/31/20 or have any questions, please call Carla Thienpont at Millennium Risk Managers 1-888-736-0210.**

## CBD Oil: Employee Drug Tests

**Who bears the burden of proof in the event of an employee drug test with possible "false positives" due to the use of CBD oil?**

A positive drug test could be grounds for discipline or dismissal (zero tolerance policy) even if an employee claims the "false positive" was due to their use of CBD oil. In at will employment states such as Alabama, the burden falls on the employee to show that the positive drug test was caused from their use of CBD oil. However, in cities with a personnel board or commission, the burden is on the city to investigate a positive drug test when an employee claims it is a "false positive". The League recommends that cities give their employees a pre-questionnaire inquiring if they have used any drugs, including CBD oil, prior to administering an employee drug test. If the employee indicates the use of CBD oil or other drugs which may result in a positive drug test the city is now on notice that they may need to investigate the results further.

**Source: Alabama League of Municipalities, Legal Department**

## Defining Moment

### Attractive Nuisance:

An attractive nuisance is an inherently hazardous condition or object that exists on a landowners property that may entice children who are too young to appreciate the risk posed by the object or condition. The attractive nuisance doctrine applies when the landowner creates some "attraction" on the property that is highly dangerous to trespassing children. It imposes upon the owner of the property the duty to take precautions that are "reasonable in light of the normal behavior of young children". This doctrine has been applied to such hazards as swimming pools, unprotected construction areas and activities, wells, tunnels, storm drains, and abandoned cars and refrigerators.

Attractive nuisances are typically not natural conditions of the land but rather conditions created or maintained by the landowner. The attractive nuisance doctrine arises when the child doesn't realize the extent of the danger. If something on the property is both alluring and dangerous, a legal responsibility exists for the landowner to prevent injuries to children who may wander or trespass onto the property.

## Social Media continued from cover

In accordance with this case, for an employee to establish a prima facie case of First Amendment retaliation the employee must show:

1. That the speech can be fairly characterized as speech made as a **citizen** on a matter of public concern (**not** pursuant to the employee's public or official job duties)
2. That interests as a citizen outweigh the interests of the governmental entity as an employer and
3. That the speech played a substantial or motivating role in the adverse employment action.

**Second:** *Garcetti v. Ceballos*, 547 U.S. 410 is another important U.S. Supreme Court Case involving government employees and the First Amendment. *Garcetti v. Ceballos* ruled that purely job-related speech made pursuant to official duties and not as a private citizen does not insulate government employees' communications from employer discipline.

In view of these cases, prior to an employer taking action against an employee concerning a social media post the employer should apply the Pickering Test. In fact, I would also recommend that prior to an employee posting on social media anything controversial, the Pickering Test should be considered. Taking the time to consider the areas addressed in the Pickering Test could very well save your job!

Based on the *Garcetti* Supreme Court decision, a police sergeant's termination was upheld. The sergeant was upset about not being allowed to use her city vehicle to attend the funeral of a fallen officer from another jurisdiction. She posted harsh comments on Facebook about her chief. The court ruled that *even if* the comments were to be considered to regard matters of public concern, the derogatory manner in which the officer commented upon the character of her chief in voicing those concerns created a risk of organizational disruption that outweighed any First Amendment interest she would have. United States Court of Appeals, Fifth Circuit.

In addition to the Pickering Test, employers should follow 4 basic rules prior to taking action against an employee.

1. Allow your emotional reaction to the posting to cool before going forward with any action.
2. Carefully evaluate the totality of the circumstances surrounding the posting before deciding on taking any action under your policy.
3. Ensure that enforcement of the policy is consistent from one incident to the next.
4. If you decide to take action, prior to "pulling the trigger" contact your legal counsel.

Officers/employees should likewise be careful with social media postings – Case in point: *Cromer v. Lexington-Fayette* – Police Officer Termination. Lexington, Kentucky city officials learned that Officer Cromer had identified himself as a police officer on his social media page. His postings included profane language, comments and images regarding homosexuals and the disabled. Both the trial court and the Court of Appeals upheld his termination on grounds of misconduct. U.S. District Court, Eastern District of Kentucky.

Freedom of speech comes with personal responsibility. We would all do well to follow Germany Kent's **Social Media Golden Rule:**

***Tweet others the way you want to want to be tweeted.***

### For more information:

- [lexipol.com/resources/blog/social-media-law-enforcement-understanding-free-speech-rights/](http://lexipol.com/resources/blog/social-media-law-enforcement-understanding-free-speech-rights/)
- [mtsu.edu/first-amendment/article/648/pickering-v-board-of-education; caselaw.findlaw.com/us-supreme-court/547/410.html](http://mtsu.edu/first-amendment/article/648/pickering-v-board-of-education; caselaw.findlaw.com/us-supreme-court/547/410.html)

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April 7 – 17	Trussville	Sept. 28 – Oct. 2	Phenix City
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- 13.011 – DVD – Workplace Violence – The Early Warning Signs – Manager Version
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[sonyam@alaim.org](mailto:sonyam@alaim.org) or FAX at 334-262-2809

## Need Help Filing Work Comp Claims?

For step-by-step instructions, visit:

[www.almwcf.org](http://www.almwcf.org)

## Employment Practices Law Hotline

# 1-800-864-5324

Through a toll-free Employment Practices Law Hotline, members can be in direct contact with an attorney specializing in employment-related issues. When faced with a potential employment situation, the hotline provides a no-cost, 30-minute consultation.

[www.losscontrol.org](http://www.losscontrol.org)