

Why states need social media policies

October 31 2013, by Melissa Maynard

Soon after Indiana Gov. Mike Pence posted a statement on Facebook expressing disappointment in the Supreme Court's ruling on gay marriage, a long string of comments affirming his support for "traditional marriage" appeared.

What was missing: Comments from people who disagreed with his position, which were promptly being deleted. "His staff tried to make it look like he was living in an echo chamber and everyone in Indiana agreed with him," said Andrew Markle, who, like the governor, is a Republican. Markle launched a website and Facebook account to document what he dubbed "Pencership" - i.e., Pence's censorship.

At first, the governor's office defended the actions as consistent with its long-standing practice of deleting "inflammatory comments that include name-calling, vulgarity or comments personally insulting to others." But eventually, the governor apologized in a statement on his Facebook page: "On careful review ... some comments were being deleted simply because they expressed disagreement with my position. I regret that this occurred and sincerely apologize to all those who were affected."

According to a recent report from the National Association of State Chief Information Officers, the courts have not yet addressed a case where a public agency has been challenged for deleting comments, so "the precise contours of citizens' free speech rights in the context of state sponsored [social media](#) are currently unclear." Still, legal experts say a state-sponsored social media site may be considered a "public forum," which could give citizens the right to say almost anything they wanted

under the First Amendment, with some exceptions like obscene language and inciting violence.

State government agencies and officials have embraced social media products such as Twitter and Facebook as a way to engage citizens and get the word out about their policies and services. But government use of social media comes with a host of tricky questions about how to protect state interests while also protecting the First Amendment rights of citizens and state employees.

According to NASCIO, every state uses social media in some way, but only about 30 states have statewide social media policies in place. "Some of the gaps found have the potential to open states up to some severe heartburn: including employee discontent, management concerns, public perception and liability," the report warns. Statewide policies are usually set by state information technology offices, but in some states, individual agencies have established their own policies. The NASCIO report provides states with a checklist of 18 legal issues and eight policy issues to consider when using social media.

Experts in the field expect to see more lawsuits related to state use of social media. "Right now, there's not a whole lot of case law or precedent out there about state use," said Meredith Ward, senior policy analyst for NASCIO.

NASCIO cites as a cautionary tale the case of Officer Trey Economidy of the Albuquerque Police Department, who was involved in a fatal on-duty shooting in 2011. A TV station found Economidy's Facebook page, which listed his occupation as "human waste disposal." After the publicity nightmare, the police department put Economidy on desk duty and established a policy to govern officers' use of [social networking sites](#)

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More recently, David Guth, a journalism professor at the University of Kansas, created an uproar by criticizing the National Rifle Association in a tweet from his personal account after the Navy Yard shootings in Washington in September. He tweeted: "#NavyYardShooting The blood is on the hands of the #NRA. Next time, let it be YOUR sons and daughters. Shame on you. May God damn you."

Guth agreed to take indefinite administrative leave after some Kansas legislators called on the university to fire him. Some lawmakers have threatened to cut the school's funding if it doesn't take further action.

The university is receiving criticism from the other side, as well. First Amendment experts warn that the school's decision to place Guth on leave and launch an investigation may have a chilling effect on political speech on college campuses. Just because the view espoused in a tweet is offensive or ill-considered, they argue, doesn't mean a public employee doesn't have the right to express it.

"It was pretty clear from reading the tweet that professor Guth is only speaking for himself," said Peter Bonilla of the Foundation for Individual Rights in Education. "He's not speaking for his university, and any reasonable observer should be able to understand that. State employees, including university professors, have every right to speak out about matters of public concern in their capacities as public citizens."

Court cases relating to employee social media speech are starting to surface with regularity. In September, the U.S. Court of Appeals in Richmond, Va., ruled that using Facebook's "like" feature to express support for political candidates is protected under the First Amendment - even when the candidate an employee "likes" is running against his or her boss.

In *Bland v. Roberts*, former sheriff's office employees argued that they

were unjustly fired for supporting the sheriff's political opponent. "It was very controversial when the trial court said that (liking something on Facebook) was not speech because most of us who use Facebook every day understand that yes, it is," said Lyryssa Lidsky, a law professor at the University of Florida.

Lidsky noted similar issues in the private sector. Those employees may be protected under the National Labor Relations Act if they complain about their jobs on social media in ways that could be interpreted as an effort to change their working conditions, she said.

Ultimately, each public official and state agency has to decide whether to participate in the often unruly world of social media and, if so, how hands-on to be in moderating comments.

There are benefits and risks to being either strict or lax, said Murray Weed, an instructor at the Carl Vinson Institute of Government at the University of Georgia. Carefully moderating comments can keep state accounts clear of lewd or offensive language that might draw complaints, Weed said. But allowing freewheeling discussion engages citizens in the democratic process, creating a meaningful back-and-forth. "You can limit it to the point where you're missing the fun part and the magical part of what social media is designed to do," he said.

In weighing free speech rights, courts are likely to take seriously policies about moderating comments that are prominently displayed and followed to the letter, Weed said.

In Indiana, the governor asked his office to develop a new policy in response to the controversy. The policy makes clear that comments will be monitored and "profanity, obscenity, vulgarity, nudity, defamation of character, advertising, or political campaigning" will be removed. It also makes clear that the governor's office is not responsible for content that

users post.

Other Indiana state employees are required to accept terms for use of state-owned information technology that also applies to social media. The state's employee handbook cautions employees not to speak on behalf of their agency unless specifically authorized to do so, and to make clear in social media that they are not representing the opinion of state officials or agencies. "You also need to understand that First Amendment rights apply when you are contributing to the debate on matters of public concern, but do not apply when you are merely griping about your job, co-worker, or superiors," the handbook says.

Markle, creator of the website Pencership, isn't impressed with the new policy, particularly with a provision that says: "The focus of the social networking opportunities is to share information about the Governor of Indiana's programs and activities. Larger discussions of political views and philosophies may be addressed elsewhere."

Markle said this defeats the entire purpose of social media: to allow people to interact in a meaningful conversation about the issues of the day. Since the incident, Markle said the governor's office has avoided posting about controversial topics like the Affordable Care Act that might draw a lot of comments from readers.

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NASCIO SOCIAL MEDIA CHECKLIST

States are advised to consider:

Does social media activity fall under public meeting or records laws?

What terms of service are social media companies requiring users to

agree to?

How will comments be monitored or moderated?

How are states using employees' and job candidates' social media accounts in employment decisions?

Are safeguards in place to prevent discrimination based on things like religious affiliation and sexual orientation that may be revealed on social media?

What happens if a state agency or public official's identity or username is stolen?

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