

**Leadership Conference, Meeting #19 - 2024**  
**Fairfield County Commissioners' Office**  
**May 14, 2024**

**Leadership Conference**

The Leadership Conference started at 8:01 a.m. and was held at the Liberty Center, 951 Liberty Dr., Lancaster. The meeting was called to order by Commissioner Dave Levacy and Commissioners Jeff Fix and Steve Davis were also in attendance. There were an additional 122 Fairfield County employees who attended, and their names are included in the minutes packet. Four additional attendees included the three speakers, and a representative from CORSA. There was a total of 129 who attended the conference.

**Welcome and Announcements**

The Commissioners, the County Administrator, and the Deputy County Administrator welcomed everyone in attendance and spoke about the benefits of the yearly Leadership Conference training to the county and to county employees.

**How to Manage the Disciplinary Process to Avoid Claims**

Jennifer George of Fishel Downey Albrecht & Riepenhoff spoke on the importance of managing the corrective action process and how to remain consistent when disciplining employees. She also spoke on the risks of improper and nonexistent corrective action and the techniques and steps employers can use when disciplining employees. Standards of employee conduct, disciplinary investigations, and the performance evaluation process were discussed. Ms. George emphasized the importance of being prepared for situations and being organized, being objective and remaining positive, knowing how to set the mood when communicating and being polite and not threatening, knowing how to deal with difficult people, and knowing how to manage the discussion. Ms. George provided a PowerPoint, and a handout titled, "How to Manage the Corrective Action Process to Avoid Claims", that are both available in the minutes packet.

**Communication in Times of Crisis**

Mark Weaver, Esq., of Communications Council, Inc., spoke on crisis communication and how to respond and what to expect. He gave tips on how to communicate to the public and the stakeholders. His tips included how to prepare your crisis team, preparing the message to be delivered, and how to effectively communicate. He stressed the importance of communicating to external and internal people. Mr. Weaver provided a media communications tip card that is available in the minutes packet.

**Break**

During the break, Deputy County Administrator, Jeff Porter, conducted a game where contestants (conference attendees) answered questions about public sector employment.

**Getting Social Media to Work with You, Not Against You**

Jennifer George provided a presentation on getting social media to work for you, and not against you. She offered tips for using social media in the workplace and spoke about the First Amendment and Fourth Amendment Protections. She also spoke about employer rights under the Fourteenth Amendment. Ms. George defined First Amendment Auditors and spoke about their rights and how employers can respond. A PowerPoint and handout titled, "Getting Social Media to Work with You, Not Against You", were provided and are available in the minutes packet.





# REVIEW AGENDA

## BOARD OF COMMISSIONERS

### Commissioners:

Steven A. Davis  
Jeffrey M. Fix  
David L. Levacy

### County Administrator

Aundrea N. Cordle

### Deputy County Administrator

Jeffrey D. Porter

### Clerk

Rochelle Menningen

## 2024 Leadership Conference

May 14, 2024, 8:00 a.m. – 12:00 p.m.

Liberty Center, 951 Liberty Dr., Lancaster

### Purpose Statement:

*The purpose of the Leadership Conference is for County Leaders to further the mission of Fairfield County and improve the organizational knowledge base by offering leadership and supervisory training in the areas of leadership, management, social media, and crisis management.*

8:00 a.m.	Welcome & Announcements	Commissioner Dave Levacy, Commissioner Jeff Fix, Commissioner Steve Davis, County Administrator Aundrea Cordle, and Deputy County Administrator Jeffrey Porter
8:15 a.m.	How to Manage the Disciplinary Process to Avoid Claims	Jennifer H. George, Fishel Downey Albrecht & Riepenhoff
9:00 a.m.	Communication in Times of Crisis	Mark R. Weaver, Communications Council, Inc.
10:15 a.m.	Break	
10:30 a.m.	Getting Social Media to Work with You, Not Against You	Jennifer H. George, Fishel Downey Albrecht & Riepenhoff
11:15 a.m.	Reasonable Suspicion Training for Supervisors	Mark Fishel, Fishel Downey Albrecht & Riepenhoff
12:00 a.m.	Closing Remarks	Commissioner Dave Levacy, Commissioner Jeff Fix, Commissioner Steve Davis, and County Administrator Aundrea Cordle

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## 2024 Leadership Conference

Adams, Leighann N	Grubb, Jason R	Robinson, Erin
Anders, Joshua T	Hampson, Bart	Scheidegger, Amanda
Arter, Kristi	Hanley, Mary Jane	Scott, Kimberly
Bergstrom, Stacey	Hannum, Amberly	Shafer, Marcey
Blevins, Garrett	Hardway, Mike	Shields, Heather
Brown-Thompson, Amy	Harper, Joshua R	Shoemaker, Kelly
Buckley, Ashton	Henwood, Dave	Smith, Jodi
Burgei, David J	Hoch, Ruth	Smith, Laura
Burke, Casie	Horacek, Joshua	Smith, Tammy
Cade, Holly	Hoskinson, Beverly A	Springer, Tommy
Caito, Ginger	Humphries, Krista	Squires III, William Gale
Camechis, Jeffrey G	Hyme, Kathy	Stedman, Andrea
Carper, Michelle	Kaper, Michael J	Stoneburner, Heather
Clark, Corey B	Karns, Sharleen	Stout, Janet
Collins, Jared B	Kennedy, Aaron T	Szabrak, Richard M
Cordle, Aundrea	Knight, Gina	Tennant, Tori
Crawford, Josh	Knisley, Staci A	Thomas, Molly
Crist, Amanda Loraine	Kochis, Heather	Thompson, Betsy
Culbertson, Melanie	Kochis, Jon P	Toney, Deshawn J
Daniels, Tiffany N	Lee, Britney	Trimmer, David Andrew
Darnell, Steven T	Less, Chelsea S	Uhl, David Andrew
Davis, Steven A	Levacy, David L	Upp, Jeremiah David
Dickerson, Jennifer A	Lines, Austin R	Varga, Kate
Dilley, Nicholas L	Lovas, Lori L	Vogel, Tony J
Donnell, Jennifer	Lucht, Chad	Wanosik, Elyssa
Dowdy, Elisa Michele	Lynch, Suzie	Watson, Abby I
Downhour, Brandi	Maple, Elizabeth Lee	Welsh, Patrick
Downour, Cheryl L	Mattei, Holly R	Wesney, Marea
Drake, Nikki	McClure, Jami	White, Michele
Drake, Sondra Nikki	McCrary, Eric	Wilkerson, Katherine
Ebel, Joe	Meachem, Sean	Wilson, Tiffany Nicole
Enyart, Kourtney	Menningen, Rochelle	Witt, Robert Kyle
Ervin, William S	Meyer, Branden C	Woodrum, Lyndsey Rochelle
Fahner, Ashley	Miller, Leah	Wotruba, Kelly Louise
Fields, Bayley E	Neeley, Daniel A	Wyrick, Shanda
Finney, Cara	Niceswanger, Bennett	
Fisher, Lea	Nietz, Jim	
Fix, Jeffrey Michael	Noland, Christine F	
Fortner, Sarah	O'Keefe, Heather	
Fox, Morgan	O'Toole, Linda A	
Fuhr, Jodi	Porter, Jeffrey David	
Garren, Sarah	Reid, Sienna	
George, Levi	Riddle, Kristin	
Gordon, James M	Riffle, Brett H	
Gray, Miranda	Roberts, Carrie Jo	



# CORSA Risk Management Services

CORSA is a property and liability risk sharing pool established by CCAO in 1987 when commercial liability insurance was either unavailable or unaffordable. The vast majority of counties, municipalities, townships and schools in both Ohio and across the country purchase their property and liability coverage through risk sharing pools. CORSA provides members with comprehensive property and liability coverage and high-quality risk management services at a stable and competitive cost.

## Available Services and Benefits

- HR Helpline
- Award-Winning Model Personnel Policy Manual
- On-Location Training Seminars
- HR Tool Kit
- On-Line Training (CORSA University)
- Broadcast Email
- Cyber Security
- Property Appraisals
- Preventive Maintenance Program (Facility Dude)
- Contract Review
- In-Person and Online Defensive Driving Classes
- Loss Control Surveys
- Flood Risk Control
- Departmental Risk Control Training

### **CORSA Loss Control Staff:**

Frank Hatfield, Risk Control Manager  
614-560-1474 | fhatfield@ccao.org

Jim Hale, Risk Control Consultant  
614-246-1630 | jhale@ccao.org

Ken Hilty, Risk Control Law Enforcement  
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Steve Flory, Risk Control Law Enforcement  
614-981-3414 | sflory@ccao.org

### **HR Helpline:**

*Counties located north of I-70:*  
Meyers, Roman, Freidberg, Lewis  
Kathleen Minahan  
216-831-0042 ext 223

*Counties located south of I-70:*  
Isaac Wiles  
Jeff Stankunas  
614-221-2121



5/14/24 Leadership Conference

209 E. State Street, Columbus, Ohio 43215  
Tel: 888-757-1904 or 614-221-5627 Fax: 614-220-0209  
[www.corsa.org](http://www.corsa.org)





# Law Enforcement & Corrections Risk Management Services

CORSA provides members with comprehensive property and liability coverage and high quality risk management services at a stable and competitive cost.

In response to an increasing risk and liability placed upon law enforcement and corrections, CORSA created a law enforcement/corrections help desk in 2010. This help desk provides assistance with expert advice on legal, law enforcement/corrections matters through services from Legal Liability Risk Management Institute. (LLRMI)



## Available Services and Benefits

- Best Practice Law Enforcement and Corrections Policies
- Policy Review & Revision with LLRMI
- Regional Law Enforcement and Corrections Training Seminars
- Online Training from LLRMI (Bridge)
- MILO Decision-Based Training Simulator
  - Contact Steve Flory to set up training
- Leadership Perspective Classes
- NAMI Classes
- Performance Reviews for Law Enforcement & Corrections Operations
- Law Enforcement & Corrections Help Desk
- HR Helpline for employee issues
- Online Training (CORSA University)

### **CORSA Loss Control Staff:**

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216-831-0042 ext 223

*Counties located south of I-70*  
Isaac Wiles  
Jeff Stankunas  
614-221-2121

### **LLRMI/Help Desk:**

For more information please  
contact Ken Hilty

# How to Manage the Corrective Action Process to Avoid Claims

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## 2024

## PRESENTED TO YOU BY

County Risk Sharing Authority  
209 East State Street  
Columbus, Ohio 43215-4309

Phone: (614) 221-5627  
Toll Free: (888) 757-1904  
Fax: (614) 220-0209



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A Service Program of the County Commissioners Association of Ohio

## **TABLE OF CONTENTS**

### **Page No.**

<b>I. WHY IS CORRECTIVE ACTION IMPORTANT?.....</b>	<b>1</b>
<b>II. RISKS OF IMPROPER/NONEXISTENT CORRECTIVE ACTION.....</b>	<b>2</b>
<b>III. STEPS OF PROPERLY APPLIED CORRECTIVE ACTION.....</b>	<b>5</b>
<b>IV. CORRECTIVE ACTION WITH A POSITIVE AND PROACTIVE SLANT .....</b>	<b>14</b>
<b>V. PRACTICAL TIPS OF DELIVERY/COMMUNICATION OF CORRECTIVE ACTION.....</b>	<b>21</b>

Scan this QR code to register for access to free CORSA Member resources, such as the HR Toolkit, Best Practices Personnel Policy Manual, and many others.



## **BEST PRACTICES PANEL**

### **HR TOOLKIT**

## **Table of Contents**

<b>Section I - Discipline – Termination Evaluation .....</b>	<b>1</b>
<b>Section II - Discrimination – Harassment.....</b>	<b>31</b>
<b>Section III - Ethics – Public Records.....</b>	<b>35</b>
<b>Section IV - Hiring .....</b>	<b>39</b>
<b>Section V - Medical ADA – FMLA – WC.....</b>	<b>48</b>
<b>Section VI - General HR Documents.....</b>	<b>101</b>
<b>Addendum – Forms and Civil Rights Posters .....</b>	<b>104</b>



## I. WHY IS CORRECTIVE ACTION IMPORTANT?

- A. **Improvement of Employees:** When discussing discipline, it is always important to start out by remembering the goal of discipline. Discipline should always be viewed as a tool to improve employee performance and not as a mechanism to simply punish, harass or target specific employees. Think of it as another arm of your performance evaluation program.
- B. **Creates an Understood Standard of Conduct / Level of Performance:** Prior discipline, in any form, can and should be used to establish a *de facto* standard of conduct for employees. That is, progressive discipline provides notice to employees of both what conduct is unacceptable and what the likely results will be for engaging in such conduct.

***Qualls v. Roache*, No. 23-10435-GAO, 2023 U.S. Dist. LEXIS 56106 (Dist. Mass. March 28, 2024).**

The court found that plaintiff's allegations were too general to meet the stringent standard required to establish municipal liability under Section 1983. To establish municipal liability under Section 1983, a plaintiff typically must show "a pattern of similar constitutional violations" by other officers such that the municipality either actually knew or should have known about the deficiency in effective training and supervision and deliberately chose not to rectify it.

Five cases of alleged police misconduct without discipline over five years did not sufficiently allege a pattern of constitutional violations to show that the municipality knew or should have identified a general or persistent deficiency in officer training or supervision. Additionally, the allegations in the cases identified by the plaintiff were not akin to the plaintiff's allegations here. Those cases alleged that officers intentionally lied to secure convictions and suppressed likely exculpatory evidence. The present complaint does not allege particular acts of willful misbehavior by officers that were effectively countenanced by the City of Boston.

- C. **Demonstrates Your Competence and Trustworthiness as a Supervisor: Your Office is as strong as your weakest supervisor.**

- 1. **The Ostrich** – “I didn’t see it,” “I’m sure it’s ‘fine’ because no one complained.” (i.e., “welcomed conduct”) “I did not have to take action because the event was off duty, online or ‘only a rumor’ so it’s not my problem.”

***Practice Point*** - Don’t bury your head in the sand. Set in place proactive measures and tackle **all** suspected harassment issues quickly and directly. Preventative and corrective measures are both a shield and sword in that they provide an affirmative defense as well as combat claims where

harassment was not reported or adequately addressed through internal procedures.

2. **The Wolf** (in supervisor's clothing) – This supervisor generally has a hunting mentality, a pack mentality or both. They may be good at choosing inexperienced employees to harass. Alternately, they are good at joining in ongoing harassment ostensibly to make their employees "comfortable". They want to be one of the "team" and they don't want to be the bad guy or disciplinarian.

**Practice Point** - Don't just take the supervisor's word for discipline or the working environment. Employers should not rubber stamp supervisor recommendations that involve tangible employment actions. Doing so could mean the employer loses its affirmative defense. Also, be concerned if a supervisor "never" has employee issues.

3. **The Eagle** – This supervisor sets standards, communicates the standards, spots inappropriate conduct, investigates and addresses the inappropriate conduct. This supervisor is self-confident, trained and is not interested in being everyone's best friend. This supervisor needs to be supported and encouraged. Employers must acknowledge that disciplining a problem employee is a lengthy and time-consuming endeavor. The supervisor on point for the discipline must be given sufficient resources and support during the process.

- D. The key element for any organization for discipline and the many applications is the creation of "**Standards of Conduct**" and "**Discipline Standards.**" These do not need, and most often should not, be extensive or detailed. Courts and state federal administrative agencies look for the simple standard of discipline of:

1. Does a standard of conduct (rules) exist?;
2. Were those known to the employee?; and
3. Were these standards violated?

Consistency in discipline (disparate treatment) is an important factor for all employers.

## II. RISKS OF IMPROPER/NONEXISTENT CORRECTIVE ACTION

- A. **Civil Rights, Discrimination, Retaliation, Unemployment:** Discipline is important in all employment settings and should be consistently administered. Various areas for exposure to liability exist and standards of conduct and discipline will assist employers in responding to claims from employees arising out of their

employment. Some of the areas for consideration (and exposure to potential liability) include:

1. Federal and State discrimination laws;
2. Unemployment compensation;
3. Workers' compensation;
4. Collective bargaining agreements;
5. Civil service laws (public employees only);
6. Retaliation claims (now available claims under discrimination laws, workers' compensation, unemployment, civil service); and
7. Implied contracts for employment.

**B. Progressive Discipline:** Whenever possible, discipline should be progressive in nature. For minor infractions, warnings or write-ups may suffice to correct the problem. However, if the performance issue is not corrected by the employee, higher levels of progressive discipline should be imposed. For more serious or frequent cases of performance issues, immediate suspension or termination may be warranted. The continuing goal for management is to make sure that the punishment fits the crime and that it is consistent with policy and past practices.

If an employer follows and generally practices a policy of progressive discipline, it is important that the employer makes it clear to employees that the employer reserves the right to fire at-will employees (especially for serious infractions) and that the employer's policy of progressive discipline is left to the discretion of management as the employer.

An example of a progressive discipline policy would state that the circumstances surrounding the offense, such as the severity of the misconduct, the number of times the misconduct has occurred, and any previous counseling, will suggest what action should be taken. Thus, usually counseling or an oral reprimand will be sufficient for the first occurrence of a minor offense. If the offense is repeated or the employee engages in more severe conduct, the employer may issue a written reprimand, which becomes a part of the employee's permanent personnel file. Further repetitions of the offense or the first occurrence of a very serious offense may be followed by suspension, reassignment, demotion, termination, or other appropriate action. It is important that the employer put a note in the progressive discipline policy that the "steps" to be taken in response to employee misconduct are intended to be guidelines because it would be difficult to be all-inclusive or anticipate every possible circumstance. Thus, the guidelines should be left to the discretion of the employer to be implemented according to each specific circumstance.

- C. **Consistent Application:** Conversely, the worst thing supervisors can do is let performance issues continue without being addressed. By not addressing a performance issue or policy violation, management sends the message to employees that the unaddressed performance issue/policy infraction is not important. It also creates a “snow ball” effect wherein other employees may start taking a lax view of the policy in question (and begin violating it). It may also create a form of “past practice” for future infractions when you do want to institute discipline for the policy violation. Ultimately, it may then lead to a claim of discrimination by an employee who will claim that the policy is being “selectively” enforced against them for an unlawful reason.

***Montague v. City of Cleveland*, No 1:22CV1878, 2023 U.S. Dist. LEXIS 220446 (N.D. Ohio December 11, 2023).**

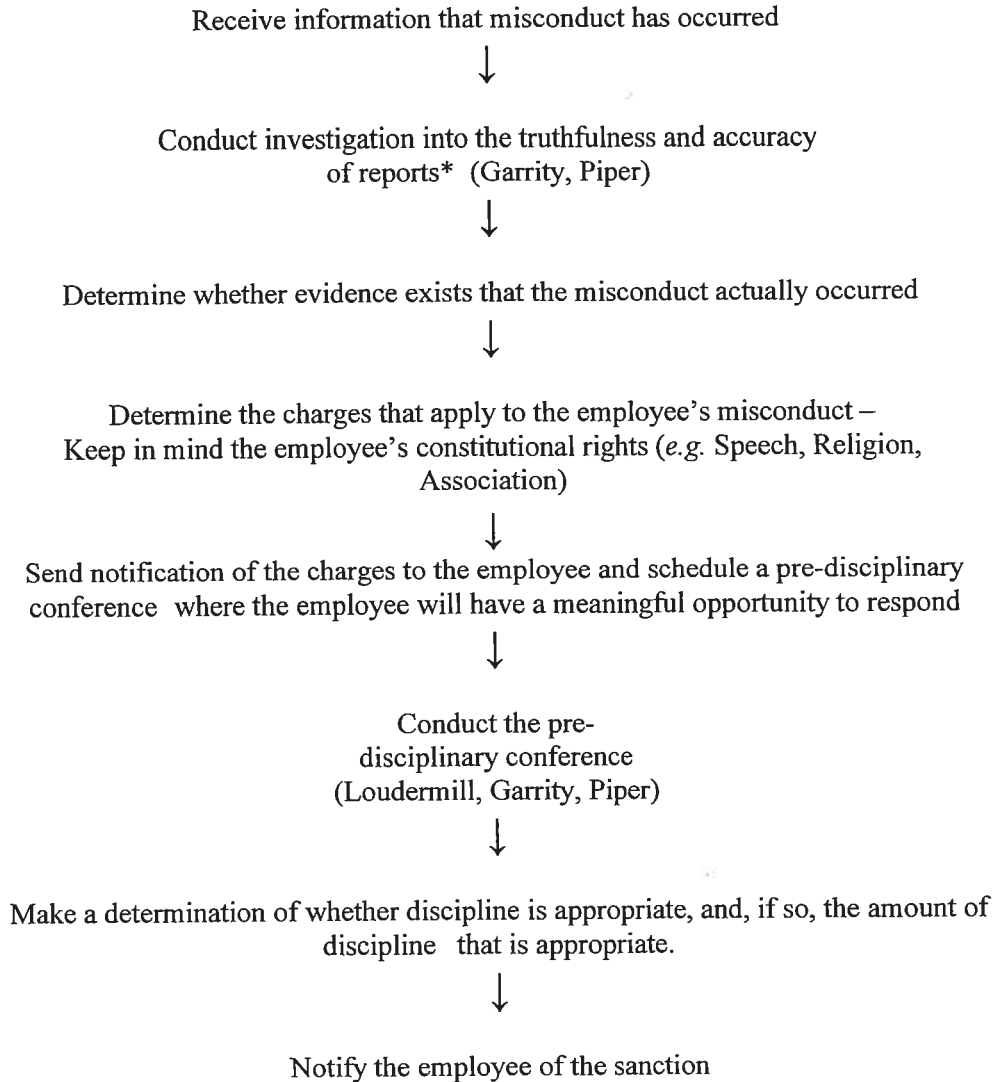
The plaintiff alleged while employed as a police officer with the City of Cleveland he met Andrew Long, owner of a bar called the Duck Island Social Club. Mr. Long expressed his desire to Montague to make a donation to the Black Shield Association, a non-profit organization of black police officers. Eventually, Mr. Long expressed a desire to hire Cleveland police officers for security at his bar. In response, Montague reached out to Defendant Timothy Maffo-Judd, a fellow Cleveland police officer who Montague knew did part-time security work for bars in the Second District of Cleveland. Montague also knew Maffo-Judd arranged for other police officers to perform security at bars.

Plaintiff Montague was given his Garrity protections and interviewed by CPD's Internal Affairs officers as a result of a bribery scandal at Long's bar. A pre-disciplinary hearing was set for October 1, 2021, however, on September 30, 2021, Montague was activated for military service. The hearing was moved to October 5, 2021, but Montague had shipped out to the military entrance processing station on October 4, 2021. The hearing went ahead on October 5, 2021, in Montague's absence. Montague's attorney attended the hearing and objected to its proceeding in the absence of Montague and in violation of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), the Collective Bargaining Agreement between the City of Cleveland and the CPD and other federal and state laws. Despite Montague's counsel's objections, the hearing proceeded without Montague having the opportunity to attend or defend himself.

On December 29, 2021, Montague's employment was terminated by the City of Cleveland. The court found that plaintiff alleged sufficient facts that the City of Cleveland violated his constitutional right due to its pattern and practice of treating African-American police officers differently than white officers when it terminated his employment due to his race.

### III. STEPS OF PROPERLY APPLIED CORRECTIVE ACTION

#### FLOW CHART FOR DISCIPLINE OF NON-UNION CLASSIFIED EMPLOYEES



##### \*Investigation may involve:

- Examination of reports
- Interview of Witnesses
- Interview of the Employee
- Surveillance
- Review of the applicable standard of conduct such as a policy manual
- Other

File a § 124.34 Order.<sup>1</sup>

##### Probationary Employees

Some of these procedures may be unnecessary for probationary employees. R.C. § 124.27

<sup>1</sup> Best Practices Panel HR Toolkit



**A. Determine Classification of Employee:** Depending upon the employee's position, discipline may be covered by a collective bargaining agreement (CBA), civil service law, or the employee may be unclassified and serve "at the pleasure" (e.g. "at will"). A vast majority of positions in the public sector will be covered by either civil service law, a CBA or both. It is, therefore, important that supervisors understand the different standards that may apply when imposing discipline.

1. **At Will Employees:** May be termed "at the pleasure." This standard will apply to unclassified civil servants (i.e. those employees in the unclassified civil service of the State of Ohio serve at the pleasure of the appointing authority and may be removed from their unclassified position at any time and for any legal reason) who are not covered by a CBA. "At will" means that an employee can be removed for any reason not inconsistent with law, without notice. While these employees have the least protection (e.g.: no due process, civil service, or union grievance/arbitration process), the investigation and discipline process should still be handled consistent with other employees as "at will" employees can still bring other civil claims related to their employment.

2. **Classified and CBA Employees: The 'Just Cause' Standard** will apply to employees who fall under a CBA and classified civil servants (i.e. all persons in the employ of the state and the several counties, cities, city health district, general health district, and city school districts of the state, not specifically included in the unclassified service). Under the basic tenet of "just cause" the employer cannot implement discipline unless it meets its burden of proving that it has complied with the fundamental elements of "just cause" used by arbitrators, courts and civil service boards.

**B. Be Certain Elements of 'Just Cause' are Fulfilled:** The elements which must be addressed in deciding whether to impose discipline are:

1. Whether a standard/rule existed;
2. Whether the employee knew, or should reasonably have known, of the standard;
3. Whether the employee violated the standard/rule; and
4. Whether the penalty imposed was appropriate.

### **C. Know the Origin of the Standard/Rule Violated by Employee**

Your disciplinary policy will be established by handbook policies/procedures and may be set forth in an applicable CBA. Additionally, statutes, ordinances, and regulations may necessitate discipline. Standards of conduct and mission statements have equal importance.

#### **Ohio Revised Code Section 124.34(A)**

(A) . . . No officer or employee shall be reduced in pay or position, fined, suspended, or removed, or have the officer's or employee's longevity reduced or eliminated, except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, unsatisfactory performance, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of any policy or work rule of the officer's or employee's appointing authority, violation of this chapter or the rules of the director of administrative services or the commission, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office, or conviction of a felony while employed in the civil service.

An employee handbook not only sets forth the employment policies in a written format, but it provides for a standard application of those policies to all employees. Beyond the practicalities, an employee handbook is a measure of legal protection if an employer is challenged by an employee in court or in an administrative proceeding. A handbook that contains clear, reasonable policies and standards of conduct, is the critical beginning of an employer's paper trail if problems develop later on in the employment relationship.

### **D. Investigate And Gather Evidence to Support Expected Misconduct**

It is unavoidable that supervisors will face the unpleasant and difficult task of conducting an investigation into the alleged misconduct of an employee. In fact, it is very likely that throughout the course of most careers, supervisors and other managerial personnel will conduct several investigations into allegations of employee misconduct. Because of the likelihood that the investigatory process will lead to discipline and subsequent challenge by the employee, it is imperative that the individuals conducting the investigation are aware of practical considerations, as well as, any and all legal requirements. As such, supervisors should be trained in this important element of discipline and be provided guidance and support.

### **E. General Investigation Tips: Employers Should Establish a Method of Conducting Thorough Investigations.**

In establishing a system for conducting investigations, employers should:

1. Establish an easy to use complaint procedure whereby employees and customers are able to file complaints against employees for misconduct;

2. Provide all employees a written copy of the complaint procedure;
3. Train all supervisory employees who receive a complaint to immediately notify specified management personnel;
4. Prior to an investigation review the employer's grievance procedure, work rules, handbook, policies or collective bargaining agreement;
5. Investigate the alleged misconduct if a good faith belief exists that the misconduct occurred;
6. Investigate the complaint even if the alleged misconduct has ceased;
7. Act promptly;
8. Thoroughly and accurately summarize the investigation into a report; and
9. Act consistently with any prior instances of misconduct.

**F. When to Investigate?**

1. Employers should investigate allegations of improper employee conduct any time an employer, or any member of the employer's personnel, obtains knowledge of the potential employee misconduct. So long as the employer has a good faith belief that an action has occurred that may have violated a work rule, then an investigation should ensue. Allegations of employee misconduct can be made by other employees and members of the general public that witness the alleged misconduct. Investigations may be necessary for both on-duty and off-duty conduct. Employers should not disregard any complaint until it has considered whether the complaint has any basis.

**G. Why Investigate?**

Several reasons exist as to why employers should investigate allegations of employee misconduct.

1. Avoiding Liability
  - a. Employers can be found liable for the improper acts of its employees.
  - b. A strong employer defense is that it promptly acted to discontinue or alleviate the alleged misconduct. Prompt action is evidenced by an investigation. By acting in a timely manner to investigate and

resolve the allegation, employers can insulate themselves from large jury verdicts.

2. Imposing Discipline

- a. A neutral party will more likely uphold the employer's decision to discipline an employee if it is supported by facts and documentation gathered during an investigation during which the employee was afforded the required rights.
- b. It is also necessary to impose discipline against an employee for misconduct, so that the employer can establish a practice for dealing with future instances of similar conduct.
- c. Properly investigating all allegations of employee misconduct and imposing discipline in a similar manner will avoid employee claims of disparate treatment.

3. Improving Employee Performance

- a. Investigations of employees are also helpful in determining whether an employee is satisfying the performance requirements of the position.
- b. Many of the same tactics and skills used by employers during an investigation can also be used for the purpose of conducting employee performance investigations.

4. Quieting Workplace Rumors

**H. Preparing for the Investigation: Steps in Preparation**

- 1. Establish the issue;
- 2. Determine where/when the investigation should commence and occur;
- 3. Establish a preliminary timeframe for completion;
- 4. Review the allegation(s);
- 5. Gather any relevant documents/records;
- 6. Decide upon individuals to interview;
  - a. Witnesses

- b. Other co-workers with information
  - c. Public
- 7. Interview the accuser;
- 8. Assess the nature of the alleged misconduct;
  - a. Criminal
  - b. Civil/Internal
  - c. Off-Duty
- 9. Establish how documents/records will be maintained;
- 10. Review relevant collective bargaining agreement provisions/policies; and
- 11. Agree upon the format of report.

**I. Who Should Lead the Investigation?**

- 1. Questions to consider: In determining who should lead the investigation, the following questions should be considered:
  - a. Is the investigator involved in the facts surrounding the matter?
  - b. Does the investigator have a relationship with any of the parties associated with the allegation?
  - c. Can the investigator be impartial and uninfluenced by others?
  - d. Is the investigator familiar with the employee's position?
  - e. Is the investigator familiar with employer's rules and policies?
  - f. Is the investigator sufficiently informed of potential legal principles involved in the investigation?
  - g. Does the investigator have prior experience conducting investigations?

**J. What To Do with The Accused Pending Disciplinary Investigations:**

- 1. The employer can choose to do nothing with the employee and permit the employee to continue working in their present position. Depending upon



the allegation and size of the workforce, permitting the employee to continue working may be desired.

2. The employer may choose to reassign the employee to a different position during the investigation. Again, the allegation may permit the employee to be reassigned to another position. The reassignment will allow the employer to continue to gain productive work from the accused during the investigation.
3. The employer can place the employee on paid administrative leave until the conclusion of the investigation. Administrative leave with pay may be necessary because the allegations require that the employee not be in the workplace during the investigation. Administrative leave is usually recommended for instances of serious employee misconduct.
4. Based upon the allegations in the complaint and the weight of the pre-investigation interview with the accuser, the employer may decide to suspend the employee pending the outcome of the investigation. Suspending the employee without pay pending the outcome of the investigation is a serious act. Employers should give this plenty of thought prior to suspending an employee. Employers may be subject to awards of back-pay if the investigation clears the employee. Also, before suspending an employee during the investigation, employers should consult relevant provisions of their collective bargaining agreement, if applicable.
5. Another option for dealing with the accused is that the employer may reassign the accused to "home duty" during the investigation. A "home duty" assignment can be made provided the assignment is made in good faith, serves a legitimate purpose and does not violate any relevant collective bargaining agreement. Assigning the accused to "home duty" is helpful because the accused will not be in the workplace and will always be readily available to be questioned by the investigator.

## **K. Conducting the Investigation**

1. Gathering Documentation: What documents to gather, or have available for review, for the investigation:
  - a. A copy of the personnel policy, rules, and CBA;
  - b. Signed code of ethics;
  - c. Employee handbook and signed signature page (indicating Employee received the work rules);
  - d. Any relevant laws or rules;

- e. The employer's complaint procedure;
- f. The terms of a pre- and post-disciplinary appeals process (if applicable);
- g. The accused's personnel file;
- h. The accused's signed job description;
- i. The accused's performance evaluations, if any;
- j. Any prior discipline of the employee or similar infractions by other employees;
- k. Information from the pre-investigation phase;
- l. Copy of any employee complaint; and
- m. Witness statements.

**L. Who to Interview?**

Any accurate, thorough investigation centers around the elements of fairness and due process. A finding from an investigation declared to lack the necessary due process requirements will likely be deemed invalid. Therefore, it is imperative the employer interview all parties involved in the complaint and any potential witnesses or others that may have relevant information. Prior to conducting an interview of the accused or witnesses, the investigator must determine who to interview and how to proceed with the interview.

- 1. Role of Union:
  - a. If the employer is a party to a collective bargaining agreement with a union, the employer may face additional procedural hurdles in interviewing witnesses.
  - b. If the employee requests a union representative, steps should be taken to provide that a union representative is present during the interview.
- 2. The Accused:
  - a. Any investigation should always include, if not begin with, an interview of the employee accused of the wrongdoing.

- b. The accused has a right to know of the charges and allegations against him and also be provided the opportunity to present an explanation or defense. As such, the investigator should discuss and explain any work rule or policy involved in the complaint with the accused.

3. The Accuser:

As noted above, the accuser must be interviewed shortly after receiving the complaint to determine whether a full-scale investigation is necessary.

- a. At the outset, the accuser should be asked questions pertaining to the specific charges. In speaking with the accuser, it is better to listen and record what is being said.
- b. Permit the accuser to tell the story of the incident.
- c. Begin the interview with an open-ended question and be prepared to take thorough notes.
- d. Also, the accuser should be questioned about other potential witnesses.

4. Witnesses:

- a. The employer should interview all witnesses that perceived the alleged misconduct firsthand. Always inform the witness being interviewed that they should be honest and tell the truth.
- b. A helpful tactic in interviewing witnesses is to initially ask broad or vague questions designed to bring forth specific testimony about the alleged incident. Asking broad questions will permit the witnesses to fill-in relevant facts. However, if general questions fail to result in a fruitful response, the investigator should be prepared to ask specific questions in regard to specific incidents. In the end, it may be necessary to ask specific questions about every incident listed in the allegation.
- c. Conclude the interview by asking the witnesses if they know of any other parties that may have witnessed or have knowledge about the alleged misconduct.

**M. What to Ask?**

Questions should be developed for each witness in a manner that will best bring forward relevant testimony and discussion about the allegation of wrongdoing.

1. Examples of useful interview questions may include:
  - a. Do you know why we are here?
  - b. Explain exactly what occurred?
  - c. When did it occur?
  - d. Where were you when the incident occurred?
  - e. How did it occur?
  - f. What happened prior to the incident?
  - g. Who was involved?
  - h. Who was present during the incident?
  - i. What was said?
  - j. Who said it?
  - k. Do you know why the incident happened?
  - l. Did you do anything in response to the incident?
  - m. Did you happen to write anything down summarizing the incident?
  - n. Do you know of anyone else who may have relevant information?

**N. How Should the Investigation be Documented?**

1. Recommendations for Record-Keeping:
  - a. Keep a list of all individuals interviewed during the investigation;
  - b. Retain records of all dates and times of interviews;
  - c. Keep detailed notes of all interviews (tape recording interviews may be helpful);
  - d. Maintain any relevant photographs helpful to the investigation;
  - e. Retain and review all documentation obtained during the investigation;
  - f. Maintain a separate investigation file, including the accused's personnel records;
  - g. Keep copies of the work rules and policies involved in the investigation;
  - h. Any other records required by law, employer policy, or collective bargaining agreement.

## O. Due Process Requirements of an Investigation

When conducting an investigation, employees are entitled to various rights. Employee rights may be granted by a law or legal precedent, by employer policy or through a collective bargaining agreement. A failure to meet the necessary due process requirements may result in a judge or arbitrator concluding that relied upon testimony is improper and unable to be used.

Because the validity of an investigation may be dependent upon the proper gathering of information, the employer must be aware of the various obligations imposed upon it.

1. **Garrity Warnings.** All employees interviewed during the course of an investigation should be provided a Garrity Warning. Simply stated, a Garrity Warning notifies an employee that if an employee's refusal to answer is based on his or her concern that such answers will incriminate him or her, he or she may not be removed for failing to answer unless and until he or she is told that his or her answers will not be used against him or her in any criminal proceeding. *Garrity v. New Jersey*, 385 U.S. 493 (1967).

Employees, prior to each interview, should be advised of their rights, acknowledged by their signature.

2. **Piper.** Any person appearing as a witness before any public official, department, board, bureau, commission, agency, or representative thereof, in any administrative or executive proceeding or investigation, public or private, if he so requests, shall be permitted to be accompanied, represented, and advised by an attorney, whose participation in the hearing shall be limited to the protection of the rights of the witness, and who may not examine or cross-examine witnesses, and the witness shall be advised of his right to counsel before he is interrogated. This section shall not apply to proceedings before a grand jury. Ohio Revised Code, Section 9.84
  - a. Situations that require Piper notices
    - i. A Piper notice is required during proceedings or investigations of a "more formal nature."
  - b. Situations that do not require a Piper notice.
    - i. "Informal investigative proceedings";
    - ii. Proceedings that do not require the witness to answer questions;
    - iii. Grievance meetings; and
    - iv. Performance reviews.



**P. Concluding The Investigation:** A Thorough Investigation Should Conclude with a Report Summarizing the Findings of the Investigation.

1. The report should be drafted after all witnesses have been interviewed, all documents reviewed, and the investigator is certain the additional information is not necessary.
2. The report should culminate with a conclusion as to whether the alleged incident occurred. It is helpful to include all relevant materials with the report, so that the individual making the decision as to the appropriate course of action has all the facts. For example, a report can consist of not only a summary completed by the investigator, but also testimony, documents, work rules and other exhibits.
3. The Report should include the following:
  - a. Summary of the issue/allegation of the investigation;
  - b. Copies of policies or work rules involved;
  - c. Chronology of events;
  - d. Factual findings of the investigation (interviews, documents, policies, for example);
  - e. Analysis of the factual findings noting any discrepancies in testimony, credibility of witnesses, and any other pertinent observations;
  - f. Conclusion; and
  - g. Recommendation.

**Remember:** The Report of the investigation will be a most useful tool in the event that any discipline resulting from the investigation is challenged through the grievance process or in a judicial setting.

**Q. Pre-Disciplinary Conference**

**Due Process – *Loudermill***

Pursuant to *Loudermill v. Cleveland Bd. of Edn.*, 470 U.S. 532 (1985), a civil servant has a reasonable expectation of continued employment, and thus, retains a property right in his job. In a removal case, the employee is entitled to due process rights and there must be “a determination of whether there are reasonable grounds to believe that the charges against an employee are true and support the proposed action.” The Court also prescribed a “minimal due process” test to ensure that these due process rights are observed, and though *Loudermill* involved a removal decision, the test must be followed for any deprivation of employment or employment status.

1. The Loudermill test requires that:
  - a. the discipline, possibly resulting in a loss of pay, must be preceded with a notice;
  - b. the employee must be afforded a pre-disciplinary hearing;
  - c. the pre-disciplinary review need not be elaborate;
  - d. the employee must be given notice and the opportunity to review the employer's evidence; and
  - e. the employee must be allowed a meaningful opportunity to respond to the grounds for discipline and to present his position either in writing or in person before any proposed action is taken.
2. Situations that require pre-disciplinary conferences
  - a. The test of whether a pre-deprivation conference/review is required centers on whether or not the employee has or will suffer a loss of status or loss of pay in his position. Deprivations which have also been held to require a hearing include:
    - i. Suspension (loss of pay);
    - ii. Layoff or abolition of job (except when for economic reasons);
    - iii. Demotion;
    - iv. Involuntary retirement of an employee or and employee being placed on an involuntary disability leave;
    - v. Removal from civil service eligibility lists; and
    - vi. Cancellation of job promotion.
  - b. Situations that do not require pre-disciplinary conferences

Court decisions have held that conferences/reviews are not required in the following situations:

    - i. Lateral transfer;
    - ii. Reassignment;
    - iii. Denial of sick leave; and
    - iv. Denial of clothing allowance.
3. Establishing a Factual Record
  - a. Tape recording
  - b. Submission of written documents
  - c. Other methods of documentation

4. Providing Objectivity

- a. The employer is not required to provide a “neutral fact-finder” for every routine suspension. The spirit of Loudermill is that employees be 1) given notice and 2) an opportunity to respond.

5. This is a Pre-Disciplinary “Meeting” Not a...

- a. Pre-Disciplinary Conference
- b. Trial / Arbitration / Hearing

Several decisions have held that notice of conference/review (hearing) need not be in writing to an employee nor do such notices need to provide a detailed description of all counts and all facts being brought against an employee. This notice of conference has also been commonly referred to as a notice of charges which is sufficient so long as it notifies the employee of the process. However, prudent management would dictate that notice be in writing. This practice provides an evidentiary trail and eliminates most questions of whether or not notice occurred. Also, rather than take the risk of losing a particular charge due to lack of specificity, it is a good practice to make the charges specific enough for a reasonable person to understand the nature of the charges and include a summary of the facts upon which those charges are based.

There are several important factors to emphasize regarding the procedure for the pre-deprivation conference/review:

- i. The pre-deprivation conference/review need not be elaborate if a post-deprivation review occurs, such as a civil service commission hearing or a grievance arbitration. The important factor is whether or not the employee has been given notice of the charges and has had the opportunity to respond.
- ii. A meeting with the employee’s supervisor will be sufficient to comply with the pre-deprivation conference/review if the employee is given a meaningful opportunity to respond. This requirement means that the employee has been given the opportunity to review and understand the charges and has had an opportunity to respond to those charges directly to the supervisor or another person in the chain of command or a designee.

- iii. There is no requirement that a record be made of the hearing.

**R. Selection of Discipline Options**

1. Verbal and/or written reprimand;
2. Suspension;
3. Reassignments;
4. Removal; and
5. Reduction in pay or position.

**IV. CORRECTIVE ACTION WITH A POSITIVE AND PROACTIVE SLANT**

**A. What Is the Role of a Performance Evaluation in the Workplace?**

Employers must consistently evaluate both the workplace and employee performance. Performance evaluation systems are the most effective tools for employers to use to review performance. Further, effective performance evaluation systems in the workplace can strengthen the notions of providing good and efficient service. A successful performance evaluation is effective for employers to not only evaluate the workplace, but also serves as a tool to reinforce the expected standards of conduct of employees. Additionally, effective performance evaluations can be used to assist in determining whether/how much raise is appropriate. Performance evaluations can also assist employers in appeals concerning employee discipline. Finally, to ensure success during a lawsuit or EEOC Charge, a properly conducted performance evaluation may be a necessary piece of evidence to make a winning defense.

In short, effective performance evaluations have many roles within the workplace. However, it is necessary that employers effectively conduct evaluations of employee performance. As a result, employers should consider implementing and/or evaluating performance evaluation systems.

**B. What is a Performance Evaluation “System”?**

1. Traits of effective evaluation systems

Effective employee performance evaluations have the following components in common:

The performance evaluation should be construed as a part of an overall performance system. That “system” is made up of the following:

- a. The Job Description (provides a blueprint of the basic performance requirements). Employees should be held accountable to performing the essential functions of the position. Supervisors and employees both should be permitted to participate in the position audit giving rise to new/updated Position Descriptions.
- b. Continual Management Feedback during the year (provides frequent notice of defective or positive performance). Employees should be advised regarding their performance during the course of the year. Regular notice regarding performance will allow employees—and employers—to recognize the variations that may impact everyday work.
- c. Discipline (provides immediate notice that employee has failed to correct defective performance or has failed to meet the basic performance requirements). Employers should always consider disciplining employees for poor performance or to emphasize an expected standard of conduct.
- d. The Performance Evaluation (provides an annual performance recap and sets future projections). Consistently apply standards and performance measures to all employees.

**C. What Should Be Included in a Performance Evaluation?**

- 1. An effective Performance Evaluation should:
  - a. Communicate the goals and objectives of the organization;
  - b. Include a scoring system that can easily be used for administrative results;
  - c. Be cost effective—both in development and use;
  - d. Strive to eliminate rater errors; and
  - e. Allow employers to evaluate the performance and growth of employees compared to defined performance objectives.
- 2. Sample Evaluation Criteria:
  - a. Quality of Work: focus on efficiency, quality, and accuracy of work.



- b. Leadership: focus on responsibility for work, trust, credibility, honest and ethical behavior.
  - c. Communication: focus on relationship building, active listening, sharing of information, demonstration of effective oral and written skills.
  - d. Planning/Organizing: focus on achieving departmental objectives/plans in a timely fashion, reflecting decision-making skills, the ability to set goals and priorities, ability to meet individual goals, and distinguish between relevant and irrelevant information.
  - e. Respect/Inclusiveness: focus on respecting co-workers and customers, promoting fairness and equity, engaging the talents/skills of others.
  - f. Service: focus on effectiveness with customers and coworkers, promoting a service mentality, ability to turn negatives into positives when faced with a stressful situation, displaying cool under fire, and the ability to resolve stressful situations in a positive manner.
  - g. Safety: focus on reduction of injuries and risk, continual planning for safety of customers and others.
  - h. Any other suggestions? This may vary by department.
3. Regardless of the number and types, the goals and objectives should be specific and defined in terms of measurable results. If individual goals and objectives are established, they should be linked to the organization's goals. The goals and objectives should be measured in a reasonable time period that is specified. Finally, the goals and objectives should be flexible as it may be necessary to adjust as conditions warrant.
  4. In preparing the performance evaluation, it is necessary to include a section that defines and explains each score. Regardless of the scoring system used, it is imperative that supervisors provide more than simply word or number responses. Explanations should be provided explaining the decision of the evaluator.

#### **D. How To Provide Effective Performance Evaluations?**

1. The most common evaluation errors

Supervisors can also be guilty of subconscious errors in providing evaluations. Therefore, it is necessary for supervisors to evaluate how they conduct performance evaluations.

- a. Duties poorly communicated: What is the employee supposed to be doing with his/her time? Has he/she been told that?
  - i. Vagueness of standards.
  - ii. Appraisals are late or done sporadically.
  - iii. Employee surprise.
    - How should the supervisor have handled this?
  - iv. Lack of employee buy-in.
- b. Rater Errors: Yes, management, as the raters, can cause the evaluation process to be polluted and unreliable if they engage in errors, including:
  - i. First Impression. Developing a positive/negative opinion of an employee early in the review period and allowing that to positively/negatively influence your perception of the employee's performance.
  - ii. Recency. Allowing the employee's most recent performance to taint/positively impact the employee's performance during the entire period.
  - iii. Leniency. Rating someone higher than they deserve. This is often "the desire to be nice," or "the desire to be liked." It is more often a desire to avoid confrontation. The antidote is a dose of preparation. It is easier to be candid when you are dealing in facts and not just subjective conclusions.
  - iv. Central tendency. Related to leniency, this is the tendency to rate a "good" or "average" employee as good or average in all categories instead of making critical distinctions. Rarely is an employee mediocre in everything, instead the employee is good at some things, not so good at others.
  - v. Halo/Horns. This is the tendency to allow one characteristic or behavior that you really like/dislike about a person to affect the ratings in all other rating areas. For example, a supervisor may really dislike tardiness and allows the employee's habit for being tardy impact all other areas of evaluation.

- vi. Clone. Giving someone a better rating to someone because they possess similar traits. Statistics show that persons of all races, genders, nationalities, and backgrounds tend to engage in this behavior even subconsciously. The more you perceive someone as being like you, the more you tend to like him or her and the higher you rate him or her. This also encompasses circumstances when the employee is the supervisor's close, personal friend. Acknowledging this inherent error is the beginning to solving the error.
  - vii. Spillover. Continuing to downgrade someone for prior performance. The reviewer believes that there is no hope for improvement.
  - viii. Length of Service Bias. This is a supervisor's tendency to assume that a long-term employee is continuing to perform the way he or she always has, or worse, that an employee's performance is increasing due to length of service. Objective criteria is key.
- c. Reducing rater errors:
- i. The best protection against rater errors is rater training!! Therefore, it is advisable to conduct supervisory training, so that the evaluations can be consistently applied.
  - ii. Also, it is recommended that employers use a check-and-balance system that provides a second-eye to review the proposed evaluation prior to providing it to the employees (such as HR or another manager). They can help catch possible indications of a rater error.
- d. Inadequate Documentation: If your evaluation system does not effectively rate or document the applicable employment standards, the evaluation system is plagued with error. To eliminate the errors of inadequate documentation:
- i. Establish performance standards that are based on what needs to be done, not on the person who will be doing them.
  - ii. Evaluate consistently between and among employees.
  - iii. Employees should sign-off on the appraisal and be given a copy.
  - iv. Set specific job-related future goals that form part of the next evaluation. It should be a continuum, not a series of isolated events.

- v. Complete the evaluation form legibly, sign and date it.
  - vi. The form should state the evaluation period and all documentation should be within that period.
  - vii. Stick with the facts you can actually support.
  - viii. What's on the paper should be consistent with what you say, don't undermine the form by sugarcoating the message.
2. The Performance Appraisal as the employee's "Sword".
- a. Employees can use "good" appraisals to prove that the employer's proffered reasons for an adverse employment action are pre-textual.

***Case Law:***

***Breyman v. RR Donnelley & Sons Co., 2016 U.S. Dist. LEXIS 123164 (N.D. Ohio).***

**Facts:**

The Plaintiff brought suit against her former employer for gender discrimination after she was denied a promotion. The plaintiff was denied the opportunity to interview, while two other males were given the opportunity.

**Holding:**

The Plaintiff was able to establish a prima facie case of gender discrimination by showing she met the qualifications for the job. The plaintiff met her burden by her experience, tenure, seniority status, and positive performance evaluations.

3. The Performance Appraisal as the employer's "Shield".
- a. Conversely, an employee's "poor" performance documented through an effective evaluation system can help defeat a wrongful discharge claim.

***Case Law:***

***Fewless v. Trinity Health-Michigan, 2011 U.S. Dist. LEXIS 125296 (W.D. Mich. 2011).***

The Plaintiff brought alleged interference and retaliation under the FMLA after she was terminated upon returning from FMLA leave for the birth of her child. The Defendant employer moved for summary judgement, arguing that the Plaintiff's termination was due to deficiencies discovered while she was on leave. The Plaintiff was unable to produce evidence demonstrating that taking FMLA leave was a negative factor in the employer's decision to terminate her. The court granted summary judgement in favor of the employer.

4. Other supervisor tips for Performance Evaluations:

- a. Honesty and Consistency: These two interwoven concepts are integral in performance evaluations. Supervisors solely control both concepts. While it may be difficult and/or uncomfortable to discuss performance issues with employees, honesty in the process will help in the defense of any subsequent employment litigation as the performance-related issue will be clearly set-forth through previous evaluations and disciplines. It is equally important that supervisors are consistent in their evaluation of performance between and among employees. All employees who have the same/similar shortfall should be treated/counseled in the same manner to avoid disparate treatment allegations.
- b. Determine the Appropriate Evaluation Period: Timing is the most important link in rebutting discrimination claims on the part of a former employee. Documentation is most effective as a defense weapon when prepared as part of an on-going review process over a long period of time. Thus, adopting and carefully administering a long-term, on-going performance review system can effectively avoid litigation.
- c. Do not be Afraid to Give Negative Evaluations: Supervisors must be aware that many potential problems can arise from inconsistent or inaccurate employee evaluations. Positive evaluations given when the employee's work performance was substantially less than glowing can cause a substantial negative impact when employment-related litigation arises. Therefore, be sure to discuss inappropriate performance (including inappropriate behavior). However, don't be lulled into providing "opinions or conclusions" as to why you believe an employee is behaving a certain way. Simply focus on the defective performance, not the person.
- d. Stick with What Works: Use A Standard Form/Procedure. By developing and using standard forms, employees are more likely to know what job performance is expected of them, while giving them a standard to look to for improvement. However, the form should be flexible enough so that comments or narratives which are

appropriate to the position can be explained or made. A supervisor must also be able to explain the purpose for each rating and category listed on the form.

The evaluation procedure should always be linked to a well-drafted and current job description and should always review and discuss any previous discipline provided throughout the review period and what is being done to ensure compliance in the future.

- e. Be Prepared: Use a personal outline of the structure of the evaluation interview, highlighting the points/topics you want to cover and ALWAYS end on a positive note. Ending on a positive note and reformatting the “action plan” (e.g. what the employee’s goals are for the new review period) is crucial. It is important to follow-up with employees to see how the action plan is proceeding within the timelines established.

Some basic rules are: (1) don’t postpone or cancel the review so that the employee knows it is important; (2) schedule adequate time and don’t allow interruptions; (3) allow plenty of time for two-way communication; and (4) remember to LISTEN when the employee disagrees - - you may learn something useful!!

## **V. PRACTICAL TIPS OF DELIVERY/COMMUNICATION OF CORRECTIVE ACTION**

### **A. Always Be Prepared!**

1. Know the context of the situation
2. Be organized
3. Avoid conveying the wrong message (think before you speak)
  - a. Don’t just think about what you are going to say, but think it through
    - i. How will my comments be received?
    - ii. Is my tone proper?
    - iii. Is my body language confident, but non-threatening?
    - iv. If I were in the other person’s shoes how would I receive the message?



4. Research all sides of a topic(s) in advance
5. You don't have to immediately respond; Remember it is appropriate, and often advisable, to say, "I'll get back with you" or "Let me look into that and I'll let you know"
  - a. Always follow-up when you make such a commitment or you will lose credibility
6. Listen (effective leaders are good listeners as well as good presenters)

**B. Be Objective: Go After the Difficult Behavior ... Not the Person!**

1. Maintain a positive attitude
2. Be direct, descriptive and non-judgmental (Wear the shoes of the other person)
3. Know your FACTS, not speculation of other
4. Do NOT get emotional
  - a. Always ask am I being rational?
5. Do NOT be SCARED to confront difficult issues
  - a. Don't let the white elephant in the room go unnoticed
  - b. Do NOT keep saying SORRY
  - c. Seek solutions
  - d. What is the other person's perspective?
  - e. What are the common interests?
6. Required to Respond to an Irrational Attack?
  - a. Ask the difficult person what exactly he/she is upset about
    - i. This shows you are interested in communicating rather than arguing
    - ii. This also places the burden of responsibility on the difficult person

**C. Maintain Your Own Behavior ... Set the Mood**

1. Be aware that everything you do during a negotiation, meeting, discussion, etc. is a part of the communication process and will impact (good & bad) results
2. Proper eye contact
3. Tone of voice
4. Body posture
5. Time the discussion properly
6. Be realistic & clear when discussing expectations
7. Remember this discussion impacts more than just you and the other person
8. Actions are louder than words

**D. Be Polite & Watch Out for People's Egos**

1. Don't come off in a threatening manner
2. Don't interrupt
3. Don't argue
4. Don't jump in with solutions
5. Allow others to let off steam
6. Don't say, "Calm down"
7. Don't disparage another's ideas
8. Don't speak negatively of others (If he speaks this way about Fred in Fred's absence what does he say about me when I'm not around?)

**E. Forbes: 8 Tips for Dealing with Difficult People**

1. Like the old *Saturday Night Live* character, Debbie Downer, some people are only happy when they're unhappy and bringing down everyone else around them too. Here are eight tips for dealing with difficult people at work:

- 1) *Don't get dragged down*—The old saying is “Misery loves company.” The most important thing is to be aware of who the Debbie and David Downers are in your company and to make sure they don't suck you into their world of negativity. Keep your guard up!
- 2) *Listen*—It's tempting to just tune these people out, but this rarely stops them. If anything, they'll talk and argue more forcefully because they'll think nobody cares about them. The best thing to do is to use good, normal active listening techniques, as you would for anyone else.
- 3) *Use a time limit for venting*—Remember that there is a difference between being a perpetual pessimist and having an occasional need to vent. Everybody has tough times, and sharing our feelings can make us feel better. Use the “5-minute rule” when it comes to this. Let your colleague vent for five minutes, but after that, assume that he's entered Downer mode, and proceed with the next steps.
- 4) *Don't agree*—It's tempting to try to appease Debbie Downer to make him or her stop and go away. As the person complains about benefits or the boss or whatever, you might be inclined to give a little nod of your head or a quiet “yeah” or shrug a “what can we do?” Even though these responses seem harmless, they just throw fuel on the flames.
- 5) *Don't stay silent*—If you are clearly listening but say nothing, Debbie Downer will interpret your silence as agreement. Worse, if others are present, they too will assume that you agree. Whether the complaint is about the boss or the benefits or the client, silence means you agree with the complainer.
- 6) *Do switch extremes into facts*—Negative people often speak in extreme terms that match their worldviews. They talk about “never” and “always.” Your first goal is to switch them to fact-based statements.
- 7) *Move to problem solving*—People who whine a lot often feel powerless and believe that the situation is hopeless. Your only chance of ending their negativity is to help them move into a problem-solving mode. This doesn't always work, but it's the only antidote known.
- 8) *Cut them off*—If, after all your efforts, you deem these people to be hopelessly negative, you need to cut them off. Make sure they

aren't just venting for a few minutes, make sure you weren't previously encouraging them, make sure they can't switch to problem solving, and then politely shut them down.

**F. Put It All Together ...**

1. It is your responsibility to manage the discussion, YOU set the tone (subtle actions are just as effective as overt ones)
2. Be concise (people tune out those who drone on & rambling gives people "more rope" to hang you with)
3. LISTEN! LISTEN! LISTEN!
  - a. Provide the person with an opportunity to communicate...LISTEN - same letters spell "silent"
  - b. Use silence to your benefit (people often have a natural tendency to fill the silent moments)
  - c. Eliminate interruptions (turn off cell phone; advise staff unavailable, etc.)
4. Try to avoid a combative environment ("I" vs. "You")
  - a. Make it a point to communicate in a fashion that says "My position is a benefit for you"
    - i. For example, when you interview for a job you don't say "I'll work for you for this much money." Instead you sell yourself by saying, "Here are how my skills & experience are of benefit to you."
  - b. Is there anything you can agree on?
5. Remember the person with whom you are dealing may not completely understand the situation.
  - a. This is an opportunity to frame the issues in a manner that benefit you as you can educate the other person
6. Remember you cannot make everyone happy all of the time – be realistic.
7. Live up to your end of the bargain

## How to Manage the Corrective Action Process to Avoid Claims

### County Risk Sharing Authority

209 E. State Street  
Columbus, Ohio 43215

PH: 614-221-5627  
FX: 614-220-0209



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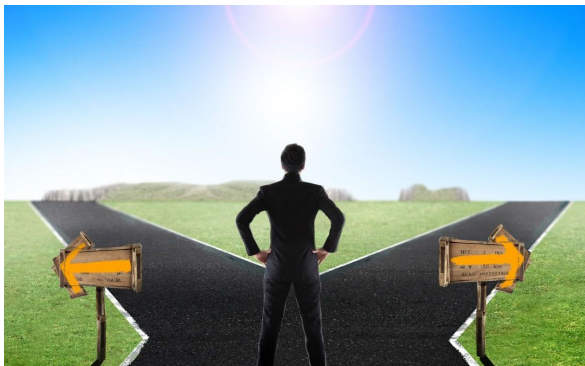
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## Corrective Action: A Problem OR An Opportunity?



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## The Canned Definition of Discipline

### • Discipline *verb*

- (1) to punish or penalize for the sake of enforcing obedience and perfecting moral character;
- (2) to train or develop by instruction and exercise especially in self-control



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## Disciple (Even in the Workplace) has a Bigger Purpose

The **purpose**, the core motivation behind Discipline is **to teach, to improve**, an employee's performance

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## Why is Discipline Important?

Why is DISCIPLINE so important?

- Gets stuff done
- Maintains team morale
- Develops co-leaders to help you
- Protects you/team/department in the future in legal claims

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## No Discipline = No Standards and No Team Morale



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### Corrective Action – How it is Approached Goes Beyond Employee in Question

**Ostrich ~**


“I don’t know anything about it because I never heard a complaint. It could be just a rumor.”





**Wolf ~**

“I am just one of you guys. I get it. Don’t worry I am not going to discipline you for that !”



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### Corrective Action – How it is Approached Goes Beyond Employee in Question



**Eagle ~**

“I am not your best friend. I am a leader who is confident in knowing that there are important standards and I will address situations that do not meet those standards. I know this takes time, but I will get the training and resources I need to support me.”



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### Do we Celebrate when we Get to Discipline Employees?

As leaders, why aren’t we excited about the discipline of employees?



**I'M NOT LOOKING FORWARD TO THIS ONE**



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## Maybe We Dread Discipline Because...

- ❖ Fear of a mistake
- ❖ Confrontation that can lead to resentment of employees/job
- ❖ Takes time

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## Failure to Discipline

While improper discipline can expose an employer to liability, so can the failure to discipline.



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## Employee Defenses/Potential Future Claims Related to Discipline

1. Discrimination or retaliation
2. Disparate treatment
3. No notice
4. Civil rights or other legal violations
5. Settlement or Last Chance Agreement

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Discipline Considerations

Classified

Unclassified

Collective Bargaining

Just Cause

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What is “Just Cause”?

❖ Standards of Conduct

- Knowledge of Standard
- Violation
- Appropriate Penalty

❖ Consistent Application

❖ Appeal Rights

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As Leaders, What Is Our Best Shield? - Just Cause

1. Notice;
2. Reasonable Rule;
3. Fair & Impartial Investigation;
4. Proof;
5. Evenhanded and Non-Discriminatory Application of Rules and Penalties; and
6. Was the Discipline Related to the Seriousness of the Offense and to the Employee’s Work Record?

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### Standards of Conduct

Employees must have notice of what conduct warrants discipline. Notice can come from:

- Statutes (R.C. 124.34)
- Personnel Policy Manuals (Disciplinary Rules and Procedures, Code of Ethics, Canons, etc.)
- Collective Bargaining Agreements
- **YOUR ACTIONS**



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### The Standards of Conduct – The Statute

Under R.C. 124.34, a classified employee may be removed for:

• Incompetence	• Neglect of duty
• Inefficiency	• Failure of good behavior
• Dishonesty	• Acts of misfeasance
• Drunkenness	• Acts of malfeasance
• Immoral conduct	• Acts of nonfeasance
• Insubordination	• Conviction of a felony
• Discourteous treatment of the public	• Violation of work policy/rule



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### Conducting an Effective Disciplinary Investigation

- When to Investigate?
- Why Investigate?
- Pre-Investigation Process
- Who Should Lead the Investigation?
- What to do with the Accused Pending Disciplinary Investigations
- Conducting the Investigation



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## Concluding the Investigation

- A thorough investigation should conclude with a report summarizing the findings of the investigation.
- Contents
  - Summary of the issue/allegation of the investigation;
  - Chronology of events;
  - Analysis of the factual findings noting any discrepancies in testimony, credibility of witnesses, and any other pertinent observations;
  - Conclusion; and
  - Recommendation.



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## General Investigation Tips

- Establish an easy to use complaint procedure
- Provide all employees a written copy of the complaint procedure
- Train all supervisory employees
- Review procedures
- Investigate the alleged misconduct
- Act promptly
- Thorough, accurate report
- Be consistent!



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## Pre-Disciplinary Meeting

- Why are we doing this?
  - Due Process – Loudermill
  - Establishing a Factual Record
  - Providing Objectivity
  - Implementing Discipline

**Remember the Goal! It is a tool to improve employee performance.**

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### Menu of Discipline Options

An employee may be disciplined in a variety of ways depending upon the employee's past record and the severity of the offense, including:

1. Reprimand (Verbal or Written)

2. Suspension

3. Removal

4. Reduction in pay or position

5. Reduction in longevity


6. Forfeiture of paid leave

7. Other Variations (Vacation leave; Workdays off; Comp time; Probationary period; Last Chance Agreement)

8. Coaching/Training

9. Encouragement

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### Performance Evaluation = Proactive Corrective Action

- A Working Definition
  - “The process of establishing a written standard of performance criteria and both telling employees about those standards and frequently informing them how they are performing in relation to the standards.”
- Why Have Performance Appraisals?
  - Employer Benefits
  - Employee Benefits

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### The Performance Evaluation Process


Core Performance Standards

- The Standard Performance Evaluation
- Tying Performance Evaluations to Core Values

The Most Common Evaluation Errors

- Duties Poorly Communicated
- Rater Errors
- Inadequate Documentation





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### The Importance of Accurate and Honest Performance Evaluations

- The Performance Appraisal as the Employee’s “Sword”
- The Performance Appraisal as the Employer’s “Shield”
- The Importance of Honesty, Consistency and Documentation of Bias in Performance Evaluation
- The Importance of Timing



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### The Importance of Accurate and Honest Performance Evaluations

- Do Not be Afraid to Give Negative Evaluations
- Stick with What Works – Use a Standard Form/Procedure
- Be Honest and Specific
- Be Prepared
- Review Performance Evaluations Before Providing them to an Employee



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### Standards For Discipline



FANDANGO MOVIECLIPS

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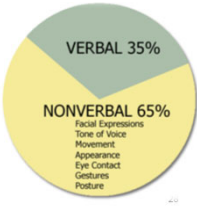

### Practical Delivery of Corrective Action ~Effective Communication

Be prepared

Be objective

Set the mood

Be polite



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### Practical Delivery of Corrective Action Forbes 8 Tips!

- Don't get dragged down
- Listen
- Use a time limit for venting
- Don't agree
- Don't stay silent
- Do switch extremes into facts
- Move to problem solving
- Cut them off



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### Thank You!

**County Risk Sharing Authority**  
209 E. State Street  
Columbus, Ohio 43215

PH: 614-221-5627  
FX: 614-220-0209



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# In case of a MEDIA emergency...

**BEFORE** you speak to anyone in the press about your incoming crisis, review this card.

## PREPARE THE CRISIS TEAM:

1. Confer with your team. Include at least one person from:
  - legal
  - PR
  - expert on subject of the crisis
2. If you're an appointed official, alert at least one of your elected officials. If you're an elected official, brief your colleagues. Be aware that anything you tell someone outside your crisis team may be leaked.
3. Have someone monitor social media and news coverage and give you updates.

## PREPARE THE MESSAGE:

1. Remind the team (especially your lawyer) that saying "no comment" is the same as saying "we're guilty."
2. Until most facts are known, don't accept blame or accuse others.
3. Determine three major points. Avoid jargon. Each point must:
  - be true
  - show compassion
  - show that you're gathering information and want a solution
4. If you have little or conflicting information, use one of the "general responses" on the other side of this card, until more facts are confirmed and can be shared.

## BEGIN COMMUNICATING:

1. Write a statement (100 words or less) and have the crisis team review it. Post it on social media and send it to local news media, noting who the statement is from.
2. Tell reporters and the public to follow your social media feed for the latest information. Update the feed regularly.
3. If media are gathering, prepare a crowd-controlled area. Plan for visuals. Brief them by restating (not reading word for word) your released statement. If you take questions, limit answers to the substance of the original statement and promise to provide more information as it is confirmed.



### IF YOU NEED QUICK HELP

Call Mark Weaver, a lawyer and crisis communications pro who NBC News in Charlotte called "one of the nation's foremost experts in crisis communications." (614) 368-7501 or email [Mark@CommunicationsCounsel.com](mailto:Mark@CommunicationsCounsel.com)

## General Responses (aka Holding Statements)

*Instead of "no comment," use something like one of these responses until you can verify fact points.*



= An official arrested for drunk driving



= A discrimination allegation

### ASPIRATIONAL responses:



"We expect all our employees to follow the law. While every person charged with a crime is presumed innocent, we'll hold any employee who breaks the law accountable."



"Illegal discrimination is wrong. That's why our goal is to make our organization a safe and fair place for all employees. We expect everyone here to follow the law and we'll hold people accountable if they don't."

### PROCEDURAL responses:



"When an employee is charged with a crime, we cooperate with authorities and do an internal review to determine appropriate next steps. That process balances employee rights with what's best for the people we serve."



"We have policies in place to make sure there's a fair and impartial review of all allegations. We take all credible concerns seriously and we're working to gather all the information surrounding this matter. This will ensure a fair process for everyone."

### "MORE TO COME" or TRANSPARENCY responses:



"When an employee is charged with a crime, we take it seriously. We're gathering information now because we understand the public wants to know more. We'll share more facts as soon as we're able."



"We understand and agree the public has a right to know more about what happened. We're moving quickly to gather and verify facts for release as soon as possible."

### GAG ORDER responses:



"As a best practice, information about active internal investigations is confidential. We'll share next steps once the review is complete."



"The judge has ordered us not to discuss the case outside court and we respect the judge's decision. We'll present the facts in court."



Visit [CommunicationsCounsel.com/resources](https://CommunicationsCounsel.com/resources) for more immediately useful crisis communications resources, including checklists, forms, and books.



# Getting Social Media to Work With You, Not Against You

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## 2024

## PRESENTED TO YOU BY

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## TABLE OF CONTENTS

	<u>Page No.</u>
I. PURPOSE .....	1
II. EMPLOYEE SOCIAL MEDIA USE.....	1
III: EMPLOYER SOCIA MEDIA USE .....	8
IV. FIRST AMENDMENT AUDITORS.....	13

## **I. PURPOSE**

This presentation will cover the ins and outs of regulating employees' on and off duty media use. Practical examples will be used to illustrate the fine line of balancing employee's First Amendment speech and privacy concerns with the need to effectively provide governmental services. Participants will also learn how to effectively capture and preserve social media posts to use in subsequent investigations. Outside of the employment space, this presentation will cover how to effectively manage the new trend of First Amendment auditors, where individuals attempt to use social media exposure against government officials, as well as tips for managing matters that go viral.

## **II. EMPLOYEE SOCIAL MEDIA USE**

### **A. Why Do We Care About Social Media?**

1. Most Americans use at least one social media site regularly.
  - a. Most common sites include YouTube, Facebook, Instagram, Twitter ("X"), Snapchat, TikTok, and Reddit.
2. The average American spends 2 hours and 25 minutes on social media per day.
3. It's not going anywhere, and only becoming more prevalent in our lives and workplaces.

**B. Social Media Concerns.** Social media can be a great tool for counties, including increasing public engagement and spreading awareness of county matters. However, and especially in the employment context, social media can also be harmful to the county, depending on how it is used. Employee social media use in particular, on or off duty, can result in a variety of challenges and issues for employers. However, there are several general protections employers should consider before diving into an employee's social media.

1. The goal is to foster positive social media use by the county and county employees.
2. **First Amendment Protections**
  - a. **First Amendment.** For public employees, the First Amendment protects speech that relates to matters of political, social or other concerns of the community ("public concern"), so long as the government's interest in maintaining an orderly and efficient operation is not outweighed by the public's need for the employee's statement. If the speech is of public concern, then courts will balance



the freedom of speech with the government's need to avoid the demoralizing and disruptive effect of the exercise of that right.

- b. This is known as the "Pickering Balancing Test" and it involves a two-step inquiry: (1) initially, a court must determine whether the speech that led to an employee's discipline regarded a matter of public concern; and (2) if it does, free speech concerns are balanced against efficient public service concerns.
- c. When conducting this balancing test, courts consider whether the subject statement:
  - i. Impairs discipline by superiors or harmony among co-workers;
  - ii. Has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary;
  - iii. Impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise; or
  - iv. Undermines the mission of the employer.

***Bennett v. Metro. Gov't of Nashville & Davidson Cnty.***, 977 F.3d 530, 539-40 (6th Cir. 2020).

- v. Other general considerations:
  - Courts give the highest protections to speech involving matters of public concern where the employee is speaking as a private citizen (as opposed to pursuant to their job duties).
  - Speech about one's own employment disputes with his/her employer is not of public concern and is therefore not protected by the First Amendment. *Connick v. Myers*, 461 U.S. 138 (1983).
  - That being said, citizens who enter government service must accept certain limitations on their freedoms, including limitations on the scope of their First Amendment rights. *Fox v. Traverse City Area Pub. Schs. Bd. of Educ.*, 605 F.3d 345, 348 (6th Cir. 2010) (citing *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006)).

d. **Implications.** An employee cannot be disciplined for lawfully exercising their First Amendment rights under the Pickering Balancing Test. When an employee is disciplined for lawfully exercising their First Amendment rights, this is known as First Amendment Retaliation.

i. **Test.** The employee must show facts demonstrating all of the following:

- They engaged in protected conduct (aka protected speech);
- An adverse action was taken against them that would deter a person of ordinary firmness from continuing to engage in that conduct; and
- There is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by [his] protected conduct.

*Heyward v. Cooper*, 88 F.4th 648, 657 (6th Cir. 2023) (citing *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999)).

### 3. **Fourth Amendment Protections**

a. **Fourth Amendment.** The Fourth Amendment protects individuals from unreasonable searches and seizures by government agents absent probable cause.

i. This extends to searches by employers of an employee or applicant's social media.

b. **Violations.** In the social media context, the Fourth Amendment comes into play when an employer searches through an employee's social media account. To determine whether an employee's rights were violated, a court will first determine whether the employee had a reasonable expectation of privacy. If the employee does have an expectation of privacy, the court will next determine whether the search was reasonable both at its inception and in its scope.

i. **Reasonable Expectation of Privacy.** The primary consideration in whether an employee has a reasonable expectation of privacy over their page, post, comment, or other social media interaction is their privacy status.

- Privacy status can vary by both the page and individual posts.
- A public employee's expectation of privacy in their offices can be diminished by virtue of office practices and procedures or by legitimate regulation. *James v. Hampton*, 592 F. App'x 449, 455 (6th Cir. 2015). The employee's expectation of privacy in the workplace can be reduced through prior notice to employees that their workspaces and work provided equipment were subject to search.

c. **Reasonableness of Inception and Scope**

- i. **Inception.** A search is justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a non-investigatory work-related purpose such as to retrieve a needed file.
- ii. **Scope.** A search is reasonable in scope when it is reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the misconduct.

d. **Examples**

- i. The search terms stored on officers' personal phones and used in criminal investigations qualify as workplace items and should be within the employer's control. *Aclu of Tenn., Inc. v. City of Memphis*, No. 2:17-cv-02120-JPM-jay, 2020 U.S. Dist. LEXIS 149578, at \*8-9 (W.D. Tenn. Aug. 19, 2020).
- ii. No reasonable expectation of privacy over public records even when they are stored on personal devices or private accounts.

4. **Fourteenth Amendment Protections.** The Fourteenth Amendment prohibits discrimination by government which either burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference. *Anders v. Cuevas*, 984 F.3d 1166, 1179 (6th Cir. 2021).

- a. In practice, an employee may allege that they were discriminated against based upon their membership in a protected class for their social media use.

### C. On-Duty Social Media Use

1. **Employer Rights.** Unsurprisingly, employers are permitted to prohibit an employee from using their personal social media while on duty. What is surprising is the wide variety of consequences employees and employers can face due to improper on-duty social media use.
2. **Disclosure of Confidential Information.** An employee's on-duty use of their personal social media can result in the accidental or intentional disclosure of an employer's confidential, protected, or sensitive information.
  - a. **Potential Issues**
    - i. Unintentionally capturing content in the background of a photo, video, or other post.
    - ii. Inadvertently revealing your location may result in security issues for the employee or members of the public.
    - iii. Accidentally capturing audio or video in the background of a photo or recording, including publicizing private conversations, phone calls, or other communications.
3. **Inefficiency.** Employee on-duty social media use can result in inefficiency in their work or create unnecessary distractions likely resulting in human error.
  - a. Social media is known to be addictive for some people, resulting in distractions, time waste, and errors.
  - b. An employee's excess social media use at work can lead to rifts between fellow employees who are upset or impacted by the behavior.
4. **Improper Use of Resources and Equipment.** An employee's use of the employer's equipment, such as a work provided cell phone or computer, to access social media can result in:
  - a. Additional users clogging up the WIFI, whether from the additional personal devices or the additional capacity needed for social media websites.

- b. Increased risk of viruses or attacks accessing social media websites on employer devices.
- 5. **Increase Accidents and Incidents.** Employee social media use at work may cause distracted behavior, resulting in accidents or incidents such as:
  - a. Recording mistakes due to a lack of attention
  - b. Failure to complete work timely or adequately
  - c. Car accidents
- 6. **Inappropriate Use of Employer Logo.** Employers can also regulate the use of their trademark/copyright, especially where used on employee social media. Employers may regulate (or ultimately ban) use of their:
  - a. Image
  - b. Insignia
  - c. Logo
- 7. **Recommendations**
  - a. Make clear what constitutes “inappropriate conduct” in terms of social media use at work and on the employer’s equipment.
  - b. Indicate the employer’s property, including computers, phones, and other technology, are subject to searches.
  - c. Restrict employees from logging into personal social media sites on employer-provided equipment.
  - d. Prohibit the use of the employer’s logos, insignia, or other images on an employee’s personal social media site.
  - e. Discourage using formal title or position on non-professional social media websites.

#### **D. Off-Duty Social Media Use**

- 1. **Employer Rights.** An employer can regulate and respond to employee off-duty social media use, but there are far greater protections for such employee speech.

- a. An office is not required to tolerate action which it reasonably believes would disrupt the office, undermine his authority, and destroy close working relationships. *Middleton v. Lexington-Fayette Cnty. Urb. Gov't*, 2024 U.S. App. LEXIS 4056, at \*26 (6th Cir. Feb. 20, 2024).

2. When Employee Off-Duty Social Media Use Becomes Problematic.

a. **Complaints from Statements**

- i. The internet has become particularly fixated on “cancel culture;” a phenomenon where social media users attempt to silence and otherwise seek repercussions against others who they perceive to have misbehaved, acted inappropriately, or made offensive statements. However, the statements or conduct at issue may have nothing to do with the employee’s work or the employer.

b. **Secondary Employment**

- i. Outside employment can create issues with employee attendance and performance. Secondary employment can result in scheduling conflicts as well as issues with an employee’s ability to focus, stay awake, and perform their regular job functions.
- ii. Outside employment may also reflect poorly on the employer. This could be anything from offensive videos or inappropriate/sexual content where the employee is easily tied back to the employer.

c. **Harassing Communications.** An employer has an obligation to investigate and mitigate harassing communications between employees, even when such communications occur off-duty.

- i. “When an employee is forced to work for, or in close proximity to, someone who is harassing her outside the workplace, the employee may reasonably perceive the work environment to be hostile.” The court considered the phone call in the “totality of the circumstances.” *Satterfield v. Karnes*, 736 F. Supp. 2d 1138, 1159 (S.D. Ohio 2010).

### III. EMPLOYER SOCIAL MEDIA USE

#### A. Using Social Media in Investigations

1. **When Does Social Media Evidence Come into Play?** There are numerous circumstances where social media may come into play during an investigation, the most common including:
  - a. Complaints about a post, comment, or other display on an employee's social media, from either the public or coworkers;
  - b. Reports of improper FMLA or sick leave use;
  - c. Refuting reports of injuries; or
  - d. Reports of use while at work.
2. **Public vs. Private Accounts.** Employees are afforded different levels of protection for their public versus private social media accounts.
  - a. **Public.** Employers can review an employee's public social media account or post.
  - b. **Private.** Employers cannot access an employee's private social media account or post which they do not already have access to.
    - i. Do not use fraudulent or improper techniques in order to obtain information. Accessing "invitation only" (aka private) internet discussion pages to make employment decisions may constitute an invasion of a privacy claim if accessed without permission. *Pietrylo v. Hillstone Rest. Group*, 2008 U.S. Dist. LEXIS 108834 (D.N.J. 2008).
    - ii. In practice, this means the employer themselves cannot friend the employee to gain access to the employee's private account. The employer also cannot create a fake account or direct another to gain access to an employee's private account.
3. **Alternative Sources for Information.** Any time you are dealing with a private social media account, post, or content, first assess whether you can obtain such information from alternative sources. The most likely source of this information is from the person who reported the post to you. Always document who the alternative source of the information is.



#### 4. How to Preserve Social Media Content

##### a. Posts

##### i. Screenshot the post or comment in its entirety

- Capture the profile picture, date of post, and full post.
- Capture any relevant comments and replies.
- If the post is long, you can screen record it.

##### ii. Screenshot the general profile of the account that made the post.

##### iii. Record who brought the post to your attention, when they brought it to your attention, when the post was discovered by this person, and how the reporter felt/reacted to the post (did it disrupt their work or ability to work with the person?). Determine if others have seen the post and repeat this process.

- Citizen vs. coworker
- Indication of impact on internal working relationships, working relationships with other agencies, public trust, or the delivery of public services.
- Any background social issues. For instance, if a post relates to ongoing civil debate or protests. If relevant, save news articles relating to the current issue for reference later.

##### b. Video

##### i. Download video or screen record the video.

##### ii. Screenshot the post containing the video using the directions for capturing posts.

##### c. Preserve as Soon as Possible

##### i. Social media evidence can be easily deleted or altered, so it is important to capture any social media evidence as soon as possible.

5. **Social Media in Investigations**

- a. Have the person identify their account, by both the social media website and their personal username.
- b. Ask them to explain what they use social media for generally.
- c. Ask them to explain their post, why they made it, and their intentions for making the post.
- d. Confirm whether their social media page was public or private. If private, confirm whether the employee permitted access to the page by coworkers or others associated with the employer.

**B. Tips for Using Social Media**

1. **Personal Use**

- i. **Impact of Your Statements and Associations.** Consider your own use of social media and what statements, comments, or other interactions you are making.
  - ii. Nowadays, it's more than just what you post. People also focus on what you like, share, or react to. People also focus on who you are friends with.
2. **Set a Good Example.** Social media is not the area for “do as I say not as I do” practices. If you or other supervisors or officials are using to make offensive statements, share divisive content, or bring in work disputes, its hard to expect employees to use their own social media accounts more responsibly.
3. **Is My Account Actually Personal?** One thing to consider when using your social media is whether you are using it personally (outside of employment) or whether your social media may be considered speech on behalf of the county.
4. **Blocking Accounts & Deleting Comments.** Whether you are speaking as a citizen or as an official matter in terms of whether you are permitted to delete comments or block accounts.
- a. **Case Example.** In March 2024, the US Supreme Court issued a unanimous decision in *Lindke v. Freed*, clarifying when public officials are permitted or prohibited from blocking individuals from viewing their social media pages.

- i. **Facts:** James Freed created a Facebook page that was once private but turned public. His bio described himself as “Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI.” He used his profile primarily to post about his life, but he also posted about matters happening in the city and answered questions from the public. When the pandemic occurred, he posted about it, with a mix of personal and work-related posts. He began receiving comments from another Facebook user, Kevin Lindke, who criticized the city’s COVID-19 restrictions. Freed deleted Lindke’s comments, and eventually blocked Lindke. Lindke sued Freed, claiming a violation of Linkde’s First Amendment rights, arguing that Freed’s page was a public forum.
- ii. **Holding:** In this case, Freed’s decision to block Lindke did not violate the First Amendment because his profile was not a public forum and Freed did not engage in state action.
- b. The Court cautioned that this is a very fact-intensive inquiry that can vary on a case-by-case basis.
- c. When an individual is blocked, the Court looks at all the posts made on the subject account, and even a single post which encompasses state action or state speech could convert a personal page into an official page.
  - i. **Test:** A public official who prevents someone from commenting on the official’s social-media page engages in state action under §1983 only if the official both (1) possessed actual authority to speak on the State’s behalf on a particular matter, and (2) purported to exercise that authority when speaking in the relevant social-media posts.

5. **Tips:**

- a. Accounts which state “this is the personal page of [your name]” are entitled to a heavy presumption that the posts are personal.
- b. Do not purport to speak for the county.
- c. Ensure there are alternative, available public sources for the information you are sharing.

6. **Be Wary of Imposters.** We have seen an increase trend in individuals impersonating public bodies on social media, whether as a spoof or to create real confusion.

- a. ***Novak v. City of Parma – Fake Pages.*** In this case, Mr. Novak, a resident, created a spoof Facebook page mocking the Facebook page of the Parma Police Department. The spoof page included the slogan “we no crime” instead of the department’s actual slogan of “we know crime.” The page included job postings that discouraged applications by members of minorities and an offer of “free abortions for teenagers provided by police in the Wal-Mart parking lot.” Mr. Novak deleted any comments calling the page fake, and when the police department posted to the real page warning about his page, he made the same warning on his. Mr. Novak took the page down after about 12 hours. By then 10 people called 911 to report the page.

While Mr. Novak’s speech was clearly not appropriate or protected, the issue was how the city responded. Weeks after the initial posts were made, the Parma Police obtained Mr. Novak’s information from Facebook and arrested him on March 25, 2016. They also searched his residence and seized his electronic devices. Mr. Novak was charged with disrupting public services, but a jury ultimately acquitted him. He then brought suit against the city and various officials.

This brief page created in 2016 resulted in litigation, which only ended in February 2023 when the US Supreme Court denied plaintiff’s application for review of the decision by the Sixth Circuit Court of Appeals. The Sixth Circuit upheld the lower court’s decision granting the city’s motion to dismiss. The court weighed Mr. Novak’s First Amendment rights, including his argument that his speech was a parody, with the government’s interest. The Court held that that it was reasonable for officers to think that Mr. Novak might have been impersonating a police officer, which unlike parody is not protected speech.

- b. ***City of Detroit Sign – Fake Posts.*** The City of Detroit experienced a real life social media expectation versus reality drama this year. The city planned to install a Hollywood style Detroit sign ahead of the NFL draft, welcoming motorists to the city. Prior to the installation, a social media user circulated a rendition of the sign. However, this individual was not associated with the city, and the depiction was far nicer than what was planned. Even the Mayor believed the social media depiction was the city’s planned

installation until he spoke further with the General Services Director.

City officials naively believed that citizens would know the circulated photo was not from the city nor an official representation of the sign to be installed. But they were wrong. The city ultimately went viral for their sign, as it did not meet the falsely set expectations of the public, resulting in national attention and even a rap song about the sign's shortcomings.

#### **IV. FIRST AMENDMENT AUDITORS**

**A. News Video Example.** Example of a public official losing his temper at a First Amendment auditor, resulting in a fifteen month investigation into his response. The official now realizes that he lost his cool in the heat of the moment, after quickly responding, putting his hands on the individual, and following the individual even after they left the property.

**B. What is a First Amendment Auditor?**

1. Activists or citizen journalists targeting a government facility, employee or event;
2. Likely demanding answers and attempting to explore a building or crime scene;
3. Encounters are typically recorded;
4. Purpose is a test of the office or official's adherence to the First Amendment;
5. Encounter is broadcast to the public via social media + YouTube;
6. Primary goal is to provoke a reaction, even a lawsuit.

**C. How to Deal with a First Amendment Auditor?** Their purpose is to egg you on and get a reaction! Do not give them the negative reaction they are looking for.

**D. What Does the First Amendment Protect in Terms of Auditors?** First Amendment auditors, and members of the public generally, have the right to free speech, including the right to protest, record in public, and otherwise speak on matters of public concern. The government also has an interest in running safe and efficient operations. Accordingly, if the government is going to restrict the right to free speech, such restrictions:

1. Must be content neutral.

2. Must be narrowly tailored to serve a significant governmental interest.
3. Must leave open ample alternative channels for communicating the speaker's message.

**E. Remember: Public Perception is Key!**

1. While we may discuss the line between legal and illegal, that may not be enough for the internet keyboard warriors who have their own perceptions of what a person should be permitted to do in public.
2. While annoying, try to be as calm and polite as possible to avoid "going viral" for a reaction. (I do not want to see any of you embarrassing yourselves in a video!)

**F. Can They Record Me?**

1. Generally, in a public space, an individual has the ability to photograph/video anything in plain view.
  - a. Cannot disturb public business.
2. What about audio?
  - a. Ohio is a one-party state. Consent is not required where speaker does not have an ordinary expectation of privacy.

**G. When Do We Let Them Stay?**

1. In a public space
2. Not disrupting public services
3. No physical altercations

**H. When Can We Make Them Leave?**

1. Accessing Non-Public Spaces
2. Disturbing Public Services
3. Physically Threatening
4. Nothing in the Constitution requires the Government to freely grant access to all who wish to exercise their right to free speech on every type of

government property without regard to the nature of the property. *Kerr v. Boulder*, 2021 U.S Dist LEXIS 114207.

**I. Permissible Restrictions**

1. Time – time of day
2. Place – location (public lobby or hall versus private offices)
3. Manner
4. Viewpoint neutral – cannot single out specific views
5. Reasonable - must be “narrowly tailored” to serve a significant governmental interest.

**J. Proactive Restrictions.** The best way to deal with auditors is to have the proper signage and rules in place before they arrive.

1. Know how to recognize auditors;
2. Ensure public areas of building are clearly marked;
3. Educate your employees;
4. Establish guidelines / policies;
5. Ensure police personnel are prepared for out-of-building encounters;
6. Consult with your attorney;
7. Know the law and their rights; and
8. When in doubt...contact law enforcement.

**K. Responding in the Moment**

1. Don't overreact- acknowledge their right to record;
2. Be prepared to be provoked;
  - a. Repeated questions
  - b. Be prepared for them to be unsatisfied with your answers
  - c. Profanity



3. Know when you need help from a co-worker, supervisor, or even law enforcement;
4. Try to keep interactions short, continue business as usual;
5. Limit business in public areas;
6. Boring is good; and
7. Understand anything that you do may end up on YouTube or in a 1st Amendment Lawsuit.

**L. Public Records Requests.** Another avenue often taken by First Amendment Auditors is to inundate public offices with records requests or scrupulously watch public hearings, hoping to monetize any errors they come across.

1. **Public Records.** Auditors typically inundate an office with public records requests, verbally and in writing, for the primary purpose of catching the office in a technical mistake.

a. **Common Mistakes:**

- i. Mishandling public records on private devices (ie. Your cell phone records);
- ii. Failing to respond requests or failing to recall verbal requests;
- iii. Getting frustrated and over withholding requests; and
- iv. Attempting to charge for labor for fulfilling the request.

- A public office is only permitted to request the “actual costs” of fulfilling a request. This can include things such as reasonable printing costs, mail postage, and thumb drives. But you cannot charge for the labor or time associated with fulfilling the request.
- A public office may charge the actual costs for any public records request, even for a single document, and the office can decide on a per record basis whether to assess the actual costs.

- b. **Penalties.** Damages are fixed at one hundred dollars for each business day during which the public office or person responsible

for the requested public records failed to comply with a lawful request beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars.

- i. The award of statutory damages shall not be construed as a penalty, but as compensation for a presumed injury arising from lost use of the requested information.
- ii. Attorneys' fees may be awarded to the relator if the public office or the person responsible for the public records:
  - failed to timely respond affirmatively or negatively to the public records request;
  - promised to permit the relator to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that specified period of time; or
  - acted in bad faith when the office or person voluntarily made the public records available to the relator for the first time after the relator commenced the mandamus action, but before the court issued any order concluding whether or not the public office or person was required to comply.
- iii. Attorneys' fees will not be awarded to the relator if both of the following are true:
  - That, based on the ordinary application of statutory law and case law as it existed at the time, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation under the Act, and
  - That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority

that is asserted as permitting that conduct or threatened conduct.

## 2. **Public Meetings**

- a. **Penalties.** If any citizen believes that a public body has violated the Open Meetings Act, that citizen may file an injunctive action in a common pleas court to compel the public body to obey the Act. If an injunction is issued, the public body must correct its actions, may have to pay court costs, and must pay a fine of \$500.
  - i. Whichever party loses the lawsuit may have to pay the reasonable attorney fees of the other party as ordered by the court. ORC 121.22(I).
    - The public office may receive their attorney fees if the court deems the action frivolous.

**M. What if we go Viral?** On rare occasions, a county may go viral, which can happen for a variety of reasons including from an employee's actions or statements. Although not an everyday occurrence, it's important to be prepared to go viral ahead of time, because you cannot predict nor schedule when you are going to go viral, and it's important to be ahead of the problem rather than playing catchup.

### 1. **Decide if you need to make a statement**

- a. Consider whether to put the statement on a temporary story versus a post which will last indefinitely.

### 2. **Potential Statements to the Public**

- a. [The office] takes allegations of wrongdoing very seriously.
- b. This matter is being investigated. As the investigation is ongoing, we are unable to comment on these allegations at this time.
- c. As this matter involves ongoing litigation, we will not be commenting further on this matter and will address these allegations through the litigation process.
- d. We look forward to addressing the allegations in court.
- e. As a general practice, employee discipline is issued in accordance with county policy, [any applicable collective bargaining agreement.], as well as the procedures set forth in state and federal law.

### 3. **Actions**

- a. Proactively turn off comments on county owned or operated social media websites.
- b. Careful with partially restricting comments. Some social media websites for instance will allow you to dictate that only accounts you follow can comment, or other similar restriction. However, these partial comment functions could be viewed as evidence of viewpoint restrictions.
- c. Careful about blocking comments on an official page.
  - i. Public officials can block comments that are not protected by the First Amendment, including comments that make a true and immediate threat to another person, incite others to imminently violate the law, or contain obscene language as defined by the U.S. Supreme Court.
  - ii. If the page was created specifically to discuss a certain issue (e.g. schools, county projects, library resources), officials are allowed to remove comments that are off-topic.
  - iii. Cannot block comments just because they are mean or perceived to be false.

### 4. **Policies**

- a. Who is responsible for access/passwords?
- b. What accounts are, on what platform, and the purpose of each account.
- c. Require turnover of access upon termination.
- d. Best practices:
  - i. Consider turning off comments proactively
  - ii. Retweet and share where possible

## Getting Social Media to Work With You, Not Against You

### County Risk Sharing Authority

209 E. State Street  
Columbus, Ohio 43215

PH: 614-221-5627  
FX: 614-220-0209



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## Why Do We Care About Social Media?

- Most Americans use at least **one** social media site **regularly**.
- The average American spends **2 hours and 25 minutes** on social media **per day**.
- It's not going anywhere, and **only becoming more prevalent** in our lives and workplaces.



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## Social Media Concerns



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## First Amendment Protections

- For public employees, the First Amendment protects speech that relates to matters of political, social, or other matters of public concern.
- If the speech is of public concern, then courts will balance the freedom of speech with the government's need to avoid the demoralizing and disruptive effect of the exercise of that right.



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## First Amendment Protections

**Courts apply a "Pickering Balancing Test" involving a two-step inquiry:**

- (1) A court determines whether the speech that led to an employee's discipline regarded a matter of public concern; and
- (2) If it does, free speech concerns are balanced against efficient public service concerns.



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## Public Service Concerns

- Impairs discipline by superiors or harmony among co-workers,
- Has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary,
- Impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise, or
- Undermines the mission of the employer.



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## Other Considerations

- Highest protections to speech involving matters of public concern where the employee is speaking as a private citizen.
- Speech about one's own employment disputes with his/her employer is not of public concern and is thus not protected.
- Citizens who enter public service must accept certain limitations on their freedoms, including limitations on the scope of their speech.



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## First Amendment Retaliation

**The employee must show facts demonstrating all the following:**

- They engaged in protected conduct;
- An adverse action was taken against them that would deter a person of ordinary firmness from continuing to engage in that conduct; and
- There is a causal connection between the adverse action and the protected conduct.



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## Fourth Amendment Protections



**The Fourth Amendment protects individuals from unreasonable searches and seizures by government agents absent probable cause.**



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## Fourth Amendment Protections



In the social media context, the Fourth Amendment comes into play when an employer searches through an employee's social media account.



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## Fourth Amendment Protections

- To determine whether an employee's rights were violated, a court will first determine whether the employee had a **reasonable expectation of privacy**.
- If the employee does have a reasonable expectation of privacy, the court will next determine **whether the search was reasonable both at its inception and in its scope**.



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## Reasonable Expectation of Privacy

The primary consideration in whether an employee has a reasonable expectation of privacy over their page, post, comment, or other social media interaction is their **privacy status**.



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## Reasonableness of Inception and Scope

- **Inception** - A search is justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a non-investigatory work-related purpose such as to retrieve a needed file.
- **Scope** - A search is reasonable in scope when it is reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the misconduct.



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## On-Duty Examples



- Generally, no reasonable expectation of privacy when using employer equipment.
- No reasonable expectation of privacy over public records even when they are stored on personal devices or private accounts.



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## Fourteenth Amendment Protections

The Fourteenth Amendment prohibits discrimination by government which either burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference.



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## Fourteenth Amendment Protections

In practice, an employee may allege that they were discriminated against based upon their membership in a protected class for their social media use.



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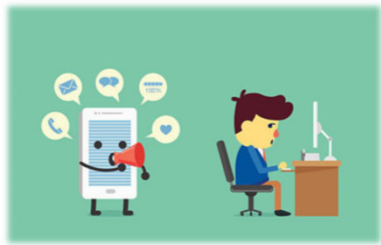
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## On-Duty Social Media Use

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## Employer Rights

Unsurprisingly, employers are permitted to prohibit an employee from using their personal social media while on duty.

What is surprising is the wide variety of consequences employees and employers can face due to improper on-duty social media use.

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## On-Duty Social Media Use Concerns



- Disclosure of confidential information
- Inefficiency
- Improper use of resources and equipment
- Increase in accidents and incidents
- Inappropriate use of employer's logo

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## Recommendations

- Make clear what constitutes "inappropriate conduct" in terms of social media use at work and on the employer's equipment.
- Indicate the employer's property, including computers, phones, and other technology, are subject to searches.
- Restrict employees from logging into personal social media sites on employer-provided equipment.

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## Recommendations



- Prohibit the use of the employer's logos, insignia, or other images on an employee's personal social media site.
- Discourage using formal title or position on non-professional social media websites.

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## Off-Duty Social Media Use

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**CORSA**  
**FD AR**  
**PHILIP DOWNEY**  
**ALBRECHT & REPPENHOF**  
Attorneys at Law

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## Employer Rights

An employer can regulate and respond to employee off-duty social media use, but there are far greater protections for such employee speech.



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**CORSA**  
**FD AR**  
**PHILIP DOWNEY**  
**ALBRECHT & REPPENHOF**  
Attorneys at Law

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## Employer Rights



That being said, an office is not required to tolerate action which it reasonably believes would disrupt the office, undermine its authority, and destroy close working relationships.

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**CORSA**  
**FD AR**  
**PHILIP DOWNEY**  
**ALBRECHT & REPPENHOF**  
Attorneys at Law

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## When Employee Off-Duty Social Media Use Becomes Problematic



- Complaints by coworkers or members of the public
- Secondary employment
- Harassing conversations



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## Employer Social Media Use



### Using Social Media in Investigations



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## When Does Social Media Evidence Come into Play

- Complaints about a post, comment, or other display on an employee's social media, from either the public or coworkers;
- Reports of improper FMLA or sick leave use;
- Refuting reports of injuries; or
- Reports of use while at work.



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## Public vs. Private Accounts

Employees are afforded different levels of protection for their public vs. private social accounts.

- **Public** - Employers can review an employee's public social media account or post.
- **Private** - Employers cannot access an employee's private social media account or post which they do not already have access to.

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## Private Accounts

- Do not use fraudulent or improper techniques in order to obtain information.
- The employer themselves cannot friend the employee to gain access to the employee's private account.
- The employer cannot create a fake account or direct another to gain access to an employee's private account.

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## Alternative Source for Information?



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## How to Preserve Social Media Content

### Posts

- Screenshot or screen record post
- Capture the general page, including the profile picture and username
- Record who reported the post to you, and any impacts to the workplace

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## How to Preserve Social Media Content

### Videos

- Download video or screen record the video.
- Screenshot the post containing the video using the directions for capturing posts.

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## Social Media in an Interview

- Have the person identify their account, by both the social media website and their personal username.
- Ask them to explain what they use social media for generally.
- Ask them to explain their post, why they made it, and their intentions for making the post.
- Confirm whether their social media page was public or private at time of post. If private, confirm whether the employee permitted access to the page by coworkers or others associated with the employer.

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## Tips for Using Social Media

- Impact of your statements and associations.
- Set a good example.
- Is your account actually personal?
- Blocking accounts and deleting comments.

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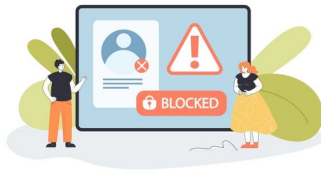
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## *Lindke v. Freed*



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## *Lindke v. Freed*

A public official who prevents someone from commenting on the official's social-media page engages in state action under §1983 only if the official both

- (1) possessed actual authority to speak on the State's behalf on a particular matter, and
- (2) purported to exercise that authority when speaking in the relevant social-media posts.

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## Tips

- Accounts which state “this is the personal page of [your name]” are entitled to a heavy presumption that the posts are personal.
- Do not purport to speak for the county.
- Ensure there are alternative, available public sources for the information you are sharing.



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## Be Wary of Imposters



**Novak v. City of Parma**



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## Expectations vs. Reality



Social Media Depiction



Actual Installation



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## First Amendment Auditors



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## What is a First Amendment Auditor?

- Activists or citizen journalists targeting a government facility, employee or event;
- Likely demanding answers and attempting to explore a building or crime scene;
- Encounters are typically recorded;
- Purpose is a test of the office or official's adherence to the First Amendment;
- Encounter is broadcast to the public via social media and YouTube;
- Primary goal is to provoke a reaction, even a lawsuit.

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## First Amendment Public Protections

First Amendment auditors, and members of the public generally, have the right to free speech, including the right to protest, record in public, and otherwise speak on matters of public concern. The government also has an interest in running safe and efficient operations.

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## First Amendment Public Protections

If the government is going to restrict the right to free speech, such restrictions:

- Must be content neutral.
- Must be narrowly tailored to serve a significant governmental interest.
- Must leave open ample alternative channels for communicating the speaker's message.

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## Can They Record Me?

Generally, in a public space, an individual has the ability to photograph/video anything in plain view.

- Cannot disturb public business.
- Ohio is a one-party state. Consent is not required where speaker does not have an ordinary expectation of privacy.

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## When Do We Let Them Stay?



- In a public space
- Not disrupting public services
- No physical altercations

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## When Can We Make Them Leave?



- Accessing Non-Public Spaces.
- Disturbing Public Services.
- Physically Threatening.

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## Permissible Restrictions



- Time
- Place
- Manner
- Viewpoint neutral
- Reasonable/  
narrowly tailored

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## Proactive Restrictions

- Know how to recognize auditors;
- Ensure public areas of building are clearly marked;
- Educate your employees;
- Establish guidelines / policies;
- Ensure police personnel are prepared for out-of-building encounters;
- Consult with your attorney;
- Know the law and their rights;
- When in doubt...contact law enforcement.

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## Responding in the Moment

- Don't overreact- acknowledge their right to record;
- Be prepared to be provoked;
- Know when you need help from a coworker, supervisor, or even law enforcement;
- Try to keep interactions short, continue business as usual;
- Limit business in public areas;
- Boring is good;
- Understand anything that you do may end up on YouTube or in a 1st Amendment Lawsuit.

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## Public Records Requests

Another avenue often taken by First Amendment Auditors is to inundate public offices with records requests or scrupulously watch public hearings, hoping to monetize any errors they come across.

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## Common Mistakes

- Mishandling public records on private devices;
- Failing to respond to requests or failing to recall verbal requests;
- Getting frustrated and over withholding requests;
- Attempting to charge for labor for fulfilling the request.

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## Public Records Penalties



- One hundred dollars for business day of the denial, maximum one thousand dollars.
- Potential for attorney's fees to requester.

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## Public Meetings

If any citizen believes that a public body has violated the Open Meetings Act, that citizen may file an injunctive action in a common pleas court to compel the public body to obey the Act.

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## Public Meeting Penalties

If an injunction is issued, the public body must correct its actions, may have to pay court costs, and must pay a fine of \$500.

Winner may receive attorney's fees.

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## What if We Go Viral?

Although not an everyday occurrence, it's important to be prepared to go viral ahead of time, because you cannot predict nor schedule when you are going to go viral, and it's important to be ahead of the problem rather than playing catchup.

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## Potential Public Statements

- [The office] takes allegations of wrongdoing very seriously.
- This matter is being investigated. As the investigation is ongoing, we are unable to comment on these allegations at this time.
- As this matter involves ongoing litigation, we will not be commenting further on this matter and will address these allegations through the litigation process.

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## Potential Public Statements

- We look forward to addressing the allegations in court.
- As a general practice, employee discipline is issued in accordance with county policy, [any applicable collective bargaining agreement.], as well as the procedures set forth in state and federal law.

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## Other Actions



- Proactively turning off comments.
- Careful when blocking comments and users on an official page.



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## Other Internal Social Media Policy Recommendations

- Who is responsible for access/passwords?
- What accounts are, on what platform, and the purpose of each account.
- Require turnover of access upon termination.
- Best practices:
  - Consider turning off comments proactively
  - Retweet and share were possible



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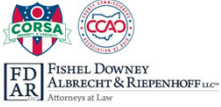
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## Thank You!

**County Risk Sharing Authority**  
 209 E. State Street  
 Columbus, Ohio 43215

PH: 614-221-5627  
 FX: 614-220-0209



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