

Frequently Asked Questions Legal Issues - State Agency Use of Social Media

1. Who can use social media for official government business?

When used for official business, employee access to social media sites is governed by agency policy. In the absence of a specific social media use policy, an agency's internet use policy will likely apply. (Personal use of social media sites is beyond the scope of this FAQ.)

2. Who is authorized to sign up for a social media account on behalf of a state agency?

To set up an account to use a social media site, it is usually necessary that the user click a mouse or check a box to signify agreement with the site's Terms of Service (TOS). (But be aware that in some cases merely use of a site may be treated as agreement to accept the site's terms.) TOS constitute a binding contract. Accordingly, someone authorized to execute a contract for the agency should set up or expressly authorize the account, preferably after reading or being briefed on the contents of the provider's TOS.

3. What is the effect of accepting a site's TOS?

It is in an agency's best interests to be familiar with and understand the TOS for its social media accounts. TOS vary widely among social media providers. Some TOS may include provisions that state agencies would not ordinarily agree to, such as setting venue of any litigation in another state. Other terms may make a provider not a good fit for a particular use. For example, an agency that intends to use a video streaming service to host material developed by its clients or customers should not agree to a TOS that requires site users to have produced and owned all of the media it posts. An agency should not agree to TOS that impose requirements that cannot be met.

4. What terms in a TOS document are of particular concern?

Concerns may vary depending upon the functionality and intended use of a site. Agencies should pay attention to provisions that address indemnification, limitations on liability, endorsements or advertising, jurisdiction and venue, choice of law, copyright and intellectual property, persistent cookies, privacy, and data gathering practices. Please regard this as an unranked, nonexclusive list.

5. What other legal issues might arise in state agency use of social media?

Probably the most significant concern for state agencies is the handling of records that meet the definition of "public records". Records retention laws and rules apply to agency electronic records, including those posted on social media sites. Public records are of course subject to public disclosure. All agency records, whether or not they meet the definition of a public record, are potentially subject to litigation holds.

Answer to Question 5 continued:

Other issues may include appropriate official use, employee ethics, hijacking of an agency's or official's identity, first amendment and expression issues (particularly on blogs or in comments), publicity rights (need for permission to publish photos, etc.), accessibility (nondiscrimination and ADA requirements), and privacy implications and commercial practices with respect to the stewardship of data. Again, please treat this as an unranked, non-exclusive list.

6. Does my agency need a social media policy?

Some existing laws and policies already apply to social media use, such as state ethics law and current agency ethics and internet use policies. Because social media tools are new and their use is developing, agencies may find it useful to establish a policy that communicates the agency's expectations. Agencies are encouraged to use an interdisciplinary approach to developing a social media policy – consider involving staff responsible for management and policy, communications, IT (including security), relevant programs, HR, legal matters, contracts, public records, and records retention. Review by the agency's assigned assistant attorney general is recommended.

“Social media policy” can cover various topics, including – but not limited to – authority to establish accounts, the purpose for which such tools can be used, who can use the tools, security concerns, records-related matters, and interactions with the public. Other policy considerations may include business reasons to use or not use particular social media tools, whether an agency should use multiple sites or tools, and whether content posted on social media sites should also be posted on a “dot gov” site.

7. What other steps should an agency take to manage risk around social media use?

Agencies are strongly encouraged to educate all employees about safe and appropriate use of social media at work. This should include information about applicable policies and the agency's expectations of its employees.

8. Where can I get more information about legal concerns regarding social media?

It's the answer you expect: Contact your assigned assistant attorney general, who is very welcome to contact me if I can be of assistance.

9. What costs are associated with using social media? It's free, right?

While there is generally no charge to establish a social media account, state agency use of social media is likely to give rise to several types of startup and ongoing costs. Among the most significant of these is the need to monitor interactive sites for inappropriate content on a regular basis.