THE INTERSECTION OF THE LAW AND THE INTERNET AND TECHNOLOGY FOR IAFF AFFILIATES

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INTRODUCTION

This manual is designed to provide basic information and to serve as a starting point for assistance as you encounter legal issues involving the Internet and electronic devices (including cell phones, laptops, and tablets). The manual is not intended to be legal advice or a substitute for getting specific legal assistance from a qualified attorney if it is needed. If your local requires legal advice or assistance on any of the matters discussed in this manual, you should contact your local legal counsel or your District Vice President to obtain advice appropriate to the particular situation. The purpose of this manual is to provide a basic guide to rights and responsibilities related to the Internet and technology.

There are two sections to this manual: (1) IAFF Members' Speech and Search and Seizure Rights at Work and (2) IAFF Websites and Social Media. These sections are organized around the main ways your local will encounter legal issues with speech, the Internet and technology: (1) as a representative of employees who speak out on matters of importance to your members; and (2) as an organization that has its own legal responsibilities if it hosts a website and/or has a presence on social media.

The first section, IAFF Members' Speech and Search and Seizure Rights at Work, primarily addresses the First and Fourth Amendments of the U.S. Constitution. The First Amendment is the source of public employee free speech rights and protects employees from discipline for legitimately expressing their views on matters of public concern. The Fourth Amendment protects public employees from unreasonable searches in the workplace. Depending on fire department policies, your members could face discipline or discharge for posting certain speech or content online. Your members may also have questions about their fire department's ability to search the cell phones or other electronic devices that they use at work. This manual describes the legal landscape in these areas.

The second section, IAFF Websites and Social Media, provides basic considerations for your local in hosting a website or establishing a presence on a social media platform. This section addresses issues such as: maintaining ownership, determining access, avoiding defamation or copyright/trademark issues, and moderating comments. A website or social media page can be a powerful tool for communicating with members and sharing information. This manual provides basic guidance to avoid or limit legal exposure while maintaining your local's presence online.

IAFF MEMBERS' INTERNET RIGHTS AT WORK

The First Amendment

The First Amendment to the United States Constitution provides that the government "shall make no law... abridging the freedom of speech ... or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The First Amendment and its protections are applicable to the states and their local governments through the due process clause of the Fourteenth Amendment.[1]

Special circumstances arise when a federal, state, or local governmental entity acts as an employer. Accordingly, the First Amendment rights of public employees are more limited than those of ordinary private citizens. As discussed more fully below, the limits on the First Amendment rights of public employees can result in a public employee being disciplined or even terminated from employment for exercising speech online.

In order to state a claim that the government employer's discipline of a public employee for his or her speech constitutes unlawful retaliation in violation of the First Amendment, the employee must demonstrate that: (1) the speech is in fact protected under the First Amendment, (2) the employee suffered an adverse employment action, and (3) there is a causal connection between the protected speech and the adverse employment action.[2] Each of these elements is addressed in turn below.

Public employees do not relinquish their First Amendment rights altogether by accepting government employment. However, the U.S. Supreme Court has long recognized that in its capacity as an employer, the government may lawfully discipline employees for their speech, both on the job and off the job, in certain instances.[3] The Supreme Court has explained the rationale for allowing government employers to restrict, to some degree, the First Amendment rights of its employees as follows: "When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her."[4] Thus, a public employee's free speech rights under the First Amendment exist at the "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[5] Because online activity is speech, it can become the subject of retaliatory discipline and is analyzed under the same framework as other forms of speech for First Amendment purposes.[6]

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[1] *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

[2] *See Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003). It is important to note that once the plaintiff employee makes this initial showing, the burden then shifts to the employer to demonstrate it would have taken the adverse action against the employee even in the absence of the protected activity. If the employer meets this burden, the burden shifts back to the employee to show that the employer's actions were a pretext for illegal retaliation. *See Morris v. City of Chillicothe*, 512 F.3d 1013, 1019 (8th Cir. 2008).

[3] *See generally Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983).

[4] Waters v. Churchill, 511 U.S. 661, 675 (1994) (plurality opinion). See also Pickering, 391 U.S. at 568 ("[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.").

[5] *Pickering*, 391 U.S. at 568.

[6] *See, e.g., Fenico v. City of Philadelphia*, No. 22-1326, 2023 BL 195800 (3d Cir. June 08, 2023).

Matters of Public Concern

The determination of whether a public employer may lawfully discipline an employee for his or her speech requires courts to undergo a multistep analysis.[7] This is a highly fact-specific inquiry, and each case must be analyzed on a case-by-case basis. First, the court must determine whether the speech at issue was made by the employee as a private citizen rather than in his or her capacity as a public employee.[8] If the speech was expressed as part of the employee's official job duties, it is made as an "employee" and not as a "citizen," and therefore, the speech is unprotected.[9] It is important to note, however, that just because the speech includes information related to, or learned through, public employment, this does not necessarily transform speech into employee speech.[10] Rather, the critical question is whether the speech at issue is *itself* ordinarily within the scope of an employee's duties, not whether the speech merely concerns those duties.[11] Further, speech made in one's capacity as a union member or official will likely be considered citizen speech, not speech in the capacity of an employee.[12]

If the speech at issue was made in the employee's capacity as a private citizen, the court will proceed to consider the second step of the analysis: whether the speech relates to a matter of public concern. This determination is made by looking at the content, form, and context of the speech.

The question of whether speech relates to a matter of public concern is a highly fact-specific inquiry, but there are general guidelines that are useful for members to keep in mind. The Supreme Court has explained that speech involves a matter of public concern "when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."[13] On the other hand, speech that deals with "individual personnel disputes and grievances" that "would be of no relevance to the public's evaluation of the performance of governmental agencies" generally is not of public concern.[14]

Common examples of speech found to relate to matters of public concern include speech addressing misuse of public funds or corruption in a public program,[15] budget cuts to a public program,[16] and matters related to public safety, including a fire department's ability to quickly and effectively respond

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[7] *Id.; Connick*, 461 U.S. at 147.
[8] *See Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).
[9] *Id.,* at 421. See also *Zimmerman v. Cherokee County*, 925 F. Supp. 777, 782 (N.D. Ga. 1995) (noting that "an employee whose job requires extensive public contact on the employer's behalf does not possess significant First Amendment protection") (citing *Bates v. Hunt*, 3 F.3d 374, 378 (11th Cir. 1993)).
[10] *Lane v.* Franks, 573 U.S. 228, 240 (2014) (citing *Garcetti*, 547 U.S. at 421).
[11] *Id.* See also *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1058 (9th Cir. 2013) (internal citations and quotations omitted) ("We have held that a public employee speaks as a private citizen if the speaker had no official duty to make the questioned statements, or if the speech was not the product of performing the tasks the employee was paid to perform."). It should be noted that the question of the scope and content of an individual's job responsibilities is a question of fact. *Id.*
[12] *See, e.g., Boulton v. Swanson*, 795 F.3d 526, 534 (6th Cir. 2015) (holding that "speech in connection with union activities is speech 'as a citizen' for the purposes of the First Amendment"); *Montero v. City of Yonkers*, 890 F.3d 386, 390 (2d Cir. 2018) (internal citations and quotations omitted) (concluding that where police officer and union official's union remarks were not "part-and-parcel of his concerns about his ability to properly execute his official job duties," he spoke as a private citizen for purposes of his First Amendment right to free speech); *Olendzki v. Rossi*, 765 F.3d 742, 747 (7th Cir. 2014) ("[W]hen a public employee speaks in his capacity as a union official, his speech is not within the purview of his 'official duties.'").
[13] *Lane*, 573 U.S. at 214 (internal citations and quotations omitted).
[14] *Ellins*, 710 F.3d at 1057 (citing *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983)).
[15] *Lane*, 573 U.S. at 214; *Garcetti*, 547 U.S. at 425 ("Exposing governmental inefficiency and misconduct is a matter of considerable significance").
[16] *Bruce v. Worcester Reg'l Transit Auth.*, 34 F.4th 129, 131 (1st Cir. 2022).

to a fire.[17] By contrast, mere personnel grievances – such as complaints about internal personnel rules or policies, or statements about disputes with an employer regarding compensation or benefits – are typically not considered matters of public concern.[18]

Finally, if the court determines that the speech that is the subject of a public employee's discipline was made in the employee's capacity as a private citizen and relates to a matter of public concern, the court must balance the employee's interest in uttering the speech and the government's interest, as an employer, in promoting the efficiency of the public services it performs through its employees.[19] Typically, for a court to find that the government employer's interest in a "smoothly-running office" outweighs a public employee's First Amendment rights, the employer must demonstrate "actual, material and substantial disruption or reasonable predictions of disruption" in the workplace.[20]

On-Duty vs. Off-Duty

As a general rule, on-the-clock speech at the employer's place of business is more likely to be deemed speech as a public employee as compared to "off-the-clock" speech away from the office.[21]

For instance, a fire chief acted as a government agent when emailing firefighters about a job-related issue from his official account using his official title.[22] Similarly, a fire fighter's speech was not protected by the First Amendment when he spoke while on duty and used workplace resources on-the-clock, unavailable to ordinary citizens, to gather the information conveyed in his voicemail to a government official.[23]

By contrast, a fire captain acted as a private citizen when he called city council members from his home as a concerned taxpayer.[24] And, a public school bus driver was deemed engaging in protected, off-duty, political speech when she wrote a Facebook post that was critical of a school board member who was running for a higher office.[25]

Nevertheless, off-duty speech in and of itself is not guaranteed to be protected by the First Amendment if it is so inflammatory that it could be disruptive at work. The "First Amendment does not provide a right to continued government employment in a capacity that is inconsistent with, and undermined by, one's off-duty expressive conduct."[26] "Stated more simply, one who cheers for the robbers has no right to ride with the police."[27] Off-duty speech "by a police officer that suggests bias against racial or religious minorities can hinder that officer's ability to effectively perform his or her job duties and undermine the department's ability to effectively carry out its mission."[28]

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[17] *Moore v. City of Kilgore*, 877 F.2d 364, 370 (5th Cir. 1989); *Powell v. Basham*, 921 F.2d 165, 167 (8th Cir. 1990).
[18] *Garcetti*, 547 U.S. at 420 (noting that "while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance'") (quoting Connick, 461 U.S. at 154); *see also Hyland v. Wonder*, 972 F.2d 1129, 1137 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2337 (1993) ("Speech focused solely on internal policy and personnel grievances does not the First Amendment.").
[19] *Pickering*, 391 U.S. at 568.
[20] *Robinson v. York*, 566 F.3d 817, 824 (9th Cir. 2009) (citing *Waters v. Churchill*, 511 U.S. 661, 673 (1994)).
[21] *DeCrane v. Eckart*, 12 F.4th 586, 596 (6th Cir. 2021); *Locurto v. Giuliani*, 447 F.3d 159, 175 (2d Cir. 2006).
[22] *Holbrook v. Dumas*, 658 F. App'x 280, 288–89 (6th Cir. 2016).
[23] *Millspaugh v. Cobb Cnty. Fire & Emergency Servs.*, No. 22-10132, 2022 BL 418435, *10 (11th Cir. Nov. 22, 2022).
[24] *Stinebaugh v. City of Wapakoneta*, 630 Fed. Appx. 522 (6th Cir. 2015).
[25] *Thibault v. Spino*, 431 F. Supp. 3d 1, 11 (D. Conn. 2019).
[26] *Sims v. Metro. Dade Cnty.*, 972 F.2d 1230, 1236 (11th Cir. 1992).
[27] *Id.*
[28] *Hernandez v. City of Phoenix*, 43 F.4th 966, 979 (9th Cir. 2022)

As discussed further below, the internet and social media has given public employees the ability to post, share, or even "like" comments as off-duty speech that still may be deemed unprotected as inflammatory or disruptive speech disruptive of the government employer's ability to fulfill its mission. This manual will discuss some recent examples of those issues.

The Chain of Command

The key U.S. Supreme Court case on determining protected "off duty" speech from unprotected "on duty" speech is *Garcetti v. Ceballos*.[29] In that case, a deputy district attorney ("DA") prepared a memo for his supervisors recommending that the DA's office should not proceed with a case based on his analysis of what he believed was a fatally flawed search warrant.[30] The Supreme Court explained that because he wrote his memo as part of his employment duties, he was not entitled to First Amendment protection for the memo's contents.[31] Following that decision, courts have used the concept of "chain of command" to help analyze whether speech was made pursuant to an employee's official duties in determining First Amendment protection.

Courts have held that when "a public employee raises complaints or concerns up the chain of command at his workplace about [their] job duties, that speech is undertaken in the course of performing [their] job."[32] By contrast, "[i]f a public employee takes [their] job concerns to persons outside the work place... then those external communications are ordinarily not made as an employee, but as a citizen" and may be protected.[33]

A deputy sheriff in New Mexico was fired for "arresting his supervisor's acquaintance, reporting another officer's misconduct, and generally refusing to cover up wrongdoing at the Roosevelt County Sheriff's Office."[34] The US Court of Appeals for the Tenth Circuit held that the deputy sheriff's speech was not protected by the First Amendment because he "was speaking to Lt. Sanchez, who had a higher rank, who completed his job performance report, and who [the plaintiff] identifie[d] in his appellate brief as 'his supervisor.'"[35]

An Illinois State Police officer who was stationed as a "range officer" responsible for overseeing an indoor firing range discovered that he had elevated levels of lead in his blood because of exposure at the range and complained to his supervisors.[36] The US Court of Appeals for the Seventh Circuit held that because he was "responsible for the safe operation of the firing range and consequently that he had a responsibility, as part of his job duties, to report his concerns about environmental lead contamination", going up the chain of command to alert his supervisors about the lead exposure was not protected by the First Amendment.[37]

A Washington DC Public Schools ("DCPS") employee who was hired in response to a court order mandating specific standards for the school system provide adequate transportation to students with disabilities was fired for candidly disclosing the school system's failings to the Special Master

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[29] 547 U.S. 410 (2006).
[30] *Id.* at 414.
[31] *Id.* at 415.
[32] *Dahlia*, 735 F.3d at 1074; *See Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008).
[33] *Gibson v. Kilpatrick*, 838 F.3d 476, 482 (5th Cir. 2016); *see e.g., Brooke v. County of Rockland*, 2021 BL 74925, *8-*9 (S.D.N.Y. Mar. 03, 2021); *Root v. Mont. Dep't of Corr.*, 2021 BL 102010, *4 (D. Mont. Mar. 22, 2021).
[34] *Ilison v. Roosevelt Cty. Bd. of Cty. Comm'rs*, 700 F. App'x 823, 825 (10th Cir. 2017).
[35] *Id.* at 829.
[36] *Bivens v. Trent*, 591 F.3d 555, 557 (7th Cir. 2010).
[37] *Id.* at 560.

appointed to oversee the court order.[38] Because interacting with the Special Master was effectively part of his chain of command in his official duties, the court held that "in each communication at issue on appeal he acted in furtherance of that duty by exposing the efforts of DCPS officials to block compliance" and, therefore, his speech was not protected by the First Amendment.

A budget officer at a college disagreed with her supervisor about whether certain expenses could be inflated in a budget report to show a multi-million dollar deficit instead of a surplus. The US Court of Appeals for the Third Circuit held that she "was not speaking outside her chain of command" when she contradicted her supervisor's position by "responding, in her official capacity, to a direct question by a member" of the school's Enrollment Management Committee.[39]

By contrast, a government employee responsible for vehicle safety inspections in Puerto Rico was terminated after going outside the chain of command to complain about a seemingly corrupt directive from her supervisors that she was not to issue safety citations to drivers of luxury vehicles was protected by the First Amendment because such concerns were outside of her official duties.[40]

A correctional officer's communications with a state senator and the inspector general were protected speech, but her internal reports to supervisors at the Department of Corrections were not.[41]

The "chain of command" analysis has become a component of the test that courts use to determine whether employee speech is private speech protected by the First Amendment or unprotected speech made pursuant to official duties. Consequently, communications within the "chain of command" to supervisors, management officials and Department employees is much less likely to be deemed protected by the First Amendment than communications outside of the "chain of command" to the public, the press and government officials about matters of public concern.

When the Union Speaks

When an employee speaks in their capacity as a union officer or representative, they are likely engaging in protected speech as a private citizen, rather than pursuant to their official fire fighter duties.[42] That protection is not exclusive to union leaders, instead it applies so long as the speaker is truly speaking on behalf of the union.[43]

Courts have found speech made in the context of union activity to constitute a matter of public concern.[44] While individual complaints about internal personnel rules or policies, or statements about disputes with an employer regarding compensation or benefits, are typically not considered matters of public concern, collective personnel grievances raised by unions on behalf of their membership may be protected.[45]

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[38] *Winder v. Erste*, 566 F.3d 209, 215 (D.C. Cir. 2009).
[39] *Bradley v. W. Chester Univ. of Pa. State Sys. Higher Educ.*, 880 F.3d 643, 653 (3d Cir. 2018).
[40] Mercado-Berrios v. Cancel-Alegria, 611 F.3d 18, 28 (1st Cir. 2010).
[41] *Freitag v. Ayers*, 468 F.3d 528, 546 (9th Cir. 2006).
[42] *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1059–60 (9th Cir. 2013); *see Fuerst v. Clarke*, 454 F.3d 770, 774 (7th Cir. 2006); *Am. Fed'n & Mun. Emples., N.M. Council 18, Local 2499 v. Bd. of Cty. Comm'Rs for Bernalillo Cty.*, No. CV 19-001 MV/LF, 2021 BL 79466, *11 (D.N.M. Mar. 5, 2021).
[43] *Hawkins v. Boone*, 786 F. Supp. 2d 328, 335 (D.D.C. 2011).
[44] *See, e.g., Ellins*, 710 F.3d at 1058 (citing *Boddie v. City of Columbus*, 989 F.2d 745, 750 (5th Cir. 1993) ("[S]peech in the context of union activity will seldom be personal; most often it will be political speech.").
[45] *See, e.g., Ellins*, 710 F.3d at 1049; *see also Lambert v. Richard*, 59 F.3d 134, 136–37 (9th Cir. 1995) (where public library employee spoke in her capacity as union representative before city council and asserted that library director's abusive and intimidating management of employees was having adverse effect on service to the public, assertions related to matter of

Not all speech made in connection with a union, however, is protected. For example, an individual with a personnel issue that would ordinarily be treated as unprotected private speech cannot transform that matter into protected speech simply by filing an individual union grievance.[46]

Retaliation by Employers

An essential element of a First Amendment claim is that the employer must have taken an adverse action that punished the employee in retaliation for their speech. The type of punishment suffered by the employee "need not be particularly great in order to find that rights have been violated."[47] However, the employee must still demonstrate the loss of some "valuable governmental benefit or privilege."[48] Termination of employment,[49] transfer to a less desirable position,[50] or any other action that "negatively affects an employee's salary, title, position, or job duties" can constitute an adverse employment action.[51]

In different courts, there are different minimum standards for the severity of the retaliatory consequences by the employer before an employee can bring a lawsuit. For example, some courts require the retaliation to be severe: "termination, cut in pay or benefits, and changes that affect an employee's future career prospects."[52] In those courts, "minor changes in working conditions and no reduction in pay or benefits will not constitute an adverse employment action"[53] unless the "cumulative effect causes an employee to suffer 'serious employment consequences' that adversely affect or undermine [their] position."[54] By contrast, other courts recognize that "[d]epending on the circumstances, even minor acts of retaliation can infringe on an employee's First Amendment rights."[55] In those courts, an action such as placing a public employee on administrative leave – which prevented him from being able to take a promotional exam – would constitute an adverse employment action that could allow the employee to sue.

In any First Amendment retaliation claim, the employee must establish causation between the speech and the fact that some punishment was imposed by the employer in retaliation for the speech. As the U.S. Supreme Court has explained: "It is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must cause the injury. Specifically, it must be a 'but-for' cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive."[56] If the employer can successfully argue that the employee was penalized for some misconduct unrelated to their speech, the employer may succeed in defeating a First Amendment claim.

Courts have used this framework to analyze whether speech is protected by the First Amendment for decades. The following sections will discuss how this framework has been applied to speech in the context of the Internet.

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public concern).

[46] *Weintraub v. Bd. of Educ. Of City Sch. Dist. Of the N.Y.*, 593 F.3d 196, 201–02 (2d Cir. 2010).

[47] *Hyland*, 972 F.2d at 1135 (quoting *Elrod v. Burns*, 427 U.S. 347, 359 n. 13, (1976)).

[48] *Nunez v. City of Los Angeles*, 147 F.3d 867, 875 (9th Cir. 1998) (internal citations and quotations omitted).

[49] *James v. Tex. Collin Cnty.*, 535 F.3d 365, 376 (5th Cir. 2008).

[50] *Akins v. Fulton Cnty.*, 420 F.3d 1293, 1300 (11th Cir. 2005).

[51] *Id.*

[52] *Charleston v. McCarthy*, 926 F.3d 982, 989 (8th Cir. 2019) (quoting *Wagner v. Campbell*, 779 F.3d 761, 766 (8th Cir. 2015).

[53] *Id.* (quoting *Spears v. Mo. Dept of Corr. & Human Res.*, 210 F.3d 850, 853 (8th Cir. 2007).

[54] *Id.* (quoting *Shockency v. Ramsey County*, 493 F.3d 941, 948 (8th Cir. 2007); see also *Lincoln v. Maketa*, 880 F.3d 533, 543 (10th Cir. 2018).

[55] *Coszalter v. City of Salem*, 320 F.3d 968, 975 (9th Cir. 2003); *see Dahlia v. Rodriguez*, 735 F.3d 1060, 1078 (9th Cir. 2013).

[56] *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019).

First Amendment and the Internet

Member Posts on Social Media and Websites

Just like oral speech or speech published in a newspaper or magazine, posts and comments on the Internet and on social media are "speech" for purposes of the First Amendment.[57] Indeed, the simple act of "liking" a post on social media may constitute First Amendment speech.[58] Therefore, a public employee's online presence, like more traditional forms of speech, can became the subject of retaliatory discipline.

Because online activity is speech, the same analysis discussed above applies when determining whether a public employee's discipline for such activity constitutes unlawful retaliation in violation of the First Amendment. That is, a court will assess whether: (1) the speech was protected First Amendment activity (*i.e.*, whether it was made by the employee in his or capacity as a private citizen and related to a matter of public concern); (2) the employee suffered an adverse employment action; and (3) whether there exists a causal connection between the protected First Amendment activity and the adverse employment action.

Protected Postings — Speech

As explained above, with regard to the first element of the analysis, speech that would otherwise constitute protected First Amendment activity can still be unprotected where the public employer's interest in efficient operations outweighs the employee's right to free speech. When analyzing speech online as opposed to more traditional forms of speech, this element is where the focus of the court's analysis often lies. In particular, because of the widespread dissemination of speech on social media, courts are more willing to find this speech to be disruptive to the operations of the workplace and thus not protected. In other words, it is more likely that the government employer will be able to show an adequate justification for the adverse employment action in cases of speech that is published online versus other forms of speech. In fact, courts analyzing First Amendment retaliation claims have recognized that "[a] social media platform amplifies the distribution of the speaker's message—which favors the employee's free speech interests—but also increases the potential, in some cases exponentially, for departmental disruption, thereby favoring the employer's interest in efficiency."[59]

A recent example out of Florida is illustrative of this principle. In *McCullars v. Maloy*, the court considered whether the public employer – the clerk's office of a Florida state court – violated its employee's First Amendment rights when it terminated him for criticizing the newly-elected Florida State Attorney's announcement that her office would not pursue the death penalty in capital murder cases.[60] In comments made from his personal account to a Facebook post discussing the State Attorney's announcement, the employee wrote that "maybe [the State Attorney] should get

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[57] *See, e.g., Grutzmacher*, 851 F.3d at 342.
[58] *Id.*
[59] *Id.* at 345.
[60] No. 6:17-cv-1587-Orl-40GJK, 2018 BL 467571 (M.D. Fla. Dec. 17, 2018).

the death penalty" and that the State Attorney "should be tarred and feathered if not hung from a tree."[61] When the employee's Facebook comments went viral, the clerk's office received immense backlash, including a "barrage" of angry phone calls and email complaints from outraged citizens, which disrupted the office's functions.[62] Additionally, several of the plaintiff employee's coworkers refused to work with him in light of the comments.[63]

The court found that while the employee's comments – which amounted to criticism of a public official for a publicly-announced policy decision – were made in the employee's capacity as a private citizen and addressed a matter of public concern, the balance of interests weighed in the employer's favor.[64] Specifically, the court found that the ensuing "disharmony" to the workplace, disruption of the office's operations, and the damage to the integrity of the office justified the employer's decision to fire the employee.[65]

In another recent example, a former employee of a city's emergency communications center was terminated after using her personal Facebook account to respond to a friend's post about the 2016 presidential election with a racial slur.[66] The former employee sued the city, alleging that her termination was retaliation for her protected speech activity under the First Amendment.[67] The trial court ruled in favor of the former employee, finding that the speech was made in her capacity as a private citizen and pertained to a matter of public concern (*i.e.*, the presidential election).[68] However, on appeal, the U.S. Court of Appeals for the Sixth Circuit reversed the lower court, finding that the speech was disruptive to workplace relations and detracted from the agency's reputation as an unbiased public service.[69] In so holding, the Sixth Circuit emphasized that the agency's mission was to provide "the vital link between the citizens and first responders for all emergency and non-emergency calls, and to do so in an efficient, court[eous], and polite manner," and that the employee's speech, amplified through social media, undermined public trust in the agency's ability to do so.[70]

As these cases demonstrate, divisive online speech increases the potential for departmental disruption, and thus, for a court to find that the speech is unprotected. Accordingly, members should exercise special caution when engaging in speech online.

Taking Photos or Videos on the Job

In the public sector, the legality of an employee posting or disseminating pictures or videos taken on the job for public consumption is analyzed under the First Amendment framework.[71] Whether a fire fighter has a First Amendment right to post images or videos taken on the job online or on social media will depend on whether the post was made by the fire fighter in his or her capacity as a private citizen and whether it involves a matter of public concern. And again, speech – including images and videos – that satisfies these criteria may nonetheless be stripped of First Amendment protection if the employer can demonstrate that its interest in promoting the efficiency of its employees' public

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[61] *Id.*, at *1.
[62] Id., at *2.
[63] *Id.*
[64] *Id.*, at *6.
[65] *Id.*, at *7.
[66] *Bennett v. Metro. Gov't of Nashville & Davidson Cnty.*, 977 F.3d 530, 533 (6th Cir. 2020).
[67] *Id.*
[68] *Id.*
[69] *Id.* at 545.
[70] *Id.* at 541–42.
[71] *See, e.g., Thaeter v. Palm Beach Cnty. Sheriff's Office*, 449 F.3d 1342, 1355 (11th Cir. 2006).

services outweighs the employee's interest in publishing the photos or videos. Importantly, when the employee's publishing of the photos or videos at issue violates a specific rule or regulation to which the employee is subject, the employer's interest in restricting the publication is heightened.[72]

A recent case in New York federal court is illustrative of this principle. In *Squicciarini v. Vill. of Amityville*, the court considered whether a fire department violated an employee fire fighter's First Amendment right to free speech by disciplining him for posting a political message on Facebook while donning fire department gear.[73] Specifically, the fire fighter made his profile picture one of him wearing department-issued bunker gear (which clearly displayed the name of the fire department) while holding his newborn baby, along with a caption stating, "We are voting Nick Lalota for Mayor."[74] The fire fighter was suspended for violating the department's social media policy, and he filed suit alleging that the suspension violated, among other things, his freedom of speech under the First Amendment.[75] The Court found that the photo of the fire fighter in his department gear, accompanied by the political endorsement, could reasonably give the impression to the public that the department as a whole was endorsing this candidate for mayor and could therefore disrupt the department's operations.[76] Under these circumstances, the court ultimately concluded that the department did not violate the fire fighter's free speech rights by limiting his speech in this manner.[77]

In another example, a federal court in Georgia upheld the termination of a fire fighter for pictures she posted on her private MySpace page. The posts at issue included a picture of a group of her fellow fire fighters, which she obtained without permission from the city's website, and partially undressed pictures of herself.[78] The fire fighter stated that she posted the picture of her fellow fire fighters to express her pride in the diversity of the department, and that the "provocative" pictures were purely of a personal nature.[79] The fire department defended its decision to terminate the fire fighter by arguing that the sexually suggestive photos, posted in conjunction with photos of department employees, brought "discredit" to the department and could damage the "mutual respect" among the department's ranks that is crucial to paramilitary organizations.[80] The court agreed with the department and concluded that, even assuming *arguendo* that the fire fighter was speaking as a private citizen on matters of public concern in posting these photographs to her MySpace page, any interest she had in disseminating the photographs could not outweigh the department's interest in protecting its public image.[81]

Members should exercise caution when posting personal photographs or videos connecting them to the workplace. Additionally, members should be especially aware of the general prohibition against taking or disseminating photographs or video recordings of persons receiving emergency assistance. Additionally, some states have enacted laws that criminalize these actions. For instance, Connecticut's Joshua's Law, signed into law in 2011, makes it a criminal offense for a first responder providing medical or other assistance to a person to take or disseminate photographs or video records of the person without his or her consent.[82] Cathy's Law in New Jersey similarly punishes first responders who take photos or videos depicting individuals at the scene of an emergency "*except in accordance with applicable rules, regulations, or operating procedures* of the agency employing

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[72] *Id.* (citations omitted).
[73] No. 17-cv-6768 (DRH), 2019 BL 89304 (E.D.N.Y. Mar. 15, 2019).
[74] *Id.*, at *2.
[75] *Id.*
[76] *Id.*, at *12.
[77] *Id.*
[78] *Marshall v. Mayor & Alderman of Savannah*, 4:08-cv-00024-JRH-GRS (Doc. 47) (S.D. Ga. June 9, 2009) *aff'd* 366 Fed. Appx. 91 (11th Cir. 2010).
[79] *Id.*, at 24.
[80] *Id.*, at 29.
[81] *Id.*
[82] Conn. Gen. Stat. § 53-341c.

the first responder" or to disclose (*i.e.* disseminate, copy, post, forward or share) such a photo/video without the individual's **prior** *written* **consent**.[83] In 2022, New York state enacted Bianca and Caroline's law, which criminalizes the "unlawful dissemination of a personal image" of a victim of a crime.[84] Locals should take care to be aware of similar laws in their respective jurisdictions.

Please also be aware of the potential risk of civil liability if first responders take photos or video of an incident for their own interest or to share with others in a non-work capacity that invades the privacy of the victims. Individual members of the Los Angeles Fire Department, as well as the Department and the County, were sued for sharing pictures they had taken of the wreckage of the helicopter crash that killed Kobe Bryant and his young daughter.[85] The lawsuit alleged that the dissemination of the photos was an invasion of the Bryant family's privacy and subjected the family to emotional distress.[86] The case ultimately settled for $30 million.[87]

Finally, locals should be aware of the federal Health Insurance Portability and Accountability Act (HIPAA). Under HIPAA, which developed standards for the protection of patients' personal health information, covered entities are subject to various privacy rules.[88] In the context of emergency response, HIPAA violations may arise where photographs of patients containing the patient's face or other identifying information are disclosed to third parties (including through email, social media, etc.) without the patient's consent. Notably, not all health care providers are covered entities for purposes of HIPAA; rather, a health care provider is only subject to the statute if it transmits electronic information.[89] Regardless, because of the likelihood of workplace discipline, criminal punishment, and/or civil liability, it is prudent for locals to advise their members to not take, disseminate, or publish photographs or videos of individuals receiving aid on the scene of an emergency without the individuals' consent.

First Amendment Right to Associate "Union Activities Protections"

While not expressly included in the text of the amendment itself, implicit in the First Amendment's protections is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends," including, specifically, the right to associate together in groups to advance shared beliefs and ideas.[90] Unsurprisingly, then, the First Amendment right to associate extends to a public employee's right to associate with a labor union (including the right to organize, solicit members for, and belong to a union).[91] Inherent in a public employee's right

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[83] N.J.S. § 2A:58D-2.
[84] N.Y. Acts, L 2022, ch. 805 §§ 250.70 – 250.72.
[85] KJ Hiramoto, *Kobe Bryan Lawsuit. Vanessa Bryant settles with LA County for nearly $30m over leaked crash scene photos,* Fox 11 Los Angeles (Feb. 28, 2023), https://www.foxla.com/news/kobe-bryant-lawsuit-vanessa-bryant-settles-remaining-claims-vs-la-county-over-leaked-crash-scene-photos.
[86] *Id.*
[87] *Id.*
[88] *See generally* 45 C.F.R. §§ 160, 164.
[89] *See* 42 U.S.C. § 1320d–1(a).
[90] *Mote v. Walthall*, 902 F.3d 500, 506 (5th Cir. 2018).
91 *See, e.g., Vicksburg Firefighters Ass'n v. City of Vicksburg,* 761 F.2d 1036, 1039 (5th Cir. 1985) ("The first amendment's freedom of association provides both public and private employees the right to organize, solicit members for, and belong to labor unions.") (citing *Smith v. Ark. State Highway Emps. Local 1315*, 441 U.S. 463, 464 (1979) ("The First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances."); *Fire Fighters Local 3808 v. City of Kansas City*, 220 F.3d 969, 972 (8th Cir. 2000) ("The First Amendment freedom of association, applied to the states by the Fourteenth Amendment, provides [union president] and other union

to associate with a labor union is a constitutional protection against retaliation for such association.[92]

The framework used to govern retaliation claims by public employees under the First Amendment is generally the same for associational activity as it is for speech activity.[93] However, the federal courts of appeal are divided on whether the "public concern" requirement discussed above in the context of First Amendment speech applies to First Amendment freedom of association claims.[94] For instance, the Second, Fourth, Sixth, Seventh, and Ninth Circuits have applied this "public concern" requirement to freedom of association claims, whereas the Fifth and Eleventh Circuits have expressly declined to do so.[95] Some courts have avoided this question altogether, finding that in the "specific context of public employee labor unions," a worker need not demonstrate that his association with the union be a matter of public concern, because "the unconstitutionality of retaliating against an employee for participating in a union is clearly established."[96]

However, even where the public concern requirement is applicable to a free association claim, courts have expressed "no doubt that an employee who is disciplined solely in retaliation for his membership in and support of a union states a valid First Amendment claim."[97]

First Amendment Best Practices

Based on the legal rights and standards described above, these are general best practices to keep in mind regarding First Amendment speech rights:

- Recognize that protection for your speech applies only to matters of public concern
- Consider the forum where you are speaking and the difference between statements to the public vs. statements to a supervisor.
- Document your statements and, if possible, have friendly witnesses.
- Use reasonable and constructive language.
- Avoid speech that could be considered "disruptive."
- Be careful on social media and assume that everyone can see your posts.

members with a constitutionally protected right to organize a labor union, even though they are public employees."); *State Emps. Bargaining Agent Coal. v. Rowland*, 718 F.3d 126, 134 (2d Cir. 2013) (internal citations and quotations omitted) (recognizing the "well-established principle that union activity is protected by the First Amendment").

[92] *See O'Laughlin v. Palm Beach Cnty.*, 30 F.4th 1045, 1053–54 (11th Cir. 2022).

[93] *Harmon v. Dallas Cnty.*, 294 F. Supp. 3d 548, 565 (N.D. Tex. 2018), *aff'd* 927 F.3d 884 (5th Cir. 2019).

[94] *See Mullen v. Tiverton Sch. Dist.*, 504 F. Supp. 3d 21, 35 n. 5 (D.R.I. 2020) (recognizing the "disagreement between Courts of Appeals on whether Connick's public concern requirement for freedom of speech claims also applies to freedom of association claims") (citing *Davignon v. Hodgson*, 524 F.3d 91, 108 n. 9 (1st Cir. 2008)).

[95] *See Cobb v. Pozzi*, 363 F.3d 89, 102–03 (2d Cir. 2004) (applying the public concern test to association claims); *Edwards v. City of Goldsboro*, 178 F.3d 231, 249–50 (4th Cir. 1999) (same); *Griffin v. Thomas*, 929 F.2d 1210, 1214 (7th Cir. 1991) (same); *Boals v. Gray*, 775 F.2d 686 (6th Cir. 1985) (same); *Hudson v. Craven*, 403 F.3d 691 (9th Cir. 2005) (applying the public concern test to hybrid speech/association claims). *But see Breaux v. City of Garland*, 205 F.3d 150, 157 n. 12 (5th Cir. 2000) (not applying the public concern test to association claims); *Hatcher v. Bd. of Pub. Educ. and Orphanage*, 809 F.2d 1546, 1558 (11th Cir. 1987) (same).

[96] *Shrum*, 449 F.3d at 1139 (internal quotations and citations omitted).

[97] *Boals*, 775 F.2d at 693; see also *Myers v. City of Wilkes-Barre*, 448 F. Supp. 3d 400, 415 (M.D. Pa. 2020) (internal quotation and citation omitted) (recognizing that "membership in a public union is always a matter of public concern").

If a fire department has begun disciplining an officer or member for their speech:

- Keep a careful record of events as they unfold.
- Keep track of dated and signed statements, news stories, articles, and internal records.
- Calmly follow all policies and procedures.
- Be sure to follow all steps for due process and appeals procedures in response to any adverse action taken in response to a member's speech.

If your local requires legal advice or assistance on any First Amendment matter, you should contact your local legal counsel or your District Vice President to obtain advice appropriate to the particular situation. The IAFF Guardian Policy may even be appropriate for any union leaders who are disciplined or discriminated against because of their union activities – including for their speech.

Fourth Amendment and Internet/Electronic Privacy

The Fourth Amendment to the U.S. Constitution is an important source of rights for Internet use and electronic devices like cell phones, tablets, or Apple watches. Fire departments across the country have adopted policies that affect members' privacy rights – including computer use policies, public disclosure/open records policies, and cell phone search policies. When the Fourth Amendment applies, it protects IAFF members from unreasonable intrusions by the government into their private communications, photos, and files.

The Fourth Amendment guarantees that people shall "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[98] A Fourth Amendment "search" is when the government invades an aspect of a person's "expectation of privacy" that society is prepared to consider reasonable.[99]

The Fourth Amendment applies to unreasonable searches and seizures by states and municipalities by virtue of the Fourteenth Amendment.[100] The U.S. Supreme Court has also clarified that the Fourth Amendment extends to non-criminal "administrative searches" by government employees.[101] And, the Fourth Amendment applies when the government acts in its capacity as an employer.[102]

To assess the legality of a public employer's search of a government employee, courts apply a two-part test. Under the first part, the employee must have a reasonable expectation of privacy. There is no definition of reasonable that applies to all cases. Determining what is reasonable is a fact-based inquiry.[103] The Supreme Court has noted that "in the case of searches conducted by a public employer, [courts] must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and efficient operations of the workplace."[104] For this reason, "the question whether an employee has a reasonable expectation of privacy must

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98 U.S. Const. Amend. IV.
99 *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).
100 *New Jersey v. T. L. O.*, 469 U.S. 325, 334 (1985).
101 *Michigan v. Tyler*, 436 U.S. 499, 506 (1978); *Camara v. Mun. Court of the City & Cty. of S.F.*, 387 U.S. 523, 534 (1967).
102 *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987).
103 *Id.* at 715.
104 *Id.* at 719–20.

be addressed on a case-by-case basis."[105] If the court finds there was no reasonable expectation of privacy, and therefore the Fourth Amendment does not apply, the plaintiff's case fails, and the test stops.

However, if the court does find that the employee has a reasonable expectation of privacy, the court must then determine whether the search was reasonable. When a government employer conducts a warrantless search of an employee for a "non-investigatory, work-related purpose" or for the "investigation of work-related misconduct", it is considered "reasonable" under the Fourth Amendment "if it is justified at its inception and if the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the circumstances giving rise to the search."[106] To find for the government employee, the court must find that the employee had a reasonable expectation of privacy and that the search was not reasonable.

Employer Ability to Access Member's Devices

Fire departments across the country have begun implementing policies that apply to all cell phones (and similar tablet/watch communication technology) setting the terms under which the department can conduct suspicionless searches of these devices. Some of these policies are not limited to employer-owned electronic devices used for work-related business. While the specific wording of the policies has varied, some have stated that simply using a personal cell phone for personal reasons while at work will be treated as consenting to the department searching the device or copying its contents. These policies are especially problematic given that fire fighters spend considerable time at work, often working shifts up to and in excess of twenty-four hours. This results in engaging in personal business on one's cell phone or tablet while at work, such as checking in on family members. The IAFF Legal Department has worked with locals in several states to push back against some of these policies – particularly to limit the extent to which fire departments can search personal cell phones owned by fire fighters that are used on-duty.

The question of whether a search of an employee's electronic device is a violation of the Fourth Amendment is decided on a case-by-case basis using such factors as the purpose of the use of the device, whether the device was used exclusively by the employee, the extent to which others had access to the device, the nature of the employment, and whether office policies or regulations placed the employee on notice that the electronic device was subject to employer intrusions.[107] As these next sections will discuss in more detail, who owns the electronic device sought to be searched is an important consideration in determining the existence and extent of an employee's protection under the Fourth Amendment.[108]

Employer Provided Devices

When an employer is providing or paying for the equipment, courts have held that, depending on the employer's written policies, employees may have no expectation of privacy or a limited expectation of privacy. When there is a reduced expectation/no expectation of privacy, courts will not hold a

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[105] *Id.* at 718.
[106] *City of Ontario v. Quon*, 560 U.S. 746, 761 (2010).
[107] *Vega-Rodriguez v. P.R. Tel. Co.*, 110 F.3d 174, 179 (1st Cir. 1997).
[108] *United States v. Angevine*, 281 F.3d 1130, 1134 (10th Cir. 2002).

government employer's intrusion into an employee's privacy to be a Fourth Amendment violation.[109] Employers are given "wide latitude" when searching property owned by the employer.[110] Employer policies shape the reasonable expectations of their employees in their employer provided devices, especially if such policies are clearly communicated.[111] Thus, if an employer has a clearly communicated policy that the employer has the right to search employer provided devices, it is highly unlikely that the court will find that such a search is an unlawful Fourth Amendment violation.

In *City of Ontario v. Quon*,[112] the U.S. Supreme Court held that a California police department did not violate the Fourth Amendment by reading text messages sent by an officer on a department-issued electronic device during an audit of text messages sent and received by the department. The court assumed that the Fourth Amendment principles governing a search of a physical office applied to "the electronic sphere." The "employer had a legitimate reason for the search" because it was an audit to determine why cell phone data usage was exceeding the limits of the plan and "the search was not excessively intrusive in light of the justification[.]"[113] The Court also noted that, "as a law enforcement officer, he would or should have known that his actions were likely to come under legal scrutiny, and that this might entail an analysis of his on-the-job communications."[114]

An employee "had no right of privacy in the computer that [his employer] had lent him for use in the workplace" because the employer "had announced that it could inspect the laptops that it furnished for the use of its employees, and this destroyed any reasonable expectation of privacy that [he] might have had."[115] Courts have also held that employees had no reasonable expectation of privacy in the contents of their employer-provided computer because that was consistent with the policy in the employee handbook[116] or the employee received a warning banner on their computer screen each time they logged in.[117]

A government employer lawfully searched an employee's electronic device on a military base when the employee's personal computer connected to the base network so that his files could be viewed by anyone accessing that shared network.[118] Similarly, an employer's search of an employee's work computer was lawful even though it turned up highly sensitive information about the employee, because she had unintentionally backed up the entire contents of her personal cell phone on the work computer.[119]

In each of these cases, the consequence of the devices being employer-owned, employer-funded, or connected to an employer-provided network where files were shared is that the employees did not have a reasonable expectation of privacy that would make an employer's search of the device an illegal intrusion into their privacy rights under the Fourth Amendment. Accordingly, fire department policies that employer-provided electronic devices or devices that are purchased by employees for business use with fire department funds are subject to search and seizure by the department will likely be found to be lawful under the Fourth Amendment.

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[109] *O'Connor*, 480 U.S. at 715 (an employee's "Fourth Amendment rights are implicated only if the conduct of the [employer] at issue in this case infringed an expectation of privacy that society is prepared to consider reasonable.").
[110] *Id.* at 723–24, 732; *Walker v. Coffey*, 905 F.3d 138, 148 (3rd Cir. 2018).
[111] *Espinoza v. City of Tracy*, 2018 BL 181667, at *7 (E.D. Cal. May 21, 2018).
[112] 560 U.S. 746 (2010).
[113] *Id.* at 764.
[114] *City of Ontario v. Quon*, 560 U.S. 746, 762 (2010).
[115] *Muick v. Glenayre Electronics*, 280 F.3d 741 (7th Cir. 2002).
[116] *United States v. Cormack*, 2021 BL 200739, at *11 (D. Md. May 28, 2021); *Smith v. City of Pelham*, 2021 BL 472562, at *3 (11th Cir. Dec. 10, 2021).
[117] *Cormack*, 2021 BL 200739 at *11; *Angevine*, 281 F.3d at 1134–1135 (banner and computer policy eliminates a state university professor's reasonable expectation of privacy in data downloaded from the Internet).
[118] *United States v. King*, 509 F.3d 1338, 1341 (11th Cir. 2007).
[119] *Smith v. City of Pelham*, No. 20–13210, 2021 BL 472562, at *3 (11th Cir. Dec. 10, 2021).

Personal Devices

The current legal protections for an employee's right to privacy in their own personal electronic devices when they are brought into the workplace remain unsettled. Even though cell phones have been fully integrated into our lives, in the "context of a cellphone and the protections it is afforded in the contemporary government workplace, neither the individual's privacy expectation nor the government's interest are clearly established."[120] It is "uncertain how workplace norms, and the law's treatment of them, will evolve" and some courts have expressed extreme caution in this area by warning that the "judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear."[121]

A federal court in Ohio noted that since the US Supreme Court decided *City of Ontario v. Quon* in 2010 (discussed above), there is "still no precedent that set limitations on a reasonable cell phone search within the [employment] context… the case law has not progressed."[122] Many "cases touch upon germane issues that… lie at the intersection of technology and overbroad seizures. But they do not help define the contours of the workplace inspection exception or how it applies when a public employer extracts work product from an employee's personal cell phone."[123] The U.S. Court of Appeals for the Eleventh Circuit explained that the "even assuming that [the employee whose phone was searched] had some demonstrable expectation of privacy in her cellphone, the relevant case law provides no meaningful opportunity for [her employer] to balance that expectation against the government's interest."[124]

At least one federal court has acknowledged that "[i]ndividuals have a legitimate expectation of privacy in the contents of their own personal electronic devices, such as cellphones."[125] But even in that case, there was no Fourth Amendment protection for the Fire Chief of the City of Monroe, GA. The incriminating texts were shared with the city from the recipient's cell phone, and the court held that an individual does not have "any expectation of privacy in someone else's personal electronic device under the factual circumstances alleged here."[126]

The legal landscape in the area of an individual's right to privacy in their own cell phone that they bring to work and use on-the-job is still developing. If a personal cell phone device is used for work-related purposes, it probably can be searched by the employer. An employer likely has less of a right to search a personal cell phone device, or those portions of a personal cell phone device, that have nothing to do with an employee's job duties or on-the-job conduct. Because the law remains undeveloped in this area, the IAFF Legal Department continues to monitor the developments in this area. If your fire department establishes, presents or imposes a policy that allows for suspicionless searches of employee-owned cell phones, please contact your DVP to discuss raising the issue with the IAFF Legal Department.

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120 *United States v. Cochran*, 682 F. App'x 828, 840 (11th Cir. 2017).
121 *Id.* (*citing Rehberg v. Paulk*, 611 F.3d 828, 847 (11th Cir. 2010); *Bowers v. County of Taylor*, 598 F. Supp. 3d 719, 726 (W.D. Wis. 2022).
122 *Zimmerman v. Knight*, 421 F. Supp. 3d 514, 524 (S.D. Ohio 2019).
123 *Larios v. Lunardi*, 445 F. Supp. 3d 778, 785 (E.D. Cal. 2020).
124 *United States v. Cochran*, 682 F. App'x 828, 841 (11th Cir. 2017).
125 *Owens v. Propes*, 601 F. Supp. 3d 1360, 1370 (M.D. Ga. 2022).
126 *Id.* (emphasis in original).

Employer Ability to Access a Member's Social Media or Website/App Login (Gmail, X, Nextdoor, WhatsApp, Groupme, Etc.)

Over half of the states in the U.S. have enacted laws that prevent employers from requesting or demanding that employees turn over the passwords to their personal Internet accounts.[127] These laws are of limited value, however, if employees are accessing their email or social media accounts on employer-provided equipment because the presence of a formal policy containing an employer's right to monitor and search an employer provided devices may subject an employee's personal information to a lawful search. Courts have found that an employer's "wide latitude" to conduct searches of employer-owned property extends to online accounts used for work purposes on employer electronic devices.[128]

Courts have used the Fourth Amendment standards for written communications, such as letters, as the basis for establishing privacy rights in e-mails. "Although letters are protected by the Fourth Amendment, if a letter is sent to another, the sender's expectation of privacy ordinarily terminates upon delivery" and "an individual sending an e-mail loses a legitimate expectation of privacy in an e-mail that had already reached its recipient."[129] Further, when an employer's policy puts an employee on notice that it will be overseeing Internet use, there was no expectation of privacy in an email account accessed on an employer provided computer.[130]

An illustrative case of the intersection of employee privacy and employer technology involved a sergeant for a sheriff's department in Wisconsin who created a Dropbox account that he paid for with his own funds, but where he used his work email address as his login and where he stored both personal and work-related files on the account.[131] The federal court in Wisconsin noted that Dropbox is a cloud-based file storage application and not on the government employer's equipment,[132] but the court ultimately ruled that the employer's search of the Dropbox account was legal because the employee linked the account to his work email, put confidential work files from a work computer in the account, and shared access to the account with others.[133]

In the context of social media, posting information that goes out to a circle of friends or acquaintances diminishes a person's expectation of privacy because the recipients are free to share that information with anyone. When "a Facebook user allows 'friends' to view his information, the Government may access that information through an individual who is a 'friend' without violating the Fourth Amendment."[134] Similarly, when "a person tweets on [X][135] to his or her friends, that person

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[127] https://www.ncsl.org/technology-and-communication/privacy-of-employee-and-student-social-media-accounts (last accessed on July 17, 2023).
[128] *Creel v. City of Baton Rouge*, 2021 BL 82081 (M.D. La. Mar. 08, 2021); *United States v. Nordlicht*, No. 16-cr-00640 (BMC), 2018 BL 36400, at *6 (E.D.N.Y. Feb. 2, 2018) (where an employer reserves the right to access or inspect an employee's email, the employee possesses no reasonable expectation of privacy).
[129] *United States v. Jones*, 149 F. App'x 954, 959 (11th Cir. 2005).
[130] *United States v. Hamilton*, 701 F.3d 404, 408–09 (4th Cir. 2012); *United States v. Cormack*, No. ELH-19–0450, 2021 BL 200739, at *11 (D. Md. May 28, 2021).
[131] *Bowers v. County of Taylor*, 598 F. Supp. 3d 719, 723 (W.D. Wis. 2022).
[132] *Id.* at 728.
[133] *Id.* at 732.
[134] *Palmieri v. United States*, 72 F. Supp. 3d 191, 210 (D.D.C. 2014).
[135] In April 2023, Twitter was renamed as X.

takes the risk that the friend will turn the information over to the government."[136] The "wider his circle of 'friends,' the more likely [the individual's] posts would be viewed by someone he never expected to see them."[137]

Protecting private and personal electronic communications from employer monitoring means exercising caution to keep those communications off of employer-provided devices and limiting the circle of people who see those communications. Accessing a password protected email account or social media site on a workplace computer or employer-owned device may allow an employer to access those accounts. Posts made on personal social media accounts are rarely perfectly walled off to prevent professional contacts from ever discovering their contents.

When Can Member Communications Be Handed Over Under Public Disclosure/Open Records Laws

Using open records statutes, citizens can obtain public records produced by a public fire department. In general, these statutes make information produced by the state (or a political subdivision) available to the public if the information relates to a matter of public concern or the carrying out of government business. No universal open records statute exists allowing for a one-size-fits-all analysis of public disclosure/open records laws. Still, with the incredible growth in electronic correspondence and records over the last two decades, courts across the country have been asked to determine whether a given email constitutes a "public record" that must be disclosed in response to a request made pursuant to a state open records request. Most courts have liberally expanded what communications must be handed over when determining which electronic materials are subject to the public records statute.

Fire fighters and locals should be cautious that work-related emails or other electronic communications sent on employer-provided systems are likely subject to disclosure if requested.[138] Even casual emails of a personal nature sent on an employer-provided system are subject to disclosure in many jurisdictions.[139] A communication may not have to be work-related to be a requestable open record if sent on an employer-provided system. Email communications of an employee of a public agency, via the public agency's email system, on private political matters with private individuals, have been found to be public records, with the contents of the emails being irrelevant to the determination of whether or not they were public records.[140] Moreover, union communications done on an employer-provided system may be a requestable public record. Emails by a public employee relating to an ongoing union organizing effort on an employer-provided system were determined to be a public record by the Washington Supreme Court.[141]

An employee's emails, text messages, and Internet records may be subject to disclosure under

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[136] *Rosario v. Clark Cnty. Sch. Dist.*, No. 2:13-cv-00362-JCM-PAL, 2013 BL 179554, at *6 (D. Nev. July 3, 2013).
[137] *United States v. Meregildo*, 883 F. Supp. 2d 523, 526 (S.D.N.Y. 2012).
[138] *Nissen v. Pierce County*, 183 Wash.2d 863, 880 (Wash. 2015).
[139] *See, e.g., Cowles Publ'g Co. v. Kootenai County Bd. of County Comm'rs*, 159 P.3d 896, 900–01 (Idaho 2007) (holding that a series of e-mails sent between an employee and a supervisor were part of the public record even where some of the e-mails were of a personal nature).
[140] *Shane v. Parish of Jefferson*, 209 So. 3d 726 (La. 2015).
[141] *Services Employees International Union Local 925 v. University of Washington*, 193 Wash.2d 860 (Wash. 2019).

these laws if they involve the execution of the employee's state or municipality's duties but were sent on personal devices or accounts.[142] The California Supreme Court has said that a city employee's communications about official agency business on a personal device may be subject to disclosure as "public records" retained by the agency under the California Public Records Act (CPRA), even if the employees used personal email or text message accounts in their preparation or transmission.[143] The U.S. Court of Appeals for the Ninth Circuit has held that any emails sent through a personal email account "but concerning official business" could be turned over to comply with Oregon public records laws.[144] In Texas, the Texas Attorney General has released an opinion stating that "if information maintained on a privately-owned medium is actually used 'in connection with the transaction of official business,' ... it would be subject to the [open records request] act."[145]

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[142] *See, e.g.*, 2008 Op. Alaska Atty. Gen. (Aug. 21) at 12.
[143] *City of San Jose v. Superior Court*, 389 P.3d 848, 859 (Cal. 2017).
[144] *United States v. Kitzhaber*, 828 F.3d 1083, 1091 (9th Cir. 2016).
[145] ORD Att'y Gen. Tex. No. 635 (1995) (Open Records Decision); Op. Att'y Gen. Tex. 2003-1890 (Mar. 19, 2003) ("Therefore, to the extent that the personal cellular, personal office, and home telephone records, as well as the e-mail correspondence from personal e-mail accounts, of the mayor and the commissioners relate to the transaction of official city business, we conclude that such information is subject to disclosure under the Act.")

IAFF Local Websites and Social Media

Local Ownership/Maintenance of Website or Social Media Page

Having an online presence is important for local unions to conduct outreach, share their mission, and remain engaged with members. Building and maintaining a website and social media accounts for your local are two ways in which the local can remain engaged in online discourse and information sharing. However, to ensure that locals strike the right balance between effective online outreach while limiting legal exposure, locals should be aware of the following basic considerations:

1. When starting a website and deciding on a host platform, choose one that is user-friendly. Unless the local has a member or officer who is specifically trained in web creation or design, having a website that is easy for lay persons to edit will ensure that the website remains current and does not require the use of outside help each time content needs updating.

2. Be wary of the terms of your contract with the host site. You should be sure that the contract allows the local to maintain ownership of the website and its content should the local decide to switch host sites at the end of the contract term.

3. Create a clear and unified message for your members and other visitors to the local's website by writing high-quality, original content that is relevant to the local's mission.

4. Design the website's appearance in a manner that is cohesive and professional. Creating a clean, consistent design that is user-friendly and leads the website's visitors where you want them to go ensures they can easily navigate the website site and engage with the local's content.

5. Linking the local's social media accounts to the local's website will increase traffic and engagement with the local's online forums.

6. Ensure that the local's website is compliant with privacy law in whatever geographic area the local operates. Every website that collects any kind of user information (even a simple contact form) must have a privacy policy in place, and the local will likely also need a cookie consent notice on its site.

7. If members discuss sensitive, internal union business on the local's website or social media pages, such discussions should only take place in a forum that is either password-protected or otherwise has access restricted to members only.

Basic Considerations —When the Union Posts

When a local posts or "speaks" on their website, there are some basic legal considerations concerning that speech. Locals need to know that speech uttered by agents of the Union may result in the local being held responsible in a possible defamation lawsuit. Moreover, Locals must be aware of trademark and copyright issues when posting or "reposting" the work of others without proper permission

or attribution. Staying mindful of these issues allows locals to effectively communicate with their members and the broader public without risking legal liability.

Defamation

1. Elements of Defamation

Locals should be aware that they and their members could be held liable for false statements made against individuals, businesses, non-profit organizations, or other legal entities. Making a false statement which damages the reputation of another is defamation. Written defamation is also called "libel"; spoken defamation is also called "slander." Defamation is governed by state law, and individuals can bring lawsuits seeking damages for defamatory statements.

Generally, defamation has four elements.[146] Different states, however, have different standards.[147] When each element is proven in court, the party who made the defamatory statement will be held liable for the damages caused by their defamation.[148] An entity, such as a local union, can be held liable for the defamatory statements of its agents – its officers – if the officers are speaking in their official capacity or the local union approves, authorizes or ratifies the statements.

The first element is that the defendant made a false and defamatory statement about an individual or entity. A true statement cannot be defamation.[149] A false statement is defamatory if it harms the reputation of an individual or entity in the eyes of the community or makes others not want to associate with that individual or entity.[150] While statements of opinion are not defamation, they can be deemed defamation when they suggest an underlying fact that defames someone's character.[151]

The second element is that the defendant's statement was "published" – in other words communicated – to a third party.[152] Certain communications, however, are privileged and protected by law (*e.g.* communications made by judicial officers, witnesses in judicial proceedings, or statements made to one's attorney or spouse).[153]

The third element is that the defendant was at least negligent as to the truth of the defamatory statement regarding a private citizen.[154] A defendant is negligent when they fail to take reasonable

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[146] *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015).
[147] *E.g., Info. Sys. & Networks Corp. v. City of Atlanta*, 281 F.3d 1220, 1228 (11th Cir. 2002) ("Under Georgia law, three elements must be proven to establish defamation: (1) the statement was false, (2) the statement was malicious, and (3) the statement was published").
[148] Damages in defamation cases are either general and presumed, such as loss of reputation and mental anguish, or special and must be proven, such as a specific economic loss. *See Hancock v. Variyam*, 400 S.W.3d 59, 64 (Tex. 2013).
[149] *See Shifflet v. Thomson Newspapers (Ohio), Inc.*, 69 Ohio St.2d 179, 183 (1982) ("Truth is an absolute defense against a claim of defamation."); *Rice v. Hodapp*, 919 S.W.2d 240, 245 (Mo. 1996) (An individual who was transferred to a new office after a sexual harassment investigation into his conduct determined wrongdoing could not sue over a supervisor's truthful statement advising other employees about the basis of his transfer.)
[150] *Jews for Jesus v. Rapp*, 997 So. 2d 1098, 1109 (Fla. 2008).
[151] *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990) ("If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth.")
[152] *In re Lipsky*, 460 S.W.3d 593; *White v. Blue Cross & Blue Shield of Massachusetts, Inc.*, 809 N.E.2d 1034, 1036 (Mass. 2004).
[153] *See Laun v. Union Electric Co. of Mo.*, 166 S.W.2d 1065, 1069 (Mo. 1942).
[154] *American Future Sys., Inc. v. Better Business Bureau of Eastern Pennsylvania*, 923 A.2d 389, 393 (Pa. 2007). Please note, however, negligence is not explicitly listed as a required element in a few states. *See e.g. Dent v. Constellation NewEnergy, Inc.*, 202 N.E.3d 248, 255 (Ill, 2022) ("To state a claim for defamation, a plaintiff must allege facts showing that (1) the defendant made a false statement about the plaintiff, (2) the defendant made an unprivileged publication of that statement to a third party, and (3) the publication caused damages.")

care to determine if their statement is true or not.[155] In other words, a defendant can be liable for defamation in some circumstances if they make statements harming someone's character if they were unsure whether their statement was true or false. Public figures – like politicians or celebrities – who attempt to sue for defamation must prove a higher standard to recover damages, that the individual who published the false statement acted with actual malice.[156]

The fourth element is that the defamatory statement must have caused damages.

Defamation *per se* is a specific kind of speech that, on its face, is so obviously damaging to someone's reputation that no special proof of damage is required. Courts in Wisconsin, for example, have described this kind of defamation as involving "an imputation of certain crimes or of a loathsome disease, or affecting the plaintiff in his business, trade, profession, or office, and of unchastity to a woman."[157] In North Carolina, courts have described defamation *per se* as the kind of speech that "expose[s] or tend to expose[s] plaintiff to public hatred, contempt, ridicule, aversion, or disgrace, induce an evil opinion of him in the minds of right thinking persons, and deprive him of their friendly intercourse and society, regardless of whether they actually produce such results."[158] In other words, posting on social media that someone is a syphilitic child molester without any proof that it is a factual statement might be so obviously damaging to the person's reputation that no further proof of damages might be required.

For all other types of defamatory statement other than defamation *per se*, a plaintiff must show some kind of special harm – "the loss of something having economic or pecuniary value."[159] For example, if someone at the fire department lost their job specifically because of a false statement that was published about them, that loss of income might be evidence of a special harm to satisfy the damages element of a defamation claim.

Locals should be aware that the elements discussed above are merely the general principles of defamation law. Again, each state sets its own standards which may differ from these principles. Locals should always consult with counsel when they are unsure if a planned statement is defamatory.

2. Actual Malice, a Higher Standard of Proof for Public Officials

The First Amendment protects the freedom of expression on public questions in order "to assure [an] unfettered interchange of ideas for [] bring[ing] about [] political and social changes desire[d] by the people."[160] Based on this principle, the Supreme Court has held that statements about a "public figure" must be made with actual malice in order to serve as the basis for a defamation lawsuit.[161] The actual malice standard is a much higher standard of proof than is required for a typical defamation case involving a private citizen. A defendant makes a statement with actual malice, when the defendant knows their statement is false or they recklessly disregard whether their statement is true or not.[162] The "reckless disregard" standard is met when a defendant makes a statement capable of defamatory meaning despite the speaker's awareness that the statement is probably false or where the statement is made without any information being obtained from any source.[163] It is, therefore, very difficult to pursue defamation suits where the actual malice standard applies.

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[155] *Id.* at 396.
[156] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).
[157] *Martin v. Outboard Marine Corp.*, 113 N.W.2d 135, 138 (Wis. 1962).
[158] *Kindley v. Privette*, 84 S.E.2d 660, 663 (N.C. 1954).
[159] *Liberman v. Gelstein*, 605 N.E.2d 344, 347 (N.Y. 1992).
[160] *Roth v. United States*, 354 U.S. 476, 484 (1957).
[161] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).
[162] *Sullivan*, 376 U.S. at 280.
[163] *Maurer v. Town of Indep.*, CIVIL ACTION NO: 13-5450 SECTION: R, 2015 BL 55333, at *18 (E.D. La. Mar. 2, 2015)

Americans have greater protection from liability for defamation when they make statements about public figures that relate to the public figure's conduct, fitness, or role in their public capacity.[164] In particular, statements about a public figure's "dishonesty, malfeasance, or improper motivation" as a comment about their fitness for office generally have greater legal protection.[165] "The public-official classification eludes precise definition" and "[n]ot every public employee is a public official for libel-law purposes."[166] States have developed definitions of 'public official' for local administrative purposes, not the purposes of a national constitutional protection."[167] Instead, the US Supreme Court has held that whether an individual is a public official is a question of law to be determined by the trial court on a case-by-case basis.[168]

In *N.Y. Times Co. v. Sullivan*, the US Supreme Court held that an elected City Commissioner of Montgomery, Alabama whose duties included supervision of the fire department was a public official.[169] In ruling, the Supreme Court declined to "determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included."[170]

A person is a public figure when they are a government employee who has, or appears to the public to have, "substantial responsibility for[,] or control over the conduct of governmental affairs."[171] Courts have held the following positions to be public officials: a New Jersey mayor;[172] "persons who serve in elective public office, including that of town meeting representative" in Massachusetts;[173] an Ohio fire chief;[174] an assistant fire chief[175] and a deputy chief[176] in Connecticut; any police officer in South Carolina;[177] and a captain in a Wisconsin fire department.[178]

A private individual can become a public figure for all purposes when they "achieve [] pervasive fame or notoriety" by becoming a celebrity.[179] More typically, however, a private individual becomes a public figure for limited purposes when "an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."[180]

3. A Member's Defamation Claim Against Another Member

The IAFF Constitution and By-Laws, Articles XV-XVIII establish the exclusive provisions applicable to internal union misconduct, charges, trials, and appeals. A member's claims of defamation against another member or local officer must be resolved through those internal procedures. It is misconduct, subject to grievance and penalty, for any officer or member of the IAFF to engage in "Libeling or slandering or causing to be libeled or slandered any officer or member of the [IAFF] or of any local union...".[181] Article XVI describes the procedural requirements for such charges. Article XVII establishes

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164 Id.
165 *Garrison v. Louisiana*, 379 U. S. 64, 77 (1964).
166 *Mandel v. Bos. Phx., Inc.*, 456 F.3d 198, 202 (1st Cir. 2006).
167 *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966).
168 *Id.* at 88.
169 376 U.S. at 256.
170 *Id.* at 305 fn. 23.
171 *Baer*, 383 U.S. at 85.
172 *Schneider v. Unger*, No. A-1530-11T4, 2013 BL 152957, at *4 (N.J. Super. Ct. App. Div. Jan. 10, 2013).
173 *Lane v. MPG Newspapers*, 781 N.E.2d 800, 802 (Mass. 2002).
174 *Becker v. Fire Fighters Local 4207*, 2010-Ohio-3467 (Ct. App. 11th Dist.).
175 *Sambuco v. Martin*, No. UWYCV126016554S, 2017 BL 249737, at *3 (Conn. Super. Ct. June 14, 2017).
176 *Papa v. Schroeder*, No. CV146052720S, 2016 BL 103625, at *4 (Conn. Super. Ct. Mar. 1, 2016).
177 *McClain v. Arnold*, 270 S.E.2d 124, 125 (S.C. 1980).
178 *Miller v. Minority Brotherhood of Fire Protection*, 463 N.W.2d 690, 696 (Wis. Ct. App. 1990).
179 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).
180 *Id.*
181 International Association of Fire Fighters, Constitution & By-Laws, Article XV Section 1(C).

the due process/trial procedures for hearing any charges for misconduct. And, Article XVIII sets out the process to appeal adverse decisions.

Trademark and Copyright

Copyright law protects original and creative expression by giving the owner of a copyright a bundle of exclusive rights and a cause of action to enforce these rights against those who use their copyrighted material without authorization. Trademark law protects an organization's reputation and ability to conduct their business without confusion, by granting the owners the right to trademark their business' name and logos which gives the business the right to control how their name and logos are used. This section provides basic guidance for locals to keep in mind to avoid liability for violations of copyright or trademark laws when posting on their website or social media pages.

1. Copyright

Copyright is a legal protection provided to authors of "original works of authorship".[182] This protection attaches from the "moment the original work of authorship is fixed."[183] Owners of a copyright have the exclusive right to reproduce the work, prepare derivative works (*e.g.* a movie adaptation of a book is a derivative work of that book),[184] distribute copies of the work, and display or perform the work publicly.[185] Any violation of these exclusive rights may be enforced under the Copyright Act.[186] In other words, locals should not incorporate these kinds of "original works of authorship" into their websites or social media pages. For example, if a professional photographer has posted their work online, their photos should generally not be used without documented permission from the artist (which may require compensation). With respect to local's webpages or social media, copyright issues most often arise with respect to the use of professionals' photographs, cartoons or articles published in written or online publications.

The legal doctrine of fair use may allow a local to post a copyrighted work on the local's website without running afoul copyright infringement in certain circumstances. Examples of fair use include commentary, search engines, criticism, parody, news reporting, research, and scholarship. Fair use is a complete defense to copyright infringement[187] and embodies the First Amendment protections which "present the most important limitation on copyright law."[188]

"Fair use", however, is not a simple exemption that locals can assume applies based on their status as nonprofit labor organizations. The "mere fact that a use is educational and not for profit does not insulate it from a finding of infringement."[189] "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[190]

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[182] 17 U.S.C. § 102.
[183] 17 U.S.C. § 101.
[184] *Shoptalk, Ltd. v. Concorde-New Horizons Corp.*, 168 F.3d 586, 592 (2d Cir. 1999) (holding that when a motion picture is published, so much of the previously unpublished screen play as is embodied in the motion picture is published as well).
[185] USC Title 17 § 106.
[186] 17 USC § 501.
[187] 17 U.S.C.A. § 107 (as an affirmative defense, its proponent bears the burden of proving that it applies in each case).
[188] *Cambridge University Press v. Patton*, 769 F.3d 1232, 1256 n.18 (11th Cir. 2014); *see also Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003) (explaining that "copyright law contains built-in First Amendment accommodations."); Golan v. Holder, 565 U.S. 302, 327-29 (2012) (holding that there was no need for heightened First Amendment review in copyright cases because of "the idea/expression distinction and the fair use defense.").
[189] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994).
[190] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985).

In *Worldwide Church of God*, a Philadelphia area church reproduced a copyrighted book that was written by a pastor of a different church and distributed it widely to its members and the public for free.[191] The court held that even though the church was a nonprofit organization and the text was distributed for free, the "profit" gained was that the book helped as a recruiting tool that enabled the ministry's growth and attracted new members who tithed.[192]

What constitutes fair use in practice can be difficult to evaluate, so fair use must be determined on a case-by-case basis by evaluating four statutorily listed factors.[193] In determining whether use of a copyrighted material is fair use, the court considers: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[194] These factors are considered together, within the overall context of the alleged copyright violation, with particular emphasis placed on whether copyrighted material is being used for a commercial purpose.[195] Accordingly, "The same copying may be fair when used for one purpose but not another."[196]

The following internet postings of copyright material have been found to be fair use: parody,[197] reprinting publicly filed legal briefs,[198] incorporating copyrighted material in commentary videos,[199] or reposting short videos of a public figure's allegedly copyrighted speech for the purpose of a critical evaluation of the work.[200]

2. Trademark

Trademark law allows organizations to control the content that is associated with their brand. A trademark is anything that creates "a separate and distinct commercial impression, which … identif[ies] the source of … merchandise [or services] to … customers."[201] Trademarks are used to identify and define organizations, such as their names, initials and logos. Locals should consider registering any unique trademarks with which they identify themselves.

Trademark law is governed by the federal statute known as the Lanham Act,[202] as well as similar state laws. Trademark law, "[protects] source-identifying marks, and proscrib[es] 'the deceptive and misleading use of [such] marks'".[203] Trademark law achieves this end in two ways: "(1) it simplifies consumer choice, by enabling consumers to rely on a mark that readily identifies a particular brand and producer, and (2) it assures the producer of a particular good that it, and not an imitating competitor,

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191 *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000).
192 *Id.* at 1118; *Soc'y of the Holy Transfiguration Monastery, Inc. v. Archbishop Gregory of Denver*, 689 F.3d 29, 61 (1st Cir. 2012) (posting the copyrighted religious texts that had been translated by a scholar on a monastery website was not entitled to the fair use defense).
193 *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).
194 17 U.S.C. § 107.
195 *See Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1257 (2023), *citing Sony Corp. of America v. Universal City Studios, Inc.*, 464 U. S. 417, 449–451 (1984) (contrasting the recording of TV "for a commercial or profit-making purpose" with "private home use").
196 *Andy Warhol Found.*, 143 S. Ct. 1278.
197 *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (fair use to sample a copyrighted song for use in a new parody composition).
198 *White v. West Publ'g Corp.*, 29 F. Supp. 3d 396 (S.D.N.Y. 2014).
199 *City of Inglewood v. Teixeira*, No. CV-15-01815-MWF (MRWx), 116 U.S.P.Q.2D (BNA) 1380, 1386 (C.D. Cal. Aug. 20, 2015) (fair use when an individual reposted city council meeting videos with his criticisms of city council members overlayed).
200 *Caner v. Autry*, 16 F. Supp. 3d 689, 710 (W.D. Va. 2014) (fair use when posting a public figure's copyrighted speech).
201 *The Rock and Roll Hall of Fame and Museum, Inc. v. Gentile Productions*, 134 F.3d 749, 753 (6th Cir. 1998).
202 15 U.S.C. §§ 1124–1125.
203 15 U.S.C. § 1127.

will reap the financial rewards of the good's (or the brand's) reputation."[204] Federal trademark law does not apply to the noncommercial use of a trademark.[205]

A mark must be inherently distinctive or have acquired a secondary meaning in order to receive trademark protection.[206] A trademark receives federal protection when a "seller or producer" registers their trademark with the United States Patent and Trademark Office,[207] which can be renewed in perpetuity.[208] Absent registration, a plaintiff can show that it has a "common law right to a trademark" when the plaintiff demonstrates "that its use of the mark was 'deliberate and continuous, not sporadic, casual or transitory.'"[209]

To establish a violation of their trademark, a plaintiff must show that they held the trademarks, the marks were valid and protectable, it did not consent to the defendant's use of those marks, and the use of the marks by defendant was likely to cause confusion as to who owned or authorized use of the trademark.[210] "To prove likelihood of confusion, plaintiffs must show that consumers viewing the mark would probably assume the product or service it represents is associated with the source of a different product or service identified by a similar mark."[211] Claims under the Lanham Act also require that the plaintiff show that the false designation has a substantial economic effect on interstate commerce.[212]

Locals are most likely to encounter trademark issues in two settings: (1) others using their trademark; and (2) the Local using another's trademark in a post (such as posting a photograph with a fire department engine bearing the trademarked logo of their employer).

Historically, unions have been allowed to use the trademark of others, so long as this use is related to a non-commercial purpose. In *United Paperworkers*, a local used the trademarked logo of an employer, a restaurant, in flyers the local distributed during a labor dispute.[213] Next to the employer's logo, the flyers listed the employer's health violations such as "dirty towels on plates", and "fruitflies over utensil bins".[214] Ultimately, the Paperworkers local was permitted to use the employer's logo because they were not using the logo "in commerce".[215] This is because the flyers were not sold, transported in commerce, or "related to the sale or advertising of a service."[216] The Paperworkers local's purpose, to improve their position in a labor dispute, was too far removed from the "sale or advertising of the Union's services to be considered [commerce] under the Lanham Act."[217]

Similarly, the Machinists union ("IAM") was allowed to use a company's trademarks in social media posts because they were "not using the SILGAN trademark as a source identifier for its services or to sow confusion as to whether Silgan approves or is affiliated with IAM's efforts, but rather to identify Silgan as the employer of the employees IAM is attempting to unionize."[218] And, a court dismissed

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[204] *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003).
[205] Jack Daniel's Properties, Inc. v. VIP Products LLC, 143 S.Ct. 1578, 1584 (2023).
[206] *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768–69 (1992).
[207] *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 162 (1995) citing 15 U.S.C. § 1052.
[208] *Phoenix Entertainment Partners, LLC v. Rumsey*, 829 F.3d 817, 825 (7th Cir. 2016).
[209] *Circuit City Stores, Inc. v. CarMax, Inc.*, 165 F.3d 1047, 1055 (6th Cir. 1999), *citing La Societe Anonyme des Parfums le Galion v. Jean Patou, Inc.*, 495 F.2d 1265, 1272 (2nd Cir.1974).
[210] *Id.*
[211] *Checkpoint Sys., Inc. v. Check Point Software Techs., Inc.*, 269 F.3d 270, 280 (3d Cir. 2001).
[212] Johnson v. Jones, 149 F.3d 494, 502 (6th Cir. 1998).
[213] *WHS Entm't Ventures v. Paperworkers*, 997 F. Supp. 946, 949 (M.D. Tenn. 1998).
[214] *Id.*
[215] *Paperworkers*, 997 F. Supp. 949.
[216] *Id.* at 950
[217] *Id.*, *citing Tax Cap Comm. v. Save Our Everglades, Inc.*, 933 F. Supp. 1077, 1081 (S.D. Fla. 1996) (distributing petitions for a political purpose is not "selling or advertising" a service in commerce because the petitions are not used to solicit funds, volunteers, or supporters for the organization).
[218] *Silgan Containers LLC v. Machinists*, No. 18-C-213, 2018 BL 413945, at *4 (E.D. Wis. Nov. 8, 2018).

a suit against UNITE-HERE over the union creating a website with the company's name in the URL where the website had a clear disclaimer that it was an "independent website posted by the labor union UNITE" that "contains criticism and information about the uniform and facilities services rental company Cintas."[219]

A recent trend where unions have incorporated the company's name into the union's name and logo has brought additional lawsuits in this area. Medieval Times restaurant sued the union representing its workers, Medieval Times Performers United ("MPTU"), for trademark infringement over the union's use of the company's name and logo. The court dismissed the company's lawsuit and explained, "MPTU's use of Plaintiff's brand name as part of its own name as well as the colors, castle, and swords in its logo serve to identify the Union as employees of Medieval Times" rather than cause the kind of confusion that could support a trademark lawsuit.[220]

3. Public Domain and Creative Commons License

The "public domain" refers to works that are not protected by copyright or trademark laws. Four of the ways that works enter the public domain are: (1) the copyright has expired;[221] (2) the copyright owner failed to follow copyright renewal rules;[222] (3) the copyright owner deliberately placed it in the public domain, known as "dedication";[223] or (4) copyright law does not protect the type of work.[224] Works in the public domain are not owned by anyone and can be used by anyone without permission.

Creative Commons is a nonprofit organization that enables sharing creative works. The organization has a search engine that identifies whether certain media is in the public domain or whether the artist has arranged for a Creative Commons License that allows for their work to be used for free or with certain limited conditions (*e.g.* some nominal charge, attribution, or that the work may only be used for noncommercial purposes). Additional details are available at: https://creativecommons.org/.

4. Locals Use of IAFF Logo

IAFF owns trademarks for its tradenames "International Association of Fire Fighters" and "IAFF" and a registered trademark for its iconic logo, the Maltese Cross. Locals may use the IAFF logo and tradenames for official purposes without prior approval from the IAFF Executive Board. Official purposes include use of the IAFF logo and/or use of the IAFF logo in conjunction with the local's number or tradename on a local websites and social media pages, business cards, and letterhead. The IAFF's policy for use of the union's logo is available on the IAFF website: https://www.iaff.org/logo-policy/.

Use of the IAFF logo for booster stickers, or other materials, used by a local to fundraise, however, must be approved by the Executive Board. Locals seeking approval for a use of the IAFF logo for fundraising or commercial purposes must submit a licensing application to the Executive Board. The application for these uses is also available on the IAFF website: International Association of Fire Fighters, Request for Permission to Use IAFF Logo, https://www.iaff.org/wp-content/uploads/LOGOAPP.Kelly_.pdf.

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[219] *Cintas Corp. v. Unite Here*, 601 F. Supp. 2d 571, 576 (S.D.N.Y. 2009).
[220] *Medieval Times U.S.A., Inc. v. Medieval Times Performers United*, Civ. No. 2:22-cv-6050 (WJM), 2023 BL 343214, at *4 (D.N.J. Sept. 28, 2023)
[221] *Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496, 497 (7th Cir. 2014) ("Once the copyright on a work expires, the work becomes a part of the public domain and can be copied and sold without need to obtain a license from the holder of the expired copyright."
[222] *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 923 F. Supp. 1231, 1241 (N.D. Cal. 1995)
[223] *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169, 186 (1896).
[224] *Leigh v. Warner Bros.*, 212 F.3d 1210, 1214 (11th Cir. 2000) (copyright holder of a famous photograph of the "bird girl" statue that was used for the cover of a novel could not sue another photographer who took a similar photo of the same statue because the "appearance of objects in the public domain or as they occur in nature is not protected by copyright").

Ownership Issues/Cybersquatters

When starting a web page or interactive website for your local, the first thing you must do with any hosting service is choose a domain name. A domain name is the website's address, which allows users to easily visit it. For instance, the International Association of Fire Fighters' domain name is www.iaff.org.

Understandably, certain domain names are highly sought after and disputes over their ownership have produced countless legal cases. Those wishing to exploit the fact that only one party can register a particular domain name—known as "cybersquatters" or "cyber pirates"—have registered valuable corporate names or trademarks, or common misspellings of them, hoping to exact a high ransom from their rightful owners in exchange for return of the domain names.[225]

In other instances, a party hoping to confront individuals of a particular opposing group with oppositional information may use a domain name to attract those individuals.[226] These "cybergripers" may register a domain name that is in itself critical of a trademark owner or may simply incorporate the trademark in the domain name of its website dedicated to criticizing the trademark owner. In the labor union context, this typically involves cypergriping by dissident groups or unhappy former members.[227]

When faced with a domain name issue, such as the hijacking of a domain name relevant to a local, the local has several legal remedies available to it. Remedies may be available under the Anticybersquatting Consumer Protection Act (ACPA) where the plaintiff can demonstrate a bad-faith intent to profit from the use, registration or trafficking in the domain name.[228] It is also possible that the use of a local's name in a domain name by someone not associated with the local may be a trademark violation.[229] Alternatively, if a domain name is merely used in bad faith (rather than with a bad-faith intent to profit), so long as use may be shown (and not mere registration), the local may pursue online arbitration in the form of the Uniform Domain Name Dispute Resolution Policy (UDRP) proceeding established by the Internet Corporation for Assigned Names and Numbers (ICANN). This process is usually quick and inexpensive, although the decision is not binding if either party files suit within ten business days of receiving notice of a final decision.[230] Locals are encouraged to seek legal counsel when getting involved in a domain name dispute.

In some instances, disputes over website ownership can arise between a local union and a former member or officer of the local. For example, in *Teamsters Local 651 v. Philbeck*, a federal court in Kentucky evaluated whether a Facebook page and union member Facebook group, both created by a former union president who had recently lost reelection, belonged to the former president or to the

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[225] *See, e.g., Petroliam Nasional Berhad v. GoDaddy.com, Inc.*, 737 F.3d 546, 554 (9th Cir. 2013); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1325 (9th Cir. 1998). In this seminal case, one cybersquatter registered around 240 domain names associated with well-known businesses, such as Delta Airlines and Crate and Barrel, in order to sell or license them for large sums to the trademark owners.

[226] *See, e.g., Jews for Jesus v. Brodsky*, 993 F. Supp. 282, 290–291 (D.N.J. 1998) (defendant maintained website with domain name purporting to be affiliated with plaintiff organization "Jews for Jesus," which sought to promote religious camaraderie between Jewish and non-Jewish people, and instead posted content opposing the group's mission).

[227] *See, e.g., Fonti v. Health Prof'ls & Allied Emps.*, No. 13-4231 (ES) (JAD), 2017 BL 105971, at *1 (D.N.J. Mar. 31, 2017).

[228] 15 U.S.C.A. § 1125.

[229] *See People for the Ethical Treatment of Animals, Inc. v. Doughney*, 113 F. Supp. 2d 915 (E.D. Va. 2000) (holding that defendant committed trademark infringement because a user could not determine the ownership, control, or sponsorship of defendant's web site until the user arrived at the site).

[230] ICANN, "Uniform Domain-Name Dispute Resolution Policy," available at https://www.icann.org/resources/pages/policy-2012-02-25-en.

local itself. In granting the local's motion for summary judgment and ordering the accounts turned over to the new local leadership, the court concluded that the accounts were owned by the union because they were "created to communicate with union members, held out as official union pages, promoted on [union] business cards, and the official website, and other members of the union had administrative privileges."[231]

Basic Considerations for Joining Social Networking Sites (Facebook, Instagram, or X)

Social media can be another powerful online tool for locals. An active social media page allows locals to elevate the value of the work they do, communicate with the broader public, pressure decision-makers to take specific actions, share workplace wins, and shape the public's perception of fire fighters and the local. Beyond many of the same legal issues (defamation, copyright, trademark, etc.) that a local should consider when posting on its social media accounts, there are additional legal considerations unique to using a third-party platform.

1. Terms of Service Agreements

Upon sign-up, locals must agree to follow the platform's "terms of service" (TOS) or other similarly named agreement, which is in essence a contract requiring the user to agree to abide by the platform's policies in order to enjoy the platform's service. These agreements are designed to protect the platform and not the user. In many cases, these terms make sense and reiterate the general legal principles already discussed. For example, a platform like YouTube or Facebook will prohibit a user from using someone else's intellectual property and take down the post if the platform finds that the post violates its policies. While playing by the platforms' rules, locals should be aware of some key provisions including advertising rules or prohibitions, privacy policies and policies governing the usage of user data, and IP/copyright issues – for instance, so-called "takedown notices," which are requests made by a copyright owner to an online service provider to have material that infringes their copyright-protected work removed from a website or other online service.[232] A social media platform can change its terms of service, but as with any contract, the platform must notify users about proposed changes to the TOS and obtain their consent.[233] Be wary that if a user violates a platform's policies, the user may be suspended or banned from use, and attempts to avoid account bans may result in an IP ban.

2. Social Media Commenting Capabilities

The ability for others to comment on a given user's social media posts is common to many social media platforms. Most social media platforms permit users to limit or restrict the ability of others to comment on the user's posts or pages. However, if locals wish to preserve the ability for others to comment on their posts, they are encouraged to draft "Social Media Community Guidelines" and post these guidelines on their respective webpages or social media pages, to the extent possible. These guidelines should encourage good online behavior and prohibit obscene, offensive, or otherwise unlawful conduct while reserving the local's right to delete or remove offending comments. Comments

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[231] 464 F. Supp. 3d 863, 872 (E.D. Ky. 2020).
[232] *See* U.S. Copyright Office, Section 512 of Title 17: Resources on Online Service Provider Safe Harbors and Notice-and-Takedown System, available at, https://www.copyright.gov/512/.
[233] *See Douglas v. U.S. Dist. Court ex rel Talk America*, 495 F.3d 1062, 1067 (2007).

should not be allowed that:

- Use foul, discriminatory, libelous or threatening language, or use racially, ethnically, sexually or otherwise objectionable or harassing language against any individual, union, or other organization, including the local;
- Disrupt normal on-topic conversation, including messages designed to provoke an angry response, or messages that are repeated over and over or fill the screen with gibberish;
- Contain advertising, campaigning, or solicitations;
- Invade the privacy of others, such as by posting phone numbers, addresses, or other personal identifying information of others (aka "doxing"); or
- Violate trademark or copyright laws or other laws.

Permissible usage rules such as these reduce the risk that inappropriate, divisive, or otherwise unlawful comments made by third parties can be attributed to the local itself.

3. Official Organization Social Media Accounts Versus Personal Accounts

Members of a local union who are active on social media may have their own, personal social media accounts as well as access to the accounts maintained by the local. It is imperative that these respective accounts be kept separate from one another to avoid logistical issues, confusion, and potential legal liability (discussed in further detail below).

Members' use of personal social media accounts for official union business can create confusion between the individual's professional and personal online identities. Further, the intermixing of professional and personal social media accounts can create problems when members leave the local or there is a change in leadership. For instance, the local can lose valuable history, content, and contacts if it can no longer access accounts used by a former member or officer. Locals may also end up in disputes with former members about ownership of accounts and data.

To minimize these concerns, locals should encourage members (particularly officers) to conduct official union business only through the local's social media accounts, not through personal ones, and insist that the local's accounts should not be used for personal affairs. And while members may feel compelled to express their opinions about their respective workplaces or their local unions in their personal capacities, if these opinions are not authorized by their employer or the local, members should include appropriate disclaimers that make clear their opinions are attributable only to themselves.[234] Additionally, members should avoid using their union email addresses for personal or private social media accounts, and vice versa.

4. Attribution of Third-Party Content

Many social media sites, such as Facebook, X formerly known as Twitter, and Instagram, allow users to reshare or repost content created by other users. While this feature can be a useful tool for building community with like-minded individuals and organizations, as well as for filling in the gaps between posts, it is important for locals to properly attribute any reposted or reshared content. Locals should not reshare or repost another user's content without linking the original user's page or account. Luckily, most social media sites that allow resharing or reposting of content automatically credit the original user; for example, when one Facebook user utilizes the "share" button to repost another user's content, the name of the original user appears on the re-poster's page, thus making clear the identity of the original poster. Thus, using built-in reshare or repost features rather than

[234] Legal considerations for members engaging in online speech are discussed more fully below.

screenshotting and posting another user's content as if it is the local's own content ensures that the local is not improperly misattributing the ownership of online content. Similarly, locals should not repost copyrighted or otherwise propriety material of third parties to their social networks without prior, express permission.

Locals, depending on the nature of their question, should reach out to legal counsel or IAFF communications for social media questions.

Online Fundraising

A local's web site can be a useful resource for fundraising and soliciting donations from members and the community. However, there are certain steps and precautions locals must take before launching an online fundraising campaign.

Most states regulate non-profit fundraising through statutes called "solicitation laws" that are primarily concerned with the solicitation of charitable contributions from the general public and require some measure of compliance reporting by the non-profit organizations (including union locals).[235] Compliance reporting under state solicitation laws is divided into two parts: registration and annual financial reporting. Registration provides an initial base of data and information about an organization's finances and governance.[236] Annual financial reporting keeps the states apprised about the organization's operations, with an emphasis on fundraising results and practices, and generally requires an audit and the filing of certain tax forms with the state.[237] Generally speaking, states with solicitation laws require both registration (at least initially) and annual financial reporting.[238]

Any non-profit conducting a charitable solicitation within a given state, regardless of the method it chooses (*e.g.*, a letter, phone call, newspaper advertisement requesting financial support from a state's residents, or e-mail), is subject to that state's laws and may be required to register before soliciting contributions.[239] However, there is little consistency with regard to the application of solicitation laws among the various states. For instance, some states require a one-time registration while others may require annual renewal of registration, submission of every common governance and financial document, or simply submission of an IRS 990 Form.[240] With approximately forty states regulating non-profits in this manner, these inconsistencies make it increasingly difficult for locals to conduct fundraising activities on a multi-state or national level.

Although most states have adopted laws that regulate charitable solicitations, it is unclear how these laws apply to online fundraising. The National Association of State Charity Officials (NASCO) approved the "Charleston Principles," which provide advisory guidelines for online fundraising and explain the circumstances under which non-profits are required to register.[241] While these guidelines are not enforceable under state law, they provide a roadmap for non-profit organizations who wish

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[235] National Association of Attorneys General, National Association of State Charities Officials, and Multistate Filer Project, Inc., *Standardized Registration for Nonprofit Organizations Under State Charitable Solicitation Laws*, http://www.multistatefiling.org.
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] National Association of State Charity Officials, *The Charleston Principles: Guidelines on Charitable Solicitations Using the Internet*, https://www.nasconet.org/wp-content/uploads/2018/04/Charleston-Principles.pdf

to fundraise online. NASCO also includes additional resources and best practices guides at https://www.nasconet.org/.

As a general rule, locals must always register in their home state if they use the Internet to conduct charitable solicitations.[242] In addition, locals that fundraise online must register in states outside of their home state if certain conditions are met. For instance, a local must register in another state if it solicits contributions through an interactive web site, *i.e.*, a website where the entire transaction can be completed online, and the local either: (i) specifically targets individuals physically located in that state for donations, or (ii) receives contributions from individuals in that state on a repeated and ongoing, or substantial basis through its web site.[243] Furthermore, even where a local's web site is not interactive, the local still must register if: 1) the local meets either element (i) or (ii) outlined above, and 2) the local either: (i) invites further offline activity to complete a contribution, *i.e.*, provides an address to which a donation can be mailed or directs individuals to a phone number where they can make donations, or (ii) contacts individuals in that state by sending e-mails or other communications promoting the web site.[244]

Locals do not have to register solely because they maintain a website, even if they receive out-of-state and unsolicited donations. Locals that maintain websites that provide general information to their members and the public are not subject to state solicitation laws as long as they do not use the site for fundraising.[245] However, locals must keep in mind that, prior to contacting an out-of-state donor to solicit additional donations (for instance, if the local maintains a database of donors for future solicitation purposes and later wishes to contact those donors), the local must be registered in those states where the donors live.

Finally, because the registration and annual financial reporting requirements are complex in nature and vary widely from state to state, and because the failure to comply with these requirements could result in large fines and penalties, local affiliates who wish to fundraise, both generally and online, should consult their local attorney to ensure that they are in compliance with state and local laws.

Online Speech Protections for Local Union Officials

As explained above, a local union official's posts and comments on the Internet and on social media constitute "speech" for purposes of the First Amendment. Similarly, an individual's association with a labor union is protected First Amendment activity. Thus, when a local union official engages in speech in his or her capacity as a union official and speaks on matters concerning the union (such as collective bargaining or collective personnel grievances), the official is likely protected against employer retaliation by the First Amendment.

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[242] *Id.*
[243] The Charleston Principles define "repeated and ongoing" and "substantial" as "contributions within the entity's fiscal year, or relevant portion of fiscal year, that are of sufficient volume to establish the regular or significant (as opposed to rare, isolated, or insubstantial) nature of those contributions." *Id.*
[244] *Id.*
[245] *Id.*

Agency Liability for Postings by Local Officers

Generally, labor organizations may only be held liable for the "authorized or ratified actions of its officers and agents."[246] Courts have held unions responsible for torts committed by union members where the member committed the tort while acting on behalf of the union and in the scope of union business.[247] This agency liability principle extends to a local union's online activities. That is, a local union may be held liable for tortious content posted online by a union member only where a principal-agent relationship exists between the union member and the local, in that the union member posted the content either on behalf of the local or with the local's approval or ratification. Where such a relationship does not exist, courts are unwilling to assign liability for online torts to local unions.

Several cases are illustrative of these principles. A federal court in Nevada declined to hold a local police union liable for defamatory comments that were posted on an online forum maintained by the union.[248] Dispositive to the Court's analysis was the lack of evidence that the two individuals who posted the offensive comments were acting on behalf of the union when they did so.[249] Therefore, the Court held, no principal-agent relationship existed between the individuals and the union, and the union could not be held liable for the individuals' comments.[250]

Similarly, the United States Court of Appeals for the District of Columbia sided with the National Labor Relations Board (which has jurisdiction over private sector employees and unions) in finding that a union was not liable for threatening messages posted on its private, union officer-controlled Facebook page where the messages were posted by members who "acted on their own without the permission of the [u]nion."[251] In so finding, the Court emphasized that the union did not authorize or otherwise condone the posting of the contested messages on the Facebook page.[252] By contrast, the Supreme Court of Maine upheld a finding of vicarious liability for defamation against a local union whose president, acting on behalf of the union, knowingly published a website with false information about a management official.[253]

In light of these decisions, the IAFF recommends that locals take care to train officers and other individuals acting on behalf of the local to refrain from engaging in defamatory, threatening, discriminatory, or other tortious speech online. If an officer or other union representative does engage in such speech, the IAFF recommends that the local remove it immediately, disavow it and make clear that it does not condone the speech.

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[246] *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1427 (D.C. Cir. 1988) (internal quotations and citations omitted).
[247] *See, e.g., Brown v. Int'l Union, United Auto. Aerospace and Agr. Implement Workers of America (UAW),* 512 F. Supp. 1337, 1350 (E.D. Mich. 1981); *Knowles v. Gwynn*, 163 S.E.2d 727, 728 (Ga. 1968); *Ballard v. Wagner*, 877 A.2d 1083, 1086–87 (Me. 2005).
[248] *Raggi v. Las Vegas Metro. Police Dept.*, No. 2:08-CV-943 JCM (PAL), 2009 BL 293157, at *1 (D. Nev. Mar. 10, 2009).
[249] *Id.*
[250] *Id.*
[251] *Weigand v. NLRB*, 783 F.3d 889, 891–92 (D.C. Cir. 2015)
[252] *Id.* at 897.
[253] *Ballard*, 877 A.2d at 1086–87. *See also Rheudasil v. Air Line Pilots Ass'n Int'l*, No. CV-07-1634-PHX-FJM, 2008 BL 362415, at *4 (D. Ariz. June 20, 2008) (where defamatory statement posted on union's webpage was made by individual in his capacity as union representative, dismissing claim against individual and suggesting that union itself likely liable on theory of respondeat superior).

Must a Local Grant Webpage Access to All Members?

Whether an IAFF Local is legally required to grant access to all members is, in part, dictated by whether the local contains any members who are employed by private companies. Even in the absence of a legal requirement, IAFF Locals should not intentionally exclude members and should look to the general requirements in the IAFF Constitution for allowing members to participate in deliberations and debate.

The Labor-Management Reporting and Disclosure Act ("LMRDA")[254] governs the internal affairs of unions in the United States. While the LMRDA applies only to private sector unions, the IAFF is subject to the LMRDA at the International level because the International includes private sector employees among its members.[255] IAFF locals composed entirely of public sector employees are not subject to the LMRDA except for local elections for delegates to the IAFF Convention or local officers who serve as delegates to the IAFF Convention by virtue of their office.[256]

In general, if a local union with private sector members maintains a webpage, it must grant access to all members, but it may impose "reasonable rules" per the statute. The right of a union member to access a local's webpage is derived from Section 101(a) of the LMRDA (emphasis added), which guarantees that every member of any labor organization:

> shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: ***Provided, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as*** to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.[257]

Although courts have declined to read union members' free speech rights under Section 101(a) as broadly as free speech rights afforded to citizens under the First Amendment,[258] union members' right of free speech is nonetheless given an "expansive protection" under the LMRDA.[259]

The IAFF Constitution's section establishing the rights of members to participate in meetings, assemble freely, and express their views largely follows the language of the LMRDA. Specifically, Article XIII, Section 8 of the IAFF Constitution (emphasis added) states:

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[254] 29 U.S.C. 401 et seq.
[255] 29 C.F.R. §452.12 ("A national, international or intermediate labor organization which has some locals of government employees not covered by the Act and other locals which are mixed or are composed entirely of employees covered by the Act would be subject to the election requirements of the Act.")
[256] 29 C.F.R. §451.3(a)(4); 29 C.F.R. §452.12 ("The requirements would not apply to locals composed entirely of government employees not covered by the Act, except with respect to the election of officers of a parent organization which is subject to those requirements or the election of delegates to convention of such parent organization.").
[257] 29 U.S.C. § 411(a)(2) (emphasis in original).
[258] *See United Steelworkers of America v. Sadlowski*, 457 U.S. 102, 111 (1982) (rejecting the notion that "the scope of § 101(a)(2) [is] identical to the scope of the First Amendment").
[259] *Mallick v. Int'l Broth. of Elec. Workers*, 644 F.2d 228, 235 (3d Cir. 1981).

> Regular or special meetings of the local union shall be held as prescribed in the local union's constitution or by-laws and every member in good standing of a local union shall have the right to attend any such meeting and to participate in its deliberations and voting, and to express at such meeting their views upon candidates in an election of the local or upon any business properly before the meeting, ***subject, however, to such reasonable rules as the local union shall establish pertaining to the conduct of its meetings including its right to enforce reasonable rules*** governing the responsibility of every member to their local union as an institution and prohibiting conduct which would interfere with the local union's or this Association's performance of their legal or contractual obligations.
>
> Members shall also have the right to meet and assemble freely with other members and express their views, arguments or opinions provided, however, that in so doing they are not guilty of misconduct as set forth in this Constitution and By-Laws or as may be prescribed in the local union's constitution or by-laws.

In *Emery v. Allied Pilots Ass'n*, a recent decision out of the U.S. District Court for the Southern District of Florida, the Court analyzed whether the free speech clause of Section 101(a) operated to prohibit a union from denying a member's access to a discussion forum on the union's website.[260] The plaintiff in Emery was a pilot who was out on disability leave for greater than five years (known as an "MDD pilot"), and as such was categorized as an inactive member of her union and removed from the airline's seniority list.[261] The union operated a website which contained a forum where union members and retirees could discuss various issues.[262] On one occasion, plaintiff made a post on the forum complaining about the airline stripping her of her disability benefits and criticizing the union for what she believed was an inadequate response.[263] Shortly thereafter, the union blocked her and other MDD pilots' access to the forum.[264]

The Court began its analysis by noting that the "LMRDA gives unions the right to provide reasonable rules in three situations: (1) for conducting union meetings; (2) for insuring individual responsibility to the union as an institution; and (3) for preventing any interference with the union's performance of its legal or contractual obligations."[265] After determining that none of the exceptions applied, the Court explained that the union's "policy of denying MDD pilots access to [the online forum] acts to silence criticism of the union's management by a discreet minority of disabled members" and a "a union cannot impair a member's right of free speech merely because it disagrees with the content of that speech."[266]

In contrast to a viewpoint-based restriction on speech, unions are allowed to restrict their members' speech if the restriction is "reasonably related to the protection of the organization as an institution."[267] For example, in *Quigley v. Giblin*, the United States Court of Appeals for the District of Columbia considered the legality of a resolution adopted by an international union requiring all candidates for local union offices and their supporters to include a password protection function on their campaign websites, limiting access to union members only.[268] The union's purported rationale for adopting this resolution was to prevent non-members from accessing sensitive information about the locals, including information that employers could use to the detriment of the locals in organizing

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[260] *Emery v. Allied Pilots Ass'n*, 227 F. Supp. 3d 1292 (S.D. Fla. 2017).
[261] *Id.* at 1294.
[262] *Id.* at 1295.
[263] *Id.* at 1296.
[264] *Id.* at 1298.
[265] *Id.* at 1300.
[266] *Id.* at 1302.
[267] *United Steelworkers of America v. Sadlowski*, 457 U.S. 102, 111–12 (1982).
[268] *Quigley v. Giblin*, 569 F.3d 449, 451 (D.C. Cir. 2009).

campaigns and contract negotiations.[269] Several members brought suit against the union, asserting that the resolution interfered with a candidate's ability to communicate with union members and was therefore violative of Section 101(a) of the LMRDA.[270] The Court ultimately upheld the resolution, finding that the password restriction "serve[d] a legitimate and protected purpose" under Section 101(a) – protecting sensitive union information from public dissemination.[271]

Even if your local is made up entirely of government employees – so the LMRDA does not apply – IAFF Locals should treat their websites and online forums as an electronic meeting space and similarly balance the rights of members to participate with the right of the local to establish reasonable rules regarding conduct (including the right to exclude members who, through their conduct, repeatedly interfere with the rights of other members or who harass other members or disrupt meetings).

Can an Employer Gain Access to a Local's Website or Bulletin Board Without the Local's Permission?

As a general matter, an employer may not gain access to a local's website or online bulletin without the local's permission. The federal Stored Communications Act (SCA) makes it an offense to "intentionally access[ ] without authorization a facility through which an electronic communication service is provided ... and thereby obtain[ ] ... access to a wire or electronic communication while it is in electronic storage in such system."[272] Websites and online bulletins are "electronic communication services" for purposes of the SCA, such that an individual generally may not access them without prior authorization.[273]

The Ninth Circuit in *Konop v. Hawaiian Airlines, Inc.* considered the applicability of the SCA to an online bulletin created by Hawaiian Airlines employee Robert Konop, wherein Konop posted criticisms of the employer and his union.[274] Konop controlled access to the website by requiring visitors to log-in with a user name and password, and created a list of individuals who were eligible to access the site.[275] Additionally, the website required users to agree to terms and conditions prohibiting unauthorized disclosure of the site's contents.[276]

The question before the Court was whether Konop's employer violated the SCA when a Hawaiian Airline's officer gained access to the site without Konop's consent.[277] The Court ultimately concluded that because the officer was granted access to the site by an authorized user of the site, one of Konop's coworkers whom he had previously granted access, the employer was exempt from liability.[278]

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[269] *Id.* at 452
[270] *Id.* at 454.
[271] *Id.* at 455–56.
[272] 18 U.S.C. § 2701(a).
[273] *See Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 879 (9th Cir. 2002).
[274] *Id.*
[275] *Id.* at 872
[276] *Id.*
[277] *Id.* at 881.
[278] *Id.*; see also 18 U.S.C. § 2701(c)(2) (exempting from liability "conduct authorized ... by a user of [the website] with respect to a communication of or intended for that user").

Thus, as illustrated by *Konop*, the SCA permits third parties to access otherwise private websites and bulletins where an authorized user enables the third party to do so. In light of this exemption, locals are advised to keep access to private union websites and bulletins limited to members and require that members log-in to secure pages with a username, password, and/or member number. Further, locals should ensure that only members in good standing are granted access to the secure portions of the union's website, continue to monitor access, and revoke access to individuals who are no longer members in good standing. Locals are also advised to only permit a union officer, such as the president or secretary-treasurer, to grant members access to the secure portions of the union's website. Locals who need further assistance developing security protocols for their websites or have additional questions about data security should contact the IAFF's Information Systems Division.

As a final note, locals should be aware that the disclosure of otherwise SCA-protected information on a union's website or bulletin may nonetheless be required if the information relates to "an emergency involving the danger of death or serious physical injury to any person,"[279] or when such information is sought by a warrant, subpoena, or court order.[280]

Can a Local Post Information About an Employer's Policies or Internal Documents on the Local's Website or Bulletin Board?

It depends. A local can likely post information about an employer's publicly available policies or documents on the local's website or bulletin board. While not directly applicable to publicly employed fire fighters, cases analyzing this issue under the NLRA are instructive. Courts addressing the propriety of an employer broadly prohibiting employees from discussing internal employment information and policies with one another have rejected these policies as unlawfully restricting employees' rights under the NLRA to discuss the terms and conditions of their employment.[281] Indeed, under labor law schemes analogous to the NLRA, states have similarly found such policies to be unlawful. For example, in a decision by the Michigan Employment Relations Commission, the Commission underscored employees' "right to communicate regarding terms and conditions of employment" as inherent under the rights afforded by the Public Employment Relations Act, Michigan's public sector corollary to the NLRA.[282]

Additionally, where a member or officer posts information about an employer's policy and speaks about the policy as a private citizen on a matter of public concern (i.e., not pursuant to his or her job duties), the First Amendment likely protects the members right to engage in the speech. However, as discussed at length throughout this manual, even where speech is otherwise deserving of First Amendment protection, an employer may be able to demonstrate that its interest in restricting the speech outweighs the employee's interest in engaging in the speech under certain circumstances, such as when the speech violates a specific rule or regulation to which the employee is subject or would otherwise unduly disrupt the employer's operations.[283] With this in mind, locals should be

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[279] 18 U.S.C. § 2702(b)(8).
[280] *Id.* § 2703.
[281] *See, e.g., Cintas Corp. v. NLRB*, 482 F.3d 463, 465 (D.C. Cir. 2007) (invalidating policy barring employees from discussing "any information concerning the company").
[282] Michigan Employment Relations Commission, Decision, *City of Bay City and Teamsters Local 214*, Case No. C04-B-031 (Sept. 25, 2007), at 5.
[283] *Thaeter v. Palm Beach Cnty. Sheriff's Office*, 449 F.3d 1342, 1355 (11th Cir. 2006) (citations omitted).

careful not to publicly disseminate the employer's confidential or proprietary information and should follow any established procedures for the dissemination of internal information or policies to non-employees or individuals outside of the organization.[284]

In short, whether a particular policy of the employer may be disseminated by a local on its website or bulletin board should be addressed on a case-by-case basis with careful consideration of the policy and whether its disclosure would undermine an employer's legitimate business interest. Additionally, the legal issues addressed in this section reinforce the importance of the recommendations in the section immediately above this one regarding password protecting and limiting access to (at least certain parts of) the local's website.

Can a Local Control or Delete What a Member Posts on a Local Controlled Website/Social Media Page?

As explained above, the LMRDA grants union members expansive free speech protections and is designed to protect the rights of members to "discuss freely and criticize the management of their unions and the conduct of their officers" ***subject to reasonable rules imposed by the union.***[285] However, to qualify for this protection, the speech at issue must "directly relate to the union-member relationship."[286]

In *Kehoe v. IATSE Local 21*[287], the plaintiff sued over internal union charges he faced after posting photos on Facebook of another member operating a forklift incorrectly and causing damage that were designed to embarrass the member. The court reiterated the standard that "a union member has the right to express any views, argument, or opinions subject to the union's reasonable rules as to the responsibility of every member toward the organization" before explaining that the speech in this case did "not implicate [the plaintiff's] free speech rights because the underlying [internal union] charges against [him] for posting the photographs to Facebook were beyond the purview of section 411(a)(2) of the LMRDA."[288] In other words, he did not have a free speech right to embarrass or harass other members.

In another recent case, the American Pilots Association ("APA") sought temporary injunctive relief against a member of the union to prohibit the member from posting messages on the union's online discussion forum.[289] The member had previously posted a message on the forum threatening the union's board of directors and staff with "violence and death," and the union brought suit against the member for civil assault.[290] The court found that the relief requested by the union would not violate the LMRDA, because "threats of death or bodily harm and engaging in assault are not examples

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[284] *See, e.g., Ingham County v. Capital City Lodge No. 141 of the Fraternal Order of Police*, 739 N.W.2d 95, 97 (Mich. Ct. App. 2007) (finding that police department had legitimate business interest in preventing unauthorized disclosure of confidential information and could lawfully require employees to seek permission before publicly disclosing internal policies).
[285] *Id.* at 454 (internal citations and quotations omitted).
[286] *See Kehoe v. Int'l Ass'n of Theatrical Stage Emps. Local 21*, No. 13-7805 (JLL) (JBC), 2016 BL 161446, at *13 (D.N.J. May 20, 2016) (citing Semancik v. United Mine Workers of Am., Dist. No. 5, 466 F.2d 144, 154 (3d Cir. 1972)).
[287] 2016 BL 161446, at *19 (D.N.J. May 20, 2016).
[288] *Id.* at *20.
[289] *Allied Pilots Ass'n v. Criddle*, No. 4:19-cv-00173-O, 2019 BL 592376, at *2 (N.D. Tex. Mar. 5, 2019).
[290] *Id.*, at *1.

of 'mak[ing] charges regarding handling of union funds by union officers' or 'express[ing] views, arguments, or opinions... in connection with... representation by the union'" – i.e., the types of speech protected by the LMRDA.[291]

A local union with members who are employed by private companies may not lawfully control or delete members' posts on its website or social media pages in a manner that interferes with the member's LMRDA-protected right to criticize the management of the union and the conduct of its officers, but the LMRDA's proviso that local's may establish ***reasonable rules*** is recognition that there are limits to members' rights in this area. Further, a local may remove or limit objectionable content posted by members on its forums. Locals can also enact neutral policies of removing posts after a certain period of time so long as the policy is evenly applied. Finally, a local union can remove any posts from individuals who are not members of the local.

IAFF Locals made up entirely of government employees should continue to follow Article XIII, Section 8 of the IAFF Constitution and By-Laws regarding the speech rights of members and follow the same guidelines used at meetings to govern whether specific comments or content posted by members should be deleted.

Local's Responsibility for the Posts Made by Members on Their Website/Social Media

As explained above, locals, as *organizations*, generally cannot be held liable for the information their members post on the local's web site or bulletin board, unless the member was acting as an agent of the local or the local approves or ratifies the post. Further, under the federal Communications Decency Act ("CDA"), providers and users of "interactive computer services" enjoy broad immunity from suit on state law claims, such as for defamation, for the content of third parties.[292] The CDA defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server."[293] Courts applying the CDA have held that internet service providers, website exchange systems, online message boards, and search engines fall within this definition.[294]

An interactive computer service qualifies for immunity under the CDA "'so long as it does not also function as an 'information content provider' for the portion of the statement or publication at issue.'"[295] "Information content providers," by contrast, which are defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service,"[296] can be held liable for content posted online when they make a "material contribution" to the content.[297]

Immunity from suit for content posted on a provider's webpage applies when three criteria are

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[291] *Id.*, at *6.
[292] 47 U.S.C. § 230(c)(1).
[293] § 230(f)(2).
[294] *See, e.g., Fed. Trade Comm'n v. LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016).
[295] *Rigsby v. GoDaddy Inc.*, 59 F.4th 998, 1007 (9th Cir. 2023) (quoting *Carafano v. Metrosplash.com., Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003)). See also *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (noting that "providers of interactive computer services are liable only for speech that is properly attributable to them").
[296] § 230(f)(3).
[297] *Rigsby*, 59 F.4th at 1007 (citing *Gonzalez v. Google LLC*, 2 F.4th 871, 892 (9th Cir. 2021)).

met: the provider is an interactive computer service, the plaintiff bringing suit is treating the entity as the publisher or speaker, and the information is provided by another information content provider.[298] In other words, as summarized by one court, "a plaintiff defamed on the internet can sue the original speaker, but typically 'cannot sue the messenger.'"[299] Rather, providers of interactive computer services are liable only for speech that is "properly attributable" to them.[300]

Applying these principles, where a local maintains an online discussion forum, the forum likely falls under the definition of an "interactive computer service."[301] As such, a local will not be held liable for defamatory or other tortious posts made on the local's forum by members or other third parties, even if the local manages the site in such a way that removes objectionable content. Indeed, courts have explained that deciding whether or not to remove content "falls squarely" within an interactive computer service's exercise of a publisher's traditional role and is therefore subject to the CDA's broad immunity.[302] However, where a local maintains a Facebook page or other social media account, the local could be liable for the content that ***the local*** posts.[303]

Are Locals Required to Turn Over the Identity of Members who Post Anonymously on the Local's Website or Bulletin Board to their Employer?

Posts made on the internet or social media are considered "speech" for purposes of the First Amendment and its protections.[304] Additionally, courts have specifically extended First Amendment protections to anonymous speech online, such as posts made to online forums by anonymous usernames.[305] Therefore, locals are typically not required to disclose to an employer the identity of union members who post anonymously on the local's website or bulletin board on routine comments.

However, as with First Amendment protections in general, the right to retain anonymity online is not absolute. For instance, if an individual engages in defamatory speech online using an anonymous

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[298] *Id.* (*citing Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019)).

[299] *Ricci v. Teamsters Local 456*, 781 F.3d 25, 28 (2d Cir. 2015) (quoting *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 672 (7th Cir. 2008)). See also *Doe v. Myspace, Inc.*, 528 F.3d 413, 419 (5th Cir. 2008) (explaining that under Section 230, "[p]arties complaining that they were harmed by a Web site's publication of user-generated content . . . may sue the third-party user who generated the content, but not the interactive computer service that enabled them to publish the content online").

[300] *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009).

[301] *See, e.g., Inge v. Walker*, No. 3:16-CV-0042-B, 2017 BL 384744, at *4 (N.D. Tex. Oct. 26, 2017); *see also FTC v. Accusearch Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009) ("The prototypical service qualifying for [Section 230's] statutory immunity is an online messaging board (or bulletin board) on which Internet subscribers post comments and respond to comments posted by others.").

[302] *Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007).

[303] *See, e.g., Sikhs for Justice "SFJ," Inc. v. Facebook, Inc.*, 697 Fed. App'x. 526, 526–27 (9th Cir. 2017) (creator of Facebook page is "information content provider" under the CDA and "SFJ, not Facebook, is the party solely responsible for creating and developing the content on SFJ's webpage.")

[304] *See, e.g., Reno v. ACLU*, 521 U.S. 844, 870 (1997).

[305] *See Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432, 440 (Md. 2009); *Taylor v. Doe*, No. 4:13-CV-218-F, 2014 BL 128927, at *2 (E.D.N.C. May 8, 2014) (citing *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199–200 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–42 (1995)).

account and the subject of the speech files suit, a court may require the disclosure of the defamer's identity through discovery or subpoena requests.[306]

Courts will balance the First Amendment rights of anonymous online speakers with the rights of "aggrieved individuals to address legitimate claims against anonymous posters in a judicial forum."[307] Specifically, courts will consider whether the burdens imposed by the revelation of the speaker's identity against the significance of the interest in disclosure of the speaker's identity.[308] As part of this assessment, courts will consider the type of speech at issue and whether it is deserving of anonymity. For example, courts typically protect anonymity in literary, religious, or political speech, while commercial speech (like advertising) is less likely to be protected.[309]

In short, the nature of the speech is a "driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes," and therefore the analysis of whether an anonymous online speaker's identity will be protected from disclosure in litigation must be assessed on a case-by-case basis.[310]

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[306] See, *e.g., In re Anonymous Online Speakers,* 661 F.3d 1168, 1177 (9th Cir. 2011) (upholding disclosure with respect to identity of three non-party anonymous speakers who allegedly made defamatory statements about plaintiff); *see also Taylor v. Doe*, No. 4:13-CV-218-F, 2014 BL 128927, at *2 (E.D.N.C. May 8, 2014).

[307] Taylor, 2014 BL 128927, at *2 (citing Brodie, 966 A.2d at 449–50 (Md. 2009); Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 577–78 (N.D. Cal. 1999)).

[308] Perry v. Schwarzenegger, 591 F.3d 1141, 1161 (9th Cir. 2010).

[309] *Advanced Career Techs., Inc. v. Doe*, Civil Action No. ELH-13-1140, Case No. 13-cv-00304, 2013 BL 196777, at *3 (D. Md. July 24, 2013) (citations omitted).

[310] *In re Anonymous*, 661 F.3d at 1177.