Social Media Policy Training and Workplace Investigations in the Age of Facebook, Instagram, Twitter and TikTok



Presented by:
Attorney Roxanne Sosnowski
Attorney Josef Kurlinkus

Sosnowski Szeto, LLP

SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

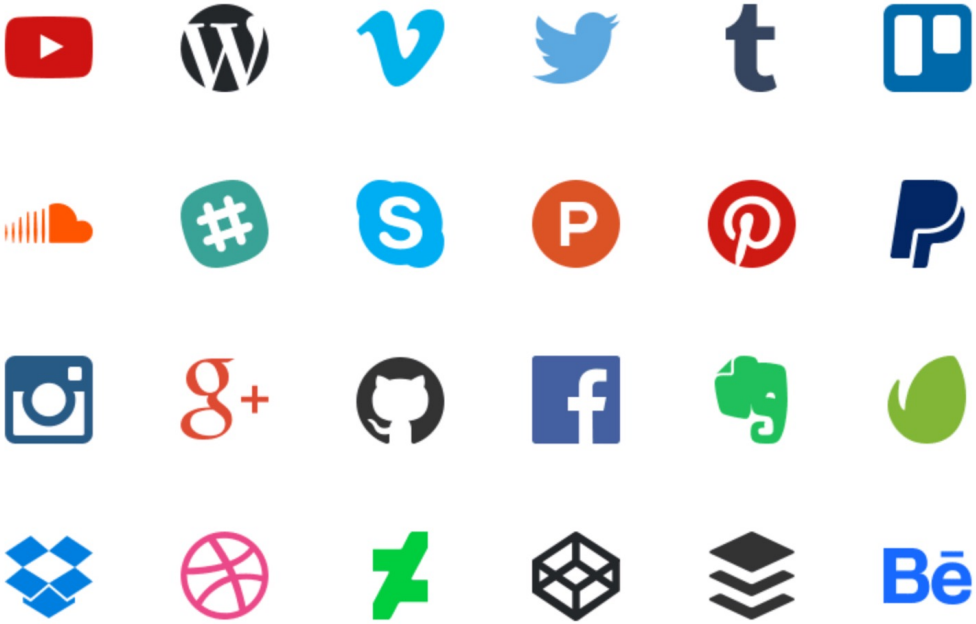
Social Media



SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

Social Media

many
options.



SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

Social Media

many, many options.

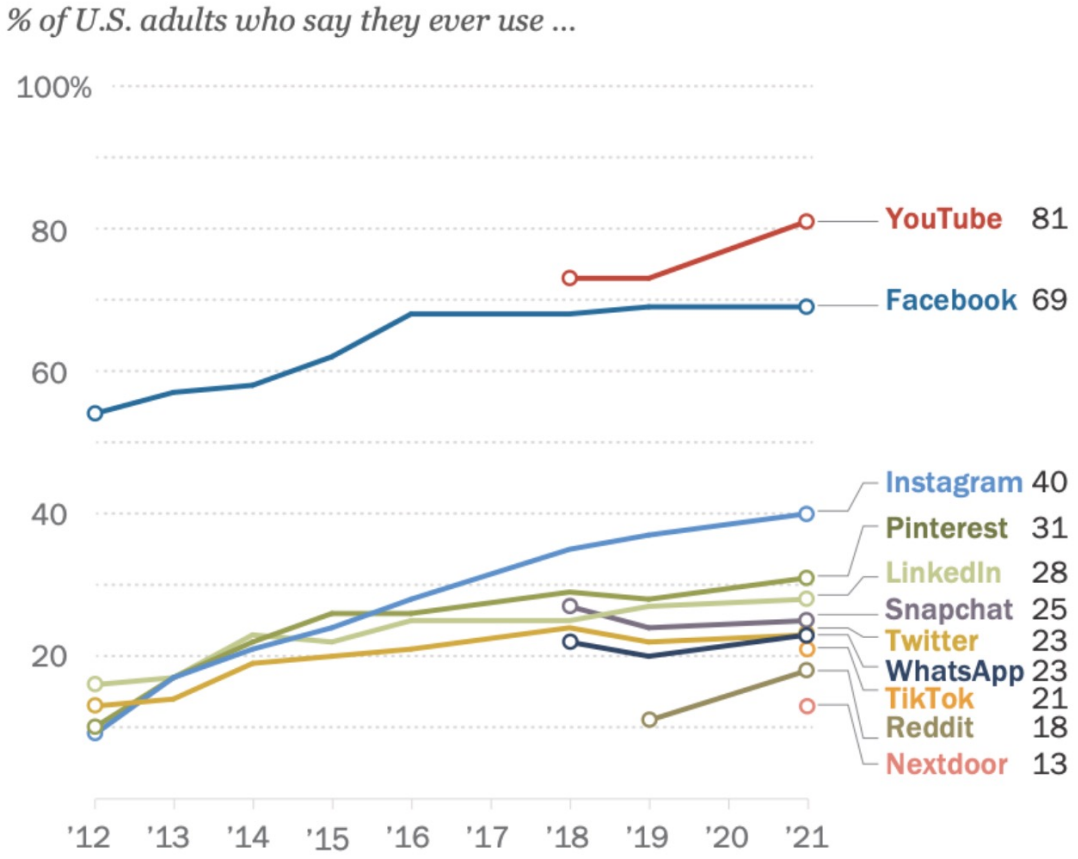


SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

Social Media

everyone is doing it.

SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW



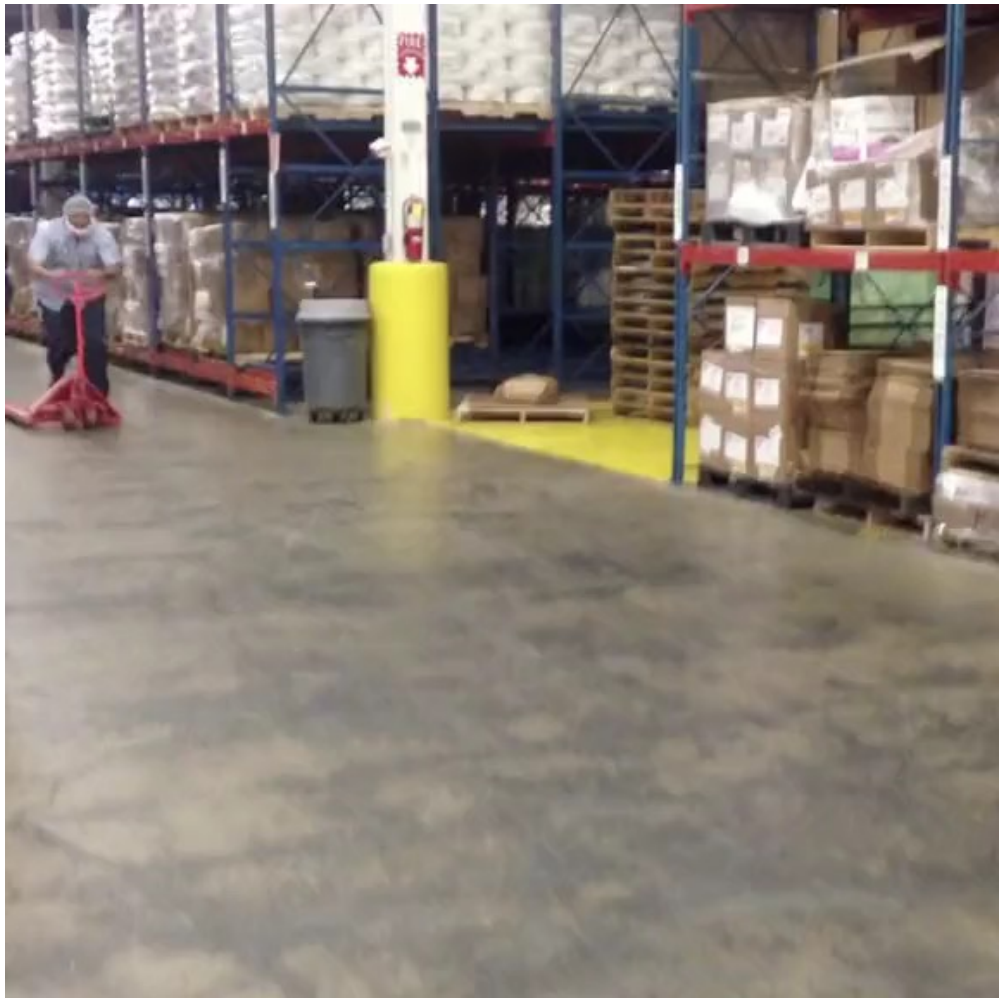
Source: Survey of U.S. adults conducted Jan. 25 – Feb 8, 2021
Social Media Use in 2021. Pew Research Center

Social Media

everyone is doing it.

(but maybe don't post to social media while at work)

SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW



Goals in establishing social media policy

SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

- Provide a clear and consistent set of rules.
- Create a clear expectation for what is and is not acceptable.
- Provide employees with guidance on expectations on their use of social media in their official role and outside of work.

Organizational, professional, or personal

SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

Organizational Accounts:

- Accounts for the Municipality as a Whole
- Accounts for Specific Departments
- Campaign?

Individual Accounts:

- Personal/Private Accounts
- Professional Accounts
- Elected Official?

Policies should be flexible and take into consideration that there are different accounts used for different purposes.

Pick your poison – any or all of it

SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

What will the municipality use its social media for?

- Disseminate Municipal Information
  e.g. Posting Agendas, announcements, road closures, etc.
- Interact with Continuants?
- Promote Local Events or Businesses?

Control Over Content

yes. please.

SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

Think this through *before* signing up.

- Who will oversee the account?
- Who has access to the account?
- Who will moderate the account?

No. These aren't all the same thing.

Freedom of Speech

what it says.

SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

"**Congress shall make no law** respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging the freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Constitution of the United States

Amendment 1.

Freedom of Speech

what it says.

SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

"All persons may speak, write and publish freely, being responsible for the abuse of that liberty. In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense."

Illinois Constitution § 4

Freedom of Speech

what it does.

SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

The First Amendment protects virtually all speech, no matter how unorthodox, offensive, or distasteful.

Except for:

- Obscenity
- Incitement
- Fighting words
- Defamation
- Perjury
- Extortion
- Harassment
- True threat
- False advertising

Public Forums

traditional, limited, or none of the above.

SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

Traditional Public Forum:
Public parks, sidewalks and areas that have been traditionally open to political speech and debate. Speakers in these areas enjoy the strongest First Amendment protections.

Nonpublic Forum:
Nonpublic forums are forums for public speech that are neither traditional public forums nor designated public forums.

Limited Forum:
A limited forum is a type of a designated public forum. The government limits access to a designated public forum to certain classes or types of speech. The government may discriminate against classes of speakers or types of speech. However, the government is still prohibited from engaging in viewpoint discrimination.

Source: *Forums.* Cornell Law School Legal Information Institute. Wex Toolbox. https://www.law.cornell.edu/wex/forums

Public Forums

limits of the forum.

SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

Limited Forum:

A limited forum is a type of a **designated public forum**. The government **limits access** to a designated public forum to certain classes or types of speech. The **government may discriminate against classes of speakers or types of speech**. However, the government is still prohibited from engaging in viewpoint discrimination.

Source: *Forums.* Cornell Law School Legal Information Institute. Wex Toolbox. https://www.law.cornell.edu/wex/forums



Designation of Social Media as Limited Public Forums and Creating Content Restrictions

- Establish limits to the types or topics of speech, but not the viewpoints.
- Create the rules in advance and apply them equally and consistently.
- Train staff (and elected officials) on the guidelines… and what happens if they aren't followed.

Public Speech by the Public

questions and comments.

SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

Comments aren't always positive…
… or constructive

- One-way communication can be a good thing.
- Comments don't have to be turned on, but if they are, make sure the public, staff, and elected officials are clear on what is expected when using official social media.
- Negative viewpoints and criticisms are a part of the public discourse, and are protected to the same extent as positive comments.
- If any viewpoint is allowed, all viewpoints must be allowed (within reason).

Public Speech by the Public

example one.

SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

"All public posts must be topically related to Village news, services, events, or messages and comments must be topically related to the original information or subject being commented on."

Source: Village of Greyslake Social Media Policy
https://www.villageofgrayslake.com/654/Village-Social-Media-Policy

Public Speech by the Public

example two.

SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

"Comments or posts made by outside users to University accounts can be removed for any of the following reasons, at any time, if they:

- use obscene, threatening or harassing language;
- disclose information that is confidential by law or regulation;
- promote or advocate illegal activity;
- violate copyrights or trademarks;
- are commercial advertising, unsolicited self-promotion, SPAM, or solicitations;
- or endorse or oppose anyone campaigning for election to a political office. "

Source: University of Illinois Urbana-Champaign - Social Media Comment Policy
https://publicaffairs.illinois.edu/services/social-media/social-media-comment-policy/

Public Speech by the Public

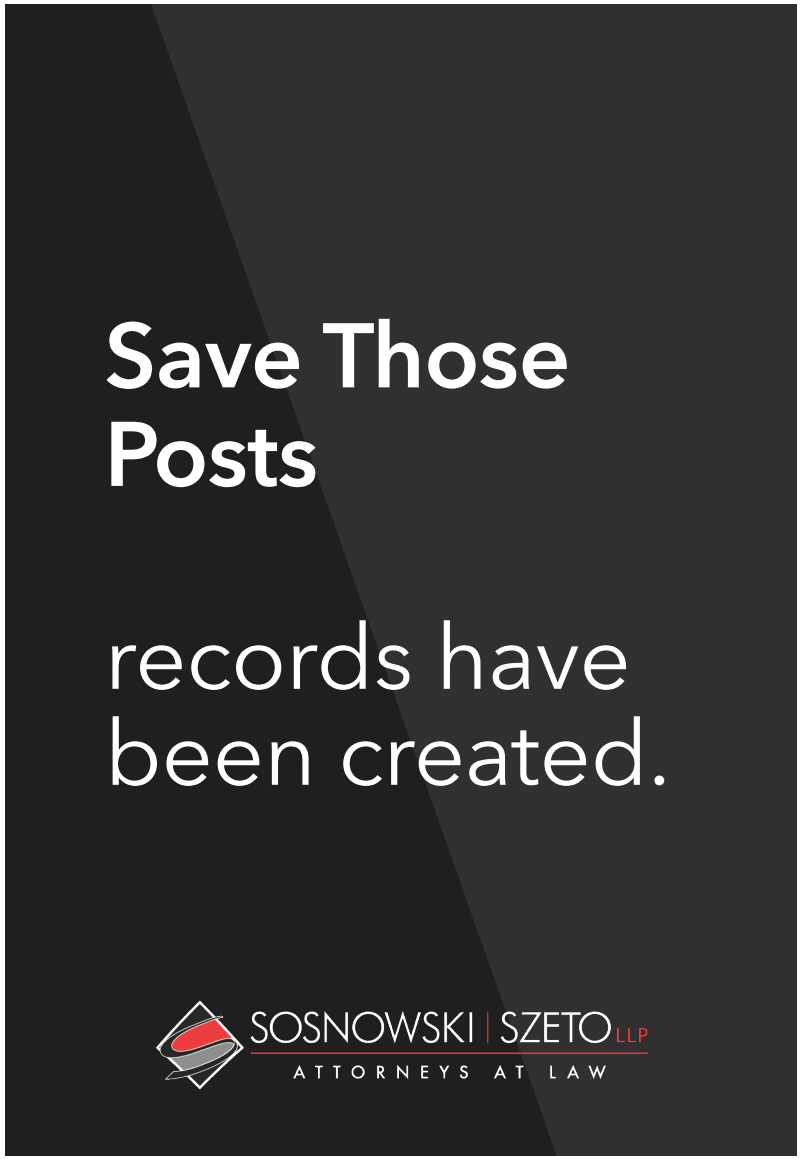
example three.

SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

"Village social media account content and comments containing any of the following forms of content shall not be allowed for posting and shall be removed:

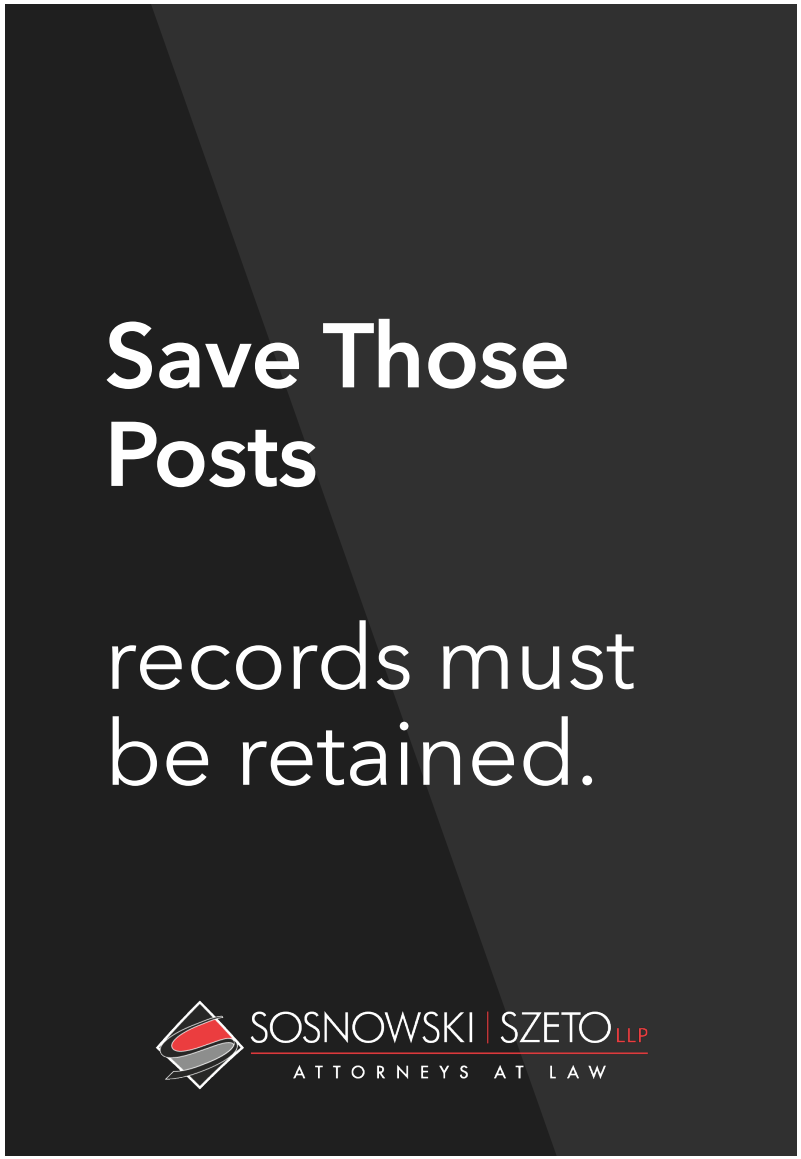
- Profane language or content.
- Content that promotes, fosters, or perpetuates discrimination on the basis of race, religion, gender, marital status, familial status, national origin, age, mental or physical disability, sexual orientation, gender identity, source of income, or other protected status under applicable law.
- Inappropriate sexual content or links to such content.
- Solicitations of commerce.
- Conduct or encouragement of illegal activity.
- Information that may compromise the safety and/or security of the public or public systems.
- Content that includes unlawful harassment or threats of violence.
- Comments that are not topically related or out of context.
- Plagiarized material or content that violates intellectual property rights or other legal rights of any other party.
- Content that defames any person, group, or organization.
- Slanderous, libelous, malicious, offensive, threatening, profane, uncivil, or insulting language. References to the personality of individuals or personal attacks, insults, or threats will not be permitted.
- Content that violates any law or regulation.
- Political campaign links or organized political activity.
- Private or personal material published without consent, including personal identifiers for any person such as home address, phone number, social security number, or other sensitive information."

Source: Village of Greyslake Social Media Policy
https://www.villageofgrayslake.com/654/Village-Social-Media-Policy



Local Records Act (50 ILCS 205/3)

"Public record" or "records" means all…[materials]…**regardless of physical form** or characteristics, made, **produced**, executed, or **received** by any agency [or officer] in the State in pursuance of State law or **in connection with the transaction of public business** and preserved or appropriate for preservation by that agency or its successor **as evidence of the organization, function, policies, decisions, procedures, operations,** or other activities of the State or of the State [or local] Government, or because of the informational data contained therein…."



Local Records Act / FOIA

- The Local Records Commission of the Illinois State Archives considers all original postings along with all associated comments to be a record.
- Municipalities must ensure that they save and retain all relevant records in accordance with their record retention policies.
- Records may also include an official's personal accounts, if that account is used as a tool of governance.
- As records, postings and comments are also subject to FOIA.

Employee Speech in Public

citizen and employee.

SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

A citizen who works for the government is nonetheless a citizen.

- Does the speech involve a matter of "public concern"?
- If so, does the employee's interest in speaking publicly outweigh the employer's interest in promoting the efficiency of the public services it performs through its employees?

Pickering v. Board of Education of Township High School District 205, Will County, Illinois, 391 U.S. 563 (1968)

Employee Speech in Public

government and employer.

SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

A government that employs a citizen, is nonetheless an employer.

"Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."

Garcetti v. Ceballos, 547 U.S. 410 (2006)

Employee Speech in Public

keeping it in balance.

SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

Making the Determination.

- A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

- Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

Garcetti v. Ceballos, 547 U.S. 410 (2006)

Employee Speech in Public

it's a concern, but whose?

SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

Public concern, or just an unhappy employee.

- Personal gripes or grievances typically do not constitute matters of public concern.
- Statements made pursuant to the employee's official job duties and responsibilities.
- Comments that interfere with the efficient functioning of the office or discredit the office in the eyes of the public.



Right to Privacy in the Workplace Act
(820 ILCS 55)

Unlawful for any employer or prospective employer to *request*, *require*, or *coerce* an employee or applicant to:

- provide a user name and password to gain access to the personal online account, or to authenticate or access a personal online account in the presence of the employer
- join a group affiliated with any personal online account of the employee or applicant
- join an online account established by the employer or add the employer or an employment agency to the employee's or applicant's list of contacts that enable the contacts to access the employee or applicant's personal online account
- discharge, discipline, discriminate against, retaliate against, or otherwise penalize an employee for refusing or declining to provide the information.

Workplace Investigations for Social Media Violations

When initiating an investigation into possible violations of your municipal social media policy, there are several considerations:

- Collective Bargaining Agreements
- Employee Handbook Provisions
- First Amendment
- Right to Privacy



SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

Conducting the Investigation

SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

Notice of Investigation

- The Five W's.

Complaint/Affidavit

- Sworn complaints may no longer be needed for Police Officers – due to Reform Act.

Statements from Witnesses/Interview Witnesses

- Who do you interview?
- Who conducts the interview?
- What questions do you ask?

Employee Interviews

- Notice of Interview may be necessary due to CBA/Employee Handbook/State Statute
- Who conducts the interview?
- What questions do you ask?

Conducting the Investigation

SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

- **Investigation is Complete, Now What?**
- **Notice of Pre-Disciplinary Meeting**
  - Due Process
  - What occurs at the Meeting?
  - Who should be present?
- **In what circumstances is discipline appropriate?**
  - Expression of Opinion or Violation of Policy
- **What type of discipline?**
  - Oral Warning
  - Written Reprimand?
  - Suspension
  - Termination?

Presented by:

Josef R. Kurlinkus
josef@sonowskiszeto.com

Roxanne M. Sosnowski
roxanne@sosnowskiszeto.com

SOSNOWSKI | SZETO LLP
ATTORNEYS AT LAW

Sosnowski Szeto, LLP
6735 Vistagreen Way, Suite 300
Rockford, IL 61107
Phone: 815-900-7272
Fax: 815-900-7444

Social Media Policy Training and Workplace Investigations in the Age of Facebook, Instagram, Twitter and TikTok

IML Annual Conference 2021