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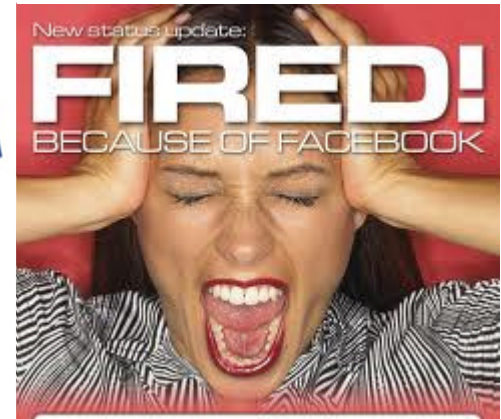
Think Before You Speak - Optimizing Corporate Social Media Policies

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What's All The Buzz?



Risks and Benefits of Social Media

Risks Are Significant: Damage to reputation, legal violations, exposure of trade secrets/leaks, forum for complaints, distraction

- **Study** of companies with 1,000 or more employees reported that 17% had issues with employee's use of social media.
 - 8% of respondents fired someone for behavior on SM sites
 - 15% had disciplined for violating sharing/posting policies
 - 13% had investigated an exposure event
 - 17% disciplined an employee for violating blog/board policies
- Sunk cost arising from dismissed employees, plus potential for litigation/exposure from content that being posted
- **Google/Mark Jen firing (employee fired 11 days after blogging about company's health benefits):**
 - *"I goofed and put some stuff on my blog that's not supposed to be there. I'm learning that Google is understandably careful about disclosing sensitive information, even vague financial-related things"*
- ***But there are benefits to social media too:*** exposure; advertising; member networks; collaboration opportunities; real time customer service; interactive contests and promotions; etc.





Creating and Implementing Social Media Policies

- Legal issues: Classic concerns but new platforms
- Entity use of social media -- defamation, IP, advertising, antitrust, tax, privacy, document retention, labor/employment
- Employee use of social media -- attribution to entity, corporate identity, discrimination/harassment
 - **Social media policy should address issues of:**
 - Business vs. personal use
 - On vs. off the job conduct
 - Entity vs. employee/third party concerns
 - Internal vs. external: may be a need for more than one social media policy (internal vs. outward facing)



Creating and Implementing an Effective Social Media Policy

Team approach: Multi-disciplinary group—legal, executive, marketing, HR, etc.

- Creating
 - Determine audience – internal (employees) or external (bloggers, agencies, etc.) and target appropriately
 - Be clear and entity-specific
 - Be clear who is the designated “voice” of your organization (for any issue/matter)
 - Be consistent/require compliance with other entity policies and procedures
 - Focus on specific conduct – both do’s and don’ts
 - Establish a reporting procedure and compliance framework and designate a compliance officer/team
 - Use appropriate disclaimers
- Implementing
 - Notice – employees and third parties
 - Mandatory training
 - Monitoring/reporting
 - Adopt plan to address issues as they arise—management” vs. “hotline”



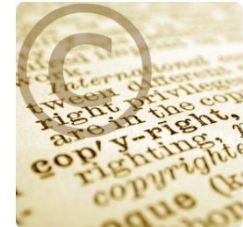
Limit Apparent Authority and Protect Corporate Identity



- Limit individuals who have authority to speak on entity's behalf & then prohibit all others from claiming or implying authorization to speak on entity's behalf
 - Create process for gaining authorization to speak on entity's behalf
- Prohibit employees and members from using entity's name in any online identity (e.g., username, screen name)
- Prohibit unauthorized individuals from using entity's intellectual property, logos, trademarks, and copyrights in any way or manner



Protect Intellectual Property



- Entity IP
 - Consider available registrations
 - Use clear placement of appropriate symbols – ©, ®, ™
 - Monitor for misuse
 - Balance IP protection with reputation protection
 - Innocent infringers
 - Enforce with policy statements, demand letters, and legal proceedings
- Third Party IP: obtain permissions and rights clearances where possible
 - Avoid trademark misuse
 - Seek permission to use third party trademarks and logos
 - Avoid use of others' trademarks in search terms, domain names, user names, metatags
 - Pay attention to copyright ownership, as social media is about content
 - Works for hire
 - Written assignment of rights
 - Digital Millennium Copyright Act and Communications Decency Act may provide some protections



Protect Confidential Information And Trade Secrets

- Prohibit employees , agencies from disclosing confidential information and trade secrets
 - Clients, customers, partners, affiliates
 - Financial information (pricing, revenue, expenses, etc.)
 - Development strategies and plans
- Dovetail with any restrictive covenant language (non-competes, non-solicitations, NDAs)





Guard Against Defamation

- Definition: the act of harming the reputation of another through false statements to a third party -- easy to do in the real-time environment of social media
 - Caution: issues of actual/apparent authority
 - Cisco “patent troll tracker” case – Cisco and former Cisco lawyer were sued for defamation after it was revealed that the lawyer was the author of an infamous blog (settled)
 - Posting consumer reviews can lead to defamation claim if reviews contain false statements of fact
- How to avoid:
 - No one may give a professional reference to a co-worker, former co-worker, vendor, customer, or any other individual without permission of HR or appropriate entity official
 - Use disclaimers and terms of use
 - Enforce a DMCA takedown policy; use Federal Communications Decency Act (provides immunity for third-party communications if no role played in publication)
 - Refrain from commenting on third-party posts
 - Consider screening capabilities for third-party hosts



Protect Privacy

- Social media raises privacy issues at more than one level, and regulators from more than one arena are interested: FTC/other federal agencies, states, self-regulatory groups -- will be an important issue in coming years
- First, most basic principle for employees: may not write about, post pictures of, or otherwise refer to any employee, member, vendor, supplier, business partner without that person's permission
- Collecting user data?
 - Must adhere to the promises made to consumers regarding privacy and data protection (privacy policies/other statements)
 - Must implement and reasonable and appropriate measures to protect personal data against theft
 - Data is an asset -- must disclose when will use or sell data
- Consider how you will really use data for the specific promotion
- Remember what your customers' expectations are:
 - If they believe you violated their privacy they won't provide information or purchase from you, and they will tell their friends...even if you violated no laws





Follow Advertising and Promotions Law Principles

- ***Basic advertising law principles apply to advertising on social media, as well as any terms and conditions imposed by the specific platform (e.g. Facebook rules for advertising, prize promotions)***
 - **All** claims require objective, verifiable substantiation, whether affirmatively communicating about products/services or responding to a question by a user
 - ***Applies to everyone speaking on behalf of company*** (can't use third party to make claims that you could not otherwise make)
 - Some options:
 - Use claims that have already been vetted and approved for other media
 - Refer back to substantiated source/static set of info to ensure consistency



Endorsements and Testimonials

- Bloggers or other social media marketers who have a relationship with the company about which they are blogging must disclose the relationship
 - So, “influencer” who receives money or in-kind payments, including samples, must disclose relationship
 - Employees blogging on their own time should also disclose their affiliation when talking about the company
- Blogger *and* marketer liability
 - ***Ann Taylor file closing***: Initial enforcement (or lack) indicates FTC is being reasonable if advertiser has disclosure policy
 - ***Reverb*** settlement: agency employees posted false blog entries for product
 - ***Legacy Learning Systems*** settlement: Legacy allegedly paid affiliate marketers to post favorable online reviews of instructional music DVDs that seemed to be from ordinary consumers. Reviews were not accompanied by disclosures.
- **Lessons?** Entity needs to have policy/procedures to make sure bloggers disclose and monitor compliance
 - Compliance with policy requirement is simple, but how to comply with requirement to monitor less clear
 - Make sure *agencies* are aware of duties and following through
 - What do you do when the relationship is more attenuated/indirect?



Comply With the Antitrust Laws

- Rules that companies can't participate in sharing pricing info, etc. apply to social media too
 - Wholefoods CEO Mackey's posts in merger with Wild Oats
- Penalties for (1) corporation, (2) individual, (3) third party participants
- How to avoid
 - Implement a written antitrust statement or policy that is easily visible to SM users
 - Require click-consent of rules prohibiting discussions of:
 - prices or pricing systems,
 - market allocation,
 - margins,
 - inventory levels and/or reduction of output
 - statements that could be seen as encouraging boycott of vendor, supplier, or competitor
 - Monitoring and enforcement



Keep Records

- **Retaining Records Related to Use of Social Media**
 - Important to implement sound records retention policies and procedures with respect to social media projects; should dovetail with other policies and procedures (substantiation, tax records, etc.)
 - Retain records for a reasonable period of time in the event the records are needed in connection with a regulatory investigation or other legal proceeding
 - Recent case law has imposed harsh penalties for spoliation of electronic records evidence and raised the bar for maintenance and production of electronic files



Generally Prevent Unlawful Conduct

- Prohibit posting of material that may be construed as ***discrimination or harassment*** based on race, ethnicity, color, national origin, sex, age, disability, religion, or any other legally protected characteristic
- Prohibit posting of material that is ***abusive, offensive, insulting, humiliating, obscene, profane, or otherwise inappropriate*** regarding organization or its employees, members, partners, etc.
- ***Prohibit unlawful/criminal conduct***
 - Cyber-stalking, cyber-bulling
 - Hate crimes
- ***Require compliance with all applicable laws***

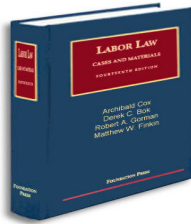


Address Employee Use Of Social Media

- Employees have *no Constitutional right to privacy* in the workplace
 - First Amendment (freedom of speech) N/A;
 - Fourth Amendment (searches + seizures) N/A
- ***Reduce expectation of privacy on computers, e-mail systems, blackberry/PDAs, and telephone/voicemail systems*** by:
 - **Notifying** employees that information exchanged via equipment and/or social media can be monitored and accessed;
 - **Expressly stating** no expectation of privacy with use of entity owned equipment, even with personal use or when telecommuting
 - **Reserving** right to remove content without notice
 - **Reminding** employees about privacy settings

Note that some states have specific restrictions on monitoring employee use





Consider Labor Law Concerns

- NLRA applies to ALL employers involved in interstate commerce except airlines, railroads, agriculture, and government
- Non-supervisory employees have §7 rights to **concerted activity** -- employees can gather to discuss workplace activity related to interests as employees
- NLRB litigation
 - *American Medical Response* complaint (Fall 2010) -- 2 alleged violations: Unlawfully terminating employee for posting negative remarks about her boss on Facebook, and unlawfully prohibiting employees from making negative comments about the company or discussing the company at all without the company's permission (internet use policy)
 - 3 NLRB advice memoranda (7/19/11): *JT's Porch Saloon & Eatery, Ltd.*; *Martin House*; *Wal-Mart*
 - *Hispanics United of Buffalo* (9/2/11): ALJ → firing for Facebook posts was **unlawful**
 - *Knauz BMW* (9/30/11): ALJ → firing for Facebook posts was **lawful**
- **Lessons**
 - Activity needs to be concerted to be protected, but knowing whether activity is concerted can be hard
 - Matters of mutual concern (not individual gripes) likely protected, even if communicated via social media and/or seen by non-employees
 - Some leeway for impulsive/intemperate behavior
 - Caution – both as to any policy and any employee discipline
 - *Stay tuned for future developments*



Successfully Implementing Social Media Policies: Policies: *The “Golden Rules” of Social Media Moderation and Posting*



1. Know What's Out There

- Understanding the true scope of your company's social media initiatives is half the battle
 - Training and pre-approval
 - Allocation of responsibilities
 - Monitoring programs



2. Ensure Disclosure of Company Affiliation

- Brand first
- Disclosure is a requirement and expectation
- Needs to be made clear to employees and third party agencies, representatives, influencers



3. Ensure Claims Are Substantiated

- Standard rules apply in social media, too!
 - All claims require objective, verifiable substantiation
 - Options:
 - Use claims that have already been vetted and approved for other media (but ensure that the context doesn't change the meaning of the communication)
 - Refer back to substantiated source/static set of info to ensure consistency



4. Think Before You Speak

- Act – don't overreact
 - Corollary: “you win some; you lose some”, or “you can't please all of the people all of the time”
- Use appropriate tone and voice
- Accuracy trumps speed
- Screenshots are forever!



5. Use One Voice

- Have a plan that identifies who will take the lead and stick with it
- Escalate when appropriate





I've updated my blog three times, responded to 35 text messages, answered 42 e-mails, and sent out 57 tweets. Now that I've got the personal stuff out of the way, I should probably do some work.





Questions?



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