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Love it or leave it?

Social media brings production and pitfalls to business.

Social media, love it or leave it? Social media has become an indispensable part of business. There is no question that social media is an effective marketing tool. Statistics show that 14% of consumers do not trust advertisements, but 90% trust peer recommendations. So go ahead and love social media, but like any love affair, be wary of some pitfalls along the way.

Unintended loss of trade secrets

Companies who fail to limit use of trade secrets on social media can easily lose a trade-secret claim. Because an essential element of a trade-secret claim is that the information is not readily accessible to others by proper means, an employer who fails to prevent employees from publishing trade secrets on social media may lose the ability to claim that the information is a trade secret. An employer who allows employees to "connect" with customers and clients on LinkedIn, without ensuring adequate privacy controls so that others cannot view the information, allows those employees to in effect publish a customer list.

Unintended loss of goodwill

Not only do employers risk losing trade-secret protection, they unwittingly give employees an end run around a customer nonsolicitation agreement. The same customer list on an employee's social-media account can be used by the employee to easily notify customers that she is now working for a new employer. A court in Massachusetts recently held that an employee did not violate a non-solicitation agreement by posting the employee's new position with the employer's competitor on the employee's LinkedIn account.

In addition to requiring adequate privacy controls, employers should prohibit employees from conducting company business, including "connecting," on social media accounts not owned by the company. If ownership of the social media account is not clearly defined, companies may wind up battling with a former employee over the account and the goodwill it generated.

Employees endorsing company products

Some enthusiastic employees like to tout their employers' products or services through social media. Although such promotion can help marketing efforts, it also can land the company in hot water with the Federal Trade Commission. The FTC prohibits employees from endorsing company products or services without disclosing their affiliation with the company. The same is true for consultants and independent contractors. Therefore, companies should ensure that persons performing social-media marketing on their behalf disclose the relationship. Failure to do so can result in litigation, injunctions against the company and penalties.

Disciplining employees for social-media posts

Invariably, disgruntled employees will voice dissatisfaction with a company, supervisor, customer or co-worker via social media. Besides seeming disloyal, such conduct can have a negative impact on a company's reputation and business. Disciplining employees for such posts, however, even if they are vehement and unprofessional, can violate a number of laws.

For example, disciplining employees for social media posts also can violate the National Labor Relations Act. Section 7 of the NLRA enables nonsupervisory employees ("covered" employees, as defined by the NLRA and cases interpreting the Act), to engage in concerted activity for mutual aid and protection. Thus, employees — unionized or nonunionized — who complain to each other on social media about working conditions, wages or a supervisor who they do not like, may be engaging in protected concerted activity under the NLRA, and their employers commit an unfair labor practice by disciplining them for such conduct. This has been a hot button issue for the National Labor Relations Board, the agency that enforces the NLRA. In one case, employees of a nonprofit complained, in a not-so-nice way and with a liberal dose of profanity, about a co-worker who they felt was not carrying her weight. The employer considered the posts to be harassment and terminated the employees. The NLRB ruled that employees' posts were protected concerted activity and that their termination violated the NLRA.

Accessing employee social media

The prospect of reviewing a current or prospective employee's social-media pages is enticing to some employers. Such social media can provide a glimpse into what the employee does during his or her downtime and help the employer determine whether the employee is a good "fit." Pictures and posts on social media may show the employee violating company policy or abusing a leave of absence. Not surprisingly, there are a number of hurdles to accessing employee social media in this way.

The first hurdle is social-media password protection statutes. Thirteen states — Arkansas, California, Colorado, Illinois, Maryland, Michigan, Nevada, New Jersey, New Mexico, Oregon, Utah, Vermont and Washington — have passed such statutes in the past several years. About 24 more states have pending legislation. Although scope and terms vary from state to state, all statutes prohibit an employer from requiring or requesting an employee or applicant to disclose his username or password so that the employer can access his personal social media. The statutes also prohibit employers, with some exceptions, from engaging in other conduct in order to access private aspects of an individual's social media.

Courts also have recognized that accessing an employee's social-media account can violate the Stored Communications Act. In one case, an Illinois federal court recognized an SCA claim when the employer used the employee's Twitter and Facebook passwords to access her personal accounts without her authorization or in excess of the authorization she gave. In a New Jersey decision, the court recognized that an employer could have violated the SCA by accessing private portions of an employee's Facebook page to gain evidence that the employee was abusing Family and Medical Leave Act leave if the co-worker who accessed the Facebook pages had not already been "friended" by the employee. An employee who succeeds on an SCA claim can recover statutory damages, attorney's fees and costs. The Illinois court recognized that damages for emotional distress caused by the unauthorized access are potentially recoverable as well.

Social media in hiring

There are both legal and practical risks in using social media in hiring. As a practical matter, information on the Internet may be inaccurate. In addition to the legal risks discussed above, an employer who reviews an applicant's social-media page may learn information about the applicant's status — such as religion, disability, sexual orientation or lawful use of lawful products that the employer finds distasteful — that are protected under the law. If the employer rejects the applicant, the applicant may assert a claim under federal and state discrimination statutes or state lawful use of lawful product statutes by claiming that the employer relied on this information.

Employers who insist on reviewing an applicant's social media should delegate the task to an administrative employee who will not be involved in the hiring decision. The administrative employee can share with the decision-maker only the information that is clearly job-related and keep a clear record of what information is shared.

Key strategy: the social-media policy

A good social-media policy is critical to avoid traps that social media poses to the unwary business. Every company should have one. The policy should include appropriate limits on employee use of social media, including limits on using social media to engage in sexual harassment or threats of violence against co-workers and other limits as addressed above. The policy should make clear who owns social media used for company business and give employees notice of the company's right to inspect (to the extent permitted by law) employee use of social media to ensure compliance. If the company monitors employee use of social media through company resources, the company should inform employees of this monitoring and that employees have no expectation of privacy in their use of social media through company resources. The company should require all employees to sign an acknowledgment of the policy and consent to such monitoring and inspection.

In drafting social media policies, however, companies must be careful not to unwittingly prohibit concerted activity protected under the NLRA. The NLRB has held that policies that prohibit releasing "confidential guest, team member, or company information" on social media or that counsel employees to "[m]ake sure that any photos, music, video, or other content you are sharing is legally sharable or that you have the owner's permission" can run afoul of the NLRA. Even prohibiting "[o]ffensive, demeaning, abusive or inappropriate remarks" on social media or requiring employees to obtain prior approval from the company's communications or marketing department before disclosing "information to the media regarding [Employer] and its activities" is a violation. Prohibitions must be specific. In addition, companies are well-advised to include a disclaimer, using language approved by the NLRB, informing employees that the social media policy is not intended to prevent employees from engaging in concerted activity protected under the NLRA.

Does your company social-media privacy policy say what you mean?

No discussion of social media would be complete without warning companies to do some housekeeping. Not only should companies ensure that they own, monitor and save the contents of their social-media sites, but the sites' privacy policies should be reviewed, updated and, above all, be accurate. The FTC's position is that companies who don't live up to promises in their policies are committing an unfair and deceptive trade practice.

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