

Employment Edge 110th Edition—Another Social Media Risk—The Nice Things Your Employees Are Saying Can Create Liability?

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Most businesses are extremely careful to avoid creating misleading or false advertising. However, did you know your organization could be held liable for false and misleading advertising based on what employees are saying about you on social media sites? According to the Federal Trade Commission (FTC), social media postings may constitute endorsements or testimonials and create liability for companies.

The FTC is the governmental organization tasked with protecting consumers and enforcing laws against fraudulent, deceptive, and unfair business practices. The FTC's revised Guides Concerning the Use of Endorsements and Testimonials in Advertising, effective as of December 1, 2009, expand liability for both persons making endorsements ("endorsers") and the company about which an endorsement or testimonial is made ("advertisers"). The revised Guides provide that both endorsers and advertisers are liable for false or unsubstantiated statements. Both endorsers and advertisers are also subject to liability for failing to disclose material connections between themselves and endorsers.

The Guides provide examples of how the FTC Act would apply to endorsements and testimonials through social media, including both paid advertisements and provision of product samples for reviews. Although the Guides do not specifically mention employee use of social media, it is easy to imagine some of the headaches the Guides could create for employers. The speed and ease of use of social media makes it easy for employees to post endorsements or testimonials about company products or services without thinking that their conduct might create liability. For example, suppose an employee of XYZ Corp. posts on Facebook that "XYZ Corp. makes the most effective teeth whitener on the market -- Try it!" That posting might create liability for both XYZ Corp. and the employee for a false and unsubstantiated statement and for failure to disclose a material connection, unless XYZ Corp. really does make the most effective teeth whitener on the market and XYZ Corp. has the data to prove it.

Given the sheer volume of information produced via social media in any given day, employers may find compliance with the FTC's Guides overwhelming. However, there are several steps that proactive employers can take to manage the realities of a wired workplace.

- At a minimum, employers should adopt a social media policy. In addition to establishing more general guidelines on employee use of social media, the policy should clearly state that employees must disclose their connection to the company when discussing the company, its products, or services, and avoid making false or misleading statements about the company or its products or services.
- Employers should also educate employees about the consequences of endorsements and testimonials via social media and be willing to enforce the policy in the event of employee violations. Social media policies are of little use if employees are not aware of the policy or if the policy is unenforced.
- Employers should consider implementing a monitoring program to monitor what is publicly being said online about the company and its products and/or services.
- Finally, employers should affirmatively disclose material connections and correct false or misleading statements if they discover any endorsements or testimonials by employees.

How an employer chooses to regulate and/or monitor employee use of social media is going to differ widely based on the needs and realities of each individual workplace. But regardless of the particular approach chosen, employers must carefully consider the legal and practical issues at stake and decide how they are going to manage employee use of social media. In light of the plentiful and often unexpected legal issues created by employee use of social media—and the rapidly changing technology itself—it is important that employers try to stay on top of the issues presented and make thoughtful decisions about the right policies and practices for their workplaces.

If you have any questions about employee use of social media, or other employment law issues, please contact Carl Crosby Lehmann or another member of the Gray Plant Mooty Employment and Labor Law practice group.

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