

# The New Internet Danger: Employers Can Be Liable For Employees' Online Conduct

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The federal government recently enacted new guidelines that could cause employers to face legal liability for the online conduct of their employees. Under new Federal Trade Commission guidelines effective December 1, 2009 ("Guides Concerning the Use of Endorsements and Testimonials in Advertising," codified at 16 C.F.R. § 255), employers could face enforcement actions should their employees use social media to comment on their company's products or services in inappropriate ways, even if the employer did not sanction or authorize the comments. Whether employees use personal blogs, Facebook, MySpace, Twitter, message boards, or any other type of online social networking platform, employers could face the wrath of the federal government or the prospect of class action lawsuits if online postings run afoul of the new guidance.

## *What Is the FTC, and Why Is It Sticking Its Nose in the Workplace?*

The FTC's role in government is to protect consumers from deceptive endorsements and advertising, and over the years, it has issued guidelines to enforce its policies under the Federal Trade Commission Act (15 U.S.C. §§ 41–58). However, the last update to these guidelines came in 1980, when the few people who had personal computers were working with a Commodore or Tandy. Fast forward 30 years to a time where the average employee has computing capability on a handheld device, and updating your Facebook status is as much a part of the daily routine as getting that morning cup of coffee. The FTC realized it needed to respond to this form of "new media," as it has increasingly been used by companies as an effective form of marketing.

In issuing the new guidelines, the FTC announced it could impose liability on endorsers and companies who fail to make required disclosures that exist between online posters and the companies upon which they are commenting. One of the obvious "material connections" that must be disclosed would be the employment relationship between the blogger and the company. Under the rules, if a consumer is found to have been misled by such a blogger into purchasing a defective or dangerous product or service, not only the blogger who failed to disclose the relationship but also the company who failed to effectively prevent its worker from blogging would be liable, whether officially approved by the company or not.

## *What Do These New Rules Mean, in Real Life Terms?*

The FTC guidelines provide an example of a potential violation. Think of an online message board where people visit to read, share and comment upon new music

download technology. One of the online posters on the message board makes several positive comments about a specific MP3 playback device, which might lead another person to purchase that product. Unbeknownst to anyone on that message board, that online poster happens to work for that playback device manufacturer. That is exactly the kind of material connection that the FTC now requires be revealed in order to stay on the right side of the new guidelines. If that product happens to be defective, and a purchasing consumer claims that the online comments from the employee were part of the reason she bought that particular unit, the company will be on the hook for a violation along with the online poster.

This scenario can be applied to any online social communication medium — a social networking site like Facebook, a privately-maintained blog, a message board — and can be applied to any product or service; whether your company sells dog food or automobiles, pharmaceuticals or shaving cream, software or machine components, or offers services like consulting, legal representation, or financial advice. No matter what your company is in the business of selling or doing, if your employees are out in cyberspace promoting what you have to offer, you can be the one who has to pay the price if something goes wrong.

#### *How Will These Rules Be Enforced?*

You can see the obvious danger when it comes to the transmission of this online information. Every time a blogger or Tweeter passes along a simple message, it has the potential to reach thousands of people instantaneously. Moreover, it can be retransmitted or passed along to an unknown number of readers with the simple click of a mouse. Finally, it will exist on the internet for a very long time — years after a message is created, a consumer might perform a Google search of your product or service and resurrect the inappropriate commentary, leading to liability well after the fact.

The FTC has announced that it would be very unlikely to take enforcement action against a company if the inappropriate communication was the work of a single "rogue" employee, a mere isolated situation that could not reasonably have been prevented. But certainly, if the employee was encouraged to spread the word about a new product or service, the FTC will look at the activity as having been sponsored by the company and therefore susceptible to enforcement. Moreover, the FTC issued a warning shot to employers, calling upon them to take proactive steps to control their employees' online behavior. The agency said it would take enforcement steps against companies "whose failure to establish or maintain appropriate internal procedures" results in online violations.

#### *What Can Employers Do to Prevent Violations?*

Obviously, employers need to update or create a social networking employment policy to address this new development. As with any employment policy, if it is not in writing, it does not exist. And if you cannot prove that it was distributed to all of your employees (preferably with a signed acknowledgement page, or an online signature for policies maintained on the company's intranet), it is practically worthless. As for

this specific policy, it is recommended that you either prohibit online postings about the company's products and services altogether, or tightly regulate any such comments. If a company chooses to regulate employee online conduct, it should start by prohibiting any postings that are misleading or otherwise untrue. The policy should also require any online posters to reveal their employment relationship with the company, so that there are no hidden material connections. The online poster should also make clear that any comments made are purely that employee's personal opinion, and that they are in no way sponsored by the company. The disclaimer should be clear enough that any reader should reasonably be able to determine that the commenter is not an organizational spokesperson. The policy may also require that, before any online comment is made, the statements are vetted and approved by a marketing department representative or some other reviewing authority.

Most importantly, employment policies of all varieties are only worthwhile if the company takes active steps to monitor and enforce them. If a company has a Cadillac-style policy in place, but turns a blind eye to the fact that many of its employees have blogs or Twitter accounts where they may be commenting on company business, the FTC will probably discount the relative effectiveness of the policy. Merely holding employees to comply with these rules by virtue of the honor system is not enough. The company may want to consider requiring any employee who wishes to comment about company business on an online forum to "friend" or link to a company representative so that the employer can monitor postings and ensure the FTC rules are not being violated. Further, if the employee is using company computers to make the online commentary, the employer will be hard-pressed to argue that it had no way of monitoring the online behavior. And it goes without saying that a policy is hollow if known violations are not enforced. An employer will need to discipline offending employees upon learning of violations.

#### *What Happens If the Rules Are Violated?*

If the FTC rules are found to be violated, the agency can bring an enforcement action against the company in order to bring it into compliance with the law. The government will almost certainly spend the next several years publicizing any enforcement actions through news releases and press conferences in the hopes of bringing these new rules into prominence. The real danger for companies is that opportunistic plaintiff's attorneys will pounce on the news of such mistakes and bring consumer protection class action lawsuits, which can lead to very costly results. Although there is no private right of action for violating the rules, the FTC can fine violators up to \$11,000 per violation.

#### *Unanswered Questions*

As with any new set of guidelines, there are still a host of unanswered questions that will only get sorted out with time. Among them:

If an online poster is supposed to provide a clear indication about his or her employment relationship to the company, can they comply by the new rules by

providing a blanket disclaimer on their online profile? Or do they need to repeat the disclaimer each and every time they make a posting about the company's products or services?

If the online poster needs to provide a disclaimer with each new comment, how can they comply with the rules while posting on Twitter, which limits entries to 140 characters?

What if the online poster makes a comment on a smaller, private community site where everyone knows the poster's relationship to the company, but someone unwittingly repeats the comment to a wider broadcast audience? Will unintended violations lead to enforcement actions if they reach a mass audience?

Will an employer unintentionally violate privacy or off-duty conduct laws by monitoring Facebook or other similar accounts in an effort to enforce these new FTC guidelines?

No matter the answers to these questions, employers who want to stay ahead of the curve will want to pay attention to the newest area of potential liability and begin addressing potential problems before they arise.

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