



PLC Law Department presents

Company Use of Social Media: Best Practices Checklist

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A checklist of best practices for a company to consider when using social media in its business strategy.

Establish Clear, Written Terms of Use and Privacy Policies for All Social Media Sites, Services and Applications the Company Offers

- Well-drafted policies can minimize undue business and legal risk.
- The terms of use should, for example:
 - require affirmative acceptance by third-party users (for example, by requiring users to actively click on an “I Agree” button) to increase the likelihood that a court will find the terms enforceable by the company;
 - include provisions that aim to protect the company from the misuse, infringement and misappropriation of its intellectual property assets and the unauthorized disclosure of its confidential and material nonpublic information; and
 - include provisions that aim to minimize liability for infringement of third party intellectual property rights, defamation, privacy violations, employment-related harassment and the acts of third party users, particularly for any content posted or uploaded by those users (referred to as user-generated content or UGC).
- An online privacy policy is required by the law of some jurisdictions (including California) and is important to assist the company in complying with its privacy and nondisclosure obligations to third parties. The privacy policy typically addresses how the site collects, uses, discloses and maintains user data collected through the site.

- Ensure the terms of use and privacy policies cover any customized pages or channels offered by the company on third-party social media sites. (For example, the company’s Facebook fan page or YouTube channels or communities.)

Understand Legal Issues Associated with User-Generated Content and Take Steps to Minimize Risk

Allowing users to post UGC on a website raises many legal issues for the site owner or operator, including exposure to liability for UGC that infringes third party copyright and other intellectual property rights, violates an individual’s publicity or privacy rights, is defamatory or obscene or is otherwise unlawful. Take appropriate steps to minimize risk for UGC, including, for example, by:

- Determining the applicability of safe harbor provisions under the:
 - Digital Millennium Copyright Act of 1998 (DMCA), which provides online “service providers” (as defined in the DMCA) with a safe harbor under certain circumstances for copyright infringement resulting from acts by their users (for example, an infringing video posted by a user on YouTube); and
 - Section 230 of the Communications Decency Act of 1996 (CDA) (giving computer services “providers” (as defined in the CDA) certain immunity for publishing tortious statements (such as defamatory statements) made by third parties.)
- Implementing procedures to take advantage of available safe harbor protections. For example, the DMCA safe harbor provisions require service providers to, among other things:
 - implement “notice and take down” procedures for infringing content; and
 - designate an agent to receive take down notices from copyright owners, notify the US Copyright Office of the agent’s

name and address and make this information available on the provider's website (for more information on the DMCA requirements, see *Practice Note, Online Advertising and Marketing* (us.practicallaw.com/4-500-4232)).

- Implementing comprehensive site terms of use that:
 - prohibit uploading of infringing, defamatory, obscene or otherwise unlawful or offensive content;
 - disclaim company liability for that content;
 - allow the site operator to remove content at its discretion; and
 - include procedures for filing and responding to third party complaints as well as a clear DMCA-compliant “notice and take down” policy.
- Before making any further use of UGC (for example, using UGC for a promotion), ensure that the proposed use complies with all applicable laws (for example, traditional advertising laws) and that necessary rights to use the UGC are obtained from all relevant third parties.

Review Terms of Use and Privacy Policies of Third-Party Social Media Sites, Services and Applications Before Use

- Terms of use can vary significantly among sites and may include important restrictions. Ensure that the company's use complies with each site's terms and monitor them regularly for updates and changes. Pay particular attention to terms relating to:
 - prohibitions or restrictions on the use of the social media site, including prohibitions or restrictions on use for advertising, marketing and promotions or other commercial purposes (for example, *Facebook's Statement of Rights and Responsibilities* (www.facebook.com/terms.php?ref=pf) (its terms of use) prohibit businesses from administering promotions through Facebook without Facebook's prior written consent);
 - legal responsibilities assumed with use of the site (for example, responsibility for complying with the “take down” provisions of the DMCA);
 - ownership of intellectual property used on, or information collected or generated through use of, the site (for example, any of the company's copyrighted material and trademarks that might be posted on the site, or customer information the company collects through the site) (for more information on intellectual property, see *Practice Note, Intellectual Property: Overview* (us.practicallaw.com/8-383-4565));
 - requirements for licenses or other grants allowing use by the site owner and other third parties of the company's trademarks or other intellectual property; and
 - recourse available to the company if its rights are violated (such as infringement of its copyrights) by other users.
- Privacy policies can also vary significantly among sites. Companies should:
 - ensure that the site owner's privacy practices for any data disclosed by the company or collected by the company

from users of the site are appropriate and sufficient for the company's intended use of the site; and

- monitor such privacy policies regularly for updates and changes.

Ensure the Company's Use of Social Media Complies With All Applicable Laws

- Certain activities could expose the company to liability as well as serious reputational damage. The company should pay particular attention to the following laws:
 - defamation laws and prohibitions on unfair or deceptive acts such as false advertising. In particular, do not engage in or permit unethical marketing practices, including posting fake blogs, fake positive reviews, or fake negative reviews of competitors;
 - promotions, contests and sweepstakes law (for more information, see *Practice Note, Sales Promotions, Contests and Sweepstakes* (us.practicallaw.com/1-500-4243) and *Sales Promotions, Contests and Sweepstakes Checklist* (us.practicallaw.com/2-500-9551)); and
 - securities laws regarding market manipulation, insider trading, selective disclosure and disclosure of material nonpublic information.
- In addition, companies should ensure they comply with industry-specific rules.

For more information, see *Practice Note, Online Advertising and Marketing* (us.practicallaw.com/4-500-4232) and *Legislation Governing Liability for Website Content Checklist* (us.practicallaw.com/8-500-4353).

Provide Clear Guidance to Company Management on Company Use of Social Media, Preferably in the Form of a Comprehensive Policy

- The guidance should include provisions to protect:
 - company intellectual property assets (such as trademarks, copyrights and patents);
 - the company's confidential and material nonpublic information;
 - third-party confidentiality and privacy (including data protection with respect to personal information of employees, customers, suppliers and others); and
 - the company's reputation and relationships with customers, vendors and other third parties (for example, statements made by employees may be imputed to the company, especially those made by senior management).
- This guidance should also include provisions to prevent against:
 - discrimination;
 - harassment;
 - misrepresentation;



- defamation; and
- disparagement.
- The company should communicate this guidance clearly, monitor compliance and ensure enforcement is uniform throughout the organization (uneven enforcement can lead to discrimination claims).

Be Careful Not to Impose Unnecessary or Impractical Restrictions on Company Management Regarding Use of Social Media

Too many restrictions can unduly interfere with the company's appropriate, productive use of social media to advance business and legal objectives.

Consider Using Social Media as a Legal Tool

- Social media sites can be used for prosecuting, protecting and enforcing company intellectual property rights and defending against third-party infringement claims (for example, searching trademark uses and patent prior art, and monitoring against potential third-party infringement).
- Social media can also provide an effective way to share non-privileged information on legal topics, and obtain referrals to legal advisers and consultants.

Understand that Use of Social Media is Changing How Litigation is Conducted

- Litigators are using social media sites to:
 - identify potential experts and other witnesses;
 - conduct discovery on adversaries and witnesses and obtain information that can discredit or impeach their testimony;
 - discover confidential information; and
 - make jurisdictional claims based on the worldwide accessibility of social media sites.
- Postings made on social media sites might expose the company to potential liability and may be discoverable. The company may lose the protections of the attorney-client privilege or work product doctrine as a result of a disclosure of information through social media. In-house counsel should warn companies about these risks, and include language addressing social media in document retention policies and litigation hold notices.

Publicly-traded Companies Should Take Care not to Violate Securities Laws When Using Social Media

When using social media sites to communicate with investors, market professionals and the public at large, avoid the following traps:

- Rule 10b-5 of the Securities Exchange Act of 1934 prohibits companies from making fraudulent statements. To prevent

violation, monitor statements made by employees on social media sites to ensure they are not false or misleading, because they may be seen as manipulating the market and be attributed to the company.

- Monitor statements made by employees also to ensure employees are not tipping off investors by disclosing material non-public information in violation of insider trading laws.
- Regulation FD (17 C.F.R. 243.100–243.103) prohibits selective disclosure of material nonpublic information. Prohibit selective disclosures on social media in the same way as the company regulates disclosures in other media.
- Securities laws prohibit companies from soliciting stockholders for votes without first providing a proxy statement, and offering or selling securities to potential investors without first providing a prospectus (sometimes called gun-jumping). Ensure social media posts do not constitute unlawful solicitations or offers.
 - Do not make “forward-looking statements” about the company or its performance, stock or prospects without also providing required written risk factors and disclaimers.

For more information regarding these risks, see *Practice Notes, Disclosing Nonpublic Information* (us.practicallaw.com/2-382-5502), *Complying with Regulation FD (Fair Disclosure)* (us.practicallaw.com/1-383-2635) and *Registration Process: Publicity* (us.practicallaw.com/1-381-0191), and

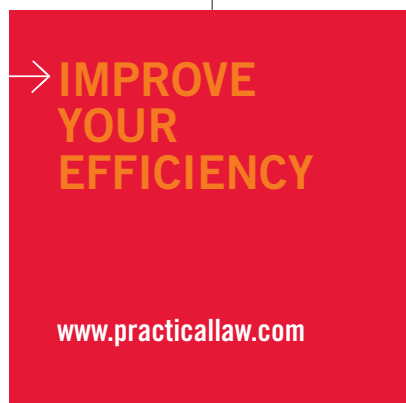
Article, Guidance Policies on Future Operating Results (us.practicallaw.com/4-383-5034).

Obtain Consent Before Use of Employees' or Third Parties' Names, Images or Information Through Social Media for Commercial Purposes

- Use a comprehensive release document to explain to the employee or third party the purpose and extent to which the company will use his, her or its name, image or information, and memorialize consent.
- Avoid unauthorized use in order to reduce the risk of common law privacy claims such as:
 - public disclosure of private facts;
 - intrusion upon seclusion;
 - false light invasion of privacy; and
 - using the name or likeness of a person for commercial purposes.

Consider the Legal Risks Associated With Use of Social Media to Run Background Checks

- Avoid making employment decisions based in whole or in part on membership in a protected class (such as race, national origin, religion and sexual orientation) revealed through social



media (see *Federal Employment Anti-Discrimination Laws Checklist* (us.practicallaw.com/5-500-4793)).

- Use the same protocols for social media screening of applicants or employees no matter their race, gender or other protected class status to avoid disparate treatment liability.
- Avoid discriminating against employees and applicants based on activity protected under the National Labor Relations Act (NLRA) revealed through social media.
- Comply with the Fair Credit Reporting Act (FCRA) and its state equivalent if applicable.
- Do not access password-protected electronic resources without proper authorization from the owner(s) to avoid liability under laws governing electronic resources (such as the Stored Communications Act) and common law governing privacy.
- Ensure the company is in compliance with the “terms of use” policies of social media websites.
- Make employment decisions using accurate information, understanding that information posted on social media sites is often false or misleading, to avoid faulty hiring, terminations or promotions.

For a more complete description of these risks, see *Practice Note, Background Checks and References* (us.practicallaw.com/6-500-3948).

Avoid Taking Retaliatory Adverse Employment Action Following an Employee’s Exercise of Protected Activity Through Social Media

- Many federal and state laws include prohibitions against retaliation for the exercise of legally-protected rights.
- Employers considering terminations, demotions or other adverse employment actions should ensure that the reason underlying the decision is not a retaliatory response to an employee’s exercise of certain rights, including:
 - whistleblowing;
 - unionizing;
 - participating in an internal investigation; and
 - taking a protected leave (including under the Family Medical Leave Act).

Be Careful Not to Violate Employee Rights Under the National Labor Relations Act in Their Use of Social Media

- To the extent employees use social media to communicate about organizing, unions, or other rights and activities protected under the NLRA, do not restrict employee speech or take adverse employment actions that could violate the statute.
- Ensure NLRA compliance even in a non-unionized workplace, see *Ashley Furniture Industries, Inc. and Voces de la Frontera, NLRB Case 18-CA-18737*.

For more information about union organizing, see *Practice Note, Union Organization Process* (us.practicallaw.com/5-501-0280).

Disclose All Material Connections with Third-Party Bloggers

- The Federal Trade Commission (FTC) requires advertisers to disclose connections with endorsers of their products if the connection “might materially affect the weight or credibility of the endorsement.” Material connections include, for example:
 - payments to the endorser; and
 - the provision of free products.
- If the company pays a blogger or provides free products to review, the company should:
 - advise the blogger of his obligation to disclose that he was given such consideration;
 - monitor the blogger’s postings to ensure compliance; and
 - monitor the blogger to ensure any claims made by the blogger about the company’s products or services can be substantiated and are not deceptive or misleading.

For more information, see the FTC’s *Guides Concerning the Use of Endorsements and Testimonials in Advertising* (www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf).

Review Corporate Insurance Policies to Ensure Appropriate Coverage

- Commercial general liability insurance policies may not cover liability arising out of certain online activities.
- Review existing insurance policies to ensure appropriate coverage and consider whether any additional insurance is desirable. Additional insurance could include, for example:
 - cyber liability insurance that covers data breaches privacy and data security;
 - business interruption; and
 - media and web content liability.



IN SUMMARY

Do:

- Establish clear, written terms of use and privacy policies for all social media sites, services and applications the company offers.
- Understand the legal issues associated with allowing users to post user-generated content and take steps to minimize risk.
- Review third-party social media sites', services' and applications' terms of use and privacy policies before using them.
- Ensure the company's use of social media complies with all applicable laws.
- Provide clear guidance to company management on company use of social media, preferably in the form of a comprehensive policy.
- Consider using social media as a legal tool.
- Understand that use of social media is changing the way litigation is conducted.
- Disclose all material connections with third-party bloggers.
- Review corporate insurance policies to ensure appropriate coverage.

Do not:

- Impose unnecessary or impractical restrictions on company management regarding use of social media.
- Violate securities laws when using social media.
- Use names, images or information of employees or third parties through social media for promotional or other commercial purposes without first obtaining such parties' consent.
- Use social media to run background checks on applicants for employment and candidates for promotion without first considering the associated legal risks.
- Take retaliatory adverse employment action following an employee's exercise of protected activity through social media.
- Violate employee rights under the NLRA in their use of social media.

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