



PLC Law Department presents

Monitoring and Responding to Third Party Use of Social Media: Best Practices Checklist

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A checklist on best practices for a company to consider in monitoring and responding to third party use of social media.

Monitor Third Party Use of Social Media

- Monitor social media sites, services and applications (and web-sites generally) for potentially damaging comments about the company or its products or services, as well as infringement of the company's intellectual property. Consider:
 - the type of content or activities to be monitored (for example, defamation and false advertising, including false endorsements, disclosure of the company's confidential information or trade secrets, trademark, copyright or patent infringement and trademark dilution; and sale of counterfeit goods);
 - whether to engage a third-party vendor or use company systems and employees to monitor third-party use of social media; and
 - the specific social media sites that the monitoring program will cover. For examples of some popular social media sites, see *Practice Note, Social Media: A Quick Guide* (us.practicallaw.com/0-501-1442).
- Monitoring can also be used as an effective customer service tool to:
 - identify and communicate with disgruntled customers;
 - track the success of business initiatives; and
 - understand the company's public reputation.

Monitor Bloggers for Compliance with Federal Trade Commission (FTC) Guidelines

- The 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:
 - 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 make sure any claims made by the blogger can be substantiated and are not deceptive or misleading.

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

Designate and Train an Internal Response Team to Handle Damaging Statements or Content

- Responding appropriately to damaging statements or content posted by third parties may require coordination by multiple employees across several company departments.
- Consider creating a response team that includes, for example, members of:
 - senior management;
 - the legal department;
 - corporate communications/investor or public relations;

- marketing; and
- human resources (in the event that company employees are responsible for (or damaged by) the activities).

Do Not Ignore Negative or Defamatory Comments or Fail to Correct False or Misleading Information

- Do not ignore negative, false or misleading statements made about the company.
- The appropriate response, however, will depend on the type and severity of the conduct at issue and could include, as appropriate, one or more of the following:
 - reviewing the terms of use for the website in question and requesting that the post be taken down, if the offending post appears on a third party website;
 - including a disclaimer reserving the right to remove content at the company's discretion and ban abusive users, if the offending post appears on the company's social media website;
 - deleting false or misleading postings, if possible, or replying to the post with correct information;
 - responding via other social media outlets, such as a company blog or fan page;
 - responding with a press release; and
 - taking legal action, for example, sending a cease and desist letter or filing a lawsuit. Drawbacks to litigation include the potential difficulty in identifying an anonymous author, negative publicity and the high cost of litigation.
- Companies should enforce their response policy consistently and thoroughly document all actions they take.

Take Measures to Enforce the Company's Intellectual Property Rights and Confidentiality Against Suspected Infringement Identified Through a Monitoring Program

- Enforcement of the company's intellectual property rights depends on a proactive, consistent policy of notifying and challenging suspected infringers, whether the infringement is detected through monitoring of social media or other means.
- Copyright, trademark, patent and trade secret rights are all susceptible to infringement or misappropriation through use of social media (on the web generally, and by means of e-mail and text messaging).
- After investigating and confirming the infringement, consider whether it is appropriate for the company's intellectual property counsel to send a notice of infringement (a cease and desist letter, which might also include an offer to grant a license on terms to be mutually agreed) to:
 - the suspected infringer, if identifiable; or
 - the operator of the social media site or application.
- Certain provisions of the Digital Millennium Copyright Act of 1998, 17 U.S.C. § 512 (DMCA) provide a safe harbor to online "service providers" (as defined in the DMCA) for copyright

infringement liability resulting from acts by their users (for example, an infringing video posted by a user on YouTube) if the service provider complies with certain requirements, including removing the allegedly infringing material upon receiving notice from the copyright owner or its agents. The site's DMCA notice and "take down" procedures are usually found in the applicable site's terms of use. For notices of copyright infringement to such service providers (which may include operators of social media sites), make sure the notice complies with the requirements of the DMCA. For more information on the DMCA, see *Practice Note, Online Advertising and Marketing* (us.practicallaw.com/4-500-4232).

Take Measures to Prohibit Third Parties from Using Social Media to Harass Employees

- Companies may be responsible for the actions of vendors and independent contractors who are engaged by the company and have contact with company employees.
- To protect employees from harassment through social media, companies should consider requiring these engaged third parties to comply with their policies, including those relating to:
 - business and office conduct;
 - anti-harassment policies; and
 - use of the company's information technology resources.

For a model independent contractor or consultant agreement, see *Standard Document, Independent Contractor/Consultant Agreement (Pro-Client)* (us.practicallaw.com/2-500-4638).

Form Relationships with Vendors Who can Help Repair Damage to the Company's Reputation Before Any Damage Occurs

Useful vendors may include public relations companies as well as specialized brand repair companies.



IN SUMMARY

Do:

- Monitor third-party use of social media.
- Monitor bloggers for compliance with FTC guidelines.
- Designate and train an internal response team to handle damaging statements or content.
- Take measures to enforce the company's intellectual property rights and confidentiality against any suspected infringement identified through a monitoring program or otherwise.
- Form relationships with vendors who can assist with repairing damage to the company's reputation before any damage occurs.

Do not:

- Ignore negative or defamatory comments or fail to correct false or misleading information.
- Allow vendors and independent contractors engaged by the company to use social media to harass employees.

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