

Employers Responsible For Employee Online Behavior

Few business owners realize that they can be held responsible for what employees say about the company's products or services when the employee is using social media like Facebook, MySpace, Twitter and personal blogs. However, under recently issued federal regulations, that's precisely the case. These regulations provide that business owners can be held liable for what their employees say in cyberspace about the company's products and services.

In a nut shell, the guidelines state that when employees use social or other on-line media to comment on their company's products or services, their employer may be liable for "misrepresentations" made by employees. Importantly, the guidelines apply even where the employer was unaware of the communication or did not authorize the comment.

What are the new guidelines?

The Federal Trade Commission Guidelines (called "Guidelines Concerning the Use of Endorsements and Testimonials in Advertising") became effective December 1, 2009.

The FTC's role is to protect consumers from deceptive endorsements and advertising. Until recently, the FTC had little, if anything, to do with the employer/employee relationship. However, under the new guidelines, liability can be imposed on so-called endorsers and companies who fail to make required disclosures that exist between on-line posters and the companies upon which they are commenting.

For instance, one obvious relationship that must be disclosed would be the employment relationship between the on-line writer and the company. Under the new guidelines, if a consumer was misled by the on-line author into



**EMPLOYMENT
LAW**

Richard Rosenberg

purchasing a defective or dangerous product or service, not only would the on-line author (who failed to disclose the employment relationship) be liable, but the Company, who failed to prevent its employee from publicizing the communication, would be liable as well. This is so, regardless of whether the communication was officially approved or endorsed by the company.

How does this apply to my company?

The guidelines provide an example of a violation which could arise within the employment setting. Envision an on-line message board where people visit to discuss new music technology and share their ideas. The on-line message board designated for discussions of new music download technology is frequented by MP3 player enthusiasts. They exchange information about new products, utilities, and the functionality of numerous playback devices. Unbeknownst to the message board community, an employee of a leading playback device manufacturer has been posting messages on the discussion board promoting the manufacturer's product.

Updated online policies should be put in place to prevent employees from misrepresenting the product or service offered from their employer.

Under the new FTC guidelines, this is exactly the type of "material connection" that must be revealed because knowledge of this poster's employment could likely affect the weight or credibility of her endorsement. Therefore, to comply with the new guidelines, the poster should clearly and conspicuously disclose her relationship (i.e., an employee) to the manufacturer so the readers of the message board would know they were communicating with a possible company representative.

Conceivably, this type of scenario can be applied to any on-line social media, including

Facebook, MySpace, Twitter, blogs, and message boards, and can also apply to any type of product or service. No industry is exempt from these guidelines.

Whether your business provides consulting, legal or financial services, or sells pharmaceuticals, software, gardening supplies, upholstery or mechanical parts, etc. if employees discuss your products or services on line, the company could be liable if something goes wrong and the consumer claims to have been misled by the employee posting(s).

What should you do?

- Companies should consider updating or creating social networking policies to address this new exposure.

- Companies should decide how the organization wants to deal with the issue of on-line postings. There are many options. Does the company want to permit them? Does the company want to entirely prohibit such online postings? Or, perhaps, require some kind of formal advance approval by a senior company official?

- Companies should educate employees about the legal impact of their on-line communications. If it's a big issue in your organization, you might want to consider an employee communication campaign. Also, this is where a written policy will help. If the employee blatantly ignores a written company directive, it might serve as a possible defense to one or more claims against the company. It will also provide a basis for employee discipline.

- If you do develop a formal policy, consider obtaining a written acknowledgement of receipt from the employee and place that document in the employee's permanent personnel file.

Richard S. Rosenberg is a founding partner of Ballard Rosenberg Golper & Savitt LLP, a management side labor law firm in Glendale. Rosenberg was recently selected as one of the 25 best lawyers in the San Fernando Valley. He may be reached at (818) 508-3700 or rosenberg@brgslaw.com.