BURR & FORMAN



InsideCounsel: A strong policy can keep your company from being the next social media casualty

Articles / Publications
04.22.2016

In an article published on April 22, 2016 by InsideCounsel, Matthew T. Scully and Kathryn Willis provide insight on the importance of having a social media policy and describe two types of social media policies an employer should consider.

The first type of policy is non-job related social media use which receives the most attention because every employer has employees who use social media. The second type of policy covers employees who use social media as part of his / her job. Scully and Willis conclude, "A clear social media policy lets employees know what they can and cannot do. And, just as importantly, it will keep your company out of trouble.

To read the full article, keep reading below or click here for PDF version.

A strong policy can keep your company from being the next social media casualty
by Kathryn Willis, Matthew T. Scully

Gaffes on social media (including blogs, Facebook, Twitter, forums, etc.) by employers and employees have become the stuff of lore. While the headscratching behavior of large (purportedly) sophisticated employers can provide amusement to those at a safe distance from the wreckage created, the legal risks underlying social media mistakes are very real.

RELATED PROFESSIONALS

Kathryn M. Willis

Matthew T. Scully

InsideCounsel: A strong policy can keep your company from being the next social media casualty

The social media legal parade of mistakes is well documented: copyright infringement, trademark infringement, violation of Federal Trade Commission guides on endorsements and testimonials in advertising, release of private employee information, defamation, libel and slander, false advertising / unfair competition, disclosure of proprietary / confidential information, labor issues under the National Labor Relations Act, employee / HR issues, creation of information that could be harmful in subsequent litigation, etc.

Indeed, a litany of lawsuits, government fines, and destruction of a company's goodwill and market share make clear that mistakes can be costly. However, possibly because widespread social media engagement by companies is in its early stages, most employers have yet to experience their catastrophic "social media moment." Thus, the question becomes: how do I keep my company from becoming the next social media casualty? It starts with your policies. Employers must consider two types of social media policies: (1) non-job related social media use by employees outside of the business environment and (2) employee social media use for his / her job.

The first type of policy-non-job related social media use-receives the most attention because every employer has employees who use social media, therefore every employer needs a social media policy.

While a social media policy should be tailored to the needs of the organization, we recommend the following key considerations:

- **Respect the audience and the company.** Employees should assume that the content they post will be read by others. Indeed, mostly everything on the Internet is public and searchable. Employees must also understand that they are personally responsible for the content they post. As such, an employer's social media policy should require that employees abide by the employer's Code of Conduct and other conduct-related workplace policies (such as Anti-Harassment and equal employment opportunity (EEO) policies) while using social media sites. Moreover, if the employee violates your social media policy then, generally, you can take corrective action (but don't forget to consider the broad protections afforded to employees who make social media posts under the National Labor Relations Act and various state laws that prohibit employers from disciplining employees for off-duty conduct).
- **Protect the company's confidential information**. Put simply, every social media policy must preclude employees from disclosing the confidential or proprietary information of the company (for example non-public sales, marketing, product and financial information, and co- worker medical information or personal information, such as a social security number) and of any third party that has disclosed information to the company. This is critical.
- **Employee's Identification.** Employees should always speak for themselves. Employees do not represent the company and should refrain from attempting to speak on its behalf. If employees are going to discuss company related matters, such as the company's products or services, they should identify themselves, their role with the company, and make clear they are speaking for themselves and not on behalf of the company.

InsideCounsel: A strong policy can keep your company from being the next social media casualty

- **No expectation of privacy**. Employees should be placed on notice that all messages sent and received, including personal messages, and all data communications stored on the company's electronic mail system, voicemail system or computer systems are the company's property regardless of content, and that the company reserves the right to access such resources at any time, with or without notice to the employee (but, be sure to check state privacy law).
- **Consider restricting social media use**. While not required, an employer can prohibit social media use during working time so long as (according to the National Labor Relations Board) employees are permitted to access social media on their personal wireless devices during breaks and meal periods.

The second type of policy covers employees who use social media as part of his / her job. While these types of policies often receive less attention than non-job related social media policies, they are just as critical, if not more so. We recommend the following key considerations:

- **Disclosure.** All employees who are communicating on behalf of the company on social media must clearly and conspicuously disclose their name and their affiliation with the company. Disclosure is particularly important if the person is making endorsements or recommendations about the company products or technology.

- **Ownership**. Employees who engage in social media activities as part of their job duties must understand that the company branded account used is property of the company, and the employee cannot take it with him or her when departing the company. This means an employee cannot change the password or the account name, or take ownership of the contacts and connections gained through the account.
- **Editing.** The company must make clear that it can edit or amend any content depicted in its social media profile. This would include posts that violate the code of conduct, or that are misleading or inaccurate.
- **Comply with copyright and intellectual property laws.** By its very nature, most social media tools encourage their users to share others' content. As such, employees must comply with laws governing copyright and fair use of copyrighted material owned by others. Best practice is to provide a link back to the source.
- **Comply with financial disclosures laws**. Disclosures -- such as misleading statements, selective disclosure and improper dissemination of material company information -- via social media can create potential liability under securities laws. Thus, ensure your social media policies cover securities and corporate governance issues.

A clear social media policy lets employees know what they can and cannot do. And, just as importantly, it will keep your company out of trouble. Otherwise, you may find yourself the next company trending on **#socialmediadisasters**.