

SOCIAL MEDIA POLICIES: DRAFTING CONSIDERATIONS

By

Maria E. Recalde and Daniel K. Fink
Intellectual Property and Technology Practice Group
www.sheehan.com



SHEEHAN PHINNEY BASS + GREEN PA
Attorneys at Law

Though not intended to be exhaustive, the following are some common, basic drafting considerations to use as a starting point for developing a social media policy. Industry specific business and legal issues will vary, and should be addressed by businesses accordingly. No one social media policy will fit all. By closely looking at social media concerns and adopting a thorough and well thought-out social media policy, however, businesses can substantially limit their exposure to the common liability risks associated with the use of social media.

- Define what is meant by “social media” (e.g., blogging or other forms of social media or technology including but not limited to sites such as Facebook, Twitter, YouTube, chat rooms, video or wiki postings, blogs or other similar forms of online forums, etc.) and explain the reasons behind the social media policy. Explaining the reasons for the policy and tying it to the culture and values of the company will encourage proper use of social media.
- Clearly explain what is considered “acceptable use” of social media. This could be “business use only” or “limited personal use”. Whatever use is allowed, clear guidance as what “acceptable use” entails should be incorporated in the policy.
- Be clear that employees must comply with other company policies when using social media - if use of social media would violate any of the company’s existing policies in another forum, it will also violate them in an online forum. Consider incorporating by reference other company policies, including anti-harassment and discrimination policies.
- Caution employees that they should have no expectation of privacy while using the company’s Information Technology (IT) resources, and include a provision stating that the company reserves the right to monitor and review employee activities using such resources.
- Warn employees that postings regarding: (i) proprietary and confidential information of the company or a third party; (ii) harassing, threatening or discriminatory statements or sexual innuendos regarding co-workers, management, customers or suppliers/vendors; and (iii) defamatory statements regarding the company, its employees, customers, competitors or suppliers/vendors are prohibited and such postings may subject the individual to discipline.

- Prohibit unlawful conduct by employees using social media, such as violations of security laws, invasion of privacy, impersonate a person or entity, etc. and remind employees that such conduct may result in civil liability and/or criminal charges against them.
- Include a statement that nothing contained in the social media policy is intended to interfere with the employees' rights under the National Labor Relations Act (NLRA) (i.e., protected activities are neither prohibited nor discouraged). A company in Connecticut was recently sued for allegedly unlawfully firing an employee after the employee posted disparaging comments about her supervisor on Facebook. The National Labor Relations Board is arguing that this activity was protected under the NLRA. The case is scheduled for hearing on 01/25/11.
- Include guidelines governing the use of corporate logos, trademarks and other branding in the social networking context.
- Consider whether only individuals officially designated may "speak" on the company's behalf. If not so designated, the policy should make clear that if the employee mentions the company with which he or she is affiliated, he or she must also include a disclaimer stating that any opinions expressed are the employee's own and do not represent the company's positions, strategies or opinions. Consider drafting a suggested disclaimer employees can use to ensure that their online postings are not to be deemed representations by the company.
- Require an employer/employee relationship disclosure. This is in part due to the Federal Trade Commission's (FTC) recently-updated guidelines on endorsements and testimonials in advertising. These guidelines, which specifically apply to social media, impose liability on endorsers and companies for failure to make required disclosures about "material connections," such as payments or employment relationships, that exist between endorsers and the companies about whom they comment. Social media policies should require adherence to these FTC guidelines.
- Include a reporting procedure for violations of the social media policy.
- Designate a management representative within the company as the point of contact for social media policy violations or questions concerning the social media policy. This helps ensure consistent application of the policy.

This article is intended to serve as a summary of the issues outlined herein for informational purposes only. While it may include some general guidance, it is not intended as, nor is it a substitute for, legal advice.

Maria E. Recalde is a shareholder at Sheehan Phinney Bass + Green, P.A, admitted to practice in Massachusetts and resident in the firm's Boston office. She chairs the firm's Corporate Department and is a member of the firm's Intellectual Property and Technology Practice Group. Daniel D. Fink is an associate at Sheehan Phinney Bass + Green, P.A, admitted to practice in New Hampshire and resident in the firm's Manchester office. Their practices concentrate on the rapidly changing areas of technology and intellectual property transactions, litigation and counseling. They may be reached at mrecalde@sheehan.com or dfink@sheehan.com.