

Social Media's Dirty Little Liability Secret for Employers



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You can't attend a Human Resource, Marketing, or Legal conference these days without a discussion on social media. My wife and I have toddler age twin boys, and I relate social media for employers to organic chocolate milk... It's organic, has milk, and the brand we purchase even advertises DHA and Omega 3's! Did I mention it was milk? Truth is we limit the boys to one glass a week and they get plenty of exercise (running away from mom and dad). Similarly, social media for your organization is probably a good idea, but it's important to put some policies and procedures in place and be consistent in your enforcement.

Social media's dirty little secret? You and your employees are probably not covered by your General Liability policy.

The landscape of business communication and the law governing social media is changing rapidly. It's important that employers speak with their attorney and understand the social media liability issues facing their organization. I would suggest that you consider reading an article published in The National Law Journal, "Social Media Permeate the Employment Lifecycle". The liability facing employers is real, and it is worth noting that on March 16, 2010 the first lawsuit alleging unlawful conduct via social media due to a former employee's restrictive covenant was filed. In the lawsuit, TEKsystems sues three of its former employees and their new employer, Horizontal Integration, Inc. Also, another interesting lawsuit occurred in 2009 when the owner of Pizza Kitchen was sued for defamation after posting disparaging remarks on Facebook about a marketing firm it was utilizing.

At the end of 2009, the FTC published the final guide governing endorsements and testimonials impart to clarify requirements related to "Word of Mouth Marketing". This FTC ruling and guidelines (FTC 16 CFR Part 255 Guides Concerning the Use of Endorsements and Testimonials in Advertising) also imposes potential liability on employers for social media comments, regardless of the employers' knowledge. For example, if an employee endorses a product without adequate disclosures, the Company itself may be liable. In the same ruling the FTC suggests that employers

institute an appropriate policy governing social media participation by employees:

"If the employer has instituted policies and practices concerning "social media participation" by its employees, and the employee fails to comply with such policies and practices, the employer should not be subject to liability. The Commission agrees that the establishment of appropriate procedures would warrant consideration in its decision"

Tom Bell an attorney with Perkins Coie, in an article published in Computerworld states:

"Companies are entitled to free speech, but their commercial speech is less protected. The lower protection comes in the form of a higher standard of care for truth and accuracy. So, when company employees participate in social media on behalf of their employer, they subject the company to the same risks as a newspaper or individual, but with less protection."

Furthermore, he suggests:

"In order to mitigate these risks, companies need to prepare their employees. A social media policy is part of that preparation. Such policies are about labor law, but also about advertising, marketing, public relations, product liability and other activities that carry legal implications."

Once you've committed the organization to the slippery slope of social media and have developed your policies and procedures, now it's time to turn to the subject no one is talking about; your General Liability policy.

This policy will most likely will NOT respond to a 3rd party claim or injury resulting from your blog or social media page.



For example, the standard General Liability policy (ISO CG00 01 12 07) will exclude injury “arising out of an electronic chat room or bulletin board the insured hosts, owns, or over which the insured exercise control”. Most policies will also exclude Personal and Advertising injury “arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights”. This includes data privacy breaches and claims resulting from a data privacy breach. You will want to speak with your attorney to decide how a social media site that an employee owns or controls would be considered relative to a defamation lawsuit against your organization stemming from that employee’s “tweet”. Most General Liability policies do not contemplate this risk.

So what is the solution?

Don’t be caught by surprise! Twitter, Blogs, Facebook and other social media exposures are soon becoming just another part of an organization’s daily operation. And while the organization may not be specifically involved in social media, what about your employees? Social media needs to be carefully considered in your risk management program.

Insurance companies are well aware of this exposure and have developed innovative products to assist in covering this potential gap. Professional, Communications, Data Privacy & Media Liability policies, in many forms are available as endorsements or stand alone products and will compliment your enterprise wide risk management program. In many cases, coverage is relatively inexpensive with minimum annual premiums as low as \$1,500.

So drink a glass of chocolate milk, as a National Dairy Council video on YouTube points out, “Chocolate milk is the most popular milk choice among children, and it only has 60 more calories than white milk does.” But it would be tough to drink chocolate milk with every meal... Likewise, with social media in the workplace, be sure to put in place controls, and stick to them. And while it’s easy to see the benefits of social media, be aware of the liabilities and whether you are self-insuring those liabilities or transferring that risk via an insurance policy.