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Legal Matters®

Business Law
fall 2015

Social media: New issues for business

Social media is a relatively new field, and the law is just beginning to catch up with all the issues that are being raised for businesses.

Here's a quick checklist of concerns. It's by no means exhaustive, which is why a thorough legal review of a company's social media practices is always a good idea.

Do you look at employees' (or job applicants') personal social media accounts? These days, many employers want to keep tabs on their workers' social media presence. Employers want to get out ahead of problems, such as employees bad-mouthing the company on Twitter or posting confidential information on Facebook.

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In addition, in one recent survey, 39% of businesses said they check their job applicants' social media accounts before making a hiring decision – and of those, 43% said they had rejected someone because of something they found.

But there's a legal minefield here. Suppose a manager's social media snooping reveals something private about the employee – perhaps that the employee is gay, or a Muslim, or disabled, or over 40, or has a family member with a disease that will affect the company's health care premiums. Once the company is aware of this information, it will be much harder to prove later that any action taken against the employee wasn't motivated by discrimination.

Of course, some information is no doubt relevant – you surely want to know if a customer service worker has racist attitudes, or if someone who drives for work has a drinking problem. But you might want to hire a third party to conduct a social media search for you, and only report information that's truly pertinent.

Have you trademarked your handle? Consider a recent case in which the Beer Exchange, a bar and grill in Kalamazoo, Michigan, sued Bexio, LLC, which operates an online network that allows beer connoisseurs to trade rare brews.

The bar and grill uses the handle "@thebeerexchange" for all its social media. Bexio generally uses the handle "@thebeerexchangeapp," except that it used "@thebeerexchange" on Instagram – which allegedly resulted in many customers getting confused and posting to the

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Supreme Court gay marriage ruling affects employee benefits

The U.S. Supreme Court's recent decision extending same-sex marriage to every state will have a big effect on many employee benefit programs.

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Domestic partner benefits are tricky to administer. Now that the Supreme Court has allowed gay couples in every state to marry, many companies are planning to phase such benefits out.

Prior to the ruling, most states (and the federal government) recognized same-sex marriage. If *all* of your employees live in states that previously recognized gay marriages, then no changes are required. But if any of your employees live in previously "non-marriage" states, then the ruling will make a difference.

If some of your workers live in "non-marriage" states and you previously offered benefits to same-sex spouses, then for any employees in those states who have a same-sex spouse, you'll need to adjust their state tax withholding to the "married" rate, and you may need to adjust their withholding to reflect the fact that spousal health benefits will no longer be subject to state tax.

If some of your employees live in "non-marriage" states and you previously did *not* offer benefits to same-sex spouses, you may now be required to do so.

A large number of spousal benefits are mandated by federal law, and for those, you will be required to offer them to same-sex spouses. (And you'll probably be required to offer *all* spousal benefits to same-sex spouses if you're a government contractor.) It's likely you'll need to have the plan documents revised, and communicate the changes to employees.

As for spousal benefits that aren't specifically mandated by federal law, it's not entirely clear, but it's very likely that refusing to offer them to same-sex couples would violate federal or state discrimination laws. It's almost certainly wiser to offer the benefits than to risk a discrimination lawsuit.

A bigger question is what to do if you have previously been offering benefits to unmarried domestic partners. Many companies have been offering domestic partner benefits to help gay couples who couldn't legally get married, and many have offered them to unmarried opposite-sex couples as well. But now that gay couples can marry in every state, a lot of companies will start rethinking whether they want to continue offering these benefits.

Domestic partner benefits can be tricky, because – unlike with marriage – there's often no clear way to determine whether someone is in fact a domestic partner, or when a domestic partnership has ended. Domestic partner benefits also create tax complexities, because typical spousal deductions don't apply. And companies that offer such benefits to gay couples but not straight couples could be violating discrimination laws.

Recently, many businesses have been phasing out domestic partner benefits, and the Supreme Court's ruling will likely accelerate this trend.

'Comparative advertising' was close to the line but okay

The Schick razor company recently complained to the National Advertising Division (an ad industry regulatory body administered by the Better Business Bureau) about ads created by the Dollar Shave Club. Schick believed the ads accused name-brand razor companies of engaging in price-gouging and ripping off customers by charging extra for useless features.

One Shave Club ad showed a razor customer at a drugstore receiving a "free gift" of a kick in the groin along with his name-brand razor purchase. Another showed a customer handing over all his worldly possessions to buy razors.

But the NAD sided with the Shave Club. It said the ads didn't "falsely disparage" Schick, because they didn't actually suggest that Shave Club razors were as good as Schick's, or that Schick's extra features had no benefit whatsoever. Rather, the ads simply suggested that the added value of a name-brand razor wasn't worth the extra cost.

And while the ads contained specific price comparisons between Shave Club razors and others, the NAD said these were accurate and not a problem.

However, the Shave Club did agree to rework its ads to remove references to its competitors' "gimmicks" and "shenanigans."

Social media creating new issues for businesses

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wrong place.

Handles and usernames have become a big part of business marketing, and it's critical to make sure you have safeguarded the legal rights to yours.

Are you running a social media contest? The Federal Trade Commission is cracking down on contests that require people to post a testimonial, add a photo on Pinterest, retweet something, or "like" a Facebook page. The problem is that this could be deceptive marketing if someone sees a like or a retweet and doesn't realize the poster had a financial incentive to create it.

Most recently, the FTC announced that if a contest has a designated hashtag, the hashtag must make extremely clear that a contest exists. For example, "#AcmeWidgetSweepstakes" would be okay – but "#AcmeWidgetSweeps" is not clear enough, the FTC says.

Keep in mind, too, that you must publish all the contest rules, just as you would for contests outside the social media realm.

Do you retweet or otherwise pass along customers' social media content? That's great – unless the customer has misappropriated a copyrighted image, violated someone's privacy, or done something else wrong. Then, you might be on the hook for it.

Do you limit employees' social media usage? The National Labor Relations Board recently weighed in on when a business can do this. The issue is that all employees (whether or not they belong to a union) have a right to communicate with each other and discuss workplace issues in an effort to improve their working conditions.

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According to the NLRB, here are three things you *cannot* legally do: Prohibit employees from posting "sensitive" information about the company, prohibit them from posting embarrassing facts about co-workers or customers, and require them to get permission to link to the company's website.

You can, however, require employees who post on certain social media to identify their employer and state that their views do not necessarily reflect those of the company.

39% of businesses check job applicants' social media before hiring them – and of those, 43% have rejected someone as a result.

Do you save business-related social media posts? Most companies these days know that they need a policy on retaining e-mails and computer files in the event of litigation. But many don't realize that social media posts also need to be included in the policy.

Who owns the company's social media accounts? This needs to be made very clear. You don't want to spend valuable resources having employees become well-known on social media, only to have them leave and take their online followers with them.

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Amazon sued for directing people to competing products

A company called Multi Time Machine makes high-end military-style watches. It refuses to sell them on Amazon. If you search for the company's watches on Amazon, you'll get a long list of competing watches.

Is this illegal?

Possibly, according to a federal appeals court in San Francisco, which allowed a lawsuit against Amazon.

If you search for MTM's watches on other sites such as Buy.com or Overstock.com, you'll get a message suggesting that they don't carry them, along with some recommendations for related searches. But Amazon never explicitly says that it doesn't carry MTM watches.

As a result, MTM claims, customers might well believe that the watches displayed are MTM products, or are manufactured by a related company – and thus Amazon is unfairly using MTM's trademark to sell competing goods.

The court made a reference to a famous *Saturday Night Live* skit in which customers repeatedly asked for Coke at a restaurant, and John Belushi replied, "No Coke, Pepsi." This was okay, the court said, because Belushi clarified that there was no Coke – but Amazon never clarified that there was "No MTM."

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Businesses may be in more trouble for data breaches

Two years ago, retailer Neiman Marcus suffered a data breach that resulted in some 350,000 customers having their credit card information compromised. About 9,200 of those customers ended up with fraudulent credit card charges.

That's bad enough – but Neiman Marcus was then sued in a class action by customers who *didn't* have any fraudulent charges on their cards. These customers said Neiman Marcus should nevertheless compensate them for the time and money they had spent on credit monitoring and other efforts to prevent fraud as a result of the hack.

Even though the actual harm to these people might be fairly small, the fact that there were hundreds of thousands of them meant that the size of potential lawsuit was very significant.

Neiman Marcus argued that these customers hadn't really suffered any harm, and couldn't prove that any future harm was imminent. But a federal appeals court in Chicago disagreed, and let the case go forward.

"Why else would hackers break into a store's database and steal consumers' private information?" the court asked. "Presumably, the purpose of the hack is, sooner or later, to make fraudulent charges or assume those consumers' identities."

This case is yet another reason why it's wise to review your data policies regularly, and make sure you're complying with the law and have adequate insurance coverage.