

FTC's NEW  
ENDORSEMENT  
GUIDELINES RAISE  
QUESTIONS

By

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EMPLOYEE BLOGS AND SOCIAL-NETWORKING WEBSITES BRING  
NEW RISKS

Employee blogs and social-networking websites create myriad potential advertising opportunities for today's businesses. Unfortunately, with great opportunity also comes great potential liability. Recently released FTC guidelines regarding product endorsements reveal one of these new risks: employer liability for false or misleading advertising stemming from employees' online postings about their employer's products or services.

Clearly, social media and blogging are only growing in their importance to companies. Getting a company's information online quickly and accurately to potential consumers is no longer an option, but a prerequisite for keeping up in today's social networking world.

FTC'S REVISED GUIDES CONCERNING USE OF ENDORSEMENTS  
AND TESTIMONIALS IN ADVERTISING

Perhaps because of consumers' overwhelming trust in blogs, the FTC has now decided to get involved in trying to insure that blogs and social networking posts are accurate and truthful. The FTC's revised Guides Concerning the Use of Endorsements and Testimonials in Advertising, published in the Federal Register at 16 C.F.R. Part 255, address the application of Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices and unfair competition in or affecting commerce, to the use of endorsements and testimonials in advertising.

NEW GUIDELINES INEVITABLY RAISE ISSUES OF FIRST IMPRESSION

*Few Examples of Some of More Far-Reaching Issues*

New guidelines inevitably raise issues of first impression that the governing agency and the governed constituencies will need to address. The following

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are a few examples of some of the more far-reaching issues that businesses should be most interested in seeing resolved.

*Level and Severity of FTC Enforcement of its New Guidelines*

One open issue is the level and severity of FTC enforcement of its new guidelines. It appears that advertisers violating the FTC's new guidelines have a great deal to fear. Even though the guidelines are technically administrative interpretations of the law and are not binding law themselves, false advertisers face the threat of FTC enforcement actions if their advertisements are deemed false. Additionally, because postings on blogs and social networking pages can reach wide audiences, false advertisers may also be vulnerable to large-scale class-action lawsuits by injured consumers and could even face legal action taken by state prosecutors.

The bottom line is that any enforcement action is terrible public relations for a company. If the FTC simply announces that one company is a particularly bad actor, it can be devastating to a company's bottom line.

A company with a number of employees blogging falsely about its products can reasonably expect an FTC enforcement action. But what about the company that is trying hard to honestly portray its products, but employs one "rogue" employee who strays off message and deceptively endorses the company's product? Would the FTC pursue an enforcement action against a company based on the actions of one employee?

The FTC has suggested that it would be unlikely to take action in this situation. However, in reality, the FTC has pursued enforcement actions against companies that failed to establish or maintain useful appropriate internal procedures and whose "rogue" employee's actions resulted in consumer injury. Therefore, instituting strong social networking policies for employees could go a long way towards helping shield a company from liability based on the actions of one individual.

Ultimately, the FTC's decision to pursue enforcement against a company because of the postings of one employee may depend upon how much actual damage or injury was caused to consumers. If there was significant injury to consumers, the company with the one rogue employee may still face an FTC enforcement action, regardless of the company had a social networking

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policy. Nonetheless, instituting strong social networking policies for employees could go a long way toward helping shield a company from liability based on the actions of one employee.

*Employer's Liability for Online Comments Posted by Employee*

*While at Work Versus those Made on Employee's Own Time*

Another open issue is the employer's liability for online comments posted by an employee while at work versus those made on the employee's own time. Clearly, businesses should assume that if the misleading online posts occur while the employee is working, the FTC could easily argue that the employer was or should have been on notice of the conduct. If those same posts occur instead while the employee is at home, the link to the company is more tenuous. Having a good social media policy addressing at-home comments could strengthen the company's defense. In addition, monitoring references to the company's brand online could also help catch deceptive employee endorsements posted off site.

*When to Use or Not Use a Disclaimer*

When to use or not use a disclaimer is another interesting issue. Whether an online endorsement or testimonial should carry a disclaimer depends on several factors, including:

- (1) whether the speaker is compensated by the advertiser;
- (2) whether the product or service in question was provided for free by the advertiser;
- (3) the terms of any agreement between the speaker and the advertiser;
- (4) the length of the relationship between the speaker and the advertiser;
- (5) the previous receipt of products or services from the same advertiser to the speaker;
- (6) the likelihood of future receipt of such products or services from the same advertiser to the speaker;
- and (7) the value of the items or services received from the advertiser to the speaker.

The more of these factors that support a strong advertiser-speaker connection, the more likely an endorsement should contain a disclaimer.

*To Best Avoid Liability, Take Time in Advance to Train Employees  
on Proper Online Social Media Usage*

If a company sells products or services and employees are blogging about them or talking about them on their Facebook accounts, the FTC may presume that the employees are doing so with the company's blessing and for the company's benefit. This could lead to corporate liability for false

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statements made by employees online. To best avoid liability, a company should take the time in advance to train employees on proper online social media usage and avoid becoming the subject of a FTC enforcement action that addresses one of these open issues.

LAWYER'S REFERENCE SERVICE

Guides Concerning the Use of Endorsements and Testimonials in Advertising, Federal Register 16 C.F.R. Part 255.

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