

Employer Liability Under New FTC Endorsement Rules

Law360, New York (March 17, 2010) -- As the importance of social networking and blogging continues to grow in today's increasing Internet-dominated business world, the Federal Trade Commission has revised its Guides Concerning the Use of Endorsements and Testimonials in Advertising, published in the Federal Register at 16 C.F.R. Part 255.

These new guidelines address the application of Section 5 of the Federal Trade Commission 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.

These new guidelines also pose a major liability risk for companies whose employees utilize social media such as blogs and other social networking sites to promote their employer's products or services.

Under the new guidelines, businesses could face liability for their employee's actions, even if the comments are not authorized by or sponsored by the company.

According to its new guidelines, the FTC plans to use a "net impression" approach to determine whether companies advertising on new media to promote their products or services should be subject to liability for false or unsubstantiated statements made through endorsements or testimonials, failing to disclose material connections between themselves and their endorsers, or for failing to properly explain atypical results.

The previous sentence contains a number of buzz words that need to be examined further in order for businesses to get a better understanding of what they can and cannot do under the FTC's new guidelines.

Net Impression

The FTC-planned implementation of the "net impression" approach to determine whether an advertisement is deceptive appears to be similar to taking a case-by-case basis analysis of each questioned endorsement. For advertisers, the key to compliance appears to be focusing on the overall impression of their advertisement, rather than getting caught up in its specific details.

The first question to ask is whether the speaker is making a personal recommendation in the online post at issue. Second, the company should consider what kind of compensation, if any, the endorser received for posting this information. Third, the advertiser should try to determine what consumers' expectations were about the endorser's compensation in this particular context, if any.

By going through this three step analysis, companies may be in a better position to analyze whether a particular endorsement is problematic, and if so, how to fix it before the FTC challenges it.

New Media

“New media” refers primarily to blogs and social-networking sites, as opposed to traditional print media. There has been a great deal of consternation as to whether new media is being held to a higher standard than traditional print media.

In the end, companies should be concerned more about the truthfulness of their employees’ statements, regardless of the media in which they are conveyed.

Material Connections

“Material connections” between advertisers and bloggers should be disclosed. These “material connections” typically arise in the form of cash or in-kind payments from advertisers to bloggers to review a particular product. If an endorser was given the reviewed product for free, the endorser should disclose that in the endorser’s post.

Endorsement

“Endorsements” or “testimonials” subject to these guidelines are messages “that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.” 16 C.F.R. Part 255.01(b).

Duty to Disclose

Employees endorsing their employer’s products or services have a “duty to disclose” to their audience their relationship to the employer at the time they give the endorsement or testimonial. This duty would even apply when the employee’s endorsement is posted on a site that is not maintained by the employer, such as a popular online bulletin board or chat room.

In the end, if your company thinks a disclaimer may be warranted, issue it. It is better to be extra cautious than to receive a letter from the FTC regarding a questionable endorsement.

Atypical Results

Advertisements that convey a consumer’s experience with a product as “typical” when that is not the case should clearly disclose the results that consumers should typically expect to receive from the product at issue. Under the previous FTC guidelines issued in the 1980s, endorsers could avoid this problem by issuing a “results not typical” disclaimer.

Instead, under the new guidelines, endorsements that reference specific positive results in advertisements should either: (1) discuss the typical results that a consumer can expect; or (2) be accompanied by a disclosure of the typical results.

It should be noted, however, that the new guidelines do not require general testimonials such as “It tasted wonderful,” or “This is my favorite new car,” to be accompanied by a typical results disclaimer.

If your company provides services or sells products and your employees are blogging about them or talking about them on their Facebook accounts, the presumption may be that they are doing so with the company’s support and for the company’s benefit. This could lead to liability for your company for false statements made by your employees online.

In order to avoid liability, companies should take the time now to adopt a comprehensive social media policy and train employees on proper online social media usage.

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