

# *Legal Update*

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## **The Legal Impact of Social Media on Today's Businesses**

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It seems as if "social media" is on the tip of everyone's tongue. Whether or not you already use social media, you have likely heard about its growing impact on global communication and culture in the news or through discussions with friends and colleagues. Some observers discount social media as just another fad for trendy teenagers. The reality, however, is that sophisticated business people are using different forms of social media to increase and manage brand awareness and grow professional networks. Because you and your organization's employees, clients, customers and competitors may be using one form of social media or another, it is essential to understand its potential benefits and pitfalls. This is the first *Legal Update* in our multi-part series discussing the growing legal impact of social media on today's businesses.

### **Social Media Defined**

"Social media" broadly describes communications and interpersonal connections using Internet and web-based platforms that enable users and groups to write and direct content. Also called "Web 2.0," it is an often inexpensive and accessible way for people to publish original content for networking, marketing, or just keeping in touch. Although the field is ever-changing, today's popular means of social media include web journals or logs, called "blogs," micro blogs, such as Twitter, and social networking websites. Currently, Facebook and LinkedIn are among the most popular social networking sites. Facebook started in 2004 primarily as a website used by college students to stay connected to friends and family. Today, Facebook has approximately 300 million users, many of them businesses that use Facebook's "fan pages" to maintain exposure to consumers. LinkedIn helps its members create and track their professional networks, with over 48 million users in 200 countries.

Many businesses are now turning to sites like Facebook and LinkedIn and encouraging their use on both a corporate level and an employee level. These businesses see the marketing potential of social media and are attracted by its measurable qualities. In what might be an exceptional case, Dell, Inc. recently announced that a Twitter account managed by a single employee earned the company about \$3 million in sales. Because social networking sites are often used by young professionals and recent college graduates, many consumer products businesses find that use of social media exposes their products and services to a key segment of the consumer market. Further, use of social media can provide vital insight into user demographics and consumer satisfaction, including the ability to collect real-time feedback on product brands.

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Yet, for every social media success story, there is a news report of a lawsuit precipitated by its use. Social media's greatest asset – its potential to broadcast information to millions of users in seconds – can also be its greatest liability. Although the marketing and networking prospects of social media are exciting, companies must be prepared for the legal concerns that inherently accompany its use in the workplace, regardless of whether a business actively pursues a social media marketing strategy. For companies employing people who use social media in their personal lives – and in today's world, that is virtually all businesses – employees' use of social media both inside and outside the workplace can expose their employers to greater legal risks. Below is a brief discussion of some of the legal issues facing today's businesses.

## **Employment Law**

Employers must be cautious when using social media to learn more about their employees and customers. Moreover, employers should follow clear guidelines when reviewing job applicants' personal social media sites and when investigating employees' online activities. Failure to do so could inadvertently expose an employer to discrimination claims or privacy lawsuits based upon information about an employee otherwise unavailable to the employer. A federal jury recently returned a verdict in favor of two former employees of a national restaurant chain who sued the chain for various privacy violations after the employer accessed a private website where the former employees aired grievances about the company. The actions of employees using social media - no matter how well-intentioned - can also expose a business to a wide range of claims for deception and statutory violations. Social media also inherently poses the risk that a company's employees could (unwittingly or not) disseminate confidential or proprietary business information to a vast audience.

## **Confidential Information & Intellectual Property**

While traditional "old media" forms such as print and television advertisements allowed companies to tightly control the information they made public, social media allows any employee, customer, competitor or critic to broadcast information instantly. Employees' activities in intentionally or inadvertently posting confidential information can expose employers to liability for violations of a host of privacy laws including the Health Insurance Portability and Accountability Act (HIPAA), the Sarbanes-Oxley Act, the Bank Secrecy Act, and numerous state laws. Companies should also be mindful of how employees use non-company information. For example, employees freely copying what is found on the Internet without regard for ownership may trigger intellectual property infringement issues. Although federal law may protect website owners from liability for copyright violations on their sites by third-party posters, companies risk losing this protection if they do not employ mechanisms to ensure that appropriate action is taken upon receiving notice of a complaint.

## **Right of Publicity & Deceptive Trade Practices**

When social media sites or their users display the names and likenesses of people to promote products or the sites themselves, rights of publicity issues may arise. The right of publicity is described generally as an individual's right to control and profit from his or her own identity, including the use of his or her name, likeness and image. Recently, St. Louis Cardinals manager Tony La Russa sued Twitter, alleging that imposters had set up fake accounts in his name. Twitter has since implemented new tools allowing users to verify that a person broadcasting a micro-blog "tweet" is indeed who he or she claims to be. Facebook has also been criticized for its practice of pairing members'

photographs with advertisements without the members' consent. Further, employees who use social media to promote their companies' goods or services – for example, by posting positive reviews of company products on a blog – may expose their employers to liability. As of December 1, 2009, Federal Trade Commission regulations will require bloggers to disclose any consideration they receive in exchange for product reviews.

Although the potential risks and pitfalls arising from business participation in social media may seem daunting, the competitive risks of remaining on the sidelines out of fear may be more severe. Even if a company chooses to avoid social media entirely, it is unlikely that its employees will do the same. Every company that uses social media or employs people who use social media should consider establishing policies that address appropriate uses and limitations on social media in a way that is mindful of both the benefits it may have for the company's particular business and the potential risks. To help our clients and friends identify potential issues arising from their use of social media and develop appropriate policies or strategies, FVLD will publish a series of *Legal Updates* over the coming months addressing in more detail the topics described in this introduction. Please stay tuned. Of course, if your organization needs assistance in the preparation of a social media or blog policy, please let us know.

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*FVLD publishes updates on legal issues and summaries of legal topics for its clients and friends. They are merely informational and do not constitute legal advice. We welcome comments or questions. If we can be of assistance, please call or write Jim Groth 312.701.6830 [jgroth@fvldlaw.com](mailto:jgroth@fvldlaw.com), Neil Rosenbaum 312.701.6824 [nrosenbaum@fvldlaw.com](mailto:nrosenbaum@fvldlaw.com), Michelle Wolf-Boze 312.701.6819 [mwolf-boze@fvldlaw.com](mailto:mwolf-boze@fvldlaw.com) or your regular FVLD contact.*

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