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Curry Insurance Agency

RISK MANAGEMENT

The Growing Risk of Speaking Out on Social Media

AS PEOPLE become more outspoken online, it's more important than ever for business owners and managers to refrain from making incendiary comments or taking political stands in their social media feeds.

With politics really heating up all over the country, many businesses have suffered backlashes for their actions or postings on Facebook.

SOCIAL MEDIA BACKLASH

- The owner of a Massachusetts coffee shop closed her business because of the firestorm created when her daughter, the store's manager, made anti-police comments on Facebook.
- A Pontiac business owner in Troy, MI, received a major online backlash after a photo containing a racial slur was posted to his Facebook page. The effects were swift for the company and hurt its sales, according to local news reports.
- An Arizona restaurant was forced to close its doors indefinitely after a politically charged Facebook post about the president and the national anthem kneeling controversy that the eatery's owners wrote prompted mass criticism from social media users.

Social media can be a great way for a business to market its products and services and engage with its customers and the public at large, but as the above examples illustrate, it also carries a number of risks.

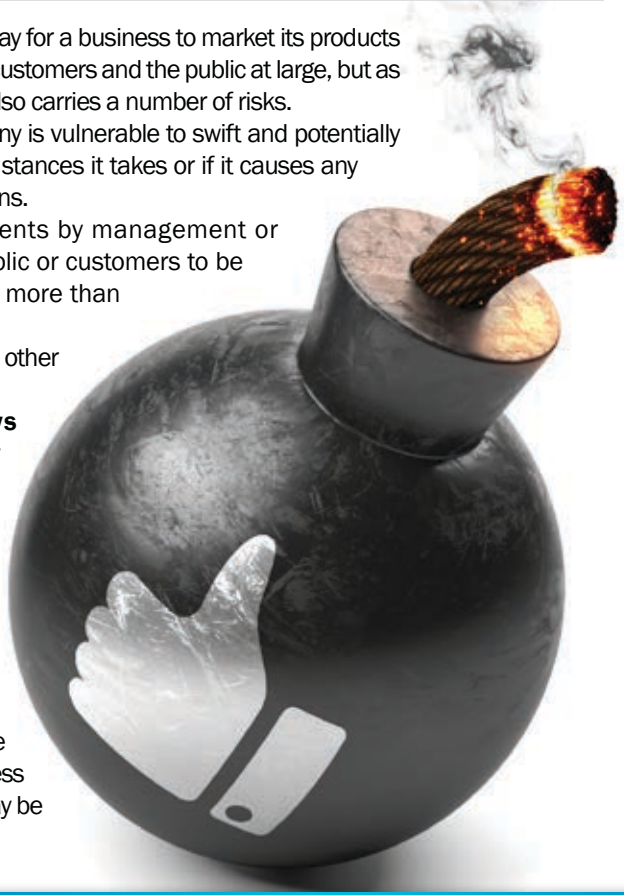
Not only that, but your company is vulnerable to swift and potentially harsh criticism for any actions or stances it takes or if it causes any damage as a result of its operations.

Also, statements or comments by management or employees are taken by the public or customers to be representative of the company, more than posts made by individuals.

Besides reputational damage, other key risks include:

Consumer protection laws – You may breach consumer protection laws by making false or misleading representations about products or services.

Breach of privacy laws – This could arise if you or one of your staff publishes (even inadvertently) confidential information on social media. This could even apply to a private account of someone who has access to any records in question that may be divulged.



Defamation, libel or slander – A company representative may make defamatory statements about someone on your social media. It should also be noted that as material that is published online is typically available throughout the world, this could in certain circumstances expose the business to claims or suits in jurisdictions outside of where its key business operations are.

Copyright infringement – A company representative may publish something with copyright issues.

The takeaway

If your company has any type of social media presence, you need to devise and implement social media policies for your business accounts as well as for employees. If you don't, you are leaving yourself open to a raft of potential liability, damage and costs.

But sometimes, even with the best policies in place, people can still act out of line, or go rogue. Three forms of coverage can help:

General liability insurance – Your general liability policy broadly protects you from third

See 'Misguided' on page 2

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WORKPLACE SAFETY

OSHA Pushes Anti-Retaliation Programs

THE OCCUPATIONAL Safety and Health Administration recently released a list of recommended practices to help employers avoid retaliation problems.

OSHA's goal in doing so was to help workers feel more comfortable in the workplace when discussing or reporting important safety issues.

The recommendations are applicable for all industries, and they align with the existing whistleblower protection laws.

Defining workplace retaliation

Retaliation occurs when an employee reports a concern or a person, and a manager or another person in authority over that employee takes adverse action against them. Adverse actions may include any of the following practices:

- Laying off or firing
- Denying overtime
- Vague disciplinary terms
- Denying benefits
- Demoting
- Making threats
- Denying rehiring
- Pay reduction
- Duty reassignment
- Isolation
- Other subtle actions.

Building an anti-retaliation program

Anyone in a position of leadership over another individual should be aware of their responsibilities at all times. To ensure that everyone is on the same page, OSHA recommends regular meetings to discuss issues.

Workers should know about the new program.

Devise a detailed outline of procedures and instructions for workers to follow if they feel they have been retaliated against. You should have an efficient system to collect complaints.

For further protection, you may consider an anonymous reporting system. Regardless, special training for all supervisors and managers is a must, and the training should be refreshed periodically. Evaluate the program regularly to identify deficiencies.

These are all recommendations and are not legal requirements by OSHA. But an anti-retaliation program can reduce the risk of safety violations, workplace injury claims and more. ❖

Elements of a solid program:

- Accountability, commitment and leadership
- A concern-resolution system
- A reporting and response system
- Anti-retaliation training
- Program oversight.

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There Is No Coverage for Misguided Public Statements

party lawsuits brought against you for reasons such as harm to another company or individual's reputation, copyright infringement, libel or slander. Generally, this policy could cover a social media lawsuit.

That said, all commercial policies are different, and there are limits to what it would cover. For example, many policies do not cover media-related lawsuits.

Umbrella policy – This would kick in in the event of an action where the limits of your general liability policy are breached. It would give you an added layer of protection.

Media liability coverage – This type of errors and omissions coverage was originally designed for publishers and media outlets, but it can now be tailored to a specific business based on the named perils it covers. It could include coverage for:

- Defamation, libel and slander
- Invasion of privacy
- Copyright infringement
- Breach of implied contract, license agreement, or product placement agreement. ❖

No cover for courting controversy

There is no coverage for a company leader making commentary that prompts a boycott. Try to keep politics out of your social media and resist the urge to pontificate.

RULE REVERSAL

NLRB Moves to Restore Joint-Employer Standard

THE NATIONAL Labor Relations Board has issued a proposed rule that would roll back an Obama-era board decision on joint-employer status for companies that hire subcontractors or use staffing or temp agency workers.

The decision by the NLRB in 2015 overturned a long-time precedent (a standard in place since 1984) that a company must have "immediate and direct" control over a worker to be considered a joint employer. The board ruled instead that a company need have only "indirect" control of a worker and not even exercise that control to be considered a joint employer.

Under the 2015 standard, a company could be deemed a joint employer even if its "control" over the essential working conditions of another business's employees was indirect, limited and routine, or contractually reserved but never exercised.

The ruling was roundly criticized by businesses as it put both the hiring employer and its contractor or staffing agency on the hook for labor violations. The decision also applied to franchisors that were suddenly liable for labor issues at individual franchisees' operations.

The ruling also spread plenty of confusion in the employer community, and it sent companies that used contract or temp labor to set strict written procedures of where their responsibility ended and the subcontractor's began.

The proposed rule

The proposed rule affects businesses that:

- Are franchisees or franchisors,
- Use temporary staffing agencies to supply manpower, or
- Hire outside workers or subcontractors.

Under the proposal, an employer may be found to be a joint employer of another employer's employees only if it possesses and exercises "substantial, direct and immediate control" over the essential terms and conditions of employment "and has done so in a manner that is not limited and routine," according to a statement issued by the NLRB.

"Indirect influence and contractual reservations of authority would no longer be sufficient to establish a joint-employer relationship," the statement said.

In announcing the proposed standard, the NLRB included a number of examples of how it would apply. Below are two.

How new rule would apply

Example 1: Red Line Staffing supplies line workers and first-line supervisors to Sporting Apparel at Sporting Apparel's manufacturing plant. On-site managers employed by Sporting Apparel regularly complain to Red Line Staffing's supervisors about defective products coming off the assembly line.

In response to those complaints and to remedy the deficiencies, Red Line Staffing's supervisors decide to reassign employees and switch the order in which several tasks are performed.

Sporting Apparel has not exercised direct and immediate control over Red Line Staffing's line workers' essential terms and conditions of employment.

Example 2: Temp Worker Plus supplies line workers and first-line supervisors to Breadstone Enterprises at Breadstone's baking plant. Breadstone also employs supervisors on site who regularly require the Temp Worker Plus supervisors to relay detailed supervisory instructions regarding how employees are to perform their work. As required, Temp Worker Plus supervisors relay those instructions to the line workers.

Breadstone possesses and exercises direct and immediate control over Temp Worker Plus's line workers.

The fact that Breadstone conveys its supervisory commands through Temp Worker Plus's supervisors rather than directly to Temp Worker Plus's line workers fails to negate the direct and immediate supervisory control.

The proposed rule is currently up for a 60-day comment period. For now, you should stick with the contracts you have had since the Obama-era decision until this new rule takes effect. ❖

HUMAN RESOURCES

Stay Legal When Conducting Background Checks

WITH THE number of harassment, discrimination and other employee lawsuits growing, besides examining their internal policies, employers need to be careful about who they hire.

Apart from calling previous employers and schools and checking for any lawsuits with the courts, many businesses will also consider using a vendor to do a background check and to look at an applicant's social media posts.

The key to staying on the right side of the law is following the Fair Credit Reporting Act (FCRA). Despite its name, the law covers more than just credit checks. It governs how an employer or a third party entity gathers background information and what it can access. It established requirements for:

- Notice.
- Consent.
- Steps required before taking an adverse action based on information from the background check (like rescinding an offer).
- Using out-of-state agencies to pull court records.

FOLLOW THE RULES

1. Always notify the employee or applicant that you plan to conduct a background check.
2. Get written permission. This can be part of the document you use to notify the person that you will get a consumer report. If you want to get reports throughout the person's employment, make sure you say so.
3. If you use a third party for the background check, certify that they comply with the FCRA.
4. If you reject an applicant based on their consumer report, you must give them a notice that includes a copy of the report and a copy of "A Summary of Your Rights under the Fair Credit Reporting Act" (on the Federal Trade Commission's website).

The FTC, which regulates the FCRA, outlines the rules employers must follow on its website: *www.ftc.gov*

Checking social media

Several states have social media laws in place that restrict employers from asking job applicants or existing employees from sharing their login credentials or private information. But hiring managers and recruiters are free to check the information and photos of anyone which are available in the public domain.

If you plan to check an applicant's social media:

- Know what you are looking for and why the information is relevant to your hiring decision.
- Is the information relevant to the hiring decision? You may find social media posts that are distasteful, but you may not know the whole story behind a post.
- Is the information reliable? Social media sources may contain false, doctored and biased information, and posts can easily be forged.
- Give a candidate the chance to explain or dispute any information you find. ❖