SOCIAL MEDIA

Social media use among the workforce inevitably leads to unpredictability and the liability risks associated therewith. The authors discuss a framework for assessing a company's current social media presence and for developing a strategy to mitigate social media-related risks.

Corporate Social Media Engagement: Strategies for Managing Unpredictability

BY MELINDA L. MCLELLAN & JAMES A. SHERER,

BAKERHOSTETLER, NEW YORK

For every modern company with even a token online presence, social media engagement is not optional, it's inevitable. The vast majority of working-age adults in the United States use some type of social media on a daily basis, and the world at large follows suit. The ubiquitous nature of these services makes it extraordinarily likely that one or more of a company's core constituencies (its employees, customers, or competitors) have discussed, are discussing, or will discuss the company on social media. Online interactions, be they positive or negative, may range from a simple

Melinda L. McLellan serves as counsel at BakerHostetler in New York, where she advises clients on the creation, development, and implementation of global privacy and security policies, standards, procedures, and guidelines, as well as company codes of conduct and employee privacy training programs. Melinda can be reached at mmclellan@ bakerlaw.com.

James A. Sherer serves as counsel at BakerHostetler in New York., where he focuses on litigation, discovery management processes, enterprise risk management, records and information governance and data privacy and security. James can be reached at jsherer@ bakerlaw.com.

"like" or retweet to a multi-page blog post or message board rant. This broad spectrum of potential participants introduces an element of unpredictability and a need for risk mitigation and management.

In light of this obvious and undeniable reality, companies of all sizes should consider their current social media posture and evaluate how best to approach multi-channel involvement across the social media spectrum. The framework below aims to foster a thoughtful and productive discussion among stakeholders undertaking this type of social media review. These lists and guidelines will help organize the evaluation process into three core tasks: (1) assessing the company's current social media footprint; (2) developing a social media strategy; and (3) crafting appropriate policies for effective and compliant social media engagement. When implemented, this framework will help minimize unpredictability by addressing inevitable corporate social media use in a pragmatic way.

Step 1: Assess the Status Quo

To develop a coherent corporate social media strategy, a company first must have a complete understanding of how it is already engaged through various channels. Although use of the most common social media outlets, such as Facebook and Twitter, may be common knowledge for everyone in the company, some social media platforms may be unfamiliar or unknown to certain stakeholders. Accordingly, the process should begin with a thorough assessment of the company's current social media engagement. A robust social media presence can be a major asset, but *ad hoc* engagement

on multiple fronts may lead to inconsistent messaging and undesirable results. In addition to internally-controlled accounts and organic or incentivized customer engagement, negative interactions with hecklers, competitors, or former clients can permeate the medium and require attention.

Ideally, the preliminary assessment should be as comprehensive as possible. It should list every social media platform that features representations of the company or its brand, bearing in mind that even if the company's current involvement with a particular service is minimal, it may escalate quickly in the event of a public relations crisis. The company should consider evaluating and updating this list at regular intervals to respond to changes in the social media landscape. Key categories to consider when creating the list of relevant services include:

■ LinkedIn and other professional networking platforms;

■ Consumer product review sites and feedback forums, such as CNET and Amazon's customer ratings;

■ Online social communities, such as Facebook and Reddit;

■ Microblogging-style services, which include:

▶ Twitter and Instagram (consider registered accounts as well as hashtagged content);

▶ Content-sharing services like Pinterest, which allow members to "pin" and share images, videos, and other media;

▶ Video applications, such as Vine and Snapchat;

▶ Short-form blogging services like Tumblr, which emphasize stream-of-consciousness sharing over lengthier pieces;

■ Geolocation-oriented services, such as FourSquare and Waze;

■ Enterprise social networking services, such as Confluence and Yammer; and

■ Cloud-based software as a service (SaaS) tools like Prezi, Varolii, and Zipwire.

After listing the relevant social media platforms, the next step of the process involves examining and describing the ways in which the company uses each platform. Do not limit considerations to conscious and intentional engagement by the company (which may include reviewing contract provisions or terms of use). Also consider organic, consumer-driven interactions, and even unwelcome engagement provoked by negative publicity, unpleasant user experiences, or rival organizations. Relevant questions to consider in this regard include the following:

■ Is the company making a conscious effort to engage through the platform?

▶ If yes, who directs this effort, and what is the intended level of engagement?

▶ If no, should the company disengage until a plan is in place?

■ How customizable is the platform?

▶ Is the platform dynamic enough to mature with the company and incorporate new or different corporate strategies?

▶ Can the company effectively suppress or delete previously-posted content, or does material on the platform live forever?

■ Do some divisions or groups within the company use certain social media platforms in ways that other groups do not?

■ How are employees using the platform with respect to the company?

▶ How does employee use reflect on the company?

▶ Is employee behavior on the platform subject to a company policy or guidelines?

■ Does the platform offer settings or controls that the company can use to monitor and/or regulate how it is represented?

■ Has the company engaged in a commercial relationship with the platform?

▶ Is there an existing advertising relationship with the platform?

▶ Does the company generate its own content, or is content provided by the platform or by a third party (or some combination of these)?

▶ How are agency relationships, if any, defined?

▶ Who maintains the information presented on the platform?

■ How is it stored?

■ Where is it stored?

■ What happens to the content when the commercial relationship is terminated?

■ If the provider shares company information with others, will the company be notified?

■ How are customers using the platform with respect to the company?

■ How are competitors using the platform with respect to the company?

■ Are interactions with the platform unilateral in nature (a "push" approach), or does the platform allow for—or even require—a company-customer dialogue? If so, does use of the platform require dedicated company resources for maintenance purposes?

Step 2: Develop a Social Media Strategy

After establishing the company's current social media posture and assessing the level(s) of engagement, stakeholders can move forward with developing and formalizing the company's social media strategy. In addition to addressing legal compliance issues, a company should protect its reputation by confirming that its use of social media accurately reflects the company's brand. The following guidelines are intended to shape that discussion, to help ensure that the company covers all of the relevant bases and steers clear of potential pitfalls.

■ Define what social media can, or should, mean for the company.

▶ What, exactly, is the company trying to achieve?

▶ It may be useful to identify other similarly-situated organizations and assess the potential applicability of their goals and approaches.

■ Be honest about the company's aspirations versus reality.

▶ The latest, splashiest technology may present exciting opportunities, but beware of hidden challenges.

▶ The most difficult discussions often concern how to address unsanctioned employee activity or unwanted negative attention, but it is crucial to consider policies and procedures that may address these scenarios.

■ Educate executives and designate an individual to lead the review and updating process that will be essential as technology, and the company, evolve.

▶ Consider re-evaluating social media strategies at least annually, if not more often.

▶ If resources are lacking, the company might consider a social management tool or aggregator that integrates multiple platforms and accounts into a single interface.

■ Address any existing problems that are identified along the way, and revisit the strategy as necessary. A nimble approach is indispensable given the immediate and unforgiving nature of the digital landscape.

■ Find workable ways to manage problems expeditiously. Even seemingly minor social media snafus can quickly spiral out of control. Strategies that require multiple levels of review and approval may prove disastrous when an immediate response is required.

■ When considering the use of internal social media platforms, bear in mind that even ''bulletin board''-type services may require evaluation, monitoring, and management in accordance with policies that are applicable to the types of social interaction that may occur.

Step 3: Craft Policies and Protocols

Understanding a platform's functionality and *how* the company can make use of it is just one piece of the puzzle. Companies actively engaged in social media should contemplate what they *ought* to do, taking into consideration the viral nature of interactions on social media platforms. In this context, experienced counsel is an invaluable resource to help companies navigate an often complex legal and regulatory environment. Armed with institutional support and an understanding of the company's goals, counsel should work through the following issues with stakeholders, then memorialize the agreed-upon strategy with appropriate policies and protocols.

■ Determine who within the company is responsible for maintaining each social media engagement under the company's control, and define a management protocol.

■ Decide who within the company will monitor social media, as well as how (and by whom) incoming inquiries and issues will be handled, escalated, and memorialized.

■ Create an ''after hours'' protocol to address the inevitable night/weekend/holiday social media crises.

■ Establish a strategy to avoid ''genericide'' and related copyright considerations.

■ Define an ownership policy for social media posts and followers vis-à-vis the parties that create content for the company's social media accounts.

■ When developing policies and guidelines concerning social media posts generated and promulgated by the company:

▶ Consider industry-specific requirements for the use and retention of posts and their related content.

▶ Consider eDiscovery and data management concerns that may involve a wide variety of circumstances:

■ What types of customer complaints are posted?

■ What representations is the company making?

■ How is the company interacting with its competition?

▶ Are the communications too chummy (antitrust)?

▶ Are the communications too adversarial (defamation)?

▶ Consider whether content may be considered an endorsement or testimonial subject to disclosure requirements set forth by the Federal Trade Commission.

▶ Consider whether a potential post discloses—or gives the appearance of disclosing—confidential information or material, inside information relevant to potential corporate deals or the movement of stocks.

▶ Consider inserting attribution disclaimers, reviewing all content before posting, screening third-party content for copyright permission issues, and obtaining appropriate releases.

▶ If photographs or descriptions of identifiable individuals are used, consider how social media use of these likenesses without permission might infringe on privacy rights.

▶ Consider application of the Digital Millennium Copyright Act.

■ When creating policies or guidelines concerning how employees may use social media (whether in service to the company or personally):

▶ Address ''cybervetting'' and its related behaviors in the human resources context.

▶ If certain employees use social media in reference to the company or its operation as part of their work, clearly articulate the company's expectations in that regard:

■ In particular, provide the relevant employees with a clear, written statement defining the company's position on ownership and copyright with respect to social media content created by employees.

▶ Determine when employees will be making statements in their capacity as an employee or agent for the company (as opposed to content employees may create in their individual capacity).

▶ Consider whether restrictive policy prohibitions may impinge on free speech or labor rights, or impact contractual obligations.

▶ Weigh the potential value of allowing (or instructing) employees to use geolocation features versus possible risks to employee safety and privacy, as well as corporate confidentiality.