

How FTC Rules Affect Employee-Generated Marketing

Law360

July 9, 2018

Authors

Brandon J. Moss
Partner
202.719.7554
bmoss@wiley.law

Nick Peterson
Of Counsel
202.719.7466
npeterson@wiley.law

Practice Areas

FTC Regulation
White Collar Defense & Government
Investigations

For many businesses, employees are a valuable marketing asset. When first launching its food delivery app, Uber Eats, Uber Technologies Inc. found it difficult to acquire new food delivery drivers at a rate that matched their growth. Rather than pay for traditional advertisements, Uber utilized its own employees to help advertise the need for food delivery drivers. Uber found success in locating Uber Eats drivers by reimbursing Uber employees the cost of meal delivery orders if the employees took time to encourage the delivery drivers to also drive for Uber Eats. While Uber's innovative marketing approach was focused on finding more Uber Eats drivers, other companies have used their own employees to market products and services. Employees' insight into their business can be valuable to consumers, and there are fewer costs associated with their endorsements. As

such, companies have begun to encourage their employees to post on social media, as well as leave product/service reviews on websites like Amazon and Yelp. Employee marketing, however, has created new issues, and the Federal Trade Commission has expressed concerns that this type of advertising can be deceptive to consumers.

At issue is something called “native advertising” — the practice of businesses paying an employee or third-party “influencer” to post about their product on social media or websites. Native advertising can be particularly effective because potential customers may not fully appreciate that they are seeing an ad; the promotion looks like other nonmarketing posts and blends into the platform. Examples of native advertising include offering incentives to employees to promote a company event on Instagram or encouraging employees to post reviews of a product on Amazon. This type of marketing is vital to modern businesses, as the average consumer is more likely than ever before to look at a product’s rating on Amazon.com or a restaurant’s rating on Yelp.com before making a purchasing decision. As a result, many companies now monitor their online ratings profiles and are eager to secure as many positive reviews as possible.

The FTC has native advertising in its sights, mainly because there is a concern that consumers may give undue credit to the representations of someone who they believe is an unbiased source, but really is a paid spokesperson. Indeed, not only has the FTC cracked down on companies that encourage employees to market without adequately informing them of their disclosure obligations, it has also contacted individuals who do not disclose their material connections with businesses whose products/services they promote. More than ever, businesses who use their employee base for advertising and marketing should institute company policies to ensure that they remain in compliance with FTC regulations and guidelines.

Employee Marketing Programs Must Require Employment Connection Disclosures

According to the FTC’s Endorsement Guides, an endorser is generally required to disclose all material connections with the product/service that they are promoting. An obvious material connection is an employment relationship. In 2015, the FTC settled charges against Sony and Deutsch LA after company employees tweeted about a new gaming console without disclosing their employment status. Sony and Deutsch LA urged employees to create awareness of the new console by tweeting about it with the hashtag “#gamechanger,” but did not instruct the employees to disclose their employment relationship. The FTC explained that while companies may encourage their employees to post about their products/services, the employees must disclose their relationship with the company if they decide to do so.

While some employee/employer relationships are easy to comprehend and disclose, disclosure becomes complicated when large companies have subsidiaries or parent companies, or when outside marketing groups become involved. Employees who work for a parent or subsidiary company of the endorsed brand must disclose that relationship. Employees working directly for outside marketing groups are also obligated to disclose their relationship with any client whose product/service they are endorsing. In 2010, the FTC brought charges against Reverb, a public relations agency hired by a game developer to promote their products.

Employees at Reverb posted reviews in the iTunes store using account names that gave readers the impression that the reviews were written by disinterested consumers. Although the individual developers were not named in the settlement, the FTC specified that the duty to disclose a relationship applies to both the seller and the seller's advertising agency. To complicate things further, the Endorsement Guides indicate that even a family member of an employee who posts an endorsement is obligated to disclose their relationship with the company.

Ultimately, both the business and the individual employee can be held liable for failing to disclose material connections. In September 2017, the FTC brought its first official action against two influencers who failed to disclose their employment relationship with the business they endorsed. Trevor Martin and Thomas Cassell, joint owners of an online gambling website called CSGOLotto.com, posted on their popular YouTube channels about betting on CSGO Lotto, without disclosing that they were joint owners of the website. The FTC settled the charges, but Acting Chairman Maureen Ohlhausen made it clear that the FTC intends to continue bringing charges against individuals who fail to disclose material connections online: "This action, the FTC's first against individual influencers, should send a message that such connections must be clearly disclosed so consumers can make informed purchasing decisions."

The Endorsement Guides are not always clear about when and how employees should disclose material connections with their employer, and it can be difficult, if not impossible, for businesses to monitor and control everything that their employees and their family members post online. The FTC has indicated, however, that it is more likely to be forgiving of violations when the company has a well-functioning, legitimate monitoring system in place and is making a good faith effort to comply with the endorsement regulations. A robust and strictly enforced social media policy can help mitigate the risk associated with employee endorsements. Such policies should include guidelines regarding when and how employees should disclose their employment status when endorsing the business's products/services.

How to Properly Disclose an Employment Connection

The FTC outlines scenarios in which disclosure is required in their Endorsement Guides, as well as appropriate ways to disclose a material connection. These Endorsement Guides apply to all endorsers who have material connections with a business, including employees.

Disclosing Employment Connections in YouTube Video Promotions

The FTC has clarified that when using video-hosting websites like YouTube, placing the disclosure in the video description underneath the posting is insufficient because there is a significant likelihood that a viewer will not see the disclosure. The FTC recommends placing the disclosure at the beginning of the video, where it appears long enough to be noticed, read and understood. To ensure that a promotional video is compliant with FTC standards, a disclosure should be placed on the screen throughout the entire video, so that users who skip past the first part of the video will still be aware of the material relationship between the creator

and the business they are endorsing.

As an example, if an employee is promoting an upcoming video game release by posting a “walk-through” video on YouTube, that employee should disclose the following: (1) that they are an employee of the company that created the video game; (2) that they received a “first-look” copy of the video game prior to its release date in return for their endorsement; and (3) any other tangible benefits they may have received for their post, including financial compensation or other employee “perks.” The disclosure should follow the guidelines listed above, and should be positioned inside the video in a way that is clear and conspicuous to their viewers.

Using Hashtags to Disclose Employment Connections on Social Media

Many social media platforms utilize hashtags, which are frequently used to disclose material connections between employees and businesses. These hashtags should be clear and conspicuous, and a hashtag should not be hidden within a sea of other hashtags, where a consumer is unlikely to see it. The Endorsement Guides have outlined various uses of hashtags that inadequately disclose material connections between employees and businesses they endorse. For instance, the FTC has explained that shorthand words like “#sweeps” (sweepstakes), “#spon” (sponsor) and “#collab” (collaboration) are likely too vague to constitute adequate disclosure. Essentially, the FTC is concerned that the average social media user will not recognize that these words insinuate a paid sponsorship or an employment relationship.

Employees disclosing material connections should also be concerned with the location of their hashtags. For instance, the FTC has cautioned against placing disclosures below the “more” button on an Instagram post. When a consumer views posts on their Instagram stream, only three lines of the caption are displayed. To see the rest of the caption, the consumer must click “more.” According to the FTC, a disclosure beyond the displayed text is ineffective, because most consumers fail to look more closely at a user’s caption. The Endorsement Guides explain, however, that placing the disclosure at the beginning of a tweet or Instagram post would “likely be effective.” A good employee marketing policy should require that employees disclose their relationship using clear hashtags that appear early in their post to ensure that all consumers are aware of the employment relationship.

Disclosing Employment Connections in Employee Bios

While it is good practice for employees to disclose their material connections with an employer on their social media home pages and bios, this should not be the only place that their relationship is disclosed. Businesses are often so diversified that it is not always clear that the endorsed products are sold by the endorser’s employer. Additionally, the FTC has explained that it is insufficient for an employee to disclose their relationship with the company solely by including their place of employment on their Facebook profile page or explaining their relationship in the bio section of their Instagram page, because “many people in your audience probably won’t see it.”

For instance, if an employee of a talent agency is tasked with promoting an upcoming concert by one of their clients on social media, every endorsement post about the concert must include a disclosure. If the employee relies solely on an “in bio” employment disclosure, a consumer who comes across one of the posts through the Instagram “Explore” tab would be blind to the material connection between the posting employee and the brand. Absent an additional disclosure attached to that individual post, the employee has not sufficiently disclosed their employment relationship. To avoid confusion, businesses should require that employees include a disclosure in each post and provide guidelines to all employees as to how to adequately disclose the nature of their relationship with the business whose product/service they are promoting.

Disclosing Employment Connections by Liking or Sharing Content on Social Media

The FTC discourages employees from endorsing their company by “liking” their posts. Many social media users endorse brands that they like by “sharing” and “liking” that brand’s posts. These features allow social media users to show their support or endorsement of a business, product, or service by simply clicking the “share” or “like” button. However, the problem with “liking” social media posts is that there is no way to adequately disclose a material relationship. While sharing options usually allow a user to include a short message in which they could disclose their employment relationship, “liking” a post only allows the user to click the like button and doesn’t give them an opportunity to disclose any material connection related to the endorsement. To ensure that businesses and employees remain in compliance with FTC guidelines, they should generally never use this type of endorsement.

Disclosing Employment Relationships in Online Product Reviews

Businesses should adopt strict regulations regarding employee reviews of products/services, as the FTC considers this type of native advertising to be one of the most egregious examples of consumer deception.

Employees are generally allowed to review their employer’s products/services online; however, they must disclose their relationship in every review. Logistically, this is easier said than done since the FTC does not view disclosures on bios to be sufficient. Similar disclosures are also required for employees who review competitors’ products/services. Additionally, an employee should also never use an anonymous or pseudonymous name when posting, as this too is likely to deceive consumers.

Further raising issues, while the employee is tasked with including a disclosure with every review, the FTC’s position is the company bears responsibility for ensuring its employees make such appropriate disclosures. This can be difficult because disclosures are still required when an employee posts an endorsement on his or her own initiative – even if the review is negative.

Of course, an employer can never require an employee to write a positive endorsement of a product or service, or review a product with which they are personally unfamiliar. On the other side of the coin, they cannot require employees to post false or misleading information about competitors. Indeed, companies

should adopt and enforce policies that prohibit employees from posting false or misleading information about a competitor's product/service, as such posts may expose employers to liability for deceptive advertising, as well as defamation claims.

Best Practices for Businesses

The FTC Endorsement Guides, while robust in some areas, are less than comprehensive regarding an employee's duty to disclose and the employer's duty to monitor. For example, the FTC has yet to provide guidance on how an employee disclosure should be worded, who a competitor is for disclosure purposes, or whether employers are obligated to monitor their employees' social media posts.

While these questions remain unanswered, cautious businesses should develop their own internal policies and procedures to ensure compliance with the Endorsement Guides. Businesses should begin by taking the following steps:

1. Review and/or put in place employee and contractor policies regarding endorsements. These policies should follow FTC guidance and be regularly updated. Revised policies should be circulated and explained promptly after being updated. Additionally, a company may want to consider providing required disclosure language to their employees to include in their posts.
2. Provide trainings and regular reminders on endorsement rules to employees, contractors and compensated reviewers. Companies should educate all employees, including their marketing departments and independent contractors, on these regulations to help ensure compliance.
3. Set up mechanisms to monitor posts by employees, consumers and marketing firms that are related to the company's products or services. For example, a brand's marketing department should regularly search social media for mentions of its name and products for potential violations. Your company is ultimately responsible for what others do on your behalf, and delegating part of your promotional program to an outside entity does not relieve responsibility under the FTC Act.
4. Develop an ethics policy that is strictly enforced, and instruct employees not to post false or misleading reviews of company products or competing products/brands.
5. Be familiar with the terms and conditions of social media platforms. Each social media platform has its own rules and regulations, which may change frequently.