Fine Print

A Quarterly Publication of The Ohio State Bar Association and Our Members

Issue 52 • Summer 2012

An FTC Violation in One Hundred Forty Characters (or Less)

By Alan Hartman

There are approximately 800 million people on Facebook. Twitter has about 200 million account holders. Add in all of the bloggers and it becomes crystal clear that social media is more than just a fad. Social media is being used worldwide to connect old acquaintances, make business referrals, and market and advertise products and services. Chances are a vast majority of your employees, customers, potential customers and competitors access a social media site on a daily basis. Social media is quickly becoming a preferred way for businesses to tout products and services.

The Federal Trade Commission (FTC) regulates the use of endorsements and testimonials in advertising through its published "Guides Concerning the Use of Endorsements and Testimonials in Advertising." These endorsement guides, which have been in effect for more than 20 years but were most recently updated in 2009, address endorsements by consumers, experts, organizations, and celebrities. Make no mistake, these endorsement guides apply with the same force and effect to social media.

So when your company's receptionist writes on his or her personal Facebook page a glowing review of the new product your company launched, do you have anything to worry about? The short answer is "yes."

Under the guides, an endorsement is "any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) 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." The overriding principle when it comes to endorsements is that they must reflect the honest opinions, findings, beliefs or experiences of the endorser.

The issue with your receptionist posting a review on his or her Facebook page is that there is a connection between the endorser (your receptionist) and the seller of the product (your company) that might materially affect the weight or credibility of the endorsement. When such a connec-

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Employers Can Prevent Doomsday Scenario with Restrictive Covenants

By Nicholas Birkenhauer

A company's most valuable asset is its customers. Businesses expend a great deal of energy to develop and maintain client relationships. What happens, though, when an employee exits the company to start a competing business and takes valuable clients with him or her? Without adequate safeguards, the results can be devastating.

The best way a business can protect itself from this scenario is through the use of employee non-competition, non-solicitation and non-disclosure agreements (often referred to collectively as "restrictive covenants"). Broadly speaking, a non-competition agreement is a contract that prohibits an ex-employee from competing against his or her former employer for a specific period of time and within a specific geographic territory. A non-solicitation agreement prohibits an ex-employee from soliciting business from, or doing business with, his or her former

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tion exists, it must be disclosed. Your receptionist's employment would likely affect the weight or credibility of the endorsement. Unless your receptionist's employment is clearly and conspicuously disclosed on his or her page, the post violates the FTC's endorsement guides.

While the advantages of being able to so easily communicate a message about your product or service to such a wide demographic are huge, it is important to keep the endorsement guides in mind when using endorsements and testimonials for your products or services. An easy way to educate your employees on how to properly use social media for business purposes is to adopt a clear, well-written social media policy. By educating your employees on what they can and cannot say and do, you should be able to avoid violations of FTC regulations.

Go to the FTC's business legal resources page at http://business.ftc.gov/legal-resources/5/33 for more information. Besides the endorsement guides, you will find other information that will help you keep your business on good terms with the FTC.

Alan Hartman is a Cincinnati attorney practicing at Dressman Benzinger LaVelle psc.

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employer's customers and vendors. A non-disclosure agreement prohibits an ex-employee from disclosing any of his or her former employer's intellectual property or other confidential information—such as customer lists and pricing information—to any third party.

When used together, restrictive covenants can effectively prevent a doomsday-type scenario where a key employee abruptly leaves a company and begins doing business with his or her former company's clients. Sales is a field that is particularly vulnerable to such a scenario. A salesperson who knows his or her former company's pricing information and who has established relationships with the company's best customers, could lure away those customers with promises of lower prices. Restrictive covenants can help prevent this scenario.

"In virtually every state, courts require restrictive covenants to be reasonable with respect to both time and geography."

Restrictive covenants are worth their weight in gold when purchasing a business. The business purchaser certainly does not expect to compete with the seller once the sale is finalized, but without the inclusion of restrictive covenants in the purchase agreement, that is exactly what may happen. In this context, restrictive covenants operate to prevent the seller from remaining in the same business or doing business with its old customers once the sale is final.

To be enforceable, restrictive covenants must comply with very specific legal requirements. Courts carefully scrutinize the contents of the written contract to ensure that the terms of the restrictive covenants are reasonable and that all requirements for a valid contract have been met. Proper drafting, therefore, is critical.

In virtually every state, courts require restrictive covenants to be reasonable with respect to both time and geography. What is "reasonable" varies greatly from case to case and is extremely fact-sensitive. Generally speaking, restrictive covenants are reasonable only to the extent that they are necessary to protect the employer's legitimate business interests.

Using the sales example from above, if a company sells products throughout the entire states of Kentucky and Ohio, then a court would likely hold that it is reasonable to restrict an employee from competing within either of those states. By contrast, if the company's sales area included only the Greater Cincinnati region, then that would be the maximum permissible geographic scope of the restrictive covenants.

Restrictive covenants generally apply for the duration of employment and then for a specific number of years following separation of employment. The time covered must be reasonable. Depending on the circumstances, a period of one, three or five years following separation of employment may be appropriate.

Nicholas Birkenhauer is a Northern Kentucky attorney practicing at Dressman Benzinger LaVelle psc.

Credit Helps Small Employers Provide Health Care Coverage

Certain small employers paying at least half of the premiums for employee health insurance coverage may be eligible for the small business health care tax credit.

Eligible small employers can claim the credit for 2010 through 2013 and for two additional years beginning in 2014. The maximum credit, in tax years 2012 through 2013, is 35 percent of premiums paid by small businesses and 25 percent of premiums paid by tax-exempt organizations, increasing to 50 percent and 35 percent, respectively, in 2014.

Visit the Small Business Health Care Tax Credit page at IRS.gov for resources that include a step-by-step eligibility guide.

Information provided by the Internal Revenue Service.