

Reprint from DEFENDER, September 2011.



10 Must-Haves in a Social Media Policy: Implementing a Policy that Dealerships Will “Like”

By Jami Farris, Parker Poe Adams & Bernstein, LLP

The social media phenomenon is continuing to explode. Facebook has almost 700 million users worldwide--approximately 150 million in the United States alone. Twitter has almost 175 million users, and LinkedIn has just reached the 100 million mark. The jury is still out on whether dealerships increase sales through social media. However, based on statistics, it is safe to conclude that dealership employees maintain personal pages. When the employees' online personal and professional identities overlap, the dealership faces potential liability. Even if dealerships do not want to jump on the bandwagon to market through social media, it is imperative that they implement a Social Media Policy to regulate their employees' use and protect their companies from liability.

A Social Media Policy has to balance the employees' right of free speech with the employer's right to protect the company image. The dealership's ability to discipline its employees for disloyalty, insubordination, harassment, violation of company policy, and revealing confidential or trade-secret information extends to social media. In fact, the National Labor Relations Board has recognized the right of employers to limit employee activity on social media sites, as long as the policies do not prohibit organizing labor unions or engaging in concerted action. The key is to have a clear policy that is easily enforceable and is actually enforced by the dealership. The following are ten guidelines to consider when drafting a Social Media Policy for a dealer client.

(1) Use far-reaching definitions. Mark Zuckerberg, founder of Facebook, claims that Facebook will continue to be popular and relevant because it is ever evolving. This concept extends to all social media providers, so to avoid revisiting the Policy every few months, it needs to be far-reaching. To broaden the scope, “social media” should be defined generally to include, but not be limited to, social

networking sites, blogs, video and photo sharing sites, review sites, and chat rooms. More inclusive definitions will preserve the Policy's viability when the next big social media site or technology is released.

(2) Make the dealership's monitoring of social media usage known. State that the dealership will monitor employees' usage of social media sites and include the right to edit or delete postings on dealership-sponsored sites. Although there is nothing prohibiting an employer from requiring an employee to provide access to a personal page, this is not a recommended practice. In January of this year, the ACLU filed a complaint on behalf of a Maryland Department of Corrections employee who was required to provide his login and password information to his personal social media pages as part of a review process. In response to the complaint and the negative publicity, the Maryland DOC voluntarily revised its policy. The lesson learned is that the potential negative fallout is not worth the information that may be gained. However, if an employee does not have privacy settings on his or her pages, anything learned from those pages is fair game. A good Policy will encourage employees to be responsible and vigilant with their own personal pages in order to avoid spillover liability to the dealership.

(3) Identify a single individual or group responsible for monitoring. If the dealership uses social media to market or advertise, it should identify a specific person or group to be responsible for populating and monitoring the dealership pages. A central social media authority helps ensure that dealership-sponsored postings are compliant with, among others, FTC regulations and state laws concerning advertising. In the event that a consumer posts on a dealership site, it is best to have one person respond to them to not only ensure an accurate, professional, and management-endorsed response, but also to prevent employees from getting personal or inappropriate.

(4) Prohibit employees from establishing a personal page on behalf of the dealership. The dealership should prohibit employees from establishing personal pages on behalf of the dealership (e.g., a Facebook page for “Joe Doe at XYZ Chevrolet”). The dealership would lack control over the content and use of the site, which could be mistaken as an official company page. Additionally, social media providers will sometimes merge similar pages. Therefore, if the dealership has a page, it could involuntarily be merged into the employee’s site, leading to the same concerns as with an employee’s personal site.

(5) Identify with specificity the categories of prohibited topics. Although we recommend using far-reaching definitions within the Policy, in order to be effective, a Social Media Policy must identify with particularity all prohibited topics. To avoid challenges to the Policy as overly restrictive with respect to free speech considerations, the Social Media Policy should list specific categories of prohibited topics to be disclosed or discussed. Among those we suggest are financial information, pricing or sales data, promotions, legal information, customer or employee information, as well as the catch-all “other confidential information.” We also recommend prohibiting the posting of trademarked or copyrighted material (belonging to the dealership or anyone else), disparaging comments of the company, customers, or other employees, and offensive or actionable statements. As noted above, in no event should a policy attempt to regulate postings concerning organizing labor unions or concerted action. There is no obligation to alert employees that this speech is permitted, so there is no need to make reference to it in the Policy in any way.

(6) Require employees to identify their employment status when posting either on a dealership-sponsored site or as a dealership employee. Employees should also be required to identify all opinions or postings as their own. In no event should a employee, directly or through others, “shill”--pose as someone else when posting, such as a satisfied customer. Such actions are subject to FTC penalties and could result in negative press for the dealership.

(7) Prohibit employees from sending SPAM through social media sites. The CAN-SPAM Act requirements and penalties extend to Internet activities. Both Facebook and MySpace have asserted this Act in actions against Spammers, resulting in awards of millions of dollars in damages, plus attorneys’ fees. Accordingly, in the context of a dealership’s official page, communications should be sent only to those individuals who have signed up as followers or who have “liked” the dealership’s page. In the context of an employee’s personal pages, no advertisements or communications on behalf of the dealership should ever be transmitted.

(8) Identify restrictions for use during company time. The vast majority of employees can access social media from their personal phones such that an outright ban on all social media in the workplace may be counterproductive. Some restrictions are important, however, in order to set boundaries for use during company time and on company equipment. It is important to identify all restrictions on timing or use of social media on company equipment with particularity. For example, games, videos, and chats that are unrelated to work should be prohibited. Regardless of the particular restrictions, they need to be clear, easily understood, and actually enforced by the dealership.

(9) List consequences for violation of the Policy. It is imperative for the dealership to identify the potential consequences to its employees for violation of its Social Media Policy. This section of the Policy should include a range of consequences, up to and including termination. The Policy can and should be made part of an employee handbook. However, if employee handbooks are not going to be redistributed, require employees to sign their acknowledgement of and agreement to the Policy.

(10) Identify a person employees should consult if they have a question about the appropriateness of a posting prior to that posting. Although the common sense rule is if it questionable, it probably should not be posted, not everyone has the same measure of common sense. We recommend someone in management be selected to make the decision about what is or is not acceptable to the dealership. Additionally, this person should be identified as an outlet for employees to share and report postings they feel require a response from the dealership. This provides an alternative to employees who may be tempted to respond.

It is abundantly clear that social media is and will continue to be a significant part of the business and advertising world. So in order to provide employees with guidelines on their use and to protect your client from potential exposure to liability, we recommend the implementation of a Social Media Policy using these ten considerations. Your Policy should appeal to the employees’ common sense and remind them that they are representatives of the company. As such, they are required to be truthful, respectful, and professional in their postings. Remind them that postings are forever. Most importantly, as for any policy, the dealership must follow the Social Media Policy and apply it consistently to preserve its viability and enforceability. ■

Jami Farris is a partner in the Charlotte office of Parker Poe Adams & Bernstein LLP. Mrs. Farris represents and advises large automotive groups and individual dealers on a wide variety of issues, including the Motor Vehicle Act, federal regulation, contract drafting, consumer claims, social media and the internet, contract and commercial torts litigation, buy-sell issues, real estate, and construction.