

Managing Risk



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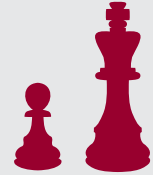
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Managing Social Media Risks

Just five years ago, Twitter didn't exist. Today, users send one billion Tweets every week. Facebook has more than 750 million users. And blogs are multiplying like rabbits. The informal give-and-take that makes these social media effective communication channels can also make them dangerous.



The immediacy and reach of social media also make them problematic for risk managers. Potential exposures include:

Defamation: Defamation, or false communications that injure someone's reputation or good name intentionally, can be criminal as well as civil. The Supreme Court has found that Internet speech is protected free speech, when a person is expressing personal opinions. Including a statement in any social media that contents are the opinions of posters might lessen your exposure, as well as using qualifying language such as "may."

But calling something opinion does not make it so. True opinions cannot be proved or disproved, but a statement may be defamatory if it implies a false assertion of fact. Truth is also a complete defense, so if something in your corporate social media injures a competitor's reputation, for example, you cannot be liable for defamation if it is true or substantially true.

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Risk Tip

Earlier this year, the National Oceanic and Atmospheric Administration (NOAA) predicted an above-normal 2011 Atlantic hurricane season. When it comes to hurricanes, wind speeds do not tell the whole story. Hurricanes produce storm surges, tornadoes, and often the most deadly of all — inland flooding.

While storm surge is always a potential threat, more people have died from inland flooding from 1970 to 2000. Intense rainfall is not directly related to the wind speed of tropical cyclones. In fact, some of the greatest rainfall amounts occur from weaker storms that drift slowly or stall over an area.

Inland flooding can be a major threat to communities hundreds of miles from the coast as intense rain falls from these huge tropical air masses. To minimize injury and property damage:

- ★ Learn your vulnerability to flooding by determining the elevation of your property.

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What happens when third parties post defamatory material to your social media? In late 2006, the Supreme Court of California ruled that the federal Communications Decency Act of 1996 limits recovery to the “original source of the statement,” or the third party who posted the material. Still, if you find defamatory material on any company media outlet, remove it immediately and post a retraction.

Discrimination/harassment: Off-color jokes and sexist or racist statements have no place on corporate media. They can also expose your organization to claims of discrimination or harassment. Remove them immediately and issue an apology.

Privacy violations: Publication of private information, such as an individual’s personal health, financial or other private information, can lead to violation of privacy lawsuits. Remove it immediately and, if appropriate, notify the individuals involved.

Specific requirements apply to financial institutions, along with “covered entities” under the Health Insurance Portability and Accessibility Act (HIPAA), such as healthcare providers and insurers—for information, consult your attorney.

Copyright infringement: As with printed materials, your social media can violate copyrights when someone posts copyrighted content without permission. To protect your organization, ensure it owns all content, including video clips, graphics and photographs, appearing in any official social medium. If not, get permissions from the copyright holders.

What about materials posted by a third party? The owner of the copyright can sue your firm if a third party wrongfully posts copyrighted materials. You can obtain some protection by including a statement that posters agree that they have the right to post any copyrighted materials.

Still, you will want to review content regularly to ensure use of copyrighted material falls into the “fair use” exception. The Copyright Act allows limited reproduction of copyrighted works for “fair uses,” such as criticism, comment, news reporting, teaching, scholarship and research. The line between fair use and copyright violation varies by situation; for more information, see www.copyright.gov/fls/fl102.html.

Other intellectual property violations: As with copyrights, ensure your social media don’t wrongfully use trademarks owned by others or reveal trade secrets of a competitor or other party. Remove any offending materials immediately.

- ✳ **Evaluate your insurance coverage; as construction grows in an area, floodplains change.**
- ✳ **If you are in a flood area, consider mitigation measures you can take.**
- ✳ **In highly flood-prone areas, keep materials on hand including sandbags, plywood, plastic sheeting, plastic garbage bags, lumber, shovels, work boots and gloves.**
- ✳ **Contact us for more information on coverage for windstorm and hurricane.**

Securities law violations: Corporate social media may violate securities law when:

- ✳ They appear to solicit securities sales from people who don’t have a pre-existing relationship with you,
- ✳ They hype a company that is registering for a public offering or
- ✳ They disclose material information not available to the public to those who use it for insider trading.

Have your attorney review any materials that might fall into these categories; in the meantime, remove them.

Reputation risk: Finally, some postings don’t violate laws or infringe anyone’s rights... they just reflect badly on your organization. Review content for appropriateness. When in doubt, remove offending material or insert a disclaimer that it is not sanctioned by the organization.

Insurance Coverage

When venturing into social media, make sure you have adequate liability insurance. The general liability policy covers businesses, except publishing businesses, from claims of libel and slander and invasion of privacy. As long as you aren’t making money from your social media, your liability coverage might apply.

Some newer liability policies include coverage for social media activity and cyber liability. Some insurers also offer specialized Internet or cyber liability policies that can provide more comprehensive coverage.

For more information on these nonstandard policies, please call us.



How to Get the Best Possible D&O Coverage

Directors' and officers' liability insurance (D&O) policies are nonstandard, so they can vary greatly from insurer to insurer. In this issue, we'll discuss some of the many provisions that could appear in your D&O policy and what they mean to your coverage.

Parts of a D&O Policy

The typical D&O policy contains two parts:

Part A covers directors and officers, reimbursing them directly for claims of liability that arise from their corporate duties.

Part B covers the corporation, reimbursing it for expenses it pays on behalf of the directors and officers, if state law permits or corporate charter or bylaws require the corporation to indemnify directors and officers.

Part C appears in some policies. Part C, or "entity coverage," covers the corporation itself when it is named in a lawsuit or claim. Insurers began adding entity coverage to their D&O policies in the 1990s, in response to a spate of securities and employment practices liability lawsuits that named the corporation as a defendant along with the directors and officers.

Entity Coverage or No?

On the plus side, buying entity coverage protects the corporation from potentially expensive claims when it is named as a defendant in a D&O suit. It can also help

eliminate disputes about allocation. (See following section.)

On the negative side, including entity coverage in your D&O policy means a claim against the corporation could exhaust any limits available to cover directors and officers. And if the company files for bankruptcy as the result of a D&O suit, the existence of entity coverage could jeopardize coverage for directors and officers under the policy. A policy with entity coverage could become a corporate asset and be used to pay creditors, rather than protect directors and officers from the claim.

Allocation Provisions

Claims can get complicated when the corporate entity is named as a defendant along with directors and officers. If the D&O policy does not include entity coverage, the insurer must allocate defense and settlement costs among the (covered) directors and officers and the (uncovered) entity to determine how much of these costs the policy will pay.

Allocation provisions determine how the claims payments will be allocated. Some assign specific percentages — such as 70 percent and 30 percent — which means the insurer would pay 70 percent of costs and the corporation 30 percent. Other allocation provisions leave the allocation up to negotiation between the insurer and corporation.

Severability Provisions

The person who signs the application for D&O coverage must warrant that the information included is true to the best of his/her knowledge. If the application contains a "material misrepresentation," traditional insurance law voids coverage. A severability provision provides that material misrepresentation by one person will not



void coverage for others. Most policies today only provide partial severability, which generally means that the CEO and CFO, who must sign off on the financial statements many insurers require, would not be covered in the event of a material misrepresentation.

Insured vs. Insured Exclusions

The insured versus insured exclusion prohibits coverage for claims filed by a corporation against its directors and/or officers. Originally intended to eliminate coverage for ordinary business losses due to bad judgment, the traditional insured versus insured exclusion could also eliminate coverage in a bankruptcy situation. You can ask your insurer to modify the exclusion so it does not apply to claims or suits brought by a bankruptcy trustee or similar party.

“Hammer” Provisions

Insurers want to resolve a claim as quickly and inexpensively as possible. This can sometimes mean settling a claim that could have been won in litigation, because defense costs and potential costs of a loss in court are so high. Some policies include a provision, nicknamed the “hammer provision,” that encourages insureds to accept “reasonable” pretrial settlement offers by limiting the insurer’s liability for the claim to the amount of the proposed settlement. Policyholders should negotiate to have these provisions removed.

Alternative Dispute Resolution (ADR) Provisions

ADR provisions require the insured to consent to participate in ADR at the insurer’s request. ADR can cut defense and litigation costs, but it can also limit your options in a claim situation. When possible, you should negotiate to remove these provisions. D&O insurance is a complex, nonstandard product, with many possible provisions and exclusions. For more information structuring D&O coverage for your organization’s specific needs, please call us. ■

Have You Heard? The Dangers of Noise

Noise-induced hearing loss is one of the greatest occupational health threats in the United States — a silent threat that can go unnoticed because it develops over time, there are no visible effects and except in very rare cases, there is no pain.



Approximately 30 million workers face occupational exposure to noise levels that could damage their hearing. Occupational exposure to chemicals and metals puts an additional 9 million at risk. At present exposure limits, one in four workers will develop a permanent hearing loss as a result of their occupational exposure to these hazards.

Occupational vs. Age-Related Hearing Loss

Workers' compensation will pay claims for loss of hearing, if it is caused or likely caused in the course of work. When faced with a hearing loss claim, employers might question whether workplace exposure, or just old age, caused the hearing loss. It's true that most people's hearing gets worse as they get older. But for the average person, aging does not cause impaired hearing before at least age 60. People who are not exposed to noise and are otherwise healthy keep their hearing for many years.

Noise-induced hearing loss (NIHL) results when loud noise damages the nerve cells of the inner ear. NIHL can occur with a single exposure to an extremely loud noise, such as an explosion, or with repeated exposure to sounds at various volumes over an extended period of time. NIHL is 100 percent preventable, but once acquired, hearing loss is permanent and irreversible.

Sound levels are measured in units called decibels (dB). To give you some comparisons, the rustle of leaves measures 10 decibels; normal conversation about 60 decibels; and city traffic noise can reach 80 decibels. Sounds of less than 80 decibels, even after long exposure, are unlikely to cause hearing loss.

Is there an easy way to tell if you might have a noise problem? There are two rules: First, if you have to raise your voice to talk to someone who is an arm's length away, then the noise is likely to be hazardous. Second, if your ears are ringing or sounds seem dull or flat after leaving a noisy place, then you probably were exposed to hazardous noise.

What Are Employers' Responsibilities?

OSHA requires employers to accurately identify employees exposed to noise levels at or above 85 decibels (dB) averaged over eight working hours. You do this by testing and mapping noise levels. The employer must notify each employee who is exposed at or above the action level of the results of the monitoring.

Employers that have any workers whose noise exposure meets or ex-

ceeds these levels must develop a hearing conservation program for them. (Employers whose workers do not meet this threshold can develop a voluntary hearing conservation program.) To satisfy OSHA requirements, this program must include annual monitoring, audiometric (hearing) testing, hearing protectors, training and recordkeeping.

Not the Only Risk Factor

As we said earlier, exposures to chemicals and other substances can also cause hearing loss. Combined exposures to noise and chemicals can cause more hearing loss than exposure to either agent alone. Vibration and extreme heat are also potentially harmful to hearing when combined with noise.

Some of the more common substances associated with hearing loss are:

Tobacco

Toluene — found in paints, thinners, rubbers and printing operations

Styrene — found in plastics, rubbers, resins, insulating materials

Carbon disulfide — found in the textile industry and insecticides

Trichloroethylene — a solvent for cleaning metal parts

Xylene — found in the paint and lacquer industry

Lead, arsenic, mercury

Carbon monoxide — occurs as a byproduct of combustion.

Workers exposed to any of these substances face a higher risk of occupational hearing loss than their exposure to noise alone would create. Employers whose workers contact these substances will likely want to implement a hearing conservation program, whether or not noise levels require one.

For more suggestions on preventing work-related hearing loss, please contact us. ■

Avoid Problems with a Social Media Policy

A well-crafted social media policy can help you avoid embarrassment and liability. Here are some considerations:

- 1** Determine who can access social media from company networks. Sophos, an online security consultant, found that 50 percent of employees are blocked from using Facebook at work due to concerns over privacy, productivity and materials that could embarrass the organization.
- 2** Determine who can communicate via official company media. Many companies limit this function to public relations staff, who should understand libel and securities law concerns.
- 3** If employees use company time or equipment to access social media, the company has the right to monitor communications. Rights to materials created on company time generally belong to the company.
- 4** Give employees guidelines on the types of content that are, and are not, acceptable topics for social media.
- 5** Reserve the right to discipline employees who publish information harmful or embarrassing to the organization, its employees or others. This includes material that is libelous, violates privacy, violates trade secrets or is discriminatory or harassing.
- 6** When employees identify themselves as employees on other sites, have them include a statement that the views expressed are theirs and do not necessarily represent the views of the employer.
- 7** Give employees a copy of your policy. Have them acknowledge in writing that they have read it and accept it as a condition of employment. Be aware, however, that the First Amendment and labor law offers protections to employees who use social media outside the workplace.
- 8** For interactive media, such as blogs, require third-party posters to register before posting, including their name and email address. Include a statement that opinions are those of individuals and not necessarily the corporation; that links to external sources are solely a courtesy and not an endorsement or guarantee of contents; and that the company owns copyrights to any postings and can use them for marketing or other purposes.
- 9** Appoint someone to regularly review social media for mentions of your organization. If you find information that violates your trademarks, reveals trade secrets or is possibly defamatory, contact the site. Most will remove problematic material immediately.
- 10** Have an attorney with experience in communications and employment law review your policy. ■

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