Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

What Companies Must Know About Social Media And Insurance


Mikaela Whitman

Law360, New York (March 23, 2017, 4:02 PM EDT) -- Tweets. Likes. Posts. Shares. Sound familiar? It should, because companies and their employees are using these methods to market, communicate, publicize, research and disseminate information on a daily basis. At the end of 2016, there were 1.86 billion Facebook users, 467 million LinkedIn users, and 319 million Twitter users worldwide.[1] The rampant proliferation of social media use by companies and their employees raises a host of liability concerns that were nonexistent just a few years ago. And the instantaneous worldwide access that social media provides with the ability to repurpose information in the public domain (i.e., continuous reposting or retweeting), can multiply a company's liability exposure by the mere click of a button. As a result, companies find themselves the subject of claims and lawsuits that arise out of social media use. However, insurance coverage may be available to respond to these kinds of claims.

Companies are increasingly using social media for advertising and marketing purposes. Inherent and often encouraged in this platform is the participation of employees and third-party users. As a result, companies can be vicariously liable for defamatory statements made by those individuals on Facebook pages, Twitter feeds and LinkedIn pages. Other risks include invasion of privacy claims from Google searches, Facebook posts and LinkedIn profile usage and product disparagement claims from using competitors logos in a negative context or posting a website that links a competitor with negative images.

Defamation-related claims are traditionally covered under the standard commercial general liability policy. CGL coverage provides broad insurance for claims against an insured alleging, among other things, "personal and "advertising injury." The definitions of "personal and advertising injury" typically include coverage for defamation, slander, copyright infringement, invasion of privacy and malicious prosecution.

However, companies should review their CGL policies for media and internet related exclusions like the "Insureds in Media and Internet Type Businesses" exclusion. This exclusion excludes losses for personal and advertising injury committed by an insured whose business is: 1) advertising, broadcasting, publishing or telecasting; 2) designing or determining the content of websites for others; or 3) an internet search, access, content or service provider. Insurers are also inserting "electronic chat-room or

bulletin board" exclusions in CGL policies that exclude personal and advertising injury arising out of electronic chatrooms and bulletin boards that the insured company owns or controls. For example, if an employee posted defamatory statements on a company owned or controlled electronic bulletin board, there would likely be no coverage for a claim arising from such an event. In one of the sole cases to discuss this exclusion, the Eastern District of Virginia held that an electronic chat room exclusion did not apply because the claims arose out of articles posted on the insureds' website rather than comments posted on a chatroom or online bulletin board on the insureds' website. See State Farm Fire and Cas. Co. v. Franklin Center for Government and Public Integrity, 2014 WL 1365758, at *7 (E.D. Va. April 4, 2014).

Social media use has also resulted in employment-related claims such as discrimination and harassment claims. For instance, companies can encounter discrimination claims when hiring decisions are based on information gleaned from sites like Facebook, LinkedIn or Instagram. Companies can also be vicariously liable for an employee's cyberbullying and superiors who "friend" employees could face harassment claims.

Employment-related harassment and discrimination claims can be covered under employment practices liability policies. EPL policies cover companies against claims or lawsuits filed by employees, former employees and employment candidates regarding their relationship with an insurer. Companies facing employment-related claims should also review their errors and omissions policies and director and officers policies for potential sources of coverage. However, a majority of EPL policies contain social media and cyber exclusions. In addition, EPL and E&O policies often only provide coverage for "professional services," so a company should review the definition of "professional services" to determine if it includes online activities such as company website usage, Facebook advertising, LinkedIn marketing and Tweeting.

Specialized insurance coverage is also available for claims arising out of social media use. For example, media liability coverage is a type of E&O coverage that covers a wide range of claims like invasion of privacy, defamation, product disparagement, copyright infringement and unauthorized use of material. Traditionally, these policies are purchased by media and entertainment companies and are tailored to claims arising out of a company's "business." The "business" of the company is a defined term in the policy and should be reviewed to assess the scope of available coverage. Cyber and technology policies can also be tailored to provide coverage for claims arising out of social media use and the transmission of internet content.

To maximize the available insurance coverage for claims arising out of social media use, companies should follow these guidelines. First, companies should review and understand how and for what purposes the company uses social media. In conjunction with this analysis, companies should consider what social media risks and claims they currently do or could suffer. Second, companies should be familiar with the types of coverage they currently own and the kinds of coverage they may be missing. There is very little case law on whether social media claims are covered under standard CGL, EPL, E&O or D&O policies. Therefore, and as a general rule of thumb for any potentially covered claim, all of these policies should be considered for possible sources of coverage. Third, companies should consider specialized media, technology and cyber policies, especially if they are in a media or entertainment related field. Fourth, companies should understand the scope of their policies insuring agreement and any terms or exclusions that are specific to social media use, technology or web based services. Fifth, and finally, when making claims for coverage following the filing of a suit or notice of a claim, companies

should not make any assumptions about what is covered under their policies, let alone assume that an insurer is right in disputing coverage.

—By Mikaela Whitman, Liner LLP

Mikaela Whitman is a New York-based partner in Liner's insurance recovery group.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1]See https://statista.com/statistics

All Content © 2003-2017, Portfolio Media, Inc.