HOW TO DEVELOP A COMPREHENSIVE AND BALANCED SOCIAL MEDIA POLICY

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BIOGRAPHIES
I. INTRODUCTION

The emergence of social media has profoundly affected the way information is conveyed within our society. For many individuals, social media is now the primary source for receiving information about social, political, and commercial matters. Social media has had an equally profound effect on the way that businesses, including those operating under the franchise business model, interact with consumers. Today, the ubiquitous nature of social media makes it a critical part of the brand strategies for many franchise brands. However, to a franchisor attempting to carefully manage its brand’s public perception, the dynamic nature of content generation on social media platforms provides both an exhilarating opportunity and a frightening threat. To optimize this new media’s potential and minimize its hazards, franchise companies need to understand how social media works and develop policies and procedures outlining the rights, responsibilities, and limitations that the various stakeholders in the franchise system have with respect to the brand’s presence on these social media platforms.

This paper begins by examining social media platforms that many franchise systems are using to attempt to expand their brand presence and how those social media platforms are being used. It then looks at key legal issues that franchisors need to be educated on when using social media. The paper then explores considerations a franchisor needs to contemplate in crafting an effective social media policy and provides a sample social media policy (Exhibit A). Beyond the written policy, the paper also offers practical measures that can be taken to make the social media policy a valuable marketing tool.

II. USE OF SOCIAL MEDIA IN FRANCHISED BRANDS

A. Common Social Networking Platforms

1. Social Group-Oriented Sites (Facebook, Twitter)

Facebook – Facebook is a social networking platform that allows users who sign up for free profiles to connect online with friends, work colleagues or people who share interests with them. Users can post information on the Facebook platform including but not limited to pictures, commentary, articles, music, and videos that can be viewed by people who have “friended” them on Facebook. Typically, users send a “friend request” to a person or entity they want to share content with. Once a “friend request” has been accepted, the two profiles are connected to each other and both users are able to view the postings of the other. User posted content can be virtually anything but frequently involves real time posting of what the user is doing, experiencing or feeling at that moment, often along with pictures. Users can also, “check in” when visiting a city or location to let their friends know where they are, tag friends in photos, tag events, ask for recommendations, poll their friends on a topic, etc., etc. Users can also “like” other pages or postings that interest them or post comments concerning the postings of others.

When a user joins Facebook they create a user profile that contains information about that user’s identity and background. However, Facebook profiles are not limited to individuals. Companies can also have Facebook profiles and many companies, including franchise brands, use their Facebook “newsfeed” as a vehicle for spreading information about what is happening with their business and the brand.
Particularly useful to franchisors is the Facebook Locations service, which allows the creation of a “location” Facebook page under the main brand page. Facebook Locations allows for the creation of a main “brand” page or root page, controlled and administered by the franchisor, and then secondary “location” pages, linked to the “brand” page, associated with each of the individual franchisees' locations of the franchise system. Facebook Locations service allows a user who is interested in the franchisor’s brand to locate the franchisor’s Facebook page through the website’s search function and then, by clicking on the Locations tab, find and receive information specifically concerning the franchised location nearest to the user’s location. One of the benefits of the Facebook Locations feature is that franchisors can create and enforce a sense of uniformity across the multiple Facebook pages associated with the brand’s franchisees. All Facebook Locations pages share the brand page’s logo and cover image, thus facilitating brand image consistency. However, the Locations feature also permits franchisors to assign local franchise administrators who can add content relevant to the franchisee’s particular location on the individual franchisee’s local page.

Twitter – Twitter is an online news and social networking platform where people communicate in short messages of no more than 280 characters, call a “tweet.” A Twitter user decides which persons or companies they want to follow and when that person or company posts a tweet, it is received by the Twitter user. Twitter users can post tweets as often as they like, and some do so many times a day. Twitter users can “re-tweet” the posts of others. Twitter users can also organize, categorize, and follow tweets concerning particular subjects or issues by using the hashtag symbol (#) before a relevant keyword or phrase in their tweets. Clicking on the hashtagged word in the tweet directs the user to other tweets that include the same hashtag. Some Twitter users actively attempt to acquired vast audiences of Twitter followers as this increases the visibility of their tweets and the degree of their social influence.

Twitter is also used as a marketing tool by many to advertise their products or services. In addition, some commercial brands attempt to employ social media influencers with wide Twitter followings, for compensation or other consideration, to endorse their brand or feature their products or services in tweets. Twitter can be an effective way of allowing brand followers to feel an immediate connection to the brand as they immediately learn of developments, news, contests, new products, discounts, sales, etc. in real time as the company is releasing information about those subjects to the public.

Facebook and Twitter are social media platforms that provide tremendous opportunities for franchise brands to reach their target audiences because the audiences are self-selecting. Users decide to friend the franchise brand’s Facebook page or to subscribe to the franchise brand’s Twitter feed. They typically are individuals who already have a connection to the brand as a consumer and are eager to learn more about, and be the first to receive, relevant content concerning what is happening with the brand or the brand’s locations.

2. Photo or Video-Sharing Services (Instagram, Snapchat, and YouTube)

Instagram – Instagram is a social networking app that allows users to share pictures and videos with their friends who connect with them through the app. The app also allows a user to connect to existing social networking profiles on other social networking platforms, such as Facebook and Twitter, meaning users can share pictures and videos across multiple social media platforms.
Snapchat – Snapchat is a mobile app that allows users to send photos or videos to a receiver. However, the photos or videos are only available to be viewed for a short period of time before becoming inaccessible. Snapchat is focused on creating an environment to foster instantaneous communication through mobile phones. Unlike other forms of social media that involve the accumulation of data, i.e., the collection and storage of posts, tweets, photos and videos, Snapchat content is intentionally temporary and after a short period for viewing is intended to disappear forever. Snapchat also has a geolocator feature, Snap Map, that allows a user to see where other Snapchat friends are in the world.

YouTube – YouTube is a video hosting platform. It has evolved over time to become a powerful platform for both amateurs and professionals to share video content. YouTube permits users to search for and watch videos, create their own personal YouTube channel where the user can upload videos, comment on the videos of others, subscribe to the YouTube channels of others, and organize and group videos together.

Photo and video sharing services such as Instagram, Snapchat and YouTube pose different marketing opportunities for franchisors than more traditional social media platforms like Facebook and Twitter. Most of the social media content associated with these services is visually based, like traditional television ads. However, reaching a specific targeted audience with branded content may be even more challenging than traditional media as the platforms essentially allow users to decide for themselves who they want to receive content from. Nevertheless, savvy franchise marketers may find ways to increase the visibility of their brands' products or services by tapping into the social influencers with a large amount of followers and wide influence who share content via these services.

3. Professional Sites (LinkedIn)

LinkedIn – LinkedIn is a social network for professionals. It's like Facebook, but with a focus on business and career development. Like other social media platforms, LinkedIn allows users to “connect” with people they know and post and share information. The LinkedIn personal profile is more professionally based and is laid out in a quasi-resume style that allows persons viewing the profile to see where the profile poster has previously worked and their professional experiences and achievements. LinkedIn allows users to converse via private messaging or via public posting. When viewing the profile of an individual LinkedIn also provides information about people the viewer and the profile poster may both know (to perhaps facilitate a more personal introduction). LinkedIn allows users to post job listings. LinkedIn permits persons to endorse other users and sends notifications when this occurs. LinkedIn also permits users to join groups based on interests or profession and, by participation, connect with potential employers or business partners.

The business and professional focus of LinkedIn makes it a potentially valuable recruitment tool for business, including franchise companies. However, LinkedIn is not the social media platform most companies would use to promote brand image.

B. Common Social Media Uses

1. Advertising

For an earlier generation, cutting edge advertising meant television and the purchase of a 30-second ad spot. This was considered the most effective method to increase consumer awareness about a product, service or brand. Now, consumers' “screen time” is divided among
computers, cell phone and tablets, video games, and streaming video services such as Netflix and Hulu. New media, including social media, have rendered the concept of paying for television ad time during a traditional prime time slot anachronistic. Today, franchisors wishing to build brand awareness, cultivate customer loyalty, and sell more products and services must be “advertising” on social media to capture consumers’ attention. “Advertising” on social media may be nothing like traditional advertising, as one thinks of the concept.

2. Customer Engagement

Customer engagement is a business communication connection between a consumer and a company or brand. In the context of social media, this connection can be a reaction, interaction, effect or overall customer experience, which takes place online. Customer engagement can also mean customer-to-customer correspondence regarding a communication, product, service or brand. The development of the internet has enabled customers to regularly engage with brands and other brand consumers in online communities revolving, directly or indirectly, around the brand, the brand’s customers or the brand’s customer experience. Increased customer engagement hopefully translates to increased customer loyalty and increased sales.

Increasing customer engagement through social media involves constantly creating new content that resonated with consumers. Ways to increase customer engagement on your social media include: 1. Always be posting; 2. Stay relevant by being timely; 3. Be bold; 4. Get to know your audience; 5. Run campaigns and promotions; 6. Have a personality; 7. Post when your audience is watching; and 8. Make your posts (and your page) visually appealing.

3. Contests

An effective way for a brand to engage an audience and gain exposure is to sponsor promotions (contests or sweepstakes) with prizes. However, many social media platforms, such as Facebook, have detailed promotional guidelines that must be adhered to in order for a company to use the platform for promotional purposes. Thus, if a company decides to use Facebook to communicate or administer a promotion, it is responsible for ensuring that the promotion is lawful, and that the official rules and the offer terms and eligibility requirements are properly posted and for compliance with applicable rules and regulations governing the promotion and prizes offered (i.e., all legal and regulatory requirements). In addition, all promotions on Facebook must include a complete release of Facebook by each participant or entrant as well as

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2. Id.
3. Id.
4. Id.
5. THE PUBLIC RELATIONS SOC’Y OF AM., INC., Strategies & Tactics: Eight Ways To Improve Customer Engagement on Social Media (August 1, 2018), http://apps.prsa.org/StrategiesTactics/Articles/view/12318/1160/8_Ways_to_Improve_Customer_Engagement_on_Social_Me#.XQamf4hKhPY.
7. Id.
acknowledgement that the promotion is in no way sponsored, endorsed, administered by or associated with Facebook.

Facebook permits promotions to be administered on Pages, Groups, Events, or within apps on Facebook. However, Personal Timelines and friend connections are not permitted to be used to administer promotions. Thus, a company may not demand that a participant “share on your Timeline to enter” or “share on your friend's Timeline to get additional entries”, and "tag your friends in this post to enter". Other restrictions and requirements apply. Therefore, before any contest or sweepstakes is posted on Facebook or any other social media platform, review of applicable guidelines to ensure that the promotion complies with applicable rules is required. For additional information concerning this subject see Section III.B.3 below.

4. Franchisee Recruitment

Social media can provide a powerful tool for franchisee recruitment. Today, before signing a franchise agreement, virtually every prospective franchise will search the internet for information about the franchisor’s brand to see what customers, competitors, and other franchisees are saying about the brand and the brand experience. Franchisors actively engaged in ensuring that positive content exists in the online locations where prospective franchisees are most likely to learn about the brand are likely to sell more franchises. Social media was not built as a tool for franchise recruitment. However, failure to effectively manage social media commentary about a brand can inhibit interest from prospective franchisees while positive “buzz” potentially may have the opposite effect. Practically speaking, although a prospective franchisee’s first interaction with a brand can take place in many ways, at some point in the vetting process the prospective franchisee is going to interact with the brand through social media. They may check out the franchisor’s Facebook page and review posted content, or read customer reviews, or access the on-line postings or tweets of the brand’s franchisees. If that content is primarily positive, and the franchisor can actively play a role in seeing that it is, that will foster increased interest in the brand and increased franchise sales.

5. Employee Recruitment

Social media can provide an effective tool for recruiting employees. The most direct way to employ social media as an employee recruitment tool is to post job opening on the company’s social media accounts. LinkedIn is the most obvious platform to post jobs and inform potential candidates about employment opportunities with a franchise company. However, other social media platforms can also be effective and in some instances may be more effective at reaching “passive” candidates, that is, candidates who are not actively looking for a new job but could be persuaded to apply. In addition, key candidates can be attracted to a franchise company through shared passions, ideals or networks, something that is more difficult to achieve with the other recruitment methods.

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8 Id.
9 Id.
10 Id.
III. KEY LEGAL ISSUES TO CONSIDER WHEN USING SOCIAL MEDIA

This section provides practical guidance on the key legal issues to consider relating to the use of various social media platforms, including, but not limited to, Facebook, Instagram, Pinterest, Snapchat, and Twitter.

A. Trademark Rights

A trademark is a brand name. Trademarks or service marks include any word, name, symbol, device, or any combination, used or intended to be used to identify and distinguish the goods or services of one seller or provider from those of others, and to indicate the source of the goods or services. Social media does not change or dilute trademark rights, but provides yet another means for potential infringement. Franchises must retain enough control over franchisor and franchisee activities to protect the goodwill reflected in their marks. Improper use of a trademark or service mark constitutes infringement and is governed by both state and federal law. Franchisors must protect their brand from misuse by franchisees and third-party infringers on social media platforms.

1. The Lanham Act and Likelihood to Cause Confusion

Despite rapidly evolving social media platforms, the rationale underpinning trademark rights has remained the same. Since Congress enacted the Lanham Act, the basic goal of trademark protection has been “securing to the owner the good will of his business and protecting the public against spurious and falsely marked goods.” Currently, the Lanham Act provides the main source of trademark protection. The Act protects the owner of a federally registered mark by providing a statutory cause of action for trademark infringement. In order to succeed on a trademark infringement claim under the Lanham Act, a franchise must prove that “1) it has a valid trademark and 2) that the defendant had adopted an identical or similar mark such that consumers were likely to confuse the two.”

13 Id.
17 Powell & Ralls, supra note 11, at 231.
19 Overview of Trademark Law, supra note 16.
20 Id.
21 Id.
The most common reason the U.S. Patent and Trademark Office refuses mark registration is a “likelihood of confusion” between the mark of the applicant and a mark already registered.\(^{22}\) Additionally, this “likelihood of confusion” inquiry remains the critical analysis in determining whether a particular use constitutes trademark infringement under the Lanham Act.\(^{23}\) A likelihood of confusion exists when both (1) the marks are similar and (2) the goods and/or services of the parties are related such that consumers would mistakenly believe they come from the same source.\(^{24}\) Similar marks or related goods and services by themselves are not enough to support a finding of a likelihood of confusion, unless a court has held that the marks is actually a famous mark.\(^{25}\) Generally, two identical marks can co-exist, so long as the goods and services are not related.\(^{26}\)

B. Advertising and Marketing Issues

The ability to use social media for advertising and marketing increased a franchisor’s potential to tailor content toward specific audiences.\(^{27}\) What constitutes “advertising” can be difficult in the social media context, particularly if user generated content is involved or if the franchise is simply linking to third party materials rather than creating or posting them itself.\(^{28}\) However, like traditional media, advertising and marketing on social media must be truthful and not misleading.\(^{29}\) The National Advertising Division of the Council of Better Business Bureaus has taken an expansive view of what constitutes advertising to include everything from a Twitter handle, a film displaying a franchise logo and website address, and a video clip absent any mention of a company or product name for a YouTube marketing campaign.\(^{30}\)

1. Deceptive Practices and False Advertising

a. The Federal Trade Commission, Section 5 of the FTC Act, and Endorsements

The Federal Trade Commission (FTC) is charged with enforcing laws prohibiting false and misleading advertising and is tasked with protecting the American consumer from deceptive


\(^{24}\) U.S. PATENT & TRADEMARK OFFICE, supra note 22.

\(^{25}\) Id.

\(^{26}\) Id.


\(^{28}\) Online Advertising and Marketing: Social Media, Practical Law Practice Note 4-500-4232 (2019).

\(^{29}\) Advertising and Promotions in Social Media: Key Issues Checklist, Practical Law Checklist w-007-9458 (2019).

\(^{30}\) Online Advertising and Marketing: Social Media, supra note 28.
business activities. Because of this mandate, FTC rules are set in place so consumers know how much weight to put behind a recommendation and/or endorsement. The FTC defines an endorsement as “any advertising message … 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.” An example of this is providing products to social media “influencers” who create (hopefully) favorable product reviews. When posting on social media, a seller is required to use proper disclosure on all posts where there is a “material connection” with the product, service, or place it is promoting. A “material connection” exists when there is a relationship “between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement.” When determining if a “material connection” disclosure is required, the question is whether or not the nature of that medium is such that consumers are likely to recognize the statement as an advertisement. Although not exhaustive, a “material connection” can be triggered by: (1) payment/monetary compensation, (2) gifts, free products, and/or substantial discounts, (3) business relationships, (4) familial relationships, and (5) the length of the relationship. Franchises should establish an internal endorsement policy that complies with “The FTC’s Guides Concerning the Use of Endorsements and Testimonials in Advertising.” As a general rule it is prudent for business relationships of persons associated with the franchise brand, such as franchisees, their employees, employees of the franchisor, and other brand stakeholders, to be fully disclosed in any social media endorsement postings.

Franchisors should establish requirements for clear and conspicuous disclosures about any material connections when advertising and should not encourage the use of features (e.g., a Facebook like) that do not allow for such disclosures. These disclosures, and the fact that the franchisor and/or its franchisees must have a reasonable basis to substantiate claims they made

31 Steven Claussen, Chad Finkelstein, & Shannon McCarthy, Tweet, Like, Share, Repeat – Effective Management of a Franchise Brand’s Social Media Program, Int’l Franchise Ass’n. 49th Annual Legal Symposium, at 16 (2016) (hereinafter, Claussen et al.).
33 16 C.F.R. § 255.0(b) (2019).
34 Zadeh & Brogoitti, supra note 32.
35 16 C.F.R. § 255.5.
38 Advertising and Promotions in Social Media, supra note 29. Although the terms contest, sweepstakes, and promotion are not always used consistently, the terms generally are used as follows: “contest” refers to a game where the outcome is determined at least in part by skill. “Sweepstakes” refers to a game of chance, typically, but not necessarily determined by, a random drawing. “Promotion” generally refers to an offer specifically related to a product or service, even if an element of chance is involved. Id.
39 THE FTC’S ENDORSEMENT GUIDES, supra note 37.
in advertising, apply to all types of advertising in any media. Each advertisement must be evaluated for express and implied claims.40

Lastly, franchisors should make certain that franchisees are aware that any type of false or misleading online post is a violation of the franchise agreement.

2. Internet Advertising Exemption for Franchise Sales

Franchisors can be exempt from state franchise sales laws for advertising the sale of franchises on the internet, and a few states have adopted such exemptions.41 Franchisors can qualify for this exemption as long as their website contains a disclaimer that their franchise is not being offered to residents of the applicable state, provided the offer is not otherwise directed to a resident of the state, and no franchises are sold in the state until the franchisor's franchise disclosure document is registered in that state.42

If the advertising is not exempt, the advertising must be filed in most registration states prior to use.43 The process for filing advertising involves the following: if the state examiner does not comment in a certain number of days, the advertising is deemed to be approved for use in that state.44 The period of time runs from three days to seven business days, depending on the state.45

3. Promotions, Sweepstakes, and Contests

Many franchisors use their social media presence as a platform for promotions by offering sweepstakes and contests within or founded on social media. Sweepstakes and contests consistently rank in the FTC’s annual top ten list of consumer complaints.46 The FTC has a

40 Advertising and Promotions in Social Media, supra note 29.
42 Charles Modell & Joseph Fittante, Advertising Tips for Franchisors: Knowing the Laws and Regulations (Jun. 1, 2001), https://larkinhoffman.com/media/advertising-tips-for-franchisors-knowing-the-laws-and-regulations (hereinafter, Modell & Fittante). Rhode Island also exempts internet offers that meet the foregoing criteria, provided the franchisor maintains a technical “firewall” or other policies and procedures reasonably designed to ensure that prior to any subsequent direct communication with the prospect the franchisor becomes registered in the State of Rhode Island to sell franchises. R.I. CODE R. § 19-28.1-6.10. Illinois also has an exemption for internet offers as long as the franchisor limits contacts with prospects to keeping a prospect list and notifying such prospects that until the franchisor is registered in Illinois, no further discussions can occur. ILL. ADMIN. CODE tit. 14, § 200.306. (Other registration states have formally or informally acknowledged their acceptance of the basic internet exemption.)
43 Modell & Fittante, supra note 42. These states include California, Maryland, Minnesota, New York, North Dakota, Rhode Island, and Washington. Warren Lewis, What Special Restrictions are there to Advertising Franchise Sales?, Franchise-Info (May 13, 2013), https://www.franchise-info.ca/cooperative_relations/2013/05/what-is-permitted-by-the-ftc-rule-when-advertising-a-franchise-to-promote-sales.html#.XO4RpGyWw2w.
44 Modell & Fittante, supra note 42.
45 Id.
number of guidelines that affect how franchisors spread the word about prize promotions. These include information about any endorsements and the use of testimonials, making words such as “sweepstakes” a part of posts and hashtags, and disclosing clearly that their promotions are being made as part of a contest. Other federal agencies, including the United States Postal Service (USPS) and the Federal Communications Commission (FCC), also enforce federal laws governing contests and prize promotions. Moreover, most states require companies to make certain disclosures about their promotions. All fifty states have “little FTC” acts that prohibit unfair or deceptive acts or practices. When running a contest, sweepstake, or other type of promotion, state contest and sweepstake laws primarily govern the structure and operation of the promotion. There is no single sweepstakes law or contest law, but instead these types of promotions are subject to a patchwork of laws across all fifty states and federal law. The key principle under these laws is that a franchisor cannot require people to make a purchase or payment in a promotion in which winners are selected based on chance. The FTC Guides go further and assert that consumers who participate in contests and sweepstakes may not understand that their posts are part of franchise promotions without the use a hashtag like “#contest” or “#giveaway”, and, therefore, all such sweepstakes and contests should require the use of an appropriate hashtag to be in compliance. When it comes to each social media platform, their respective terms of use must also be considered before structuring a contest or sweepstake. If a promotion violates platform guidelines, the sponsor may be prohibited from using the platform.

C. Copyright Issues

All existing copyright protections apply to material posted on social media. Copyright is a form of protection grounded in the U.S. Constitution and granted by law for original works of authorship (i.e., photography, music, art, books, videos, etc.) in a tangible medium of expression. Copyright covers both published and unpublished works. Work is under copyright

47 The FTC’s Endorsement Guides, supra note 37.
49 Id. (Contests and Sweepstakes).
50 Advertising and Promotions in Social Media, supra note 29.
52 Advertising and Promotions in Social Media, supra note 29. These state laws may require promoters to make disclosures, seek licensing, or post a bond. Advertising FAQ’s, supra note 48.
53 Advertising FAQ’s, supra note 48.
54 Egle & Mandell, supra note 15, at 54-55.
55 Id. at 50.
56 Claussen et al., supra note 31, at 8.
57 Advertising and Promotions in Social Media, supra note 29.
58 Online Advertising and Marketing, supra note 28.
60 Id.
protection the *moment* it is created and fixed in a tangible form that is perceptible either directly or with the aid of a machine or device.\textsuperscript{61}

Generally speaking, copyright law does not prohibit franchises from linking to other sites without permission.\textsuperscript{62} Visual content infringement on social media receives much more attention than text, but it raises complex legal issues like who owns the copyright. Most franchise agreements include provisions about who owns the works created or derived from the franchisor’s intellectual property.\textsuperscript{63}

To establish copyright infringement, a franchisor must demonstrate “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”\textsuperscript{64} To avoid copyright issues, it should not be assumed that photographs on Pinterest, Instagram, and other social media platforms are in the public domain. User-generated content from consumers on these platforms can expose a franchisor to legal liability for embedded intellectual property infringement.\textsuperscript{65} “When using photographs on Instagram, [for example], for commercial purposes, the poster should make sure that it has the proper licenses to the photograph. This is easy if the poster has taken the photograph himself/herself and post it directly to his/her account. It is often more difficult to ascertain who owns the copyright to a photograph that is obtained from another source. Franchisors should make sure (or require franchisees to make sure) that appropriate releases are obtained from anyone shown in the photograph so their rights of privacy/publicity are not violated.”\textsuperscript{66} The U.S. Copyright Office can provide information about who owns a copyright.\textsuperscript{67}

1. **The Digital Millennium Copyright Act (DMCA)**

Social media platforms, like all service providers on the internet, are regulated by the Digital Millennium Copyright Act (DMCA), which addresses copyright infringement on the internet.\textsuperscript{68} A franchisor that operates a social media site where franchisees (or others) may post content should take steps to ensure the protection and application of DMCA’s safe harbor provision.\textsuperscript{69}

Despite the rapid evolution of social media, the DMCA has remained unchanged since its 1998 addition to Title 17 of the U.S. Code.\textsuperscript{70} The DMCA grants a safe harbor to service providers, which are defined as “entit[ies] offering the transmission, routing, or providing of connections for

\textsuperscript{61} *Id.* (emphasis added).

\textsuperscript{62} Elefant, supra note 14, at 21.

\textsuperscript{63} Claussen et al., supra note 31, at 16.


\textsuperscript{66} *Id.*


\textsuperscript{69} 17 U.S.C. § 512 (2019).

digital online communications between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.\textsuperscript{71} The law protects service providers from liability for "injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider…"\textsuperscript{72}

DMCA's safe harbor does not provide blanket immunity.\textsuperscript{73} To first qualify for the safe harbor provision, the service provider must satisfy the following three-part test:

1. The service provider must (i) have no actual knowledge of infringement, (ii) in the absence of knowledge, not have a reason to suspect infringement, and (iii) act expeditiously to remove content upon gaining knowledge;

2. The service provider must receive no financial benefit from the infringement where "the service provider has the right and ability to control such activity;" and

3. The service provider must act expeditiously to remove content upon receipt of notification.\textsuperscript{74}

Franchisors can lose their protection if they have knowledge of infringement or are aware of facts from which infringement should be apparent.\textsuperscript{75} To stay within the safe harbor provisions, franchisors should take several steps to:

1. Adopt and maintain internal procedures setting up clear duties and responsibilities to assure receipt and proper handling of notices, prompt takedown actions, tracking of repeat offenders, and termination of repeat infringers' accounts.

2. Adopt appropriate, carefully drafted documents, including terms and conditions applicable to all users of the website and service agreements for all contributors of user generated content that must be affirmatively accepted by the user.

3. Include in all documentation broad, unilateral takedown and termination provisions, content policies, warranties and indemnification obligations of the submitter, and limitation of liability of the service provider to content submitters.\textsuperscript{76}

A franchisor that fails to take down properly-noticed material exposes itself to copyright liability.\textsuperscript{77} Additionally, the DMCA outlines procedures that copyright holders can use to protect their content from infringement.\textsuperscript{78} Under the DMCA, a copyright holder can submit a DMCA Takedown Notice to the designated agent of a service provider, “search engine, host or other type

\textsuperscript{71} 17 U.S.C. § 512(k)(1).
\textsuperscript{72} 17 U.S.C. § 512(a).
\textsuperscript{73} Advertising and Promotions in Social Media, supra note 29.
\textsuperscript{74} 17 U.S.C. §512(i)(1)(A)-(C).
\textsuperscript{75} Advertising and Promotions in Social Media, supra note 29.
\textsuperscript{76} Powell & Ralls, supra note 11, at 236.
\textsuperscript{78} 17 U.S.C. § 512(i)(1).
of site-owner/manager” to remove material that is infringing on the copyright holder’s rights. The burden is on the service provider to review the takedown notice and remove the infringing content.

The franchisor must also post on the website information that enables a copyright owner to notify it of an alleged infringement. A set of standard elements to assert a copyright claim include a signature, identification of what work is being infringed, contact information, and standard boilerplate language provided by 17 U.S.C. §512(c)(3). Best practice would include posting a link to enable users to report other complaints, abuse, harassment, or any inappropriate content.

2. **Fair Use Defense**

Today’s technology makes it very easy to freely post another company’s copyrighted material, trademark, logo, or slogan on a social media platform. Under the fair use doctrine of the U.S. copyright statute, it is permissible to use limited portions of a work including quotes, for purposes such as commentary and news reporting, without permission from the copyright holder. Whether a particular use qualifies as fair use depends on several factors:

1. The purpose and character of the use, including whether such use is or is for nonprofit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work.

These factors are non-exclusive, but “must all be explored, and all the results evaluated together, in light of the purposes of copyright” on a case-by-case basis.

D. **Privacy Rights**

By creating and using social media platforms, franchises have greater access to customers and information about them. The opportunity to collect additional information may

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79 17 U.S.C. § 512(c)(3) (outlining the elements of a takedown notice).
80 Sperling, *supra* note 68, at 90.
81 Powell & Ralls, *supra* note 11, at 236.
82 Sperling, *supra* note 68, at 90.
83 Powell & Ralls, *supra* note 11, at 236.
carry a variety of legal risks. General privacy rules apply to how franchises use harvested data, and state laws and federal regulations may subject franchisors to heightened requirements for protection of customer data. Almost all franchise systems involve trade secrets, particular methods of operation, and other confidential and/or proprietary information. Disclosure of confidential information on social media could:

1. Result in an employee’s breach of his or her confidentiality and nondisclosure agreement;
2. Violate the terms of a confidentiality agreement between the franchise and a third party, causing the franchise to be in breach;
3. Cause the franchise to lose protections of its proprietary intellectual property rights;
4. Violate securities laws.

At a minimum, a consumer should be able to access a franchise’s privacy policy on every page on which personally identifiable information is collected. Franchisors should evaluate the ways in which existing privacy laws impact their consumers and their own data collection practices. Facebook and similar social media platforms now enable users to access “data privacy” settings within their accounts to see what personal data is on file and which advertisers and other franchisors have utilized personal data for marketing and related purposes. These platforms also allow users to delete certain categories of data, turn off the collection of some types of personal data, and limit the accessibility of their personal data. While consumers have more control of their data privacy, franchise systems may lose valuable information that impact how they communicate to those consumers.

1. **The Children’s Online Privacy Protection Act of 1998 (COPPA)**

The FTC enforces the Children’s Online Privacy Protection Act of 1998 (COPPA), which applies to operators of commercial websites, online services, online and mobile applications, and general audience websites that collect, use, or disclose personal information received from children under the age of thirteen. Franchisors who operate social media accounts and are subject to COPPA should include specific policies for handling personal information provided by children, including providing direct notice to parents and obtaining verifiable parental consent prior to the collection, use, or disclosure of information about children. On the other hand, to help

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88 Claussen et al., supra note 31, at 14.
89 Social Media Risks and Rewards, Practical Law Practice Note 8-501-1933 (2019).
90 Edward Chansky, Michael Laidhold, & Jill Suwanski, The Ins and Outs of Franchise Advertising Programs, Int’l Franchise Ass’n. 49th Annual Legal Symposium (2016) (hereinafter, Chansky et al.).
92 Id.
94 Claussen et al., supra note 31, at 17.
avoid problems under COPPA, many franchisors choose to limit participation in their promotions to persons of age thirteen or older.95

2. **The California Consumer Privacy Act of 2018 (CCPA)**

The California legislature unanimously passed the California Consumer Privacy Act of 2018 (CCPA) and it is arguably the most far-reaching data protection law ever enacted in the United States.96 The CCPA will become effective on January 1, 2020.97 The CCPA is intended to give California consumers “an effective way to control their personal information” and guarantees consumers the right to, among other things:

1. Know the types of personal information companies collect from them;
2. Know whether their personal information is sold or disclosed and to whom;
3. Prevent the sale of their personal information;
4. Delete any personal information a business collected;
5. Have access to their personal information; and
6. Receive equal service and price, which prohibits discrimination against those who exercise their privacy rights under the statute.98

Furthermore, subject to certain conditions, the CCPA provides consumers a new private right of action for “unauthorized access and exfiltration, theft, or disclosure [of personal information] as a result of the business’ violation of the duty to implement and maintain reasonable security procedures and practices …”99 The CCPA, however, allows franchisors to charge special fees to consumers if those consumers request that their personal data not be sold, as a method of recovering lost revenues from the sale of personal data.100

It is important to note that the existing California Online Privacy Protection Act of 2003 continues to govern the online privacy policies of companies whose websites (and even social media contests, promotions, and sweepstakes) collect personal information from California consumers.101 However, covered businesses must revise their current policies to address the additional information required by the CCPA.102

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95 Chansky et al., *supra* note 90, at 27.
96 CAL. CIV. CODE § 1798.100 (2019).
97 *Id.*
98 CAL. CIV. CODE §§ 1798.120-140.
99 CAL. CIV. CODE § 1798.150.
100 CAL. CIV. CODE § 1798.145.
101 CAL. BUS. & PROF. CODE §§ 22575, 22577(a) (2019).
There are several exceptions to and exemptions from the CCPA that may limit its application to certain franchisors. For example, the CCPA does not restrict a business from complying with any federal, state, or local laws or cooperating with law enforcement.\footnote{CAL. CIV. CODE § 1798.145.} The CCPA also does not apply to health information governed by the Health Insurance Portability and Accountability Act, or to the sale of information to or from a consumer reporting agency covered by the Fair Credit Reporting Act.\footnote{Id.}

Covered franchisors should consider taking the following steps to comply with the CCPA:

\begin{itemize}
    \item[a.] Evaluate existing privacy disclosures for potential revisions to comply with the mandates of the CCPA. For example, website privacy policies will need to include the categories of data collected from consumers and the purposes for which the data will be used. Such policies will also need to be revised to include the rights afforded to consumers under the CCPA. Franchisors will also need to be able to easily halt the sale of consumer data pursuant to opt-out requests from consumers.\footnote{Cahill et al., supra note 102.}
    \item[b.] Consider whether it is necessary to update contracts with third parties and service providers with whom personal information is shared or sold. Franchisors will need to consider whether agreements adequately restrict third-party use, disclosure, and sale of personal information. They will also want to ensure that service providers with whom personal information may be stored are able to assist with responding to any consumer requests under the CCPA, including requests for deletion of personal information.\footnote{Id.}
\end{itemize}

3. \textbf{General Data Protection Regulation (GDPR)}

In 2018, the European Union (EU) rolled out the General Data Protection Regulation (GDPR), a comprehensive data protection law that impacts franchisors worldwide.\footnote{The text of the GDPR is available at https://gdpr-info.eu/.} Non-EU affiliates of a multinational franchise will be impacted if data is accessible from one central system to affiliates across the globe, and if the entity holds or uses data on individuals located within the EU.\footnote{GDPR, Art. 3, Territorial scope, available at https://gdpr-info.eu/art-3-gdpr/; Nick Ismail, \textit{The Multinational Impact of GDPR}, INFO. AGE (Dec. 18, 2017), http://www.information-age.com/multinational-impact-gdp-123470071/ (hereinafter, Ismail).}

The GDPR does not require businesses to obtain a consumer's consent to sell data in all circumstances, but does allow consumers to withdraw consent to their data being sold if they have previously consented to the sale.\footnote{GDPR, Art. 7, Conditions for consent, available at https://gdpr-info.eu/art-7-gdpr/.} Specifically, a company cannot rely on opt-out
mechanisms to obtain consumer consent and must instead use an explicit option. The GDPR requires that data be kept no longer than necessary for the purpose for which it was collected. Further, companies are required to report data breaches within seventy-two hours of their discovery. If a company is not compliant, fines can be imposed amounting to either four percent of global revenue or €20 million, whichever value is greater. Noncompliant franchisors could face bans or suspensions on processing data, in addition to the risk of class actions and criminal sanctions.

Some scholars have argued that GDPR compliance should be viewed as a default protocol, "given the nature of how global social media enterprises and service providers will be forced into new sensitivities regarding data management (i.e., restrictions on profiles, enhanced consent requirements, data portability restrictions, and mandatory breach notification)."

E. Franchise Agreement Terms and Termination

Franchisors must ensure that their agreements and policies contain terms that expressly address social media postings and facilitate online de-identification upon termination. In other words, when a franchisor decides to allow franchisees to use social media, particularly in the promotion and marketing of their franchise locations, it should ensure that it retains the level of control needed to protect the brand through the franchise agreement.

Because the essence of almost any franchise is a license to use the franchisor’s trademarks and other intellectual property in the franchisee’s business, the franchise agreement must place limits on using that license. For example, it should include language prohibiting use of the marks in a manner that is injurious or detrimental to the brand. Franchisors may also mandate that use of its marks requires franchisor approval. To the extent social media content posted by franchisees includes trademarks or other intellectual property of the franchisor, it will be subject to the limits on the license contained in the franchise agreement. Franchisors may also need or want to add language in their agreements reserving control rights over additional and unknown social media channels such as specifying that "social media are channels of

110 GDPR, Key Issues: Consent, available at https://gdpr-info.eu/issues/consent/. This is given through an opt-in, a declaration, or an active motion so there is no misunderstanding that the consumer has consented to a company processing their personal data. Id.


113 Cahill et al., supra note 102.

114 Ismail, supra note 108.


116 Powell & Ralls, supra note 11, at 231.

117 Claussen et al., supra note 31, at 13.

118 Id.

119 Id.

120 Id.

121 Id.
commerce covered by the franchise agreement, the use of which franchisor has the right to control."122 Furthermore, the franchise agreement should provide for (i) de-identification of the franchisor’s trademarks and names upon termination or expiration of the franchise relationship123 and/or (ii) turning over social media accounts to the franchisor upon termination or expiration of the franchise relationship. And a provision that allows the franchisor to update its operations manual at any time and requires the franchisees to conform to the requirements of the manual also facilitates implementation of changes to a social media policy.124

F. **Employment Liability**

An additional layer of risk and potential liability arises when social media is used in the employment context.125 Social media is often implicated in hiring decisions, internal investigations, advertising, marketing, termination, and the use of confidential or proprietary information by employees.126 These events are subject to legal regulation, violations of which could expose a franchisor or franchisee to costly liability and regulatory scrutiny.127

In recent years, the National Labor Relations Board (NLRB or Board), the agency that enforces the federal labor law,128 the National Labor Relations Act (NLRA), has issued a multitude of guidance, memoranda, and decisions on the lawfulness of the parameters of employers' social media policies with regard to employees' social media activities.129 The NLRA governs the relationship between employers and employees by, among other things, (i) protecting employees' rights to unionize or engage in concerted action for “mutual aid or protection”,130 (ii) prohibiting employers from engaging in specified unfair labor practices131, and (iii) imposing obligations on employers to collectively bargain with representatives of employees.132 The NLRA also acts to prevent and remedy unfair labor practices involving retaliation by employers against employees

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122 Id.
123 See infra discussion Part IV.A.1-2.
124 Id.
127 Id.
130 29 U.S.C. § 157 (Section 7 of the NLRA).
who have criticized their employers on social media. These rights apply to both public and private employees and to both unionized and non-unionized employees.

The NLRB has repeatedly struck down provisions of employers’ social media policies and reversed employer discipline of employees based on employees’ personal social media activity where the social media policy was overbroad. According to the Board, those employers violated Section 7 of the NLRA by implementing broad policies that interfered with an employee’s right to discuss the terms and conditions of their employment or by disciplining employees for exercising that right on social media. This includes discussions around wages, hours, and workplace conditions like job security, health and safety issues, which are deemed to be “inherently concerted,” and thus protected activity even when no group action is contemplated.

According to a 2011 NLRB Memorandum, the following social media policies were found to be unlawful because they created a “chilling effect” on an employee’s right to engage in protected concerted activities under the NLRA:

- Policy was unlawful because it prohibited employees from making disparaging remarks about the employer, co-worker, or its supervisors or engaging in “disrespectful conduct” without including limiting language that the policy did not apply to employees’ right to discuss terms and conditions of employment.
- Policy was unlawful because it prohibited an employee from posting comments on a personal Facebook page regarding the poor job performance of a co-worker and other staffing and workload issues that restricted the employee’s right to discuss work conditions.
- Policy was unlawful because it prohibited any communication or posts that constitute embarrassment, harassment, or defamation of the employer or its employees, or from making statements that were inaccurate, lacked truthfulness, or might damage the

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133 See 29 U.S.C. § 158(a); Vroman et al., supra note 125, at 5.
136 The NLRB and Social Media, supra note 129.
137 N. W. Rural Electric Cooper., 366 NLRB No. 132, slip op. at *5 (July 19, 2018); Hoodview Vending Co., 362 NLRB No. 81, slip op. at 1 & n.1 (Apr. 30, 2015) (finding employee conversation about job security to be inherently concerted); Food Services of Am., Inc., 360 NLRB No. 123, slip op. at 3 (May 30, 2014); Alternative Energy Applications, Inc., 361 NLRB No. 139, slip op. at 4 n.10 (Dec. 16, 2014); see also Aroostook Cnty. Reg’l Ophthalmology Ctr., 317 NLRB 218, 220 (1995) (finding that employee discussions regarding both wages and work schedules are inherently concerted), enforcement denied in part on other grounds, 81 F.3d 209 (D.C. Cir. 1996).
140 Flagler Hospital, Case 12-CA-27031, Advice Memorandum dated May 10, 2011, at 3-4, available at https://www.nlrb.gov/case/12-CA-027031.
reputation or goodwill of the employer because it could restrict employees' right to criticize labor policies or treatment of employees.\textsuperscript{141}

- Policy was unlawful where it prohibited an employee from calling a supervisor a “scumbag” over a personal Facebook page because the employee had a right to protest supervisory actions with other co-workers via a personal Facebook page when it did not interrupt the work of other employees, the statement was made during nonworking time, and the derogatory remark was not accompanied by verbal or physical threats.\textsuperscript{142}

- Policy was unlawful because it prohibited employees from using the employer’s logo or name in non-work related social media communications and employer should have considered narrowly tailoring any restrictions on the use of the corporate logo to prevent improper use.\textsuperscript{143}

By 2018, however, the NLRB, under a new administration and with new Board composition\textsuperscript{144}, issued new guidance on employee handbook rules that appears to contradict the earlier guidance.\textsuperscript{145} Under the 2018 guidance, the Board designated three categories of employer rules with respect to the NLRA: Category 1 rules, which are presumptively lawful; Category 2 rules, which warrant individualized scrutiny; and Category 3 rules, which are presumptively unlawful.\textsuperscript{146} According to the NLRB, the following types of employee handbook rules fall within Category 1 and are thus presumptively lawful:

- Employees may not make or post any negative or disparaging remarks, photographs, video, or audio about other employees;
- Employees may not record conversations, phone calls, images, or company meetings without prior approval;
- Employees may not disclose the company’s confidential, proprietary, or trade secret information;
- Employees may not disclose information concerning the company’s clients, customers, vendors, or business partners;
- Employees may not misrepresent the company’s products, services, or employees;
- Employees may not make defamatory statements;
- Employees may not use the company’s logo, trademark, or graphics without prior written approval; and
- Employees may not comment for or speak on behalf of the company without prior approval.\textsuperscript{147}

\textsuperscript{141} Id.
\textsuperscript{143} Chipotle Servs. ,LLC, 364 NLRB No. 72 (Aug. 18, 2016).
\textsuperscript{144} The NLRB is composed of five members who are appointed by the President to five-year terms, with Senate consent, and the term of one member expires each year. NAT’L LABOR RELATIONS BD., The Board, https://www.nlrb.gov/about-nlrb/who-we-are/board (last visited July 10, 2019).
\textsuperscript{145} 2018 Handbook Rules Memo, supra note 129.
\textsuperscript{146} Id.
\textsuperscript{147} Id, at 2-14.
Although some of these rules could have violated a worker’s right to engage in protected concerted activity under the old guidance, the new guidance provides otherwise. While the new guidance does not expressly reference social media policies, it does apply to company handbook rules for employees, which arguably encompasses social media policies given the references to posts and recordings of images, video, or audio that can be posted.

Even under the new guidance, the NLRB has clarified that overbroad and blanket rules will be closely scrutinized and/or deemed presumptively unlawful:

- Confidentiality rules broadly encompassing “employer business” or “employee information” (as opposed to confidentiality rules regarding customer or proprietary information);
- Rules prohibiting employees from criticizing or making disparaging or negative remarks about the company (as opposed to disparagement of employees);
- Rules generally restricting speaking to the media or third parties (as opposed to rules restricting speaking to the media on the company’s behalf);
- Rules prohibiting making false or inaccurate statements (as opposed to rules against making defamatory statements);
- Rules prohibiting use of the company’s name (as opposed to use of the employer’s logo or trademark);
- Blanket rules providing that wages, benefits, working conditions or other terms of employment are confidential or prohibiting employees from discussing them; and
- Blanket rules prohibiting employees from joining outside organizations (as that could cover unions).

The foregoing examples illustrate that a franchisor or franchisee can only regulate their employees’ social media conduct to the extent it does not infringe on the employees’ right to engage in “protected concerted activities” under the NLRA.

By not having a social media policy, the franchisor or franchisee is left vulnerable and cannot guide its employees toward using social media to protect and further the business purpose. Additionally, where a policy exists only in name, potential liability exists. Franchisors and franchisees should always be wary of the liability that can arise from their employees’ online conduct, even if such conduct happens outside of work. As discussed below, establishing a policy provides employees with clear expectations about when social media can be used, for what purposes, what is an acceptable post, and what level of privacy an employee should expect regarding personal use. Having a social media policy also promotes consistent enforcement throughout the franchise system.

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148 Id. at 15-19.
149 Hudson & Roberts, supra note 139, at 781.
150 Id. at 768.
152 Claussen et al., supra note 31 at 12.
153 Hudson & Roberts, supra note 139, at 768.
154 Id.
IV. CRAFTING AN EFFECTIVE SOCIAL MEDIA POLICY

A. Review and Evaluation of Key Documents

1. The Franchise Agreement

The franchise agreement is the document that defines the legal relationship and the respective rights and obligations of the franchisor and franchisee to each other. Consequently, this document potentially is a key document to be reviewed to determine what pre-existing rights and obligations exist between the franchisor and franchisee that could facilitate or limit the franchisor’s right to restrict the franchisees’ use of social media. However, the franchise agreement should not be the primary vehicle for communicating social media policy to franchisees. A franchise agreement’s sheer longevity makes it a less than optimum vehicle for defining the contractual parties’ rights with respect to emerging and dynamic technologies, including social media. Because franchise agreements frequently have terms of up to ten or fifteen years and often may be renewed for a comparable term, contract provisions which may have been progressive and forward-thinking at the inception of the franchise relationship risk being completely obsolete by the time the contract is due to expire. Consequently, while the franchise agreement typically should establish general principles potentially applicable to social media (such as, for example, the franchisor’s right to control the use of its mark, the obligation of the franchisee to refrain from engaging in conduct that potentially could damage the good will of the brand, and the obligation of the franchisee to comply with applicable laws), too much specificity in the franchise agreement concerning social media policy can result in future problems as the looming influence of an emerging but unanticipated technology media platform may be completely missed.

2. The Operations Manual

The preferred method for addressing policies affecting aspects of the franchise relationship that could change during the term of the franchise relationship is through the Operations Manual. Most franchise agreements contain a provision stating, in effect, that the franchisee is obligated to conform the operation of the franchised business to the requirements, policies, and procedures set forth in the Operations Manual as that document may be updated or revised by the franchisor from time to time. This acknowledgement by the parties to the franchise agreement that policies and procedures applicable to the operation of the franchise may change and evolve over time permits the franchisor to maintain consistent system standards in the face of changing competition and rapid technological and societal change. Thus, a system-wide policy, such as a social media policy, that may have to evolve over time is best suited for the Operations Manual which, by its nature, anticipates the potential for change.

3. Other System Policies

In addition to franchise agreements and Operations Manuals, many franchise systems maintain separate compilations of policies and procedures that apply to franchisees and/or employees of the system. These policies, rather than being contained in an Operations Manual, typically are communicated to franchisees by electronic communication or by a posting on a centralized digital bulletin board. When crafting a social media policy, the contents of these additional system policies and procedures should be considered to make sure that system standards and messaging are consistent and that confusion is avoided.
B. Relevant Stakeholders

Consideration of the scope and content of a franchise company’s social media policy requires weighing the interest of multiple parties, some of whom may have conflicting interests. A franchisor will have to reflect upon the effect of the social media policy’s terms on relevant stakeholders including: (1) content generators (such as the franchisor and its employees and perhaps the franchisee and its employees); (2) content consumers (such as the general public); and other interested third parties (such as regulatory authorities, social media platform owners, and owners of third-party content that might be posted on the franchisor’s social media pages).

C. Franchisor Control vs. Dynamic Content

When drafting a social media policy, inherent tension exists between the franchisor’s desire to exercise control over its brand image and the unscripted, real-time, dynamic, and unpredictable nature of social media as an information sharing method. While it is relatively easy for a franchisor to control and monitor its own social media content, it may be considerably more difficult to keep tabs on the postings of others who may post content associated with the brand. Franchisees and their employees, for example, may have different views than the franchisor’s management concerning what constitutes appropriate brand messaging, what is humorous or what is offensive, what is edgy or what crosses the line. So, the challenge for a franchisor in crafting a social media policy is to permit enough freedom to allow the creative potential for social media to flourish while still maintaining sufficient control to keep non-desirable content from becoming associated with the brand.

In general, franchisors retain for themselves in their franchise agreements the right to control the use of their trademarks and to approve all brand marketing, advertising, and promotions. This general right to control brand image also has immediate application in the realm of social media. A social media policy must make clear that the use of a social media platform in no way diminishes the franchisor’s domain over the interactions with the public that are likely to affect brand image, and that where a franchisee’s social media posts diverge from the franchisor’s notions of what is appropriate the franchisor has the right to require that the franchisee cease such postings. The correct mix of franchisee autonomy and franchisor control will vary in each system and will depend upon, among other things, the brand’s need to engage customers through local, franchisee specific content, the conservatism of the franchisor’s management to maintaining brand image, and the creativity and autonomy of the brand’s franchisees.

In larger franchise systems it may be impossible to monitor the individual postings of each franchisee, even on franchisor sanctioned social media pages. The franchisor may need to consider what strategies for monitoring brand-related social media content will work best for its system. Some franchisors place that burden on members of the franchisor’s marketing department generally (who may or may not use social media management platforms/software), or through a dedicated employee whose job is to evaluate social media usage by franchisees and employees. Others may engage outside consulting firms to oversee that process. Still others may simply rely upon other franchisees in their system to self-police, or consumers to complain, by bringing to the attention of the franchisor postings of franchisees who may be abusing social media platforms and generating content that is inconsistent with brand image.

1. Vicarious Liability Concerns

As with many other aspects of the franchisor/franchisee relationship, direct or indirect control by the franchisor over the franchisee’s methods of conducting business can sometimes
translate into vicarious liability for the actions of the franchisee. Consequently, the franchisor’s exercise of a high level of control over the franchisee’s use of social media potentially creates exposure for the franchisor if the franchisee’s practices result in violation of the law or liability to third parties. As discussed elsewhere in the paper, it is important that the franchisor’s social media policy contain a comprehensive list of prohibitions so that, in the event the franchisor is sued based on the franchisee’s social media use, the franchisor has the opportunity to claim that such actions by the franchisee violated the franchisor’s policies and, thus, could not be within the scope of any actual or ostensible agency.

2. **Employment Liability Risks**

As discussed above in Section III.F., an employer cannot have an overbroad social media policy and subtle differences in policy language can make all the difference between a lawful and unlawful policy. Given the unequivocal rights granted to employees under the NLRA, an employer’s social media policy should include a disclaimer that the policy in no way intends to dissuade or interfere with the employee’s rights under Section 7 to engage in protected concerted activities, such as the employees’ right to discuss their working conditions, wages, benefits, and other terms of employment. As a result, blanket prohibitions on “disparaging” statements or use of “confidential” or “inaccurate information” should be appropriately tailored and defined through examples that make it clear to a reasonable employee that the general language is not intended to encompass protected speech. Best practice would be to use limiting language related to social media postings, when disciplinary actions will be assessed against violators, and the extent to which employer review of social media will occur. For instance, by limiting work-related social-media use to individuals with marketing or public-relations duties, employers can more easily monitor social media, establish account ownership, and mitigate liability exposure.

Considering the risks of providing a social media policy for franchisees’ use with their employees is also vital and should be weighed against the benefits. With the constant flux and lack of definitive regulation surrounding joint employer liability, any control by a franchisor—even if only tangential or reserved—concerning employment matters at the franchisee level, including what a franchisee’s employees can and cannot post on social media—potentially may be viewed as evidence that the franchisor jointly employs the franchisees’ employees. Franchisors should therefore evaluate whether they want to mandate their franchisees to use a specific social media policy with their employees.

155 See *People v Jth Tax, Inc.*, 212 Cal. App. 4th 1219, 1238 (Cal. Ct. App. 2013) (upholding trial court’s finding that franchisees were acting as agents of franchisor when they placed misleading advertising in violation of California law and the franchisor was, therefore, liable for the violations because the franchisor “literally provid[ed] a detailed, step-by-step guide for every aspect of marketing and advertising” in its operations manual).


159 Whitfield, *supra* note 151, at 877.

D. **Key Terms of Social Media Policy**

As stated above, the most common practice is to have the social media policy be contained within the franchise system’s operations manual. Including the social media policy in the operations manual allows for maximum flexibility in updating the policy to address issues arising from the rapidly changing social media environment, changing technology, new technology, and legal requirements. In addition, including the social media policy in the franchise system’s operations manual allows for quick changes to the policy when necessary while still legitimately requiring franchisee compliance. The provisions below concern social media policies applicable to franchisees engaging in social media to promote their franchised business. These provisions are not intended to apply to franchisees engaged in social media solely in their personal capacity.

1. **Social Media Platforms**

   The social media policy should specify which social media platforms the franchisor will allow franchisees to use to promote the franchised business. The determination of the appropriate social media platforms for franchised businesses operating under a franchise system and the permitted scope of use of such social media platforms will generally depend on the customers intended to be reached. Most franchise systems have a presence on Facebook, Twitter, and/or Instagram. Pinterest, Snapchat, YouTube, and LinkedIn are also popular social media platforms used by many franchise systems. The number of social media platforms and popularity of each platform are constantly changing, and the franchisor should reserve the right to change the social media platforms that may be used to promote franchised businesses and how such social media platforms may be used.

   A franchisor will need to determine whether a franchisee must obtain permission before establishing each social media account to promote the franchised business, whether the franchisor or franchisee will be the record owner of each social media account, and who will have ownership and/or administrative rights to each social media account.

   Many franchisors are using social media management platforms/software to manage Facebook accounts for all outlets operating under the system. For many of these social media management platforms/software, the franchisor must have access to the Google My Business listing for each outlet in order to manage the outlet’s Facebook page.

2. **Naming Format**

   Social media platforms require users to be identified by user names or handles. For each social media platform that a franchisor permits franchisees to use, the franchisor should designate in its social media policy the naming conventions for user names and handles for accounts established by franchisees for franchised businesses. A naming convention is critical for brand consistency to avoid customer confusion and disputes between franchisees over user names and handles. The social media policy should also provide that no trademarks, trade names or logos can be used in connection with user names or handles for personal social media accounts. This prohibition should also be covered by the guidelines discussed in Section 8 below.

   In general, naming conventions for user names and handles for accounts for franchised businesses reference the (i) brand and (ii) market or location of the franchised business. For example, a name or handle would first reference the brand followed by the market or location of the franchised business (e.g. Xbrand_City or Xbrand_Street). This structure may initially seem
easy, but it becomes increasingly more complicated for a franchise system with multiple locations in a city or market.

As previously referenced, Facebook has a function called “Facebook Location” which allows a brand or franchisor to connect and manage all business locations operating under a brand. Facebook Location was previously called “Parent-Child.” With Facebook Location, there is a structure where there is one main Facebook page for the brand with individual local Facebook pages for each location operating under the brand. The owner of the main Facebook page has the ability to add new local pages, edit information for existing locations, and manage its locations from one central spot. For Facebook Location, all of the local pages connected to the main Facebook page must have the same name. The default name for local pages is the main page’s name (e.g., Xbrand), complemented by a location descriptor that tells people which store the local page refers to. For Facebook Location, the default location descriptor is “city” or if there are multiple locations the default is “address, city.” The administrator for the main page has the ability to edit the location descriptor for local pages under the main page. In addition to the location descriptor for the local page, there is an option to create a username for each local page. The username for the local page appears below the local page’s location descriptor and in the local page’s URL to assist people in finding and remembering the local page. Unfortunately, Facebook is the only social media platform that presently has a feature like Facebook Location.

3. **Content**

   a. **General Provisions**

There are many laws that must be followed and legal considerations to be evaluated when engaging in social media. In addition to the legal issues discussed above in Section III - Key Legal Issues To Consider When Using Social Media, libel and discrimination laws can be violated based on certain conduct on social media. Therefore, a social media policy should make franchisees responsible for investigating laws and regulations applicable to their social media activity and complying with such applicable laws and regulations. To get franchisees thinking about potential legal issues, best practices suggest that it is helpful to include a non-exhaustive list of conduct on social media that could potentially violate certain laws and regulations. This list could include, among other things, the misuse of the franchisor’s intellectual property; unauthorized use of a third-party’s intellectual property; false or misleading advertising; improper promotions, contests or sweepstakes; improper endorsements or testimonials; the violation of confidentiality or privacy agreements or laws; the disparagement or harassment of individuals (including employees of the franchisor and other franchisees) or competitors; and discrimination in employment. A social media policy should also require that all posts be true and accurate.

In addition to compliance with applicable laws and regulations, a social media policy should require franchisees to comply with the terms and conditions for the social media platforms that they use. These terms and conditions are basically the license terms for the user to use the social media platform, and the terms and conditions are sometimes called terms of service, a statement of rights and responsibilities or other names. Social media platforms generally have the right to modify the terms and conditions at their discretion so franchisees will need to regularly evaluate changes to remain in compliance.

The franchisor also should specify that (i) all social media activity remains subject to the terms and conditions of the franchise agreement and operations manual, and (ii) the franchisor’s social media policy is an additional requirement that must be adhered to in order for the franchisee to engage in business-related social media activity. For instance, trademark usage restrictions
and requirements in the franchise agreement and operations manual remain applicable to
trademark usage in connection with social media activity unless explicitly noted otherwise.
Additionally, the social media policy should make clear that any social media activity that violates
the franchise agreement, operations manual, or social media policy may result in a default under
the franchise agreement. Further, the social media policy should remind franchisees that they
are solely responsible for any claims, liabilities, costs or fees arising from their social media
activity, and they must indemnify the franchisor in the event that the franchisor faces any claims
based on the franchisee's social media activity.

Similar to the terms in the franchise agreement, the social media policy should (i) prohibit
franchisees from engaging in any activity on social media that would damage the goodwill of the
franchisor, brand or trademarks, (ii) prohibit franchisees from infringing on franchisor’s trademarks
or any third-party’s trademarks, and (iii) require franchisees to follow all trademark usage
requirements and directions established for the use of the franchisor’s trademarks. In addition,
the posting or discussion of politics, religion, and other controversial topics should be prohibited.

It is important to remind franchisees that the franchise system is proprietary and contains
trade secrets and confidential information that must not be posted on social media. Franchisees
may inadvertently post such proprietary and confidential information without carefully thinking
about the type of information being posted or the implications of posting that information. A social
media policy should prohibit any postings related to recipes, processes, procedures,
developments, updates, and marketing initiatives related to the franchise system unless the
franchisor has explicitly given permission for franchisees to disclose that information publicly.
Franchisees also should be reminded to refrain from discussing suppliers, contractors, or vendors
for the franchise system, including their confidential and proprietary information. Further,
franchisees should be prohibited from discussing legal matters involving the franchise system on
social media promoting the franchised business.

The social media policy should remind franchisees that non-public information (Non-Public
Information) is often covered by confidentiality obligations franchisees are required to follow. Non-
Public Information can include financial information that is related to the franchisor and/or
franchise system. If a franchisor is publicly traded, federal and state securities laws may prohibit
the disclosure and use of certain material Non-Public Information related to the franchisor.
Franchisees should be reminded that this is another reason that Non-Public Information may not
be posted on social media.

Franchisees should be reminded that they must be careful when posting on social media
any information involving a customer. A social media policy should prohibit franchisees from
posting customer information that is personal, proprietary or confidential, or customer names or
photos without advanced written permission from the customer (or in the case of a minor
customer, advanced written permission of the minor customer’s legal guardian). Franchisees
should also be prohibited from making posts discussing employment matters related to their
employees.

As discussed in Section III.B.1 above, there are various laws related to endorsements and
testimonials, and a social media policy should require franchisees to be generally familiar with
and comply with such laws. The social media policy should require the disclosure of an endorser
relationship when a party (i) is providing some type of payment or monetary compensation to the
endorser, (ii) is providing gifts, free products, and/or substantial discounts to the endorser, (iii) has
a business relationship with the endorser, and/or (iv) has a familial relationship with the endorser.
These endorser relationships could arise in connection with (a) an endorser posting on behalf of
the franchisee or franchise system, or (b) a franchisee posting on behalf of the franchisor or franchise system. As such, franchisees should always disclose their relationship to the franchisor or franchise system when they make posts on social media endorsing the franchisor and/or the franchise system. Aside from endorsing the franchisor and/or franchise system, the social media policy should prohibit endorsing any products or services that are not offered under the franchise system.

As noted above, social media policies should cover all social media accounts used to promote the franchised business. If a franchisee has personal social media accounts, those accounts should not be used to promote the franchised business unless approved by the franchisor. However, as discussed further below, a franchisor may also wish to have social media guidelines to cover a franchisee’s personal social media usage.

b. Franchisor-Generated Content

The social media policy should address the posting of franchisor generated content on social media accounts used to promote the franchised business. This would include (i) allowing the franchisor to post content directly through Facebook Locations and/or social media management platforms/software and/or direct access to each franchisee’s social media accounts and/or (ii) requiring each franchisee to post or use content that is prepared or provided by the franchisor from time to time. Retaining these rights is important for a franchisor to maintain brand consistency and a consistent marketing strategy. Additionally, franchisors generally want the right to post promotions, coupons, and other marketing materials consistent with the marketing calendar for the franchise system.

c. Franchisee-Generated Content

If a franchisor allows franchisees to generate content for social media, the social media policy should address whether such content must be preapproved by the franchisor prior to posting or whether there will be guidelines or templates for approved postings. Many franchisors follow the approval process used for general advertising, which usually depends on the level of control the franchisor wishes to maintain over marketing. Preapproving all postings will require the franchisor to have significant resources and may impact the effectiveness and value of social media. Social media moves fast and the most effective social media tends to be relevant and timely local focused social media that franchisees are typically in a better position to generate and post. Many franchisors simply elect to periodically monitor franchisees’ posts to make sure they are in compliance with the social media policy.

For any personal social media account that a franchisee has which is capable of being connected to the franchisor or the franchise system (including any disclosure that the individual is a franchisee or franchise owner operating under the franchise system), the social media policy should specify that such social media account must include a disclaimer that all posts are those of the individual and do not represent the views of the franchisor, franchise system or any other franchisees operating under the franchise system.

4. Ownership of Domain Names, Accounts, and Content

Many franchise agreements expressly provide that the franchisor owns the telephone numbers associated with the franchised business or is entitled to receive an assignment of the telephone numbers upon termination of the franchise. This permits the franchisor to control the good will associated with the location of the franchised business post-termination and to redirect
customers who may use that telephone number to other brand facilities. Franchisors need to consider whether social media domain names, accounts, and content should be treated in a similar fashion. In many cases, a franchisor will preclude the franchisee from owning domain names that contain the franchisor’s trademarks. Typically, the franchisors will exercise ownership over any such domain names and, as appropriate, license them or otherwise make them available for use by franchisees, without actually transferring ownership. But what about social media accounts that contain brand-centric content, and perhaps are followed by many individuals, that do not contain a domain name associated with the franchisor’s trademarks? Franchisors should consider whether their social media policies should contain provisions that make clear that any social media accounts used by franchisees in connection with the franchised business, along with any applicable passwords, ownership rights, administrative rights, etc. should be assigned to the franchisor upon termination or expiration of the franchise or be assigned to the franchisor or buyer upon sale of the franchise. The franchisor is then in a position to decide, in its discretion, whether to terminate the social media accounts post-termination or expiration, or repurpose them for the benefit of the franchisor or another franchisee. Otherwise, if a franchisee owns the social media account, the franchisor may have to engage in a more involved and costly process, including litigation, to have the social media account taken down.

5. **Privacy**

When using social media, the social media policy should specify that franchisees must comply with all privacy laws and regulations, including those discussed in Section III.D. above. The social media policy should either require the social media account to have a link to the franchisor’s privacy policy or a privacy policy approved by the franchisor. The goal is for customers to interact through social media and possibly provide content and/or customer information. Therefore, it is critical to have this customer provided content and/or customer information subject to a privacy policy that will allow the franchisee, franchisor, and franchise system to use the content and information in an effective manner.

6. **Recourse in Event of Breach**

The social media policy should specify that the franchisor may monitor all social media accounts and take appropriate action when necessary in the event of a breach of the social media policy. In the event that any post is not in compliance with the social media policy, the franchisor should reserve the right to remove or modify such post or direct the franchisee to remove or modify it. The social media policy should specify that non-compliance with the social media policy includes the failure to comply with any applicable laws or regulations, and/or any terms and conditions for the applicable social media platforms. In the event of any violation of the social media policy, a franchisor should reserve the right to issue abuse notifications, follow the franchisor’s takedown procedures, and/or issue defaults under the franchise agreement.

7. **Franchisor’s Employees**

The social media policy for a franchisor’s employees should be a separate, stand-alone document from other franchise policies. The policy should encompass guidelines for business-related use and personal use. The franchisor should include language that it “sets the rules” and
reserves the right to remove and change content. Franchisors should include language that addresses everything from password protection and protecting personal or confidential information stored on portable devices such as laptops and mobile phones, to respecting the intellectual property rights of the franchisor and others. In drafting a social media policy, franchise counsel should consider the following non-exhaustive concerns:

1. ensuring that the social media policy states, and employees are aware, that the employer's respectful workplace policies apply not only in the office, but to communications on social media platforms that concern the employer's business and its employees;

2. prohibiting employees from discussing and disclosing any confidential and/or proprietary business information, including specific trade secrets and intellectual property, on social media platforms and, most critically, defining the scope of material the employer may deem to be confidential or proprietary;

3. prohibiting employees representing themselves as spokespersons for the company;

4. limiting employee's personal use of social media during working "time" (not work "hours");

5. requiring that employees obtain the employer’s consent before commenting on the employer's goods or services on social media platforms;

6. ensuring that time spent by non-exempt employees after hours on business-related social media activity is accurately accounted for;

7. recommending that employees, especially those using business and professional social media platforms, add disclaimers to their personal profiles stating that the account is personal and that the user is not authorized to speak on behalf of the employer on the platform; and

8. advising employees that they do not have a reasonable expectation of privacy in emails, computer use, or other employer-provided technology and that franchisor reserves the right to monitor and access such online activity.

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162 Claussen et al., supra note 31, at 11-12.

163 The following portion of a social media policy was found to be lawful: “If you identify yourself anywhere on a web site, blog, or text as an employee of USA . . . we require that you put the following notice in a reasonably prominent place on your site: “The views expressed on this web site/blog are mine alone and do not necessarily reflect the views of my employer, [employer name].” Heather Sherrod, NLRB approves social media policy disclaimer language, NORTON ROSE FULBRIGHT SOCIAL MED. L. BULLETIN (Nov. 24, 2014), https://www.socialmedialawbulletin.com/2014/11/nlrb-approves-social-media-policy-disclaimer-language/.

The policy should contain precise language and examples of prohibited behavior that fit within the context of the franchisor. As discussed above, employees must understand that any limitations on their use of social media are precisely drawn for legitimate business purposes rather than for the purpose of restricting their NLRA Section 7 rights. For instance, instead of simply prohibiting the employee from posting about “any confidential franchise information” or “distasteful language,” the policy should specifically describe the information that the employee may not post, including sales data, customer lists, harassing comments, and racial slurs. Using concrete examples helps prevent overbroad definitions and reduces potential liability.

8. Franchisees’ Employees

Nearly a decade ago, two employees of a well-known pizza chain posted a video of themselves on YouTube "experimenting" with novel and unhygienic pizza toppings. The YouTube clip received more than 1 million hits and was an international overnight news story, causing significant brand damage. This incident highlights the importance of ensuring appropriate guidelines on use of social media in the workplace. In the current joint employer landscape, what guidance can or should a franchisor give when it concerns employees of its franchisees?

Having one universal social media policy for all employees in the franchise system can promote uniformity of social media use across the franchise system and reduce franchisees’ cost of compliance. However, the franchisor may be risking assuming full responsibility for ensuring that the social media policy complies with all applicable labor and employment laws and defending against joint employment claims based on that policy. An alternative approach is for the franchisor to provide a sample social media policy that at a minimum complies with the NLRA discussed above. When doing so, the franchisor should include clear disclaimer language that the policy is a sample, optional, that the only employer is the franchisee, and, as such, the franchisee is solely responsible for ensuring compliance with all applicable laws relating to its employees. As an additional safeguard, the franchisor can remove its name, trademarks, and logos from the sample policy so franchisees’ employees who receive it are not mislead as to the identity of their true employer. Moreover, the franchisor’s social media policy applicable to franchisees should make clear that it is the franchisee’s sole responsibility to ensure that any social media content posted by the franchisee’s employees mentioning the brand complies with the franchisor’s policy and, as such, the franchisee must adequately train its employees on the

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165 Jay Greathouse & Heather Sherrod, Owning you social media policy: Drafting a social media use policy, NORTON ROSE FULBRIGHT SOCIAL MED. L. BULLETIN (Mar. 4, 2013), https://www.socialmedialawbulletin.com/2013/03/owning-your-social-media-drafting-a-social-media-use-policy/.
166 Id.
167 Id.
168 Drakes & Bond, supra note 125.
169 Id.
170 Id. at 182.
171 See id.
172 Id.
social media policy applicable to franchisees. Incorporating this language will help alleviate potential joint employer liability.

V. ADDITIONAL STEPS TO MAKE YOUR SOCIAL MEDIA POLICY VALUABLE

A. Education and Training

A well-crafted social media policy is useless if no one knows it exists. Accordingly, a franchisor must make sure that its employees and franchisees are educated about the rights, responsibilities, and restrictions that apply to the use of social media platforms within the franchise system. Indeed, because understanding and utilizing social media for customer generation has now become a critical aspect of many franchises, education about social media and its role in the operation of the franchised business should be incorporated into the initial training of most franchised systems. To reduce joint employer risks, the franchisor should not train employees of franchisees, but focus on training its franchisees so they can in turn train their personnel. In addition, franchisor marketing departments need to be made aware of the particulars of any social media policy adopted by a franchisor. Ongoing training provided by franchisors needs to not only provide refreshers to franchisees on existing social media policies but also be prepared to educate franchisees on the changes in social media that affect their businesses.

B. Enforcing Social Media Policy

A well-crafted social media policy is also useless if no one adheres to it. Accordingly, a franchisor needs to act promptly to address infractions of the social media policy when they occur. This means developing a monitoring scheme that makes sense for the franchise system and appropriate recourse and/or sanctions for addressing violators. Depending on the nature of the infraction, that may mean an initial warning and education, a fine or penalty, the withdrawal of the right to participate in brand centered social media, default or termination. In most cases the franchisor will have the leverage to address violations of its social media policy without having to escalate the matter to a default and potential termination. However, in situations involving repeated offenses or a franchisee who simply refuses to comply, a franchisor may have grounds for ending the franchise relationship. However, before doing so, the franchisor needs to make sure that the franchise agreement and any applicable state franchise relationship statutes permit that action to be taken based on the violation that has occurred.

VI. CONCLUSION

Social media is a key component of the marketing strategy and viability for most franchise systems. No matter the type, size, or level of sophistication of the franchise system, the franchisor should not ignore its ability and right to regulate social media use. However, social media is an area that is constantly changing, including the advertising, trademark, privacy, employment, data protection, and sweepstakes/contest laws and regulations applicable to social media activities; the number of social networking platforms; and the rules and policies for the social networking platforms. Given the importance of social media and risks of improper social media use,

173 Claussen et al., supra note 31, at 12.

174 Claussen et al., supra note 31, at 12; Powell & Ralls, supra note 11, at 237.
franchisors will therefore need to monitor developments in this area and take appropriate steps to conform their social media policies as needed.
EXHIBIT A – SAMPLE SOCIAL MEDIA POLICIES

XYZ Franchise Company
Social Media Policy (this “Social Media Policy”)

Social Media Policy for XYZ Franchise Owners

You are expected to uphold the brand’s high quality professional image for a XYZ shop. We recognize that the internet provides unique opportunities to participate in interactive discussions and share information on particular topics using a wide variety of social media, such as Facebook, Twitter, Instagram, Pinterest, YouTube, Snapchat, Vine, blogs, podcasts and wikis (collectively, “Social Media”). The above list is not exclusive and the term Social Media applies to any social networking website, mobile application, blog or microblog, public and private message boards, comment sections, etc. We encourage you to be actively engaged in the local community, which may or may not include connecting with various local groups through Social Media and online means. However, your use of Social Media can pose risks to our and the XYZ franchise system’s (the “System”) confidential and proprietary information, and our reputation and brand. Please keep in mind that your Social Media activity and that of your employees and/or agents can (a) reflect negatively on us, the System, and other franchisees, and (b) negatively impact the business of shops operating under the System.

To (i) minimize these business and legal risks, (ii) ensure that our brand standards are maintained, and (iii) ensure that our trademarks are used appropriately, we require you to adhere to this Social Media Policy. This Social Media Policy applies to all franchisees and has been adopted to provide guidelines on your use of Social Media in your personal capacity (“Personal Use”) and as a franchisee (“Business Use”). Certain policies apply to your use of Social Media for both Personal Use and Business Use; some policies differ depending on the type of use.

We have the right to monitor your public Social Media accounts and activity and that of all other franchisees. In the event that any Social Media post is not in compliance with this Social Media Policy, we reserve the right to remove or modify such post, or direct you to remove it. Such non-compliance with this Social Media Policy includes failure to comply with any applicable laws or regulations, and/or terms and conditions for applicable Social Media platforms.

This Social Media Policy does not contain all information relevant to compliance with applicable law or a Social Media site’s terms of service. You are responsible for investigating all laws and terms of service before engaging in Social Media use. This includes conduct related to: (i) the misuse of our intellectual property; (ii) unauthorized use of a third-party’s intellectual property; (iii) false or misleading advertising; improper promotions, contests or sweepstakes; improper endorsements or testimonials; (iv) the violation of confidentiality or privacy agreements or laws; (v) the disparagement or harassment of individuals (including our employees and other franchisees’ employees) or competitors; and (vi) discrimination in employment.

Please note that this Social Media Policy is subject to change at any time without notice. Please check for updates on a regular basis. You are responsible for complying with the most recent version of this Social Media Policy.
I. Social Media Activities for Business Purposes

If you wish to develop business accounts on Social Media websites to (i) increase communication and build business relationships with customers and potential customers; and (ii) promote your shop (“business purposes”), you may do so, but must ensure a Best Practices approach. Engagement in these activities for business purposes is at your discretion. Currently (with the exception of Facebook, as detailed below), we do not intend to pre-approve or review each franchisee’s Social Media activities for business purposes (although we reserve the right to do so). We may designate a format or structure for all Social Media pages, messages, tweets, links, or website areas used for business purposes. You must comply with such designated formats or structures and control and use any such Social Media accounts accordingly. Social Media is not a substitute for your obligations to advertise and market your shop as may be required by the franchise agreement and this Operations Manual. Social Media should supplement your other promotional channels in the community.

The following terms and conditions apply to any Social Media activities for business purposes. We reserve the right to require you to discontinue use of a particular Social Media account at any time and in our sole discretion.

A. Identification and Responsibility:

1. Unless otherwise specified herein, you may not create or maintain a Social Media account name, user name, “handle,” URL, screen name, or any other identifying name that contains any of our trademarks or variation of one of our trademarks including, but not limited to “XYZ,” “XYZ Shop,” “XYZ Services,” or “XYZ Product.”

2. You must include a link to our public website (https://www.facebook.com/XYZ/) on all Social Media sites and include links to the official XYZ brand Facebook page (https://www.facebook.com/XYZ/).

3. You must include a link to our Privacy Policy or a privacy policy that we have approved in writing.

4. All postings should indicate that the shop is an independently owned and operated franchise and that you are speaking for yourself and not for us or any other franchisee. We shall have access as a “friend,” connection, follower, member, user or other party to any Social Media websites and/or Social Media pages, messages, tweets, links or website areas that you use for business purposes.

5. The use of Social Media is subject to various legal and other requirements (including each Social Media website’s terms and conditions of use) and it is solely your responsibility to deal with those issues. You should keep in mind that, with respect to any Social Media activities, you are solely responsible for any claims, liabilities, costs or fees arising from your activities. You are also solely responsible for your computer system and all technology issues and risks associated with using Social Media for business purposes.

6. Any violation of this Social Media Policy by you and/or in connection with the shop is a violation of the provisions of your franchise agreement that require compliance with our procedures and System, including this Operations Manual. You may face consequences for failure to comply with this Social Media Policy.
7. All Social Media accounts and intellectual property created or used by you to promote or market the shop ("Social Media Marketing Material") or the System belong solely to us. We shall own and have the right to control all Social Media Marketing Material whether you create the account or use, manage, or access it. Social Media Marketing Material includes any and all log-in information, data, trademarks, and content related to the account, including all followers, subscribers, and contacts. Social Media Marketing Material does not include Social Media accounts that are created or used by you exclusively for your personal use.

B. Posting Content:

1. You speak for yourself and not us. You are not permitted to make any statements on your Social Media accounts on our behalf or on behalf of the System. Although your Social Media accounts are specific to the shop, they still represent the System as a whole and we have the right to control brand messaging. Be brief, polite, and professional.

2. You are not permitted to post any photographs or videos of customers of the shop without advanced written permission of the customer (i.e., a customer release), or in the case of a minor customer, advanced written permission of the minor customer’s legal guardian.

3. You are not permitted to post any photographs, graphics, music, videos, artwork, written expression of ideas, or any other copyrighted materials, without proper attribution or advance permission of the author, creator, or owner, regardless of whether the materials are marked as copyrighted. Attribution includes providing track-back details to the original post or content.

4. Anything you post online has the potential to live on forever, even if you attempt to delete or erase it.

5. Your Social Media communication should be engaging and create excitement. It should also be helpful, insightful, and add value to your audience.

6. We are permitted, from time to time, to (or require you to) post or use content we prepare and/or provide on your Social Media accounts.

7. When posting on Social Media:
   a. Add terms to Social Media pages, messages, tweets and links. These terms should include (i) disclaimers of endorsement, sponsorship, etc. of content posted (as further described in Section F below), and (ii) rules about what may and may not be posted by third parties.
   b. Do not disclose any confidential information related to us or the System.
   c. Do not disclose the names of customers or any other information about them.
   d. Do not endorse any products or services other than those provided by the shop.
   e. Do not post any false or misleading advertisements.
   f. Do not engage in any activity that would damage our goodwill and/or reputation or the goodwill and/or reputation of the System or the brand. This includes postings or discussions of politics, religion, and other similar controversial topics.
   g. Exercise caution with regard to exaggeration, colorful language, guesswork, obscenity, copyrighted materials, legal conclusions, and derogatory remarks or characterizations.
h. Do not use any Social Media website to (i) post any of our proprietary information (including but not limited to confidential information and/or trade secrets), (ii) criticize our policies, (iii) criticize or make disparaging remarks about us, any happenings within the System, or franchisee-specific happenings, or (iv) criticize any other brand or competitor.

i. Do not disparage any competitors, competing services or service providers. If anyone disparages or otherwise makes negative comments about us, the System, any franchisee, or any person associated with us, let us know immediately. In those circumstances, we may ask to step in to respond to those comments.

j. Do not post on any Social Media website information related to profitability, revenue, or other financial data related to the shop or to us.

k. Do not violate the trademark or copyright rights of others. Plagiarism must be avoided; proper permissions or attribution is required.

l. When in doubt about any Social Media activities, or if you have questions about this Social Media Policy, contact legal@xyz.com.

m. If you become aware of any violation of this Social Media Policy or any comments or postings that could be inappropriate, please contact legal@xyz.com.

C. Time & Monitoring:

1. If you decide to use Social Media for business purposes, you must monitor daily all Social Media websites used for business purposes. You are responsible for acting quickly on posts and e-mails. In the event of unwanted or inappropriate messages/posts on your Social Media page, links or website areas, or posts that violate the content restrictions described in this Social Media Policy, you must immediately act to remove the messages/posts.

2. Frequent communication to “friends,” connections, followers, members, users or other parties will be necessary if Social Media websites are to serve as a useful communication tool. You should not use Social Media websites unless you will devote appropriate time to managing these Social Media activities, which requires an ongoing time commitment.

D. Security Risks:

1. By choosing to use Social Media websites for business use, you take full responsibility for any security risks associated with Social Media websites as a result of installing various external applications.

2. If you choose to use Social Media websites, you should regularly run malware protection on your computers to avoid infections of spyware and adware.

3. You should have current anti-virus software on any computer accessing the internet. We also recommend firewall software or a device to help prevent attacks.

4. You must keep confidential the user names and passwords of any business account for a Social Media website.

5. You should also review the terms of service or terms of use for each of the Social Media websites before setting up an account as you are committing yourself and the shop to those requirements (and any updates) when the new account is created.
E. **Advertising:**

Remember that your advertising or marketing must comply with this Operations Manual. We reserve the right to approve all advertising and marketing. While Social Media is an excellent tool for marketing and promotion, Social Media activities are not a complete substitute for other more traditional forms of advertising, marketing, and promotion.

F. **Endorsements and Influencers:**

While it is permissible for you to use influencers/endorsers to promote XYZ products and services on Social Media, the Federal Trade Commission has strict guidelines that must be followed by both the influencer/endorser and you (as the advertiser/marketer). Unless it is already clear from the context of the communication, any “material connection” between you and the influencer/endorser must be clearly and conspicuously disclosed. A “material connection” may include: (1) payment/monetary compensation; (2) gifts, free products, and/or substantial discounts; (3) business relationships; and (4) familial relationships.

Often times, consumers viewing Social Media posts on mobile devices typically see only the first three lines of a longer post unless they click “more,” which many may not do. When making endorsements on Instagram, they should disclose any material connection above the “more” button. Additionally, when multiple tags, hashtags, or links are used, readers may just skip over them, especially when they appear at the end of a long post – you must be sure not to do this as the FTC considers this inconspicuous and unclear.

G. **Facebook:**

In order to maintain brand standards and ensure uniformity and consistency of information, we have a “master” Facebook account for the XYZ® brand (“Master Page”). Each shop location has a Facebook page that is linked to the Master Page (“Shop Page(s)”). A third-party digital marketing provider (“DMP”) maintains the Master Page and, along with us, has administrative authority over all Shop Pages. You are not permitted to maintain your own local Facebook page outside of the Shop Page for your respective shop(s). The DMP manages Shop Page titles and location information and shall have the ability to remove offensive or disallowed posts and comments from the Shop Pages in its own discretion and at our direction. You shall have the option to participate in additional NAF approved services offered by the DMP.

H. **Employee and Agent Social Media Activities:**

You are expected to ensure that your employees and agents are informed, trained, and adhere to this Social Media Policy. You must ensure that your employees and agents are trained when hired on complying with this Social Media Policy and any additional policies you establish for the shop. A sample social media policy that you may wish to use for your employees is attached hereto as Exhibit A-1. Before using or implementing the sample social media policy, you must have your legal counsel review and edit the sample social media policy based on your business and the most current laws applicable to your business. In addition, we strongly recommend that you review this Social Media Policy with all employees and agents as a reminder on an annual basis. You can be held responsible under your franchise agreement for violations of this Social Media Policy by your employees and/or agents.
II. Personal Social Media Activities

We recognize that you may have personal accounts with one or many Social Media websites. You should use good judgment in the content that you choose to post on Social Media websites. Using Social Media for personal purposes is subject to various legal and other requirements and it is solely your responsibility to deal with those issues. Below are some guidelines by which you are expected to adhere if using personal Social Media accounts.

A. Privacy:

1. Keep personal Social Media accounts private. Set “privacy” settings to limit who has access to what is on the account and know that keeping everything private does not ensure that a “friend,” connection, follower, member, user or other party will not copy and paste private information elsewhere.

2. Post only what you want the world to see. Imagine customers, prospective customers, community leaders, employees, and other franchisees seeing posts. Your Social Media activity can reflect on us, the System, other franchisees, and the XYZ shops operating under the System.

B. Content:

1. There can be no direct or indirect reference to us, any XYZ shop or any of our franchisees. You may identify yourself as an owner of a XYZ shop. If identified as an owner of a XYZ shop, all communications are subject to our policies including our confidentiality and non-disclosure policies. Simply put, if you identify as a franchisee or owner of a shop on a Social Media account, you must conduct yourself with professional standards. You must also make clear that you are not acting or communicating on behalf of the shop for business purposes, or on behalf of us, the System, or any other franchisee. If you are unable to act professionally using Social Media, you should not identify as a franchisee or owner of a shop when using personal Social Media accounts.

2. Exercise caution with regard to exaggeration, colorful language, guesswork, obscenity, copyrighted materials, legal conclusions and derogatory remarks or characterizations.

3. Do not discuss customers, employees, independent contractors, vendors, other franchisees and/or our employees.

4. Do not use any Social Media website to:
   a. post any of our proprietary information (including but not limited to confidential information and/or trade secrets), including our Proprietary Marks;
   b. criticize our policies;
   c. criticize or make disparaging remarks about us, the XYZ brand, any XYZ shop or any franchisee, any happenings within the System, or franchisee-specific happenings; or
   d. criticize any other brand or competitor.

5. Do not conduct any business related to the shop using any personal Social Media account, including business-related communication with customers and potential customers.
Sample Social Media Policy for Shop

Social Media Policy (this “Policy”) for ABC Corporation (“Employer”)

Employer is a XYZ franchisee operating a XYZ franchised shop (the “Shop”) under the XYZ Franchise System (the “System”). Employer operates under the System pursuant to a license and/or sublicense granted by XYZ Franchise Company (“Franchisor”). As a franchisee operating under the System, Employer and its agents and independent contractors are expected to uphold the System’s high quality professional image for the Shop. Employer recognizes that the internet provides unique opportunities to participate in interactive discussions and share information on particular topics using a wide variety of social media, such as Facebook, Twitter, Instagram, Pinterest, YouTube, Snapchat, Vine, blogs, podcasts and wikis (collectively, “Social Media”). The foregoing list is not exclusive and the term Social Media applies to any social networking website, mobile application, blog or microblog, public and private message boards, comment sections, etc.

This Social Media Policy applies to all employees, independent contractors, and agents of the Shop and has been adopted to provide guidelines on the use of Social Media by a Shop’s (i) employees, independent contractors, and agents in their personal capacity (“Personal Use”) and (ii) employees, independent contractors, and agents in connection with the Shop (“Business Use”). Certain policies apply to the use of Social Media for both Personal Use and Business Use; some policies differ depending on the type of use.

This Social Media Policy does not contain all information relevant to compliance with applicable law or Social Media site’s terms of service. You are responsible for investigating all laws and terms of service before engaging in Social Media.

This Social Media Policy in no way intends to dissuade or interfere with an employee’s rights under Section 7 of the National Labor Relations Act to engage in protected concerted activities, such as an employee’s rights to discuss their working conditions, wages, benefits, and other terms of employment.

Please note that this Social Media Policy is subject to change at any time without notice. Please check for updates on a regular basis. Employees, independent contractors, and agents of the Shop are responsible for complying with the most recent version of this Policy.

I. Personal Social Media Activities

Employer recognizes that the employees, independent contractors, and agents of the Shop may have personal accounts with one or many Social Media websites. Please use good judgment in the content that you choose to post on Social Media websites. Using Social Media for personal purposes is subject to various legal and other requirements and it is solely your responsibility to deal with those issues. Below are some guidelines by which employees, independent contractors, and agents of the Shop are expected to adhere if using personal Social Media accounts.
A. Privacy:

1. Keep personal Social Media accounts private. Set “privacy” settings to limit who has access to what is on your account and know that keeping everything private does not ensure that a “friend,” connection, follower, member, user or other party will not copy and paste your private information elsewhere.

2. Do not share the user name or password of personal Social Media accounts with anyone. If there is a chance that your password becomes compromised, it is your responsibility to immediately change it.

3. Post only what you want the world to see. Imagine your co-workers, bosses, community leaders, and prospective customers seeing your posts.

4. Please keep in mind that your Social Media activity can (i) reflect negatively on Employer, the Shop, the System, Franchisor, and other XYZ shops and franchisees, and (ii) negatively impact the business of the Shop and other XYZ shops operating under the System.

B. Content:

1. There can be no direct or indirect reference to the System or Franchisor. You may identify yourself as an employee, independent contractor, or an agent of the Shop. However, if you identify yourself as an employee, independent contractor, or an agent of the Shop, all your communications are subject to this Policy. Simply put, if you identify yourself as an employee, independent contractor, or an agent of the Shop, you must conduct yourself with the same professional standards that Franchisor and this Policy require of you when you are at work. You must also make it clear that you are not acting or communicating on behalf of Franchisor, the System, the Shop or any XYZ shop operating under the System. We suggest adding the following disclaimer to such messages: “The views expressed are mine alone and do not necessarily reflect the views of XYZ Franchise Company, the XYZ franchise system or any XYZ shop.” If you are unable to conduct yourself in a professional manner using Social Media, you should not identify yourself as an employee, independent contractor or agent of the Shop.

2. Exercise caution with regard to exaggeration, colorful language, guesswork, obscenity, copyrighted materials, legal conclusions and derogatory remarks or characterizations. Anything you post online has the potential to live on forever, even if you attempt to delete or erase it.

3. Do not conduct any business related to the Shop or the System using any personal Social Media account, including correspondence with customers, prospective customers, or business-related communications with other employees, independent contractors, and/or agents.

4. Do not use any Social Media website to advertise for the Shop, any XYZ shop or the System.

5. Do not use any Social Media website to:
a. post any proprietary information (including but not limited to confidential information and/or trade secrets) related to Employer, Franchisor, customers, vendors, business partners, the System, the Shop or any other XYZ shop;
b. criticize or make disparaging remarks about Franchisor or any XYZ shop;
c. criticize or make disparaging remarks about the XYZ brand or the System;
d. criticize any other brand or competitor;
e. make or post any negative or disparaging remarks, photographs, video, or audio about other employees, agents, or independent contractors;
f. record conversations, phone calls, images, or company meetings without prior approval;
g. misrepresent the Employer’s, System’s, Franchisor’s products, services, or employees;
h. post the Employer’s, System’s or Franchisor’s logo, trademark, or graphics without prior written approval; or
i. comment for or speak on behalf of Employer, the System or Franchisor without prior approval.

II. Business Social Media Activities

Employees, agents and independent contractors of Employer are not to engage in business-related Social Media activities. This means that you may not create a Social Media account related to your employment, agency, or independent contractor relationship with the Shop.

Any violation of this Policy can be grounds for immediate termination of employment or other business relationship.
BIOGRAPHIES

Marlén Cortez Morris is a Partner with Barnes & Thornburg LLP in Chicago, in the Firm’s Litigation Department and Franchising and Distribution Group. Marlén represents and advises clients on a wide range of franchise and distribution, commercial litigation, and labor and employment matters in courts and alternative dispute resolution venues and before government agencies across the country. Marlén routinely handles claims (from inception through appeal) involving contract rights, intellectual property rights, torts, franchise registration and relationship laws, and employment liability, including joint employment claims. She also regularly advises clients on labor and employment law compliance and best practices for navigating joint employment issues. Marlén recently co-authored a chapter on “Joint Employer and General Labour and Employment Issues” in Lexology’s Getting the Deal Through – Franchise Practice Guide. Marlén is a member of the ABA’s Forum on Franchising (where she is an editor of the ABA’s Franchise Law Journal) and Section of Labor and Employment Law, and of the International Franchise Association (where she serves on the Diversity Institute Board). She earned her J.D., cum laude, from the University of Illinois College of Law (2006) and her B.S., with honors, magna cum laude, from the University of Tampa (2003).

Jim Goniea is the General Counsel of Self Esteem Brands, LLC, whose brands include Anytime Fitness, Waxing the City and Basecamp. Jim has been practicing franchise law for over 26 years. Jim is a frequent presenter at both the ABA Forum on Franchising Annual Conference and the IFA Legal Symposium. Jim previously served two terms on that Forum Governing Committee where, among other things, he served as Chair of the Publications Committee and Chair of the Technology Committee. Jim is the co-author of Annual Franchise and Distribution Law Developments, 2012, and is a chapter author of The Franchise Compliance Manual, 2d Ed. This is the 24th straight year that Jim is attending the ABA Forum on Franchising. Jim graduated from Rutgers School of Law-Newark in 1990 with High Honors. Jim clerked for the Hon. Samuel A. Alito, Jr. in 1990 when Justice Alito sat on the Third Circuit Court of Appeals.

Gerald Wells is General Counsel and Chief Compliance Officer for Rita’s Franchise Company. Prior to joining Rita’s, Mr. Wells was General Counsel, Secretary and Director for the Dessange Group North America, Inc. and it subsidiaries (including the franchise brands Dessange Paris salons and spas, Camille Albane salons and Fantastic Sams salons); a partner in the Washington office of Quarles & Brady; and a partner in the Atlanta office of DLA Piper LLP (US). Mr. Wells also worked in the legal departments of Hewlett-Packard Company and US Office Products Company (the parent company for several companies, including two franchise companies). He is a member of the Forum Governing Committee and serves as the Chair of the Diversity Caucus for the Forum. He earned his J.D. from the College of William and Mary and obtained a B.S. from the University of Maryland. He is admitted to practice in Maryland, Georgia and the District of Columbia.