

## Publications

### Be Careful With Your Employees' Online Reviews

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Jackie Ford, partner in the Vorys Houston and Columbus offices, authored an article for *Employment Law360* about online reviews. According to the article, if an employer asks an employee to make a self-interested “fake” review look like a review by an actual customer, the employer may have violated state and federal laws on deceptive advertising. Ford also notes that even when the employee does this under his own initiative the employer may still be liable. The full text of the article is included below.

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### Be Careful With Your Employees' Online Reviews

Most employers have policies prohibiting various forms of lying. The typical employee handbook prohibits falsifying records, padding time sheets, stealing company property and other forms of dishonesty. Many express a commitment to transparency, both within the company and in relationship to customers and business partners.

But lying about your own product, or about a competitor's, is nothing new. Yet some employers may be tempted to ignore employee falsification when it occurs online — or, worse, to condone or even encourage it. Not surprisingly, courts and competitors may notice what the employer has not, creating a risk for employer liability.

Longstanding state and federal laws prohibit deceptive advertising. When it happens on the web, such behavior has a specific name, “astroturfing.” Astroturfing makes something look like what it is not — for example, making a self-interested “fake” review by one of your employees look like a disinterested review by an actual customer.

When astroturfing is done by employees at their employer's direction, the employer may have violated state and federal laws on deceptive advertising. When the employee astroturfs on his own initiative, the employer may still be liable, particularly if the employer knows or learns of the deception and fails to correct it.

A recent study suggests that three-quarters of all customers consider online reviews in choosing local businesses, and that eight in 10 Internet shoppers consider online reviews in making purchasing decisions. Given that kind of impact on sales, the temptation to falsify can be great.

And where temptation grows, legal actions tend to follow. Studies have found that as many as one in five online reviews may be fake — written by overzealous employees, underhanded competitors or a host of other dishonest actors. And just as consumer reliance on online reviews has increased, so too has the liability for false reviews.

Last month, the New York attorney general investigated and fined 19 separate companies for their roles in procuring or posting false reviews. The AG's anti-astroturfing project was reportedly nicknamed "Operation Clean Turf."

The false reviews were posted on sites such as Yelp, Google Local and Citysearch and covered products ranging from bus service to plastic surgery. Some companies had even hired "reputation management" firms to plant fake reviews on their behalf. As a group, these 19 companies will pay over \$350,000 in fines.

Some legal principles being applied to online falsehood cases long predate the Internet and its specific forms of deception. In *NTP Marble v. AAA Hellenic Marble*, for example, a federal court in Pennsylvania found that traditional standards prohibiting defamation, along with the Lanham Act's longstanding prohibition on false advertising, could readily be applied to Internet postings.

The plaintiff, NTP, had become suspicious when a host of negative reviews about its customer service, employment practices and performance appeared on websites such as Citysearch, Insider Pages, YellowBot and Google. NTP claimed that the reviews were too numerous and appeared in too short a time frame (more than 100 over a few months) to possibly be legitimate.

NTP sued AAA, a competitor, for defamation and for false advertising under the Lanham Act. During the course of discovery, one of AAA's employees admitted to posting most of the false reviews and claimed his employer knew nothing about his misconduct.

On that basis, AAA moved for summary judgment because the employee (whose job at AAA did not involve computer access, much less the posting of online reviews) had acted outside the scope of his employment. The court denied summary judgment motion, finding that AAA might still be vicariously liable for its employee's actions because the reviews were posted from AAA's locations, aided AAA's business and were made by an AAA employee whose "rogue employee" story was factually questionable.

In short, the company could not escape liability for its employee's actions even when those actions were, as the company claimed, unrelated to the employee's job duties.

In *Clay Corporation v. Colter*, another employee-related "business defamation" case, a Massachusetts car dealership brought a defamation and tortious interference suit against two brothers of a disgruntled former employee. The brothers claimed that their sister had been fired because her employer found out she had cancer. In reality, the employee's manager had been aware of the sister's cancer when she was hired and had accommodated her illness throughout her employment.

Nevertheless, the brothers advocated a boycott of the dealership through a Facebook page that went viral, attracting a reported 44,000 “likes.” Finding the brothers’ statements “clearly defamatory,” the court issued a \$700,000 attachment on the brothers’ real estate holdings and bank accounts.

In an interesting twist, at least one Internet review site is itself suing over false reviews. Yelp Inc. has filed suit in California against a San Diego bankruptcy law firm that Yelp claims violated California’s consumer protection laws by posting glowing — and fake — reviews and testimonials about its services.

The complaint in *Yelp v. McMillan Law Group* alleges that employees of the firm, rather than the firm’s actual clients, posted the reviews on Yelp as part of a scheme to deceive consumers. McMillan Law has denied the allegations, claiming the case was filed in retaliation for its small claims court victory against Yelp for breach of contract.

In a similar case, car shopping site Edmunds.com recently announced a settlement of its fraud and breach of contract lawsuit against Texas-based Humankind Design Ltd., having alleged that Humankind had created over 2,000 fake Edmunds accounts as a means of posting positive (and fake) dealerships reviews. The settlement included an undisclosed monetary payment and a permanent injunction agreeing not to register any more users on Edmunds.com.

In addition to violating longstanding prohibitions against defamation and false advertising, employees who post fake reviews may run afoul of the Federal Trade Commission. In its 2009 updated endorsement guidelines, the FTC proclaimed its disapproval of reviews, even truthful ones, whether online or elsewhere, that fail to disclose a “material connection” between the poster and the product being reviewed.

To that end, the guidelines require that all endorsements “reflect the honest opinions, findings, beliefs, or experience of the endorser.” Because an employment relationship is a “material connection,” employees posting reviews of their companies or their products should disclose that relationship in the review.

For the same reason, companies should require employees to disclose their employment relationship in any review of their own companies’ products or those of a competitor.

Employers cannot monitor their employees’ every online activity to prevent them from defaming competitors or engaging in other actionable misconduct. However, employers should consider the following steps to reduce their potential exposure to liability for false, deceptive or misleading online reviews:

1. Create and distribute a social media policy that addresses all forms of online activity, including review sites. Use the policy to set guidelines for responsible online activity and to discourage dishonest or misleading postings both on your own site or elsewhere.
2. Remind employees of your ethics policies — then follow them, even when it’s hard. Be ready to punish violators, even when the violators are otherwise strong performers and even when their unethical Internet activity drives up your sales.
3. Fight back against false reviews by others. When you discover a false or misleading review, contact the site where it’s posted and ask that it be removed, particularly if the review violates the website’s own terms of service by being fake, defamatory or otherwise. If you know who posted the review, contact the poster as well, and demand that the false information be taken down.

4. Avoid the temptation to feather your online nest with fake reviews. False advertising, defamation and other serious claims can result from instructing employees to post false information or ignoring evidence that they may be doing so.

Although online review and ratings websites are relatively new, the prohibition against false advertising is not. To reduce liability, it is important for companies, their employees and their contractors to understand how the rules apply to both old and new forms of communication