

# Whitepaper



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## **Q&A** **“Corporate Influencers”** What companies need to know now

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# Q&A “Corporate Influencers”

## What companies need to know now

Ever more companies are relying on their own staff members when promoting their organizations on social networks: Employees report on business activities in LinkedIn posts, tweet about their employers, or show the latest products in Instagram Reels.

By that, employees become Corporate Influencers, both benefitting the company’s image and increasing employee loyalty. These activities are, however, not always governed by clear internal guidelines. It is not uncommon for Corporate Influencer activities to develop by chance, leaving companies to figure out how to deal with this new phenomenon.

Our Q&A on “Corporate Influencers” answers key legal questions especially for German employers and businesses about this interesting topic, ranging from labeling obligations and rules on liability, social media guidelines and data protection to issues relating to tax, copyright, and employment law.

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# #CorporateInfluencers

## What is a Corporate Influencer?

- Corporate Influencers are employees who are posting on social media about their work and company, thus effectively becoming brand ambassadors for their employers. By establishing a level of personal trust, they ensure greater visibility among potential job applicants as well as existing and future customers. Corporate Influencers are able to convey messages more credibly and can create long-term relationships with clients.

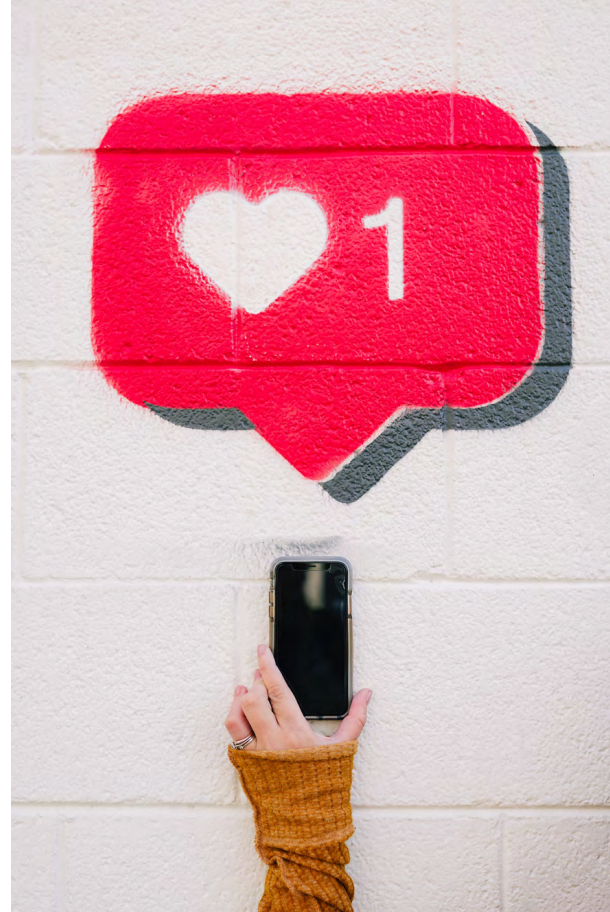
## How do employees become Corporate Influencers?

- Some companies specifically select certain employees to act as Corporate Influencers as part of an established Corporate Influencer Program (CIP). Sometimes, however, individual employees draw attention to themselves on social media without their employer's intervention or even knowledge. Often gaining a large number of personal followers, these individuals are known as organic Corporate Influencers.

## Private post or Corporate Influencer – where to draw the line?

- if employees post on social media as part of a CIP, this would generally benefit their employers because the activity is at least indirectly related to sales promotion. Corporate Influencers assist in competition on the market, as they primarily aim at giving their employer an advantage (such as portraying the company in a better light or marketing its products and services).

Purely self-related postings, such as about a personal promotion or a summer party among colleagues, are of a private nature.

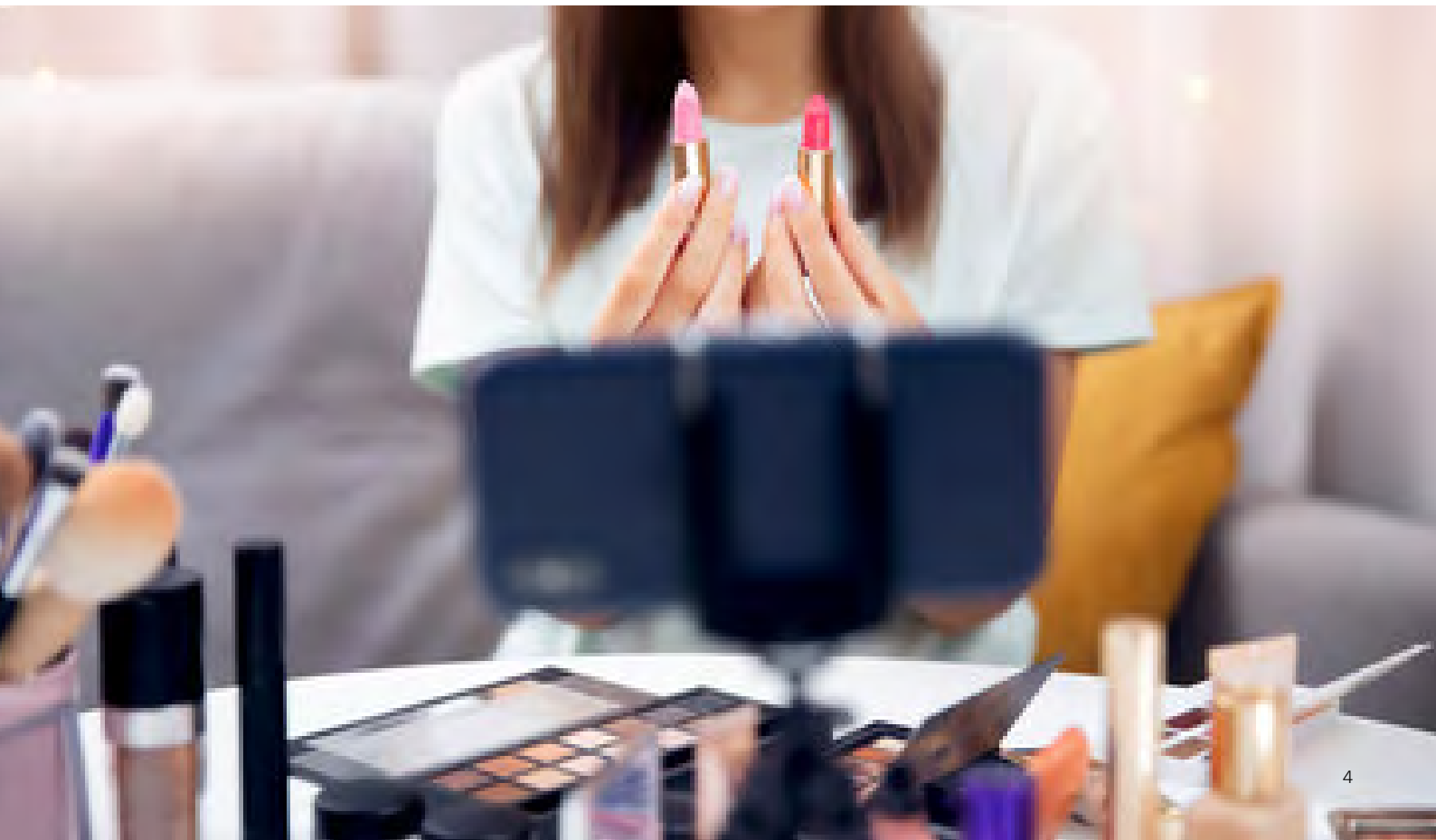


**Can employees avoid being associated with the company by referring to posts as “Private post”/ “This is my private account”?**

- No, such references cannot eliminate the existence of a commercial purpose and are therefore not useful.

**Are Corporate Influencers allowed to exercise business activities on all social media platforms?**

- Corporate Influencers are found on many platforms, such as Instagram, Facebook, or LinkedIn. Some platforms (such as Clubhouse) are still excluding direct activity by businesses, although indirect activity by Corporate Influencers remains possible and is even explicitly promoted by Clubhouse, for example.



# #SocialMediaGuidelines

## **Do companies have to sign a cooperation agreement with Corporate Influencers?**

- Unless the employment contract contains specific provisions on working as a Corporate Influencer, companies should enter into written amending agreements with their Corporate Influencers. These agreements should specify the contents and the times to be spent for the activity as well as potential separate remuneration. They should also include the extent to which the company is authorized to use the posts even after the Corporate Influencer's activity has ended.

## **How can companies make their employees aware of guidelines and potential pitfalls?**

- Companies need to establish internal social media guidelines, in particular where Corporate Influencer activities are part of a CIP. This includes the training of employees in the conscious use of social media while raising their awareness of potential liability risks. Companies that simply wish to specify existing contractual obligations, may unilaterally issue guidelines as supplements to employment contracts. In cases in which employees' duties are supposed to be expanded, however, companies must conclude the guidelines as a supplementary agreement to be signed by both parties.

It is also highly useful to offer regular legal training and contractually obligate Corporate Influencers to participate.

## **What should the social media guidelines say?**

- While the exact content of social media guidelines depends on the individual circumstances, some specifics should be included in any case:

- rules on the use of social media in the workplace
- information on legal obligations and consequences of breaches of duties
- general instructions on proper communication with colleagues, customers, and competitors.

In view of the potential liability risks associated with social media use by employees, it is advisable to request employees to ask for explicit permission prior to posting advertising content on their own. Companies with a works council also need to observe the works council's co-determination rights. The guidelines may also be integrated into a works agreement and would then apply directly to all employees.



## #LabelingObligations

**Do employees have labeling obligations when corporate content is posted on social networks?**

→ Yes, it always has to be clear if a Corporate Influencers' post has a commercial purpose.

**Is there a specific threshold for labeling obligations?**

→ In general, even if social media users only have a handful of followers, postings may still need to be labeled. While there is no specific limit, the following criteria play a role in the mandatory labeling of posts and their classification as commercial activity:

- frequency of company-related posting in relation to the number of personal posts on the profile/account
- number of followers in the social network
- public visibility of the social media account

## Which posting have to be labeled?

- All posts of Corporate Influencers that serve a corporate interest and where the Corporate Influencer intends to promote a third-party have to be labeled. Content that is not strictly product-related also has to be labeled, while posts relating purely to the influencer's own professional activities (such as posting about a personal promotion or a summer party among colleagues) are excluded.

## How shall postings be labeled?

- In contrast to "normal" influencers, it is not mandatory to label posts as advertisements. Frequently, Corporate Influencers do not even receive separate remuneration for their posts. Therefore, Corporate Influencer posts should be labeled by clear explanations and references such as "my employer" or similar. Note:
- The company affiliation must be evident from each social media post itself, mere reference in the profile will not be sufficient
  - The post should not be labeled merely at the end, i.e. in a "hashtag cloud"
  - For German-language posts, the use of English labels such as "sponsored by" or "powered by" will not be sufficient

## What needs to be considered when retweeting or sharing employers' postings?

- Sharing or retweeting employer social media posts is a business activity by Corporate Influencers for the benefit of their employers. Such posts are therefore also subject to the labeling requirements.

## Do the labeling obligations also apply in professional networks such as LinkedIn or XING?

- Generally speaking: Yes, because the commercial purpose does not necessarily arise from the social media platform's professional nature but shall be made clear. In the case of professional networks, however, the company affiliation is often already apparent from the details below the person's profile (e.g., on LinkedIn) so that it is automatically visible in every post, making separate labeling unnecessary.

## Does it make a difference whether Corporate Influencers use their private account or the employer's account?

- Yes, it does in fact make a difference. When posting on the employer's corporate account, there is no need to label the post as advertising, because it is easily recognizable that a company advertises its own products or services on its account. When Corporate Influencers are posting company articles under their private social media profiles, however, corporate postings must be clearly identified as a matter of transparency.





# #LegalNotice

## **Do Corporate Influencers need a Legal Notice?**

- This depends on whether Corporate Influencers use their account for private or business purposes. For purely private accounts, no Legal Notice is needed. Corporate Influencers, however, are usually expected to use their accounts for business purposes so that a Legal Notice will be required.

## **What content has to be included in the Legal Notice? How does the Legal Notice have to be embedded?**

- The general requirements apply, so that the Legal Notice must primarily contain the person's contact details. In addition, the Legal Notice has to be accessible with no more than two clicks in the profile at any time. This may be difficult with social media platforms because profiles may not offer all the necessary fields and there might be differences in the way they are displayed on mobile or stationary devices. The integration of "talking links" has emerged as best practice here.

## **Do Corporate Influencers have to list their home address?**

- No, Corporate Influencers only have to provide an address for summons, which may be the business address. If the business address is listed, however, processes in the company must ensure that the Corporate Influencer can be reached there. In terms of responsibility and liability, both of these options have advantages and disadvantages. Companies should therefore consider this issue and ideally include it in the CIP.

# #Liability



## What are potential liability risks?

- When cooperating with Corporate Influencers, companies must review a variety of potential legal risks. Infringements of competition law, such as misleading statements (attention must be paid to cosmetics, food, medical products, and environment-related advertising), USP advertising (“We are the market leader”), unjust exploitation of reputation, and disparagement of competitors are of particular importance. Violations of the above-mentioned labeling obligations also constitute unfair conduct and may be subject to warning notices. There may also be cases of copyright infringements, trademark infringements, or violations of personality rights.

## Corporate Influencer or company - who is liable for legal violations?

- In principle, both the Corporate Influencer and the company will be liable for legal violations. Depending on the field of law, the business owner may also be personally liable. Irrespective of a formal employment relationship, Corporate Influencers are legally considered “agents” of the company. In general, the company’s liability does not require fault. In some fields of law, however, an “exculpatory option” exists if Corporate Influencers were carefully selected, instructed, and supervised; this does not apply, however, to the wide-ranging area of competition law violations!

Criminal liability, on the other hand, rests solely with the Corporate Influencer.

## What are the possible consequences?

- Claims for injunctive relief and removal are usually asserted by way of warning notices. This generally requires the submission of a cease-and-desist declaration with a penalty clause and warning costs. Failure to do so may result in interim injunctions or lawsuits. It depends on the field of law whether claims for damages may also be considered.

# #Copyright

## **What needs to be considered for postings from a copyright perspective?**

- Companies should ensure that Corporate Influencers' posts do not constitute copyright infringements and that companies will be released from liability in the event of such infringements. It is important to establish appropriate legal and factual control mechanisms and contractual indemnifications in advance, for example in the CIP or in the guidelines, to avoid such incidents.

## **Who owns the rights to works recorded by Corporate Influencers?**

- In general, the rights to images, videos, or texts are initially held by the originator, i.e., usually by the Corporate Influencer if the content is self-produced. To avoid disagreements, companies should conclude a licensing agreement with the Corporate Influencer to be granted the rights to use and exploit posts and images.

## **What about personal rights when publishing images?**

- Corporate Influencers are generally entitled to the "right to their own image," i.e., to all postings showing them as a person. Companies should therefore also obtain the appropriate rights of use and exploitation from the Corporate Influencers. This consent usually relates to the planned purpose of use.

## **What needs to be considered when placing links in social media posts?**

- The following applies if external content, such as articles from newspapers or blogs, is linked in a blog: If such external content is protected by copyright, it may not be adopted in its entirety. Embedding, i.e., the integration of content such as links, however, is usually permitted.

# #Privacy

## Who is responsible for Corporate Influencer accounts under data protection law?

- This issue has not yet been conclusively resolved. Depending on who is responsible for collecting the data of visitors to the social media account, either the Corporate Influencer or the company may be responsible. Companies should therefore clarify liability risks and responsibilities prior to working with Corporate Influencers.

## Do Corporate Influencers need a Privacy Policy?

- It makes sense for Corporate Influencers to have a Privacy Policy because their legal responsibility has not been conclusively resolved, cf. above. Corporate Influencers may either include their own Privacy Policy or link to that of their company.

Privacy Policy templates for Corporate Influencers are helpful, also to minimize the risks for companies. Links to the corporate Privacy Policy should indicate that it also applies to Corporate Influencers (including the reference to the platforms used).

## Which obligations under data protection law apply to Corporate Influencers, and which ones to the company?

- If Corporate Influencers are responsible for data collection and processing, all obligations under data protection law (including the rights of data subjects) apply. This will, however, largely depend on the specific form of the cooperation. Therefore, the relationship between company and Corporate Influencers must ensure clear rules of rights and obligations.

## What is the role of platform operators (Facebook, Instagram, LinkedIn, etc.)?

- Corporate Influencers are not subject to any special rules, so that they themselves and companies alike should constantly monitor whether a specific platform attracts negative attention, such as on grounds of data protection violations, and then consider whether to continue to use that platform.

## Does the company's data protection officer need to be involved?

- Due to the corporate nature of working with Corporate Influencers, it makes sense to involve the company's data protection officer at an early stage and to consider Corporate Influencers in the company's data protection concept.



# #Sweepstakes

## What are the legal requirements for sweepstakes?

- Sweepstakes are subject to the transparency requirement under unfair competition law. They must be clearly recognizable as such and require terms and conditions (cf. below). There should also be a reference to the promotional nature of the sweepstakes. Since personal data of participants is always processed in sweepstakes, a Privacy Policy must also be provided. If copyright-protected works are submitted for the sweepstakes (such as photos or Instagram Reels), companies should obtain the appropriate rights of use. Specific requirements also arise from the terms of use of the respective platform. If Corporate Influencers violate these terms of use, the platform operator may stop the sweepstakes and, in the worst case, exercise its virtual domiciliary rights.

## What do the Terms and Conditions need to cover?

- The terms and conditions for the sweepstakes must be clear, understandable, and unambiguous. At a minimum, the following information should be included:
- organizer's name
  - potential prize
  - eligibility and participation requirements
  - sweepstakes implementation
  - determination of prizes, notification, and handling
  - possible additional costs

The terms and conditions must be easily accessible, for example by way of a clearly visible link in connection with the sweepstakes (e.g., in the post or in the profile bio).

## Which child and youth protection requirements apply?

- Generally, free online sweepstakes may also be offered to minors; there is no minimum age of 14. The interests of the protection of minors must, however, be safeguarded. In particular, the sweepstakes may not be detrimental to development. This is not expected in the case of free sweepstakes, unless there are special circumstances. Minors under the age of 14 are not allowed to participate in paid sweepstakes. As a purely precautionary measure, it is therefore advisable to generally limit the participation of minors to a minimum age of 14.



## #EmploymentLaw

### **Is the company allowed to monitor its employees' private profiles for Corporate Influencer activities?**

- No, purely private accounts of employees may generally not be monitored or controlled without grounds. For accounts that are also explicitly used for business purposes by officially appointed or recognized Corporate Influencers, however, a contractually guaranteed right of control may specifically be granted. In cases of concrete suspicion of problematic behavior, monitoring may be permissible in individual cases within very narrow limits.

### **May companies prohibit employees from acting as (unofficial) Corporate Influencers?**

- Yes, this may even be required unless a CIP or monitoring capabilities exist in a company.

### **To what extent are companies allowed to dictate the content and opinions of postings or on specific social media channels?**

- Here, again, a distinction has to be made between purely private and company-related use of social media accounts.

For the company-related use of social media accounts, specific content or general social media guidelines may be issued as mandatory employers' instructions. New employees may also be subject to appropriate provisions in employment contracts. It is also possible to specify company-wide guidelines in works agreements.

With respect to employees' private activities, specifications may only be made in exceptional cases. Companies may intervene, for example, if a certain behavior is detrimental to the company's reputation or if duties of loyalty are violated. It is advisable to define in cooperation agreements with Corporate Influencers in advance or in social media guidelines what kind of company-related social media behavior is allowed.

## **Is the company allowed to specify the times when Corporate Influencers are active on social media (during or outside working hours)?**

- When Corporate Influencers work for the company, their activities will usually be considered working time. The usual provisions of employment contracts, internal company rules such as a company agreement, and the German Working Hours Act has to be considered for all working hours. The provisions on maximum working hours and rest periods need to be observed. The company will generally be allowed to specify the working hours. Timing of the activities as a Corporate Influencer and its scope should therefore ideally be agreed upon in advance.

## **Does the works council have to be involved?**

- The drafting of company-wide social media guidelines will regularly involve provisions on employee conduct in which the works council needs to be involved. In cases where Corporate Influencers' activities are to be monitored by technical means, the works council normally has to be involved.

## **Does the activity as a Corporate Influencer have to be remunerated separately?**

- If Corporate Influencers act on the employer's instructions during working hours, this activity must be remunerated. The amount is set by the amount agreed on in the employment contract. Under certain circumstances, Corporate Influencer activities may be subject to higher pay, for example, if resulting from internal company rules or where comparable employees receive higher remuneration as Corporate Influencers. In cases where the Corporate Influencer activity occurs outside working hours, the payment will be governed by the fact whether the employer has ordered or tolerated the activity as overtime. It is advisable to draw up written agreements on Corporate Influencer payment.

## **What are the options under employment law when Corporate Influencers post negatively about the company?**

- Depending on the breach of conduct in the individual case, companies may generally resort to all measures available under employment law, ranging from warning notices to extraordinary termination without notice (in absolutely exceptional cases). It will be required, however, that the conduct of the Corporate Influencer or employee violates contractual obligations. In general, warning notices will likely be permissible in cases of first-time violations.

# #Taxes

## **Corporate Influencers are receiving free products for testing and showcasing – is this tax-relevant?**

- Providing free products is not considered a gift under tax law, as these products are not provided free of charge. Rather, the advertising activity is a service in return. Items given in expectation of a consideration are therefore a “gift in kind” for tax purposes and taxable as such. Exceptions only apply to gifts in kind whose acquisition cost does not exceed 10 euros.

## **What are tax pitfalls that need to be considered when working with Corporate Influencers?**

- Total income (profit) that exceeds the annual tax-free amount of EUR 9,744.00 (for 2021) will be subject to income tax. There is, however, one exception: If the influencer activity is carried out as a secondary line of work and the main income is gained from regular employment, an exemption limit of EUR 410.00 per year will apply. Provided that the income does not exceed this amount, the income from the influencer activity will be tax-free. The flat-rate taxation by the company is another exception.

## **Will the activity of Corporate Influencers also incur trade tax?**

- Only commercial income is subject to trade tax. In cases of predominantly writing, teaching, or artistic work (as is the case with blogs, for example), this constitutes income from freelance work. If income is, however, generated by advertising products such as in the majority of cases on Instagram, etc., this will be a commercial activity in the vast majority of cases. This income is not only subject to income tax, but also to trade tax once an exemption amount of EUR 24,500,00 is exceeded.

## **What needs to be considered with respect to value-added tax?**

- In general, value-added tax is levied on companies' sales. Corporate Influencers are entrepreneurs in cases where they perform an activity independently and with the intention of repeating it to generate income. Upon application, an exemption from value-added tax collection as a small entrepreneur is possible.

## **Does the activity as a Corporate Influencer have to be registered commercially?**

- Yes, it will have to be registered commercially provided that the activity is classified as a commercial activity.



# #PoliceFluencers

## Are there any special considerations for civil servants or employees in the public sector?

- Civil servants may only engage in secondary activities as Corporate Influencers to a limited extent, which is largely stipulated by law. Some of those secondary activities require the employer's consent. Since work as a Corporate Influencer for a company is usually remunerated, it is generally an activity that must be approved in advance by the civil servant's supervisor. Consent may be refused, for example if the remuneration is too high in relation to the annual base salary or the secondary activity jeopardizes the impartiality of civil servants. Some agencies have now drawn up a social media policy that defines a Code of Conduct for civil servants' social media activities. Depending on the agency, those attitudes may be relaxed or rather restrictive.



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