

Whitepaper



SKW
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Corporate Influencer What companies need to know now

Corporate Influencer

Everything companies need to know now

More and more companies are relying on their own employees when it comes to promoting their organization on social networks: employees report on company activities in a LinkedIn post, share posts about their employer on TikTok or present the latest products in a reel on Instagram. This turns employees into corporate influencers. This is good for the company's image and for the loyalty of its own employees to the company.

However, these activities are not always subject to clear, internal company guidelines. It is not uncommon for corporate influencer activities to develop unnoticed and unplanned. Companies are then faced with the question of how to deal with this new phenomenon. The SKW Schwarz white paper "Corporate Influencer" answers the most important questions for employers and companies relating to this exciting topic, from labelling obligations and liability rules, social media guidelines and data protection through to tax, copyright and employment law issues.

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What is a corporate influencer anyway?

- Corporate influencers are employees of a company who post on social media about their work and their company. The employees become brand ambassadors for their employer and ensure greater visibility among potential applicants as well as existing and future customers. By establishing personal, trusting proximity, corporate influencers can convey messages more credibly and interested parties can be retained by the company in the long term.

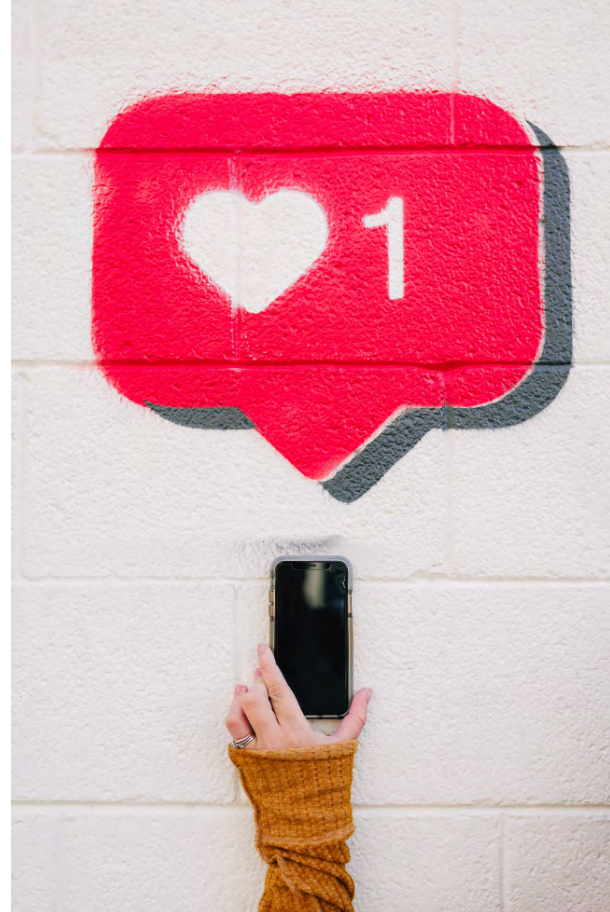
How do employees become corporate influencers?

- The company often specifically selects suitable employees as corporate influencers. In most cases, the use of corporate influencers by companies is part of an established corporate influencer program (CIP). However, it also happens that individual employees present themselves on social media without the help or even knowledge of their employer and gain a large number of followers for themselves. This phenomenon is known as organic corporate influencers.

Private posting or already a corporate influencer - where is the boundary?

- If employees post articles on social media as part of a CIP, this will generally be classified as behaviour for the benefit of their own employer because it is at least indirectly related to the promotion of sales. This is because the posts of corporate influencers interfere with the competition for the benefit of their employer. Their actions primarily aim to create an advantage for the company they work for (e.g. to make it appear in a better light or to market its products and services).

It is necessary to distinguish between posts that represent purely personal professional activities from posts about a personal promotion or a summer party among colleagues. The latter are classified as of a private nature under competition law.



Can employees get out of the responsibility by saying „On the move here privately" / "This is my private account" to evade responsibility?

- No. This notice cannot eliminate the existence of a commercial purpose and is therefore not useful.

Are corporate influencers allowed to be commercially active on all social media platforms?

- Corporate influencers can be found on many platforms, such as Instagram, Facebook or LinkedIn. However, some platforms currently still exclude direct business activity from companies (e.g. Clubhouse). However, indirect action by corporate influencers remains possible and is even explicitly encouraged by Clubhouse, for example.





Do companies have to conclude a cooperation agreement with corporate influencers?

- If the employment contract does not contain any specific provisions on working as a corporate influencer companies should conclude a written supplementary or cooperation agreement with the corporate influencer. In particular, the parties shall specify the objectives and scope of the activity in terms of content and time as well as possible additional remuneration. The agreement should also include the extent to which the company shall be authorized to use or continue to use (in case of a termination of the work contract) the content created by the corporate influencer will continue to be the activity of the corporate influencer is authorized to use the published contributions (so-called granting of rights of use).

Is the company allowed to check the private profiles of its employees for corporate influencer activities?

- No, monitoring purely private accounts of employees without cause is generally not permitted. However, a contractually guaranteed right of control is conceivable, especially for accounts that are explicitly used for business by officially recognized corporate influencers and explicitly used for business purposes only. If there is a concrete suspicion of problematic behavior, monitoring may be permissible in individual cases within very narrow limits.

Can companies prohibit employees from working as (unofficial) corporate influencers?

- Yes, this may even be necessary if a company has no CIP or no means of control.

To what extent can companies dictate the content and opinions of posts or certain social media channels?

- Here too, a distinction must be made between purely private and company-related use of a social media account.

For the company-related use of a social media account, specific content or general social media guidelines can be specified by way of the right to issue instructions. For new employees, corresponding regulations in employment contracts are also conceivable. It is also possible to specify company-wide guidelines by means of a works agreement.

With regard to employees' private activities, guidelines can only be issued in exceptional cases. Companies can intervene, for example, if the behavior is damaging to the company's reputation or if duties of loyalty are violated. It is therefore advisable to define in advance in cooperation agreements with corporate influencers and in social media guidelines for all employees which company-related social media behavior is permitted.

Can the company specify when corporate influencers are active (during or outside working hours)?

- If corporate influencers work for the company, this regularly constitutes working time. For the distribution of working time, the usual employment contract regulations, any internal company rules such as internal company policies or works agreements as well as the Working Hours Act must be taken into account. In particular, the regulations on maximum working hours and rest periods must be observed. In principle, the company can specify the time window of working hours. The timing and scope of the activity as a corporate influencer should therefore ideally be regulated in advance.

Does the works council have to be involved?

- The establishment of company-wide social media guidelines regularly usually involves regulations on employee behavior in which the works council must be involved. Even if the activities of corporate influencers are to be technically monitored, the works council must regularly be involved.

Does the activity as a corporate influencer have to be remunerated additionally?

- If the activity as a corporate influencer is carried out on the instructions of the employer during working hours, this activity must be remunerated normally. The amount of remuneration is generally based on the remuneration agreed in the employment contract. A higher remuneration for work as a corporate influencer may arise under certain circumstances, for example, if this results from internal company regulations or if comparable employees receive higher remuneration as corporate influencers. If the activity as a corporate influencer takes place outside of working hours, the decisive factor for any remuneration is whether the employer has ordered or tolerated the activity as overtime. It is advisable to regulate the remuneration for work as a corporate influencer.

What options are available under employment law if corporate influencers post negatively about the company?

- Depending on the breach of conduct in the individual case, companies can generally resort to all known labor law measures, from a warning to extraordinary termination without notice (in absolutely exceptional cases). However, the prerequisite is that the behaviour of the corporate influencer or employee violates contractual obligations. As a rule, a warning is advisable for a first-time violation.

#SocialMediaGuidelines

How can companies sensitize their employees to these issues?

→ Companies should definitely establish internal, company-specific social media guidelines, especially as part of a CIP. In this way, they train the responsible usage of social media and at the same time raise their employees' awareness for potential liability risks. If companies merely wish to specify existing contractual obligations, the guidelines can be issued unilaterally as a supplement to the employment contract. However, if the scope of employees' duties is to be expanded in terms of content, the guidelines must be concluded as a supplementary agreement to be signed by both parties.

Offering regular legal training is also extremely useful, for example on topics such as labelling obligations or the use of images and text in posts. Companies can also contractually insist on the participation of their corporate influencers in these training courses.

What must be regulated in the social media guidelines?

→ The content of the social media guidelines depends on the individual circumstances of the respective company. However, some standards should be included in any case:

- Education about the general potential dangers of social media
- Liability risks (the Internet is not a legal vacuum)
- Labelling and other legal obligations
- Confidentiality obligations
- Netiquette
- Best practice examples
- Regulations on postings during/outside working hours

In view of the potential liability risks associated with the use of social media by employees it is advisable to make independent advertising posts dependent on explicit permission. If the company has a works council, its co-determination rights must also be observed. The guidelines can also be integrated with the help of a works agreement and then apply directly to all employees.



#Labelling obligations

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

- Yes, it must always be clearly recognizable if the corporate influencer's posts have a commercial purpose.

Are there specific thresholds for when posts have to be labelled?

- Generally speaking, no – a labelling obligation can also exist if one only has a handful of followers. There are no fixed thresholds for when a post must be labelled. When it comes to the obligation to label a post, i.e. its classification as a business the following criteria therefore play a role:

- Frequency of company-related posts in relation to the number of personal posts on the profile/account
- Number of contacts in the social network
- Public visibility of the social media account

Which posts must be labeled?

- As a rule, it can be assumed that corporate influencers must be labeled, as they receive either their salary, a reduction in working hours or possibly even additional remuneration or bonuses such as free products or travel. This constitutes a consideration that establishes a commercial purpose. All contributions that serve an interest and contain an intention by the corporate influencer to promote a third party towards their employer must therefore be labelled. This also applies to content that is not strictly product-related. However, posts that are purely professional activities (e.g. posts about a personal promotion or a summer party with colleagues) are excluded.

How must contributions be labelled?

- To date, there is no case law on the specific labelling by corporate influencers. As a result, very different forms are currently developing in practice.

Labelling with terms such as "advertising" or "advertisement" as with normal influencers seems less appropriate. It would be more appropriate to label corporate influencers with clear explanations and references, e.g. "my employer" or similar in the post description. The following is important:

- The affiliation to the company must be evident from each social media post itself, a mere reference in the profile description is not sufficient
- The reference should not be hidden at the end of the post, e.g. in a so-called "hashtag cloud"
- The use of references in English such as "sponsored by" or "powered by" is not sufficient

However, if you want to be absolutely sure, you should follow the case law on external influencers and also use the terms "advertising" or "advertisement" prominently in the post. This also applies in particular to tap tags, i.e. links to the employer's product pages.

What should I bear in mind when retweeting or sharing my employer's posts?

- Sharing or retweeting posts by the employer is a business act by the corporate influencer for the benefit of the employer. These posts are therefore also subject to the labelling obligation.

Do the labelling requirements also apply to professional networks such as LinkedIn or XING?

- Basically: Yes. This is because the commercial purpose does not necessarily result from the professional nature of the social media platform, but must be made explicitly clear. The special feature of professional networks, however, is that the company affiliation is often already apparent from the labeling under the profile name of the post creator (e.g. on LinkedIn). This means that the company affiliation is automatically visible with every post and a separate reference may not be necessary. The extent to which this assessment will be shared by the courts cannot be determined at the present time.

Does it make a difference whether corporate influencers use their private account or the corporate account?

- Yes, if something is posted via the employer's corporate account, there is no need to mention that this is advertising, as this is easily recognizable. The fact that a company advertises its own products or services on its own accounts is clear to everyone. However, the situation is different when corporate influencers are used and post company posts on their private social media profiles. Then the most important basic rule is transparency. Business postings must therefore be clearly labelled as such.



#Imprint

Do corporate influencers need a legal notice?

- Corporate influencer accounts require an imprint because they are used for business purposes and therefore the imprint obligation from Section 5 Digitale Dienste Gesetz (DDG) applies.

What content must be included in the legal notice?

How must the legal notice be integrated?

- The general imprint requirements apply. The legal notice must therefore primarily contain the contact details of the person responsible. In addition, it must be accessible at any time via two clicks in the profile at any time. This may be difficult with social media platforms because profiles do not provide all the necessary fields and the display on mobile or stationary devices may differ. The "best practice" here is the integration of so-called talking links. This link can also lead to the imprint of the company. However, this should then also contain the information that the company imprint also applies to corporate influencers.

Do corporate influencers have to provide their home address?

- No, Corporate Influencers only need to provide an addressable address. Thus, it can also be the company address of the corporate influencer. If the company address is specified, however, the company must ensure accessibility by appropriate processes. Both options have advantages and disadvantages in terms of responsibility and liability. Companies should therefore bear this in mind and, at best, include it in the CIP.

#Liability

Which liability risks are conceivable?

- Companies need to be aware that when using corporate influencers, a variety of different legal violations are possible. Particularly relevant are infringements of competition law, e.g. misleading statements (particular care should be taken in the case of cosmetics, food, medical devices and environmental advertising), exclusive advertising, exploitation of reputation or the belittling of competitors, e.g. in the context of “deinfluencing”. A violation of the above-mentioned labelling obligations also constitutes unfair behaviour and may be subject to a warning. In addition, postings can interfere with copyrights, third party trademarks or infringe personal rights of third parties.



Corporate influencers or companies – who is liable for legal violations?

- In principle, both the corporate influencer and the company are liable for violations of the law. Depending on the area of law, the business owner may also be personally liable. Corporate Influencers are legally regarded as “agents” of the company. A formal employment relationship is not important. Furthermore, liability does not normally presuppose any fault on the part of the company. In some areas of law, however, there is a so-called possibility of exculpation for the company if the corporate influencer has been carefully selected, instructed and monitored by the company. However, this does not apply to the competition law infringements that are most relevant for corporate influencers! Criminal liability, on the other hand, falls solely on the corporate influencer.

What are the possible consequences?

- Claims for cessation and deletion are usually asserted with a formal written warning. This usually requires the submission of a cease and desist declaration with a penalty clause and the reimbursement of the warning costs. The failure to cease and desist may result in injunctive relief proceedings or a lawsuit. Whether claims for damages are also subject of the claim depends on the respective jurisdiction.

#Copyright

What is to be considered when posting from a copyright point of view?

- Companies should ensure that the corporate influencers posts do not commit any copyright infringements. It is important to establish appropriate control mechanisms in advance to avoid such incidents, for example in the CIP or in the guidelines.

Caution is also required when using artificial intelligence, such as ChatGPT or Dall-E, to generate texts and images. Much is still unclear here from a copyright perspective. The usage (or ban on the use) of such tools can also be regulated in a CIP.

Who owns the rights to the works recorded by corporate influencers?

- In principle, the rights to images, videos or texts initially lie with the author, i.e. in case of doubt with the corporate influencer themselves if they produce the content themselves. However, to avoid any discrepancies, companies should obtain the rights of use and exploitation of posts and images from the corporate influencer in writing.

What about personal rights when publishing images?

- Corporate influencers and other persons depicted are generally entitled to the so-called right to their own image, i.e. to all postings that show them as a person. Companies should therefore also obtain the corresponding rights of use and exploitation from the corporate influencers or ensure that these have been obtained. The respective consent usually relates to the intended use of a posting.

What should be considered when placing links in social media posts?

- If third-party content, such as articles from newspapers or blogs, is linked in a blog, the following applies: If the third-party content is protected by copyright, it may not generally be adopted in full. However, embedding, i.e. the integration of content such as links, is usually permitted.

#Data protection

Who is responsible for the accounts of corporate influencers under data protection law?

- The answer to this question depends on the specific structure of the collaboration between the corporate influencer and the company. If the company makes very strong content-related specifications regarding the target group of the postings and the specific platforms, the company can be classified as responsible under data protection law. In this constellation, the corporate influencer would be acting purely as a processor for the company (Article 28 GDPR). However, if the corporate influencer has already achieved a relevant reach through his/her social media accounts before becoming a corporate influencer, for example, and if he/she and the company also jointly define the specific target group, joint responsibility under data protection law can be assumed (Article 26 GDPR). The corresponding contracts (data processing agreement or joint controllership agreement) must be concluded. According to the current contract design of the platform operators, there is often also joint responsibility under data protection law between the operator of the respective social media platform (e.g. Meta) and the data controller (company and/or corporate influencer). The corresponding data protection structure should be carefully checked before the corporate influencer starts working. The determination responsibility under data protection law has a very significant impact on the following topics (data protection declaration, DPO involvement etc.) and on liability.

Do corporate influencers have to include a privacy policy on their profiles?

- Yes, a privacy policy must always be included. However, the question arises as to whether corporate influencers must draft their own privacy policy or whether they may include a link to the company's privacy policy. Again, this depends on the definition of data protection responsibilities. The privacy policy of the data controller must always be included. In cases where the corporate influencer acts as a processor for the company, this is the company's privacy policy. Even if there is joint responsibility between the corporate influencer and the company, it can be contractually stipulated that the corporate influencer always incorporates the company's privacy policy in order to fulfill the information obligations under Article 13 and 14 GDPR. Of course, it is always important that the linked privacy policy contains a corresponding section on social media.



Which data protection obligations apply to corporate influencers and which to the company?

- If the corporate influencer acts as a controller or joint controller, all requirements of the GDPR must be complied with. If the corporate influencer only acts as a processor, this obligation applies solely to the company.

What role do the platform operators (Meta, Instagram, LinkedIn, etc.) play?

- There is often a joint data protection responsibility with the platform operators with regard to postings made by the corporate influencers on the respective platform. It is important that the respective contracts and data protection information of the platform operators are checked accordingly. It is also important to regularly review the respective contract amendments, as the platform operators amend them very frequently.

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

- The correct legal classification of corporate influencers is somewhat tricky and it must be carefully checked, which contracts need to be concluded for a legally compliant activity of them. With this in mind, the company's data protection officer must be involved at an early stage. The corporate influencer themselves will often lack the relevant legal expertise. In addition, there is always the special nature of the employment relationship and corresponding duties of care of the company towards its employees.

#Prize games

What are the legal requirements for competitions?

- The transparency requirement under fair trading law applies to prize games. The prize game must be clearly recognizable as such and requires certain conditions of participation (see below). There should also be a reference to the promotional nature of the prize game. As personal data of participants is always processed when the prize game is conducted, data protection notices must also be drawn up. If copyrighted works are submitted for the prize game (e.g. photos or reels on Instagram), companies should be granted sufficient rights of use by the participants. Finally, specific requirements arise from the terms of use of the respective platform. If the corporate influencer violates these, the platform operator can stop the prize game and, in the worst case, make use of its virtual domiciliary rights.

How are the conditions of participation to be drafted?

- The conditions of participation must be clear, understandable and unambiguous. At least the following information should be included:

- Name of the organizer
- Possible prize
- Eligibility and entry requirements
- Game design and entry procedure
- Determination, notification and processing of winnings
- Possible additional costs

It is important that the conditions of participation are easily accessible. To this end, it is sufficient if they are clearly visible in connection with the prize game by means of a link (e.g. in the post or in the bio of the profile of the corporate influencer).

What child and youth protection requirements apply?

- In principle, free online prize games may also be offered to minors; there is no age restriction from 14 years of age. However, the prerequisite is that the interests of the protection of minors are safeguarded. In particular, the prize game must not harm the child development. However, this cannot generally be assumed for free prize games, unless there are special circumstances. However, in the case of paid prize games (incl. a participation fee), minors under the age of 14 may not participate. As a precautionary measure, it is therefore advisable to generally limit the participation of minors to a minimum age of 14 years.

#Taxes

Corporate influencers receive free products to test and introduce – is this tax relevant?

- The provision of free products or the invitation to travel is not considered a “gift” for tax purposes as they were not provided free of charge. The advertising activity of the corporate influencer is rather a compensation for the “free” product. The supply of goods in anticipation of a compensation is therefore a so-called ‘gift in kind’ for tax purposes and is to be taxed as such. An exception applies only to gifts in kind, if the purchase cost of such do not exceed 10 Euros.

What are the tax pitfalls of corporate influencers?

- If the total income (profits) from all types of income exceeds the annual exemption of EUR 10,908.00 (exemption 2023), these are subject to income tax. There is one exception: if the influencer activity is part-time and the main activity earns income from an employment relationship, an exemption limit of EUR 410.00 per year applies. If the income does not exceed this amount, the income from influencing activities is tax-free. Another exception is flat-rate taxation by the company.

Does the activity of corporate influencers also incur trade tax?

- Only business income is subject to business tax. If the writing, teaching or artistic aspect predominates (as may be the case with blogs), there is income from freelance activities. However, if – as in the majority of cases on Instagram and Co. – income is generated by the promotion of products, in the vast majority of cases there is a commercial activity, i.e. the income is not only subject to income tax, but also to business tax if an exemption amount of EUR 24,500.00 is exceeded. Business tax applies to activities, which are self-employed, repeated and profit making. For this purpose, the intention to generate revenue which exceeds expenditure is sufficient (revenue minus expenditure = profit = business income).

What is to be done?

- Corporate influencer should keep records of revenue and expenditure. Upon commencement of the activity, the questionnaire for commencement of a commercial activity (or self-employed in the case of the blogs described above) must be submitted to the tax office. Tax returns shall be submitted electronically. The paper form is no longer accepted.

What should be considered with regard to VAT?

- The turnover tax is basically taxed on the turnover of companies. Corporate influencers are entrepreneurs if they carry out an activity independently and with the intention of recurring, in order to generate income. As a small entrepreneur (provided that the turnover plus the applicable tax did not exceed EUR 22,000 in the previous calendar year and is not expected to exceed EUR 50,000 in the current calendar year) it is possible to apply for an exemption from the VAT collection.

Does the activity as a corporate influencer have to be registered commercially?

- Yes, if the activity is to be classified as a commercial activity, a registration must be made with the competent trade office.

#Policefluencers

Are there any special requirements for civil servants or employees in the public service?

- Civil servants may only engage in secondary employment as influencers to a limited extent, which is largely prescribed by law. A distinction is made between secondary employment requiring approval and secondary employment not requiring approval. As working as an (corporate) influencer for a company is usually remunerated, generally this activity must be approved in advance by the superior. Under certain circumstances, the superior may refuse the approval, for example if the remuneration is too high in relation to the final annual basic salary or if the impartiality and impartiality of civil servants could be jeopardized by the secondary employment. Regardless of this, civil servants can of course also work as corporate influencers for their own authority. Some authorities have now drawn up a social media policy that defines a code of conduct for social media activities for civil servants. It depends on the authority whether it has an open or cautious attitude towards corporate influencers.



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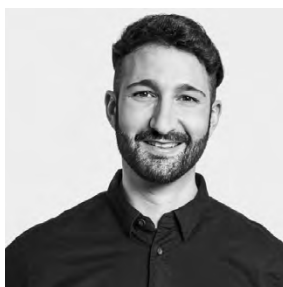
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