



Employment Notes

FTC GUIDES MAY IMPOSE EMPLOYER LIABILITY FOR EMPLOYEE COMMENTS POSTED ON SOCIAL MEDIA SITES

The U.S. Federal Trade Commission (“FTC”) has adopted revised Guides Concerning the Use of Endorsements and Testimonials in Advertising (the “Guides”). The Guides, which became effective as of December 1, 2009, seek to protect consumers against deceptive marketing schemes by, among other things, requiring the disclosure of certain “material connections” between advertisers and endorsers. The Guides indicate that employers may be liable under the FTC Act for their employees’ postings on social media – such as Facebook, LinkedIn, Twitter, and blogs – that comment on the employer’s products or services without properly disclosing the employment relationship, or where such employee postings are otherwise misleading.

Does an Employee Posting Constitute an Endorsement? The FTC has advised that a speaker (e.g., an employee) who disseminates positive statements concerning an advertiser’s (e.g., an employer’s) products or services will be considered to have provided an endorsement under the Guides if he or she is “acting on behalf of the advertiser or its agent.” According to the FTC, the factual circumstances to consider in determining whether a person was acting on behalf of the advertiser include whether the speaker is compensated by the advertiser. Consequently, where an employee receiving wages from an employer posts a comment on social media concerning the employer’s products or services, such a comment will likely be considered an endorsement under the Guides. Consider the following example from the Guides:

An online message board designated for discussions of new music download technology is frequented by MP3 player enthusiasts. They exchange information about new products, utilities, and the functionality of numerous playback devices. Unbeknownst to the message board community, an employee of a leading playback device manufacturer has been posting messages on the discussion board promoting the manufacturer’s product. Knowledge of this poster’s employment likely would affect the weight or credibility of her endorsement. Therefore, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board.

Employer Liability for Employee Endorsements on Social Media. The Guides indicate that employers may be subject to liability under the FTC Act for their employees’ “false or unsubstantiated statements made through endorsements” or for “failing to disclose material

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connections between themselves and their endorsers.” In addition, employers may be liable for such unsubstantiated or deceptive statements posted by independent contractors or other service providers of the employer. While the FTC has advised that whether a particular endorsement is deceptive will depend on the specific factual circumstances of the advertisement at issue, the text of and examples in the Guides indicate that employers may incur liability as a result of their employees’ postings on social media which are misleading or discuss the employers’ services but fail to disclose the employment relationship – even where the employer had no knowledge of the employee’s postings or blogging. Pursuant to the Guides employees themselves may also face liability stemming from misleading statements related to the employer’s services or inadequate disclosure of material connections.

Employers Must Protect Themselves by Enacting a Social Media Policy. In addition to providing employees with sufficient training and guidance, employers must consider enacting and evenly enforcing a clearly written social media policy in order to protect themselves from liability stemming from their employees’ improper online postings. Although the FTC has rejected blanket immunity for employers that have adopted social media policies, it has advised that “the establishment of appropriate procedures would warrant consideration in [the FTC’s] decision as to whether law enforcement action would be an appropriate use of agency resources” The FTC specifically noted that it has brought disciplinary action against companies that failed to establish or maintain appropriate internal procedures, resulting in consumer injury. Accordingly, employers may not rely on a rogue employee defense to avoid liability under the Guides, especially where the employer failed to implement an appropriate social media policy.

Suggested Social Media Policy Provisions. Considering the FTC’s Guides, an employer’s social media policy should clearly define the limitations upon employees’ work-related use of social media channels. Any such policy should require employees to identify their association with the employer whenever an employee is using social media to comment upon the employer’s products or services. And unless an employee’s blogging or online postings are officially sanctioned and reviewed by the employer, the employee should be required to use conspicuous disclaimers that his or her views do not represent the views of the employer. Finally, employees should be reminded of the employer’s right to lawfully and respectfully monitor their social media postings and other online activities for compliance with the employer’s policies, the Guides, and applicable law.

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If you have any questions regarding the Guides, social media policies, or other issues of employment law, please contact any of the following attorneys in our Employment Law Group, or other attorney at the firm with whom you work:

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The assistance of Scott Rader, a law student at New York Law School, in the preparation of this Employment Note is gratefully acknowledged. This Employment Note, which may constitute attorney advertising, is for educational purposes only and should not be construed as legal advice in any jurisdiction.

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