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EMPLOYMENT LAW ALERT

March 2010

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- Comprehensive Litigation Services

For further information, please contact these Employment Law Group members:

Jeffrey M. Schlossberg
Chair
(516) 663-6554
jschlossberg@rmfpc.com

Douglas J. Good
(516) 663-6630
dgood@rmfpc.com

Joseph R. Harbeson
(516) 663-6545
jharbeson@rmfpc.com

Kimberly Malerba
(516) 663-6679
kmalerba@rmfpc.com

REMINDER!

RMF "Best Practices" Roundtable Seminar

"Social Media: Reaping The Benefits While Protecting Your Business And Its Reputation"

Wednesday, March 24, 2010
8:00 a.m. to 10:00 a.m.
at the offices of Ruskin Moscou Faltischek, P.C.
HRCI/CPE/CLE

New FTC Endorsement Rules Impact Employers and Social Media

By: Jeffrey M. Schlossberg

Last month, the Federal Trade Commission issued regulations concerning Endorsements and Testimonials in Advertising. The regulations set restrictions on how employers may advertise their products through endorsements. An endorsement means any advertising message that includes opinions, beliefs, or experiences of someone other than the advertiser. In particular, companies are subject to liability for "false or unsubstantiated statements made through endorsements or for failing to disclose material connections between themselves and their endorsers."

What does this mean to employers? An employee's comment about your product on Twitter, Facebook, or a blog may constitute an endorsement. Therefore, the employee must disclose his or her connection with your company or the company could be liable for violating FTC regulations.

How does an employer respond? Along with all the other reasons for developing a social media policy (see December 2009 Alert),

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employers must develop a policy to address the way employees refer to their employers in social media. A social media policy should include express statements that employees may not speak about the company or its products without a clear disclaimer.

There are many unanswered questions under the new regulations - is a tweet and its limited space enough to constitute a material connection to the employer? The answer to this and other questions will evolve over time. However, employers certainly can stay ahead of the curve by implementing an effective social media policy and providing appropriate training to its workforce.

Federal Appellate Court Cuts Back Employer's Affirmative Defense

The Second Circuit Court of Appeals, with jurisdiction over New York, significantly curtailed an employer's ability to defend against hostile work environment claims. Over a decade ago, the U.S. Supreme Court provided employers with an affirmative defense to hostile work environment claims where no tangible employment action was taken. Specifically, an employer who published its workplace harassment policy including a detailed complaint procedure was insulated from liability if the employer exercised reasonable care to prevent and correct promptly any harassing behavior and the employee unreasonably failed to complain. As such, many employers published complaint procedures outlining to whom an aggrieved employee could complain so the company could have the opportunity to address the problem and promptly correct it.

In the Second Circuit case, the complaint procedure stated that an employee could complain to "his or her immediate supervisor, the human resources department, or any member of management." The plaintiff complained, but only to her immediate supervisor who also happened to be the alleged harasser. The employer argued that it should be entitled to the affirmative defense, and, thus, the case should be dismissed, because the plaintiff unreasonably failed to complain to others identified in the policy. However, the court concluded otherwise stating that it was reasonable for someone in the plaintiff's position to believe she complained to management by complaining to her supervisor. Thus, the court reasoned, she satisfied her obligation under the policy. Accordingly, the employer was not permitted to rely on the affirmative defense and will now be required to go to trial.

The message to employers is clear: it is not sufficient merely to have a policy reciting the various avenues of complaint. Employers must ensure that supervisors are trained to be responsible for forwarding complaints to the proper channels, even if the complaint involves that supervisor. If not, the employer will be deemed to have been given notice by virtue of the supervisor's knowledge without having had the opportunity to correct promptly the underlying harassing behavior.

If we can be of assistance on these or any employment law issues, please do not hesitate to contact us.

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East Tower, 15th Floor
1425 RXR Plaza, Uniondale, NY 11556-1425
516.663.6600
www.rmfpc.com

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