

CAN EMPLOYERS BE LIABLE FOR THE EMPLOYEE TWEETS OR BLOGS?

Mark A. Fahleson, Esq.
Rembolt Ludtke LLP

On January 26, 2010, Ann Taylor's LOFT division ("LOFT") offered an "exclusive blogger preview" to bloggers attending the clothing retailer's preview party featuring the company's summer 2010 product line. In its invitation, LOFT promised bloggers a "special gift" if they attended the event, and promised them further compensation if they covered the event on their blogs within 24 hours of the party. The invitation drew numerous bloggers to the event, including many whom enthusiastically blogged about the preview party and the products featured. Some of the bloggers disclosed that they had received gifts from LOFT in exchange for their promotion of the event. But, others did not. The silence of the bloggers was enough to cause the Federal Trade Commission ("FTC") to launch an investigation. The target of the FTC's investigation was not the bloggers, however. The target was LOFT.

The FTC's investigation of LOFT in 2010 marked the agency's first investigation under the recently issued *"Guides Concerning the Use of Endorsements and Testimonials in Advertising"* (the "Guidelines"). 16 C.F.R. Part 255. The Guidelines discuss the application of Section 5 of the FTC Act, which forbids unfair or deceptive acts or practices and unfair competition in or affecting commerce, to the use of endorsements and testimonials in advertising. "Endorsements" or "testimonials" subject to the Guidelines are defined as messages "that consumers are likely to believe reflect[] the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser." 16 C.F.R. Part 255.0(b).

Generally, an employer may face liability for the comments of its employees under two circumstances. First, any endorser of a product or service, who has a material connection with the seller of the advertised product or service such that the connection may affect the weight or credibility of his or her endorsement, must fully disclose the connection between the endorser and the seller. The FTC has stated that such a material connection exists between an employee and an employer. Therefore, an employee commenting on the products or services of his or her employer must disclose the employment relationship between the employee and the employer. This duty to disclose even applies if the employee is not saying anything misleading about the employer's products or services. Otherwise, if the employee fails to disclose his or her

Employment/Labor Law Practice Group

David J. A. Barga
dbarga@remboltludtke.com

Mark A. Fahleson
mfahleson@remboltludtke.com

Sarah S. Pillen
spillen@remboltludtke.com

Rembolt | Ludtke LLP
 Attorneys at Law

MAIN OFFICE

1201 Lincoln Mall, Suite 102
Lincoln, NE 68508
Fax: 402 / 475-5087
402 / 475-5100

BRANCH OFFICES

125 South 6th Street
Seward, NE 68434
Fax: 402 / 643-3969
402 / 643-4770

3280 Woodridge Boulevard
Suite 160
Grand Island, NE 68801
308 / 384-6888

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employment relationship, the employer may face an enforcement action by the FTC.

Second, even if an employee discloses his or her employment relationship when endorsing a product or service of that employer online, the employer may still be held liable for false or unsubstantiated statements of the employee. This liability extends beyond comments made on websites maintained by the employee or employer. Indeed, an employer may be held liable for comments that an employee makes about the employer's products or services on other websites such as Facebook, Twitter, MySpace, online bulletin boards, or chat rooms. *See* 16 C.F.R. Part 255.5 (entitled "Disclosure of material connections"). Moreover, even though the LOFT scenario involved LOFT actually promising bloggers a gift for covering a particular event, an employer may be liable for the mere comments of its employees, even if the employer never authorized or asked the employee to say anything.

The Guidelines describe two factors diminishing the chances of the FTC bringing an enforcement action against an employer. First, the FTC states that if an employer articulates appropriate procedures regarding online endorsements by employees, the FTC would consider such a policy in deciding whether to pursue an enforcement action against the employer. For example, in its April 20, 2010, letter to LOFT's counsel, the FTC explained that company's revised social media policy led the FTC to not initiate an enforcement action against LOFT. In fact, in February of 2010, LOFT adopted a written policy maintaining that LOFT will not issue a gift to any blogger without first telling the blogger that he or she must disclose the gift on his or her blog. The decision letter also expressed the FTC's expectation that LOFT will honor its new policy concerning gifts to bloggers and that the company will take reasonable steps to ensure compliance. The LOFT example demonstrates that it is important for an employer's online endorsement policy to be clear and illustrate the employer's desire to comply with the Guidelines. Second, employers may be worried that despite creating an online endorsement policy, an employee may still post comments about the employer's products or services without the employer's knowledge or permission. Nevertheless, the Guidelines note that the FTC is not aware of a single instance of the FTC bringing an enforcement action against a company for the actions of a single "rogue" employee who violated an established company policy that sufficiently covered the conduct in question.

Lesson:

The FTC's new Guidelines pose an increased risk for employers who may now be liable for the comments their employees make online. The Guidelines do not specify the procedures that employers should adopt in formulating an online endorsement policy. However, to minimize potential liability, an employer should contemplate four considerations in designing an online endorsement policy. First, employers should develop an online endorsement policy informing employees of the procedures that employees should follow when commenting online about the products or services of the employer. Depending on the needs

of the employer, the policy should either prohibit such comments altogether, or notify employees that they must always disclose their relationship with their employer when making comments about the employer's products or services. Second, if employees may make comments online about the products or services of their employer, it may be beneficial to require an employee to obtain prior authorization before endorsing a product or service of the employer online. In this regard, employees should clarify that their views do not necessarily represent the views of their employer. Third, employers should prohibit employees from making misleading or false statements. Fourth, to demonstrate the employer's commitment to enforcing its policy, the policy should also list the consequences for an employee failing to follow the policy. Regardless, employers desiring to create an online employee endorsement policy are encouraged to work with experienced employment law counsel before doing so.

Fahleson is partner with the law firm of Rembolt Ludtke LLP and may be reached at (402) 475-5100 or mfahleson@remboltludtke.com. This article is provided for general information purposes only and should not be construed as legal advice. Those requiring legal advice are encouraged to consult with their attorney.

