Advertising and Employment Issues for Your Social Media Presence

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As the growth of social media continues, there remains inherent conflicts between protecting the interests of the company and the rights of individuals using the various social media platforms.

A first area of concern is the social media activities of employees. The law remains relatively unsettled, but there is no shortage of examples of terminations for disapproved social media activities. Terminations have occurred for employees posting negative comments about their employers or activities relating to their employment. Cases in point are a teacher terminated for complaining about her students and a car salesman terminated for complaining about the decor of a company event. Early cases seemed to hinge on employment agreements. It is of vital importance that employees have actual knowledge of the company's social media policy. If termination is required, having a defined policy alleviates many concerns.

The scope of that social media policy is currently unclear. Recent cases have found the NLRB intervening in various matters of employment termination, under the interpretation of social media posts as a public forum and the view that termination is retaliatory in nature. While the issues remain unclear, it is still important to have a defined social media policy that can minimize exposure. It is also important to distinguish between mere "venting" and termination-worthy disclosures.

Disclosures that traditionally have warranted termination should remain verboten in social media forums. For example, prohibition of the disclosure of confidential information should be denoted clearly in a social media policy. Similarly, postings that can have a negative commercial impact may not merit First Amendment protection.

While the issues remain unclear, having a defined social media policy for all employees is a minimum requirement to protect the company.

Another timely issue concerns the use of third parties or employees for social media promotion. For example, companies may hire advertising agencies or consultants to run social media accounts. Questions arise when those relationships terminate. There is existing litigation over Twitter and who owns the "followers." When a company delegates social media advertisement activities to employees, employment law provides that the company retains copyright ownership of those social media activities. But a consultant does not fall within the works made for hire concept under copyright law, so ownership is going to rest first under the consulting agreement, and next under applicable state of Federal law.

Other issues include who owns the social media content, are the fans, followers, etc., deemed a business contact list, and who retains liability for causes of action, such as copyright infringement. Again, many of these issues can be addressed by contract provisions. Consulting agreements for social media advertisements need to contain many additional provisions to account for generation of content, ownership and functional results of the activities on the social media platforms.

While the law remains unsettled in many of these areas, having clearly defined terms and conditions for employees and contractors can minimize adverse results when there are disruptions and negative postings in the social media universe.

Should you have any questions, please contact Timothy J. Bechen at 804.420.6477 or or any other member of the Williams Mullen Intellectual Property Team.

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