TEN LITTLE-KNOWN CONCERNS FOR EMPLOYERS ABOUT SOCIAL MEDIA

Paul D. Godec, Esq.
Kissinger & Fellman, P.C.
3773 Cherry Creek North Drive, Suite 900
Denver, Colorado 80209
303-320-6100
www.kandf.com

Social media such as Facebook, Twitter, MySpace, and LinkedIn have become increasingly ubiquitous in society in general and in the workplace in particular. The ever-expanding use of social media by employees in the workplace presents many new challenges for employers. Unfortunately, most employers do not know that several particular legal concerns even exist.

1. **Misunderstanding**. Employers should not assume that employees will understand that the use of social media involves a non-work activity. For instance, if employers otherwise permit employees to make telephone calls to family members on company time, then employees will perceive communications via social media as an extension of their telephone privileges. If employers want to treat the use of social media as different from ordinary telephone calls, then employers need to communicate this expectation plainly and directly in a written policy.

2. **Employees Have Rights to Engage in Concerted Activity**. The National Labor Relations Board ("NLRB") has promulgated rules that broadly allow all employees – regardless of union representation – to engage in "concerted activity" for their "mutual aid and protection" about their terms and conditions of employment. The NLRB expressly authorizes employees to engage in such concerted activities via social media. The NLRB has also provided extensive, and often surprising, guidance about which provisions of employers' social media policies that will satisfy or violate the National Labor Relations Act ("NLRA").

3. **Anonymous or Pseudonymous Posts**. Employers' social media policies should prohibit anonymous or pseudonymous activities by employees. The Federal Trade Commission ("FTC") requires a company to disclose a "material connection" about anyone who endorses or recommends a company's products or services. An employee's message via social media could recommend an employer's products or services, but fail to disclose the material connection of an employee as the sender. Such a message containing an employee endorsement could subject an employer to an FTC enforcement action.

4. **FTC Guidelines**. The FTC has long-standing guidelines that generally prohibit deceptive advertising practices in connection with endorsements and testimonials. The FTC

considers employees' social media posts and messages on behalf of an employer as advertising. Thus, social media posts and messages by employees could subject employers to the FTC requirements that control advertisements.

5. **Harassment**. Employees will invariably talk to and about each other via social media. Social media policies should cross-reference and reinforce other policies that require civil and respectful behavior between and among co-workers. Otherwise, comments made via a social media while off-duty and away from the employer's premises might still cause conflicts and morale problems between employees while on-duty and at the employer's premises.

6. **Intellectual Property**. Employees must understand that information received from vendors or other contractors often remains subject to confidentiality agreements. If employees post or disseminate the intellectual property of others without permission, an employer could become subject to infringement claims or breach of contract claims.

7. **Private Information**. Employers' social media policies should prohibit employees from disclosing private information about other employees or customers via social media. Most states recognize common law claims for "invasion of privacy." An employer could face lawsuits if an employee posts and publishes embarrassing private facts about another employee or customer via social media. An employer could also face lawsuits if an employee misappropriates the name or likeness of another employee or customer through postings or messages via social media.

8. **Recruiting and Hiring**. Federal and state nondiscrimination statutes, common laws, and local ordinances generally prohibit prospective employers from using certain criteria as the basis for employment decisions. Those legal authorities generally prohibit employers from making employment and hiring decisions based upon an applicant's age, race, gender, national origin, ethnicity, pregnancy, disability, sexual orientation, veteran status, medical condition, or family status. After employers learn such information based on improvident access to prospective employees' social media sites, employers become subject to discrimination allegations that adverse hiring decisions unlawfully relied on information irrelevant to a legitimate hiring criterion.

9. **Genetic Information Nondiscrimination Act (GINA)**. All employers, regardless of the number of employees, must comply with GINA. An employee or prospective employee could post genetic information on a Facebook page or broadcast genetic information via Twitter. For example, an employee could post information or send messages about a high incidence of breast cancer within her family. An employer could imply from those post or messages that the employee has a genetic predisposition to breast cancer which could lead to future claims for leave. Employers must exercise caution to avoid improperly tainting their disciplinary

proceedings or hiring processes with improvidently learned genetic information that could lead to discrimination claims under GINA.

10. **Discipline**. Employers should not discipline or terminate employees for social media postings or messages arguably related to concerted activity about the terms and conditions of employment. On the other hand, employers must intervene and take disciplinary action if an employee's conduct through social media violates established law or subjects the employer to civil liability. Thus, employers must intervene and impose discipline on employees who engage in conduct such as revealing private or proprietary information; violating FTC rules on endorsement of products or advertising; or threatening, intimidating, or harassing coworkers.