

# PUBLICATION

---

## I Never Asked For My Employee's Endorsement! Newly-Revised FTC Guidelines Create New Headaches

January 28, 2010

The Federal Trade Commission (FTC) recently published guidelines regarding endorsements and testimonials in advertising effective on December 1, 2009. These guidelines have left many employers wondering if they will be the subject of an FTC enforcement action for their employees' statements. In "Guides Concerning the Use of Endorsements and Testimonials in Advertising" (16 CFR Part 255), the FTC asserts that employers will be held responsible for "endorsement" statements made by their employees regarding the employer's products and services, even if those statements are made without the employer's permission or knowledge.

The revised guidelines present two potential areas of concern for liability – liability for false and/or unsubstantiated claims made by employee endorsers, and liability for failure to make proper disclosure of an employment relationship as part of an endorsement.

Under the guidelines, an "endorsement" includes any statement that consumers are likely to believe reflects the opinions, beliefs, findings or experiences of a party other than the sponsoring advertiser. Direct payment and direction from the advertiser is not necessary for an endorsement to exist. Accordingly, employees who comment in a public forum regarding a company's products or services may, even without the employee's or the company's knowledge, be offering a covered endorsement. This is particularly problematic considering the popularity of Internet blogs and social media sites that provide an easy forum for such statements to be made.

The revised guidelines state that a company is "subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers." 16 C.F.R. § 255.1(d). Considering the broad definition of "endorsement," an employer could potentially become the subject of an FTC enforcement action based on the false assertions made by an employee about the company's products or services on the employee's Facebook or MySpace page, or on some other Internet forum.

Additionally, the revised guidelines state that "[w]hen there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed." 16 C.F.R. § 255.5. The guidelines provide the following specific example related to employees and this disclosure requirement:

**Example 8:** 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.

According to the FTC, an employment relationship is a "material connection" that gives rise to required disclosure.

What can an employer do to avoid liability for its employees' unsolicited "endorsements"? First, employers who have not already adopted a social media policy that addresses employee statements regarding the company should take the steps to do so. The policy should require employees to disclose their employment relationship when making online comments regarding the employer's products or services or, in the alternative, prohibit such online comments altogether. Employers with existing social media policies should review their policies to ensure that employee endorsements are addressed. Of course, once a policy is in place, it is imperative for employers to train managers and employees regarding the policy, and to equally enforce the policy when there is a known violation.

Baker Donelson stands ready to assist you with these and other employment-related challenges. For assistance, please contact your Baker Donelson attorney or any of our more than 90 attorneys practicing labor and employment law, located in *Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; and Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee.*

Baker Donelson gives you what boutique labor and employment firms can't: a set of attorneys who are not only dedicated to the practice of labor and employment issues, but who can reach into an integrated and experienced team of professionals to assist you in every other aspect of your legal business needs. We set ourselves apart by valuing your entire company. And when it comes to your company's most valuable asset - your employees - we're committed to counseling with and advocating for you every step of the way.