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Class Action Notification and Social Media

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Social media has altered the very fabric of society, including class and collective action litigation. Just this last April, the Southern District of New York approved a proposal to provide class action notification to potential claimants via social media. In *Mark v. Gawker Media LLC*, former interns of the blog site Gawker Media LCC ("Gawker") filed suit against Gawker for allegedly violating the Fair Labor Standards Act ("FLSA"). However, plaintiffs could not ascertain any email or mailing addresses for fifty-five potential claimants. This was attributed to the fact that the potential claimants were college students, members of a population that frequently change their email and physical addresses yearly and upon graduation. As a result, plaintiffs petitioned the court to allow them to notify potential claimants via social media since 27 of the 55 were known to have a Twitter and/or Facebook account and 16 of the 55 were known to have a LinkedIn account.

The approved proposal permits plaintiffs to notify individuals, whom plaintiffs can identify as having a potential claim, through Twitter, Facebook, and LinkedIn. First, plaintiffs were permitted to create a Twitter account using the handle "@Gawkerintern" to follow the potential claimant. If the potential claimant followed them back, plaintiffs could send the claimant a private message containing instructions on how to join the lawsuit. Furthermore, plaintiffs were required to unfollow any interns when the opt-in period closed unless the intern had already opted-in to the action. Second, plaintiffs were permitted to create a Facebook account through which private messages could be sent to potential claimants instructing them on how to join the lawsuit. However, plaintiffs were explicitly prohibited from "friending" the potential claimants since doing so could "create a misleading impression of the individual's relationship with plaintiff's counsel." Finally, plaintiffs were also permitted to create a LinkedIn account through which plaintiffs could send an "In-Mail" message to potential claimants instructing them on how to join the lawsuit.

The court stated that it accepted the proposal because its proposed methods were "tailor[ed] … to reaching known former Gawker interns with a substantially similar message to that contained in … traditional forms of notice." In fact, the court rejected a prior proposal, which advocated for public notification through general tweets, publicly accessible social media groups, and hashtags, asserting public means of notification strayed too far from the purpose of FLSA notice: to advise putative plaintiffs of their rights in a lawsuit. Thus, while the court approved of the use of social media to disseminate notification of a class action to potential claimants, it placed restrictions on this means of service, stating that public notification is explicitly prohibited since such notification is likely to punish the employer with negative publicity rather than fulfill the purpose of FLSA notice.

As social media continues to grow, it is likely that courts will increasingly approve of notification via social media where such means of notice more likely to reach potential class members than other, more traditional, forms. In

fact, a district court in California recently approved of a class action notice proposal which utilized Facebook to create a short Facebook advertisement that directed putative collective action members (also college-aged individuals) to the official case website. However, the court specified that the language and content of the Facebook advertisement would have to adequately protect against any reputational prejudice against the defendant. *Woods v. Vector*, No. C-14-0264 EMC (N.D. Cal. 2015).

It is clear that social media has become more than just a collection of websites. It is a means to contact people and share information, in real time, regardless of a person's physical location. Today, news and information often go "viral." With courts increasingly looking to social media to notify potential class members of collective actions, group size and public awareness of class actions are likely to increase. This in turn, despite the best efforts of a court to avoid it, will inevitably lead to adverse publicity and notoriety for the defendant. To avoid increased group sizes and negative media attention, employers should maintain up-to-date records of their employees' traditional contact information. If employers can demonstrate to the court that private emails and traditional forms of service are likely to be sufficient to notify potential class members of their opt-in rights, the employer may be able to avoid notice through social media.

If you or your institution has any questions or concerns regarding employment or litigation-related issues, please contact James G. Ryan at jryan@cullenanddykman.com or at 516-357-3750.

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