Byers' Market

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When is a Picture Worth a Million Bucks?

A picture is worth a thousand words, as the old saying goes. But using a picture of your company's employees for the company's benefit — without their consent — may cost you a thousand bucks . . . or 10 thousand . . . or 100 thousand . . . or more.

Celebrity snapshots

Arnold Schwarzenegger recently sued an Akron, Ohio, car dealership and its advertising agency for $20 million. The reason? The dealership ran a sale ad in a local newspaper that included a thumbprint-sized picture of the muscular actor without his permission.

Earlier this year, husband-and-wife stars Matthew Broderick and Sarah Jessica Parker filed a $15 million lawsuit against the Sephora USA cosmetics chain for allegedly using their images in an ad campaign without their consent. The suit followed a similar claim filed against Sephora last September by divorced couple Tom Cruise and Nicole Kidman.

Zooming from 'Tinseltown' to your town

What, you ask, do those celebrity lawsuits have to do with Kansas employment law or my company? After all, no Hollywood stars are working in the office or cubicle next to mine (although it would be really cool if there were). Read on, and the picture will come into focus.

Kansas was one of the first states to recognize a common-law claim for invasion of privacy. It's now well-established that employees enjoy a right of privacy in the workplace.

The right of privacy actually consists of several distinct rights. One is the protection from "appropriation." A person or entity that appropriates the name or likeness of another to its own use or benefit is subject to liability to the other for invasion of privacy. The typical case is when a person's name or image is used to advertise another's business or product or advance some similar commercial purpose. Appropriation claims sometimes arise from the employment relationship when an employer uses employees' pictures in advertising or promotional materials without their consent.

The right to privacy isn't limited to celebrities or public figures. It applies to ordinary individuals as well. So regardless of whether your employee is Arnold Schwarzenegger or Arnold Smith, if you use his picture or image for the company's benefit without his permission, you may be liable for appropriating his likeness (although the value of Schwarzenegger's likeness presumably is a lot greater than Smith's).

Employees whose likenesses have been misappropriated may recover damages for the harm to their interest in privacy resulting from the invasion as well as mental distress. Recovery isn't conditioned on the proof of specific damages.

Consent is an absolute defense to an invasion of privacy claim. Consent may be either express or implied and may be shown from a person's conduct and the surrounding circumstances.

Focus on the cases

The Supreme Court of Kansas first recognized a claim for appropriation in 1918. The court found a privacy violation when a "dry-goods store . . . caused moving picture films to be taken of [a customer's] face, form, and garments [without her knowledge or consent], and afterwards procured the films to be developed, enlarged, and used to advertise their business, by public exhibition in a moving-picture theater in the neighborhood where she lived." (Don't you love that early 20th century language?)

The court discussed appropriation in the employment context for the first time in the 1950s. In that case, an employee sued his employer after his image appeared in a company advertisement that ran in nationally circulated magazines. The court found that the employee was precluded from recovering because he had voluntarily posed for a photograph and didn't suggest or fix any restrictions on its use. Thus, he had given his implied consent to the company's use and publication of his photo.

In 1999, the Kansas Court of Appeals clarified that invasion of privacy claims based on appropriation are limited to appropriation for a commercial use. In other words, the value of a person's likeness isn't appropriated unless it's published to take advantage of his reputation, prestige, or other value associated with him for publicity purposes.

The big picture

If your company intends to use photos or images of your employees (or anyone else for that matter) in an advertisement, brochure, website, employee handbook, or any other publication, *get their consent first.* Failure to do so could overexpose you to liability for an invasion of privacy claim.

Although consent may be implied if the employee allows the pictures to be taken, knowing that they'll be used for the company's benefit, why take the chance a court will find otherwise?

Always obtain a clear, written consent from the employee. Then keep it on file, along with the picture, as long as you (or your advertising agency or so forth) keeps the picture.

In drafting the consent, use language that's broad enough to cover any and all possible uses of the photos. Also specify that the consent is of unlimited duration and isn't affected by later changes in the employment relationship. Have your lawyer assist in drafting the consent, or at least run it past your lawyer to make sure it passes muster. Courts have found that an employee's consent to use her name or likeness — in the absence of clear terms to the contrary — may be restricted to certain uses or limited in duration, such as the tenure of the employment relationship.

Unless the understanding between the company and the employee is made clear by the language, the court may let a jury determine the terms and reasonable implications of the consent given. Why needlessly put your fate in the hands of 12 strangers? Get the picture?