Everyone's an Influencer Now (Including Your Employees)

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The workplace keeps finding new ways to blur the line between "job" and "personal life," and the latest entrant is the employee-turned-brand-ambassador. Companies have spent years courting outside influencers to hawk their products; now a growing number are looking at their own payroll and asking why they'd pay a stranger with a ring light when they have hundreds (or thousands) of employees who already know the brand, the product, and the customer. That shift, dressed up as a marketing innovation, is really a new employment relationship wearing a content-creator hat, and it comes with all the usual legal baggage. If you're an employer and you haven't thought about whether your own workforce is (or should be) part of your marketing strategy, you're behind, and probably by more than you think.

Here's the thing about "employee creator programs" that HR and marketing teams love and employment lawyers lose sleep over: they sound like a fun perk until they quietly turn into a wage-and-hour claim, a discrimination lawsuit, or an NLRB charge. As I told Lexology PRO recently, the line that matters isn't what you call the initiative—it's how much control the company exercises over it. The moment you start directing what employees post, when they post it, how often, or tying compensation or performance expectations to participation, you've stopped having "employees being enthusiastic" and started having "work". And once it's work, every employment law that applies to work applies to it too.

Compensable Time Doesn't Care How Fun It Looks

Under the FLSA, if an employer "suffers or permits" the work and gets a benefit from it, the time is generally compensable—filming, editing, posting, and yes, monitoring the comments section at 9 p.m. on a Tuesday. The test isn't whether the activity "feels like" work to the employee, and calling participation "voluntary" doesn't hold up if the company is nudging it along through metrics, recognition, or the kind of informal pressure everyone in the office recognizes but nobody wants to write down. As the same Lexology PRO piece noted, if a manager assigns the skit, or even just watches an employee film it after hours without stepping in, that employee will, in most jurisdictions, be entitled to compensation for the time spent.

Activities that most often turn into compensable time include:

- Filming, editing, or posting content outside of scheduled hours
- Responding to feedback or revision requests from legal or marketing
- Monitoring or responding to comments after a post goes live
- Traveling to filming locations or company events for content purposes

Employers should track this time the way they'd track any other non-exempt duty, and be honest with themselves about whether "optional" content creation is actually optional in practice.

Stipends, Bonuses, and Prizes: The Regular Rate Trap

This is where well-intentioned programs get unsustainably expensive. Under the FLSA, nondiscretionary payments tied to performance generally must be folded into the regular rate for overtime purposes, including:

- Engagement-based bonuses tied to views, likes, or shares
- Stipends that function as compensation for services rather than a true reimbursement
- Prizes awarded for meeting content or engagement targets, such as "best content of the quarter"

Calling something a stipend or a prize doesn't change what it legally is if it's functioning as pay for a job. The same Lexology PRO piece flagged the same math problem: a lump sum combined with hourly wages and total hours spent creating content can push an effective hourly rate below minimum wage.

Selection Criteria: Please Don't Pick Based on "Vibes"

Treat selection like the employment decision it legally is. As I put it to Lexology PRO, choosing creators based on who "looks good on camera" or has the right "vibe" is a fast track to litigation, because those subjective standards can easily become proxies for race, age, gender, or other protected traits. A few practical fixes go a long way:

- Use objective, documented criteria for who gets invited to participate, rather than a manager's informal pick of favorites
- Monitor outcomes by protected characteristic to make sure the program isn't quietly becoming a proxy for who gets more visibility, incentive pay, or a leg up internally
- Document the reasons behind selection decisions so they can withstand scrutiny later

A creator program that becomes a backdoor promotion track is a discrimination claim waiting to be discovered in discovery.

Social Media Policies: Don't Chill What the Law Protects

Creator policies need to be drafted with precision, not a blanket "don't say anything negative" approach—Section 7 of the NLRA protects employees' right to discuss wages and working conditions even in non-union workplaces, and an overbroad policy can chill that regardless of intent. Regulate the company-sponsored content itself—brand messaging, use of marks, disclosure obligations—and expressly carve out employees' right to speak about their own terms of employment.

IP, Likeness, and the Stuff Nobody Thinks About Until Someone Leaves

Every creator agreement should answer, in plain terms, who owns what when the relationship ends, because that's exactly when disputes happen. Key provisions should address:

- Whether the content is work made for hire or licensed to the company
- Whether the company can keep using the content (and the employee's name and likeness) after departure, and for how long
- Who owns the audience built on a personal account versus a company-created one

"Who owns the audience" is quickly becoming one of the most litigated issues in this space. Broader commentary on this landscape covers much of the same ground—wage-and-hour, NLRA, IP, privacy, and biometric statutes like BIPA—and reaches largely the same conclusion: build the legal framework before you launch, not after someone's already gone viral.

Confidential Information: Guardrails, Not a Lockdown

Confidential information deserves a tiered approach, not a pre-clearance bottleneck that kills the authenticity the whole program exists for. A workable model looks like this:

- Train creators on categories that are off-limits, such as trade secrets, material non-public information, and customer or employee data
- Pair that training with spot-audits rather than mandatory pre-clearance of every post
- Build a clear escalation path for anything touching sensitive categories

This approach tends to produce better compliance than a full legal sign-off requirement, without stripping out the authenticity that makes these programs valuable in the first place.

Recent high-profile program rollouts show this trend isn't slowing down. If your company is building (or already running) an employee creator program, now is the time to get legal, HR, and marketing in a room together—before your next viral moment becomes your next lawsuit. Contact a member of Kelley Drye's Labor and Employment team if you have questions.