KANE | KESSLER

WE'VE MOVED!
666 Third Avenue
New York, NY 10017

Our Business Is You® | October 2016

Recent Lawmaking Places Emphasis on Gender Identity, Pregnancy and Muslim Discrimination

About Kane Kessler...

Kane Kessler is a midsize law firm located in Midtown Manhattan, serving clients throughout the United States and globally. Kane Kessler has been in the business of providing exceptional legal services to its clients for over 80 years, with experienced and specialized lawyers practicing in many areas of the law. At Kane Kessler, we take pride in delivering personal attention to each and every client and in our ability to offer a wide range of experience and knowledge in many legal specialties to help your business grow and prosper.

Our Business Is You®

For more information about the Firm, please visit our website at www.kanekessler.com or call us at (212) 541-6222.

The Editors,

Gary E. Ostroff
Dana M. Susman

In the past year, both New York and federal law have expanded beyond traditional notions of discrimination and disability to require an employer to consider carefully accommodation requests relating to gender identity, pregnancy and religious observance. Below is a summary addressing recent laws and guidelines regarding how to handle these complex issues.

Accommodations for Individuals with Gender Dysphoria

On January 20, 2016, the New York State Human Rights Law ("NYSHRL") was amended to identify gender dysphoria as a medical condition that qualifies as a disability. Gender dysphoria is defined as a "recognized medical condition related to an individual having a gender identity different from the sex assigned to him or her at birth." As a result, refusal by an employer to provide a reasonable accommodation for persons with gender dysphoria constitutes disability discrimination.

On December 21, 2015, guidance was issued by the New York City Commission on Human Rights requiring employers with dress and grooming policies to update such policies so that they are gender neutral. For example, employers are required to permit a transgender woman to wear a dress, makeup or jewelry at work if she requests to do so, even if allowing the same does not comport with the employer's traditional notions of femininity or masculinity.

New York State and New York City both define an employer as having four or more employees. With respect to sexual harassment claims under New York

continues on page 2

INSIDE: Corporate Use of Social Media: Avoiding Legal Pitfalls | Footwear Wars | Successor Liability and the Asset Deal

Copyright © 2016, Kane Kessler, P.C. All Rights Reserved.

state law, an employer is defined as every employer within the state, regardless of the number of individuals in its employ.

Accommodations for Pregnancy and Breastfeeding

On October 21, 2015, Governor Cuomo signed the Protect Women from Pregnancy Discrimination Act, which codified previous guidelines from the NYSHRL that a "pregnancy-related condition" is a disability. As a result, employers are required to provide reasonable accommodations to individuals with a pregnancy-related medical condition. Examples of reasonable accommodations include modified work schedules and job restrictions. Additionally, employers are required to provide unpaid break time or to permit an employee to use a paid break or mealtime to express milk for her nursing child for up to three years following the birth of the child.

New York City law already in effect contrasts slightly with state law. Under New York City law, employers are required to accommodate pregnant individuals even if there is no correlating medical condition. Examples of such accommodations include bathroom breaks, water intake breaks, rest periods and assistance with manual labor.

Accommodations for the Muslim Faith

In January 2016, the EEOC issued a Question and Answer sheet relating to an employer's responsibility with respect to employees who are, or are perceived as, Muslim or Middle Eastern. Employers with 15 or more employees are required to reasonably accommodate religious practices or dress. For example, employers should work closely with employees who request permission to use certain workspace for prayer. The employer should consider the request of a specific individual and not take into consideration its concern that other employees will seek the same accommodation. Again, the employer is encouraged to think creatively, but is permitted to deny certain requests to use workspace for prayer if such space is needed for business purposes. If flexible scheduling is feasible, employers should accommodate employees' prayer time based on break periods. If such prayer time takes longer than the allotted break periods, employers are also permitted to require employees to make up any time missed for such religious observance.

Likewise, employers may be required to grant certain exceptions to uniform and grooming policies based on an individual's religious practice.

Conclusion

Based on these recent legal developments, employers should update their practices and employee handbooks to reflect the emerging law on gender identity, pregnancy and religious observance. Given the challenges surrounding these issues, employers should train employees to be sensitive to the legal rights of their co-workers.

Kane Kessler's Labor and Employment Law practice group has extensive experience advising clients regarding discrimination and accommodations under federal, state and local law.

David R. Rothfeld is a Partner and **Jaclyn K. Ruocco** is an Associate in the Firm's Labor and Employment Law practice group. David can be reached at (212) 519-5154 or drothfeld@kanekessler.com, and Jaclyn can be reached at (212) 519-5177 or jruocco@kanekessler.com.

CORPORATE USE OF SOCIAL MEDIA: AVOIDING LEGAL PITFALLS

It has become standard practice for companies to use social media for a variety of purposes, including public relations, marketing, business generation, and obtaining insight into brand perception and reputation. Companies that effectively embrace social media can propel performance to new heights. However, there are numerous pitfalls to consider when using social media. While every company is unique and each situation must be evaluated on its own merits, awareness of the following legal concerns relating to the use of social media should help companies avoid some common problems.

Public Company Issues

The Securities and Exchange Commission ("SEC") has permitted public companies to use social media websites to disseminate material information in accordance with Regulation FD (an SEC rule designed to promote fair disclosure by regulating a public company's disclosure of material, nonpublic information). However, the SEC has warned that disclosure of material, nonpublic information through the social media accounts of company executives without prior notice to investors of the use of such accounts would violate Regulation FD. As a result, many public companies have implemented Regulation FD policies which focus on the use of social media accounts by employees and which prohibit publishing company information through accounts not authorized by the company as acceptable means of investor communication.

Social media communications by public as well as private companies may also violate securities laws if they are perceived as impermissible solicitations or advertising an offering of securities. To address these concerns, companies should implement blackout periods during securities offerings for social media postings to avoid any potential improper solicitations or advertising of securities. Companies should carefully monitor corporate social media posts to ensure that such communications do not violate these policies.

Disclosure of Confidential Information

Inadvertent disclosure of a company's confidential information, such as trade secrets, by employees on social media accounts is also a growing concern among many companies. The disclosure of a company's trade secrets on social media could result in a loss of the a company's intellectual property rights in the disclosed information. A detailed and updated confidential information policy, together with periodic reminders, may be a good defense against unauthorized disclosure of confidential information by a company's employees.

Use of Trademarks and Copyrights

A social media presence has become a standard method for companies to connect with potential and current customers and to expand brand recognition. Companies should carefully monitor their social media footprint to ensure that their own employees are not improperly using the trademarks or publicity rights of third parties, including other companies and celebrity figures. Additionally, companies should also monitor the social media presence of third-party users to guard against the unauthorized use of the company's trademarks and

copyrighted materials. Repeated failure to assert rights against infringers can compromise the strength of a company's intellectual property.

Human Resource Issues

Many HR departments have begun reviewing a job candidate's social media postings as another tool in their employment vetting process. While this review may assist a company in selecting valuable candidates, an HR department should avoid basing decisions on unlawful criteria found in such social media pages. Additionally, with respect to current employees, professional social media websites, such as LinkedIn, allow for recommendations to be posted to a user's account, which may create concerns for supervisors writing such recommendations. Companies should be aware that a positive recommendation posted on social media for a current employee may make it difficult for a company to prevail in a case of wrongful termination, while a negative recommendation may expose the company to liability for certain claims such as defamation or workplace retaliation.

Defamation

A company's posts about a third party to its social media followers may result in a defamation claim if the posts allege a fact that is negative and untrue. Additionally, an employee acting on behalf of a company who engages in defamatory posts and statements may subject the company to claims relating to such statements. Furthermore, even if such posts are "anonymous," in many cases they can be tracked via the IP address and expose a company to potential liability.

Privacy Issues

Businesses should take precautions to avoid the disclosure of private information by employees on social media. Detailed policies published in a company's employee handbook should help avoid such inadvertent disclosure. Under some circumstances, e.g., under the National Labor Relations Act, an employee may have a protected right to disclose such information. Furthermore, companies should also ensure that they maintain adequate security policies and procedures to protect against the disclosure of confidential information from threats emanating by outside of their organization.

Litigation Issues

A company's social media posts are considered discoverable information in litigation and subject to data retention policies. Furthermore, even private posts on message boards would be subject to discovery in a litigation. A company should continually monitor its social media sites and its employees' use of social media to ensure that information posted would not be harmful in litigation. Additionally, data retention policies should be updated in order to review and control the information contained on social media websites.

Businesses in industries that are governed by privacy laws, such as financial services and healthcare providers, could trigger violations of such laws through inadvertent disclosure of private information by employees on social media.

Social media is proving to be an indispensable tool in business. Attention to the issues discussed above and consultation with legal counsel are therefore becoming an increasingly important part of minimizing legal risk while enabling a company to harness the benefits of social media. Kane Kessler has considerable experience helping our clients navigate the perilous waters of social media and is available to consult on inquiries specific to your business.

Steven E. Cohen is a Partner and **Brendan P. Harney** is an Associate in the Firm's Corporate and Securities practice group. Steven can be reached at (212) 519-5115 or scohen@kanekessler.com, and Brendan can be reached at (212) 519-5148 or bharney@kanekessler.com.

FOOTWEAR WARS

Within the fashion industry, footwear brands with successful product features want exclusivity in those features. Often, those features can be protected by one or more forms of intellectual property available in the United States legal system, including patents (particularly design patents), trademarks, trade dress and copyright. This article discusses some of the current footwear battles being fought, which serve as cautionary tales to any fashion company concerned with protecting the forms of IP at issue in those battles.

Crocs' ability to protect its iconic foam clog may be in trouble because of an IP mistake. In the early 2000s, Crocs took the market by storm with a line of foam clogs having a distinctive shape and construction. The various styles had some common visual features, including the classic "clog" shape and the ventilation openings in the toe area and on the sides. Functional common features used across the product line include the lightweight, waterproof, EVA foam material and the heel strap that stayed up by itself to provide ankle support. Crocs tried to prevent knockoffs by suing a number of manufacturers for infringement of utility patent, infringement of a number of design patents and trade dress infringement. The basic design patent became a big part of Crocs' success in fending off competitors.

"The Crocs clogs were promoted on the Crocs website for more than a year before Crocs filed for a patent in the U.S. Under U.S. law, those early offers for sale constitute a legal bar to obtaining a patent; Crocs had waited too long to file."

The U.S. Patent and Trademark Office recently rejected the basic design patent in a "reexamination" proceeding brought by USA Dawgs, which had been sued by Crocs. During its investigation, USA Dawgs found that the Crocs clogs were promoted on the Crocs website for more than a year before Crocs filed for a patent in the U.S. Under U.S. law, those early offers for sale constitute a legal bar to obtaining a patent; Crocs had waited too long to file. Crocs is appealing this administrative ruling, and still has other IP covering various features of its clogs, but the gates are now open a little wider for those who want to copy this popular style.

Sneakers are also a source of much IP litigation today. For example, Nike has been asserting trade dress and trademark claims against competitors for copying its famous Converse All-Star trade dress. (Trade dress protection for a footwear design can become available after a long period of market exclusivity.) This design includes the rubber toe cap and bumper, and the single colored stripe running along the white outsole. Nike's problem is that its design, first marketed over 50 years ago, has been freely copied for decades without objection. That was the basis for a recent International Trade Commission ("ITC") decision concluding that the trademark registration is invalid and denying relief to Nike. The ITC found that today's consumers do not believe that shoes having this particular design come only from a single source, namely Converse, but rather believe they are freely available from others. Simply put, Nike slept on its rights for too long.

In another action, Adidas sued Skechers for allegedly copying Adidas' three-stripe trade dress of its famous Stan Smith tennis shoe as well as other Adidas designs. Adidas also sued Sears for selling shoes with "two, three or four parallel stripes on the mid-foot portion of the upper in a manner likely to be confused with Adidas."

In yet another battle, Nike has sued Skechers for alleged infringement of eight design patents related to the popular Nike Flyknit shoes. Nike seeks an injunction against further sales, as well as money damages. Nike has also sued Adidas for infringement of a utility patent covering the construction of the one-piece knitted shoe upper. This is one example of a utility patent that can be obtained on footwear.

The footwear business runs on innovation and design, and as long as the market remains competitive, there will be IP litigation between competitors.

Kane Kessler frequently advises on innovation—advising clients how the design and function of their footwear might be considered proprietary—and also helps avoid claims from others by surveying the appropriate IP landscape, prospectively identifying potential problems and offering design-around solutions as needed.

Paul E. Szabo is Counsel in the Firm's Intellectual Property practice group. Paul can be reached at (212) 519-5143 or pszabo@kanekessler.com.

SUCCESSOR LIABILITY AND

In *Oorah, Inc. v. Birch Communications*, Kane Kessler's Litigation department recently prevailed at the Appellate Division, First Department, in fending off an attempt by a contract creditor to hold the purchaser of assets liable for the contractual obligations of the seller. Certain key factors were present in the subject asset transaction which every purchaser should consider before consummating an asset deal, or they will run the risk of being held liable for the debts of the seller under the theory of successor liability.

"Certain key factors were present in the subject asset transaction which every purchaser should consider before consummating an asset deal, or they will run the risk of being held liable for the debts of the seller under the theory of successor liability."

While the general rule is that a corporation that acquires the assets of another is not liable for the debts of the seller, New York recognizes four exceptions to this general rule: (1) the buyer formally assumes the seller's debts, (2) there was a consolidation or merger of seller and buyer, (3) the buyer was a mere continuation of the seller, and (4) the transaction was undertaken to defraud creditors.

Most asset purchase agreements contain schedules which list the debts and/or contractual obligations that the purchaser is assuming. If specific contractors' debts are not included on that list, the first exception will not apply. However, the courts will look beyond the mere exclusion of a contractual liability or debt to determine whether any of the other three exceptions apply.

The issue of whether there was a consolidation or merger, the second of the four exceptions, is often the most litigated. To determine if there was a merger, courts will look to what are known as the "hallmarks of a de facto merger," which include continuity of ownership; cessation of ordinary business and dissolution of the acquired corporation as soon as possible; assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and continuity of management, personnel, physical location, assets and general business operation. Of all these hallmarks, continuity of ownership is an essential element–without it, the court will not find a final de facto merger. Continuity of ownership can be established where the purchaser pays the seller in stock or some other ownership interest instead of paying in cash for the assets.

As a result, the easiest way to avoid a finding by the court that there was a merger or consolidation is for the purchaser to pay all cash in an asset deal. It is also essential that the officers and directors of the seller not hold such titles in the purchasing entity and that they not have any ownership interest in the purchaser, such as stock or even options which were paid as consideration for the assets of the seller entity.

THE ASSET DEAL

For the third exception to apply, New York's highest court has held that "mere continuation" refers to corporate reorganizations "where only one corporation survives the transaction and…the predecessor corporation must be extinguished." In other words, where the seller sells certain of its assets, but remains an existing entity with other assets and a continuing ability to do business, the "mere continuation" exception will not apply.

Finally, the courts will hold a purchaser of assets liable for the debts of the seller where there is a finding that the asset transaction was fraudulent in nature. This fourth exception to the general rule seeks to avoid a situation where the seller creates a mere paper-shuffle by transferring assets to another company (oftentimes a newly created entity) for minimal consideration in an attempt to avoid its creditors. The court will look to the five "badges of fraud" to determine whether the transaction is tainted with fraud so as to hold the asset purchaser liable for the seller's obligations as a successor-in-interest. The badges of fraud include a close relationship between the parties to the conveyance, inadequacy of consideration received, retention of control of the property by the transferor, suspicious timing of the conveyance after the debt was incurred and the use of fictitious parties.

In many of the cases where fraud was established, the owners of the seller entity created a new company, naming either themselves, close family members, or employees of the seller as officers and directors of the new company, and transferred the assets from the seller to the new entity for less than adequate consideration, all the while retaining control of the assets in the new company and leaving the creditors of the seller without the ability to collect the debt. The court will not permit such machinations and is likely to find the new entity liable for the debts of the seller.

In conclusion, while the general rule is that the purchaser of assets is not liable for the debts of the seller, there are exceptions to that rule, even where the debt and/or contractual obligation is specifically excluded from the asset purchase agreement. The courts in New York will examine the transaction by weighing different factors to determine whether the purchaser of assets should be held liable for the seller's debt as a successor-in-interest. The proper guidance to an asset purchaser is essential to avoid both successor liability and the legal pitfalls that a purchaser may face when buying the assets of another company.

Jeffrey H. Daichman is a Partner and **Gerard Schiano-Strain** is an Associate in the Firm's Litigation practice group. Jeffrey can be reached at (212) 519-5142 or jdaichman@kanekessler.com, and Gerard can be reached at (212) 519-5164 or gstrain@kanekessler.com.

Kane Kessler, P.C.
666 Third Avenue
New York, NY 10017-4041
(212) 541-6222
www.kanekessler.com

The information contained in this Newsletter is of a general nature and does not constitute legal advice. Under the rules of certain jurisdictions, this material may be considered attorney advertising. Consultation with our attorneys is recommended before taking any action based on any of this information. To comply with the requirements imposed by the IRS and Treasury Department rules governing tax practice, we inform you that any advice contained herein is not intended or written to be used and cannot be used by a taxpayer to (i) avoid tax penalties or (ii) promote, market, or recommend to another person any transaction or matter addressed herein. You are receiving this Newsletter because you are or have been a client or friend of our Firm.

FIRM NEWS

ACHIEVEMENTS

On April 25, 2016, **the Firm's Labor and Employment Law practice group** conducted a seminar for over 125 human resources professionals on the Family and Medical Leave Act. The seminar was prompted by a recent Second Circuit decision holding that human resources managers may be personally liable for violations of the act.

In *DeMarine, et al. v. IHMS, LLC* (owner and operator of the Pierre Hotel), *et al.*, a federal judge issued a 15-page decision dismissing a lawsuit brought by four current union employees who believed that they were being treated unfairly under the existing collective bargaining agreement between their union and a multiemployer trade association of which the hotel is a member. The court stated that plaintiffs' counsel "contorted that unhappiness into a panoply of claims against the Hotel" under the Fair Labor Standards Act and New York Labor Law. Plaintiffs claimed that the hotel denied them gratuities and full-time sick leave benefits, and discriminated against them based on their race, ancestry and ethnicity. The court granted a motion to dismiss filed on behalf of the Firm's client, ruling that plaintiffs failed to state claims under federal law for gratuities, sick leave benefits and discrimination. The court further dismissed plaintiffs' claim for full-time sick leave benefits under state law and declined jurisdiction over the remaining state claims for gratuities and discrimination. **The Firm's Labor and Employment Law practice group** represented the owner and operator of the hotel.

The Firm's Corporate and Securities practice group represented an NYSE global Fortune 500 company in the successful sale to another NYSE company in a deal having an enterprise value in excess of $21 billion.

The Firm's Corporate and Securities practice group represented a venture capital sponsor in a $5.5 million equity raise and its investment in two sports technology companies.

The Firm's Corporate and Securities practice group represented an activist hedge fund specializing in small-cap value investments in a bitterly fought proxy contest resulting in the election of both of its independent director candidates to the board of directors of Omega Protein Corporation at its Annual Meeting of Stockholders, with each of the fund's two director nominees receiving an unprecedented 80% of the votes cast.

The Firm's General Business and Corporate and Securities practice groups represented a consortium of angel investors in its $1 million investment and reorganization of an emerging sports footwear company.

Representing a New York City hospitality client, **the Firm's Labor and Employment Law practice group** successfully prevailed on its motion to dismiss a complaint filed in the Supreme Court of the State of New York, New York County. The plaintiff alleged, among other things, invasion of privacy and discrimination under local, state and federal law. The court dismissed the complaint in its entirety, finding that the plaintiff lacked standing to sue and failed to allege any cognizable claim.

The Firm's Litigation practice group successfully presented a petition for dissolution in *re Precision Imaging of New York, P.C., Index* No. 653464/2015, in which the New York County Supreme Court Commercial Division granted dissolution of a medical practice on the ground that dissension and deadlock between the equal shareholders were so severe and irreconcilable that dissolution was warranted under Section 1104(a) of the Business Corporation Law.

Congratulations to **Robert L. Lawrence** (Corporate and Securities practice group), **David R. Rothfeld** (Labor and Employment Law practice group), **Adam M. Cohen** (Intellectual Property practice group), **S. Reid Kahn** (Litigation practice group), **Jeffrey H. Daichman** (Litigation practice group), **Jennifer M. Schmalz** (Labor and Employment Law practice group), **Barry E. Negrin** (Intellectual Property practice group) and **Gerard S. Strain** (Litigation practice group for being named 2016 Super Lawyers. Congratulations to **Jonathan M. Sabin** (Litigation practice group) for being selected to the "New York Metro Rising Star List" in 2016 by Super Lawyers.

SPEAKING ENGAGEMENTS

On June 9, **Adam M. Cohen,** head of **the Firm's Intellectual Property practice group,** moderated a panel at the Association of Independent Commercial Producers AICP Week Business Affairs Bootcamp titled "Lawyer's on the Clock."

David R. Rothfeld, head of **the Firm's Labor and Employment Law practice group,** was a speaker at the 10th Annual National Human Resources in Hospitality Conference and Expo held in Scottsdale, Arizona. Mr. Rothfeld spoke about National Labor Relations Board "quickie" elections affecting the hospitality industry.

Kane Kessler is co-sponsoring the New York Regional Labor and Employment Roundtable in conjunction with the Cornell Institute of Hospitality Labor and Employment Relations on June 20, 2016. The roundtable will address current issues affecting hospitality employers.

JOINED THE FIRM

Jennifer M. Schmalz has joined the Firm as a Senior Associate in its **Labor and Employment Law practice group**. She has extensive experience providing advice and counsel to employers in all aspects of labor, employment and employee benefits law. Jennifer has worked with clients in a wide variety of industries including travel and hospitality, real estate, transportation, financial services, healthcare, manufacturing, technology and not-for-profit corporations. She litigates on behalf of employers in federal and state courts and before federal and state administrative agencies. Jennifer received her BA from the University of Michigan and her JD from Michigan State University School of Law. She is licensed to practice in New York and the District of Columbia.

PRACTICE GROUPS

Bankruptcy, Reorganization and Creditors' Rights
Corporate and Securities
Corporate Investigations
General Business
Intellectual Property
Labor and Employment Law
Litigation
Matrimonial
Mediation
Real Estate
Trusts, Estates and Taxation