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Employment Law *Trending Now*

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Is Your Former Employee Violating a Non-Solicitation Agreement Through Social Media Activity?

Non-solicitation agreements are a common tool used by employers to prevent employees from engaging in certain conduct for a specified period of time after resignation or termination. Those prohibited activities typically include soliciting the employer's customers, clients, trade partners or other employees. When drafting a non-solicitation agreement, most employers undoubtedly intend to preclude a former employee from communicating through traditional modes of communication, such as through in-person meetings, telephone calls, letters, e-mails or even text messages. With the ever-increasing popularity of social media, such as LinkedIn, Facebook, Instagram, Twitter, Snapchat and blogs, many employers are left wondering whether: (1) their non-solicitation agreement prevents solicitation through social media; and, if so, (2) whether a former employee's social media activity violates the non-solicitation agreement.

Does Your Non-Solicitation Agreement Prevent Solicitation Through Social Media?

The wording of a non-solicitation agreement is crucial. Many standard non-solicitation agreements generally preclude a former employee from "communicating" with an employer's customers or employees post-termination. This could leave open for the court's interpretation whether social media activity was contemplated as a type of prohibited communication by the employer and employee when they entered into the non-solicitation agreement.

To avoid any ambiguity, and to minimize the risk that a court might interpret the non-solicitation agreement in a manner that an employer did not intend, employers should consider expressly prohibiting communications through social media. Employers may also want to consider providing specific examples of social media activity that would be considered a violation of the non-solicitation agreement, such as:

- Encouraging current employees to leave the employer and join a different company through a LinkedIn post;
- Sending a current or former customer a message through Facebook enclosing a brochure for a product sold by a competitor; or
- Sending a tweet that an employee left the employer to start a competing business and inviting followers to tweet back for a price quote.

The appropriate wording of a non-solicitation clause necessarily depends on the nature of the employer's business and the interest it is seeking to protect.

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Is Your Former Employee's Social Media Activity Violating a Non-Solicitation Agreement?

Determining whether a former employee's use of social media is in violation of a non-solicitation agreement is highly fact-based. It depends not only on the language of the non-solicitation agreement (as discussed above), but also on the nature and content of the former employee's social media activity.

Recent case law has suggested that passive or non-targeted social media activity by a former employee – such as updating an employer or job description on LinkedIn, announcing a new position on Twitter or "friending" a former client on Facebook – does not violate a non-solicitation agreement.

In *Bankers Life & Casualty v. American Senior Benefits, LLC*, 2017 IL App (1st) 160687-U, an Illinois appellate court recently ruled that emails containing invitations to connect on LinkedIn sent by a former employee to employees of his former employer and a posting on LinkedIn about a job opening, did not constitute an unlawful attempt to solicit employees. In so holding, the court noted that the LinkedIn invitations were generic, and they did not contain a discussion of the former employer or the new employer, suggest that the recipient view a job description on the former employee's page, or encourage the recipient to leave their place of employment. *Id.* at ¶23 [i]

Other recent cases have suggested that active or targeted social media activity by a former employee – such as posts inviting contacts to call for a quote or a tweet encouraging customers or employees to leave a company – does violate a non-solicitation agreement. On July 25, 2017, a federal district court in Minnesota entered a preliminary injunction enjoining a former employee from posting on social media, the court finding that prior posts on LinkedIn relating to the former's employee's new position at a competitor were likely in violation of the non-solicitation agreement. *See Mobile Mini, Inc. v. Vevea*, No. 17-1684, 2017 WL 3172712 (D. Minn. July 25, 2017). The former employee's prior LinkedIn posts invited her contacts to "give [her] a call today for a quote" for her new employer's product. *Id.* at *2. The court found that these posts were blatant sales pitches, the purpose of which was to entice members of the former employee's network to call to make a purchase from her new employer, in direct violation of the non-solicitation provision. *Id.* at *6.[ii]

What Employers Should Know

1. If an employer intends to prohibit solicitation through social media, it is important that the employer implement a clearly worded non-solicitation agreement with explicit language prohibiting solicitation through social media.

2. In determining whether a former employee has violated a non-solicitation agreement, the focus should be on the content and substance of the social media activity. If the activity is passive in nature, the activity is unlikely to constitute a breach of the agreement. If, on the other hand, the activity is active or targeted in nature, it is more likely to be deemed a breach.

[i] *See also, Arthur J. Gallagher & Co. v. Anthony*, No. 16-284, 2016 WL 4523104, at *15 (N.D. Ohio Aug. 30, 2016) (press release posted on LinkedIn and Twitter announcing that an employer had hired a new employee was not a solicitation); *BTS, USA, Inc. v.*

Executive Perspectives, LLC, 2014 WL 6804545 (Conn. Super. Oct. 16, 2014) (update to LinkedIn account with new position and post encouraging contacts to "check out" a website he designed for his new company (a competitor), was not a violation of the non-solicitation agreement); *Prepaid Legal Servs. V. Cahill*, 924 F. Supp. 2d 1281 (E.D. Okla. 2013) (employee's posting on Facebook which touted his new employer's product and which was viewed by former colleagues did not violate agreement to not recruit employees from former employer); *Invidia v. DeFonzo*, 2012 WL 5576406 (Mass. Super. Oct. 22, 2012) (becoming "friends" with former clients on Facebook did not, in and of itself, violate a non-compete clause); *Enhanced Network Solutions Grp. V. Hypersonic Techs*., 951 N.E.2d 265 (Ind. Ct. App. 2011) (posting a job opportunity on LinkedIn page was not a solicitation).

[ii] *See also, Amway Global v. Woodward*, 744 F. Supp. 2d 657, 673-74 (E.D. Mich. 2010) (a blog entry in which a former independent owner of plaintiff announced his decision to join a competitor and stated "[i]f you knew what I knew, you would do what I do," the court finding that this statement was readily characterized as an invitation for the reader to follow his lead and join the competitor)

*If you have any questions about this Alert, or if you would like assistance in drafting a non-solicitation clause prohibiting solicitation through social media, please contact the author listed below or the **Aronberg Goldgehn attorney** with whom you work.*

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