Today's Use of Social Media Blurs Lines with Non-Solicitation Covenants

Social media has become an integral part of business interactions. Job postings, industry news and personal career changes are commonly shared through LinkedIn and other social media sites. However, social media activity often blurs the lines of certain obligations contained in non-solicitation covenants between employers and their former employees. For example, may a former employee post news about starting a new job if the former employee is "linked" with clients and customers of the employer? Can a former employee connect with clients, customers and employees of a former employer? Or must an employee delete any social media connections with an employer's customers or clients upon termination? Generally, an employer's non-solicitation covenant is silent on such questions. The resulting void has required the courts to decide how social media activity should be considered in the context of non-solicitation covenants.

Daniel B. Fitzgerald

Daniel B. Fitzgerald is an associate at the law firm of Brody Wilkinson PC. He practices in the areas of employment law, business law and litigation. He frequently represents employers in connection with employment matters, including the drafting and enforcement of non-competition and non-solicitation covenants.

Brody Wilkinson PC
2507 Post Road
Southport, Connecticut 06890

203.319.7100 Phone

dfitzgerald@brodywilk.com
brodywilk.com

The Increasing Popularity of Non-Solicitation Covenants

Amid concerns regarding adverse economic consequences and basic fairness, non-competition covenants in the employment context are becoming increasingly disfavored across the country, both by courts and state legislatures seeking to statutorily limit the use of such covenants. A less restrictive and often more enforceable alternative is a non-solicitation covenant. A non-solicitation covenant between an employer and employee typically protects the employer's clients, customers, vendors and/or employees from being poached by a former employee for a specified period of time.

Do General LinkedIn Posts and Updates Constitute Solicitations?

"[T]he use of social media, whether it be Facebook, LinkedIn, Twitter, or some other forum, has become embedded in our social fabric." The Connecticut Superior Court so observed in the case of *BTS, USA, Inc. v. Executive Perspectives*, 2014 Conn. Super. LEXIS 2644 (Super. Oct. 16, 2014) (aff'd, 166 Conn. App. 474 (2016)). In *BTS, USA, Inc.*, the court, among other things, was presented with the issue of whether defendant, Marshall Bergmann, breached a non-solicitation covenant with his former employer, plaintiff, *BTS, USA, Inc.* The non-solicitation covenant at issue, which was contained in Bergmann's employment agreement, stated in relevant part, that:

> "[e]mployee shall not for a period of two (2) years immediately following the end of Employee's active duties with employer, either directly or indirectly… [c]all on, solicit or take away or attempt to call on, solicit or take away or communicate in any manner whatsoever, with any of the clients of Employer; [or] [c]all on, solicit, or take away, or attempt to call on, solicit, or take away or communicate in any manner whatsoever, with any of the clients of Employer on behalf of any business which directly competes with employer."

After approximately five years of employment with BTS, Bergmann accepted a position with Executive Perspectives, LLC, a direct competitor of BTS. Thereafter, Bergmann took to LinkedIn. Bergmann first posted about his new job on LinkedIn and subsequently invited his connections to "check out" his new employer's website which he had reworked. Notably, clients and contacts that Bergmann developed during his employment at BTS were part of his LinkedIn network. He did not "unlink" these individuals upon his departure from BTS nor was he requested to do so. Bergmann also counted current BTS employees in his network.

BTS alleged that Bergmann's LinkedIn activity constituted a breach

of his non-solicitation covenant with the company. The court, however, was unpersuaded. Bergmann's posts did not constitute a solicitation or breach of his employment agreement, the court held. Significantly, the court noted that his announcement of his new employment was "a common occurrence on LinkedIn" and although he invited his network to visit Executive Perspectives's website, "[t]here was no evidence as to the extent to which any BTS clients or customers received the posts." Moreover, the court noted that "[a]bsent an explicit provision in an employment contract which governs, restricts or addresses an ex-employee's use of such media, the court would be hard-pressed to read the types of restrictions urged here, under the circumstances, into the agreement."

Other jurisdictions have treated social media activity similarly to the court in *BTS, USA, Inc.*, drawing a bright line between direct solicitation and passive activity, such as general posts and updates. For example, a Massachusetts court found that becoming "friends" with former clients on Facebook, absent other evidence of solicitation, did not constitute solicitation. *Invidia, LLC v. Difonzo*, 30 Mass. L. Rep. 390 (2012). In *Pre-Paid Legal Services v. Cahill*, 924 F. Sup.2d 1281 (E.D. Okla. 2013), Facebook posts of a former employee touting his new employer's product did not violate an agreement to not recruit employees from his former employer. However, a Minnesota court granted a preliminary injunction ordering a former employee to remove LinkedIn posts touting the products of her new employer for the duration of her non-solicitation covenant. *Mobile Mini, Inc. v. Vevea*, 2017 U.S. Dist. LEXIS 116235, at *1 (D. Minn. July 25, 2017). Most recently, the Illinois Appellate Court held that a former employee's request to connect on LinkedIn with three former employees was not violation of a covenant not to recruit employees. *Bankers Life & Cas. Co. v. Am. Senior Benefits LLC*, 83 N.E.3d 1085 (Ill. App. 2017).

Lessons for Employers

This area of employment continues to develop and will likely change as social media evolves. The overriding lesson that can be derived from these decisions is that courts have drawn a distinction between passive or generic activity on social media, such as general posts and updates, and direct solicitations that would breach a non-solicitation covenant whether conveyed over email, telephone or in-person. General posts, status updates and linking with others, even clients, customers or employees of a former employer, may be acceptable so long as activity is not accompanied by a direct solicitation. Further, absent an agreement to do so, a former employee is not required to remove clients, customers or former co-workers from online networks for fear of violating a non-solicitation covenant.

If an employer wishes to govern the social media activity of its former employees, the employer should include specific language to that effect in a non-solicitation covenant. (For example, by including a definition of "solicitation" that includes communication on social media). However, an employer must avoid including overly restrictive terms which may render the covenant unenforceable. In addition, an employer should discuss social media activity with departing employees and consider providing a notice to the departing employee, reminding the employee of his or her continuing obligations to the employer.

Conclusion

It appears that employers have been slow to contemplate the pervasive nature of social media as it pertains to non-solicitation covenants. Nevertheless, employers must address the use of social media in its non-solicitation covenants if employers expect to enforce such provisions through litigation. To this end, the courts, despite the inherently fact-specific nature of such claims, have provided employers with useful guidance to modernize employee non-solicitation covenants.