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EMPLOYER LAW BLOG

# Employer Privacy: Is Your Non-Solicitation Agreement Current In the Modern Age of Social Media?

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We are frequently reminded that the "old" attending networking events and social dinners model of business development will soon be viewed as archaic and simply too costly. Replacing the traditional networking event and social dinner is the ever increasing and efficient use of social media. To this end, companies commonly use social media, such as Facebook or LinkedIn, to market, advertise and communicate with customers. A company's employees also frequently will add these same customers to their own personal social media accounts as Facebook "friends" or LinkedIn "connections." Social media is proving to be an effective tool when the company and employee are working collaboratively to achieve the same goal, usually to increase company sales. But, things often go amidst upon a "business-divorce" and the employee leaves to work for a direct competitor. When this happens it is common for the company's customers or employees to continue to receive status alerts from the company's former employee, either in the form of automatic updates, usually regarding their new employment, or more often direct communications.

Are the automatic updates and announcements a violation of a non-solicitation covenant? Are the direct communications a violation? While the expressed terms of a particular agreement should control the scope and interpretation of the post-employment restriction, the courts have begun to wrestle with technology and the use of social media. While the cases are often very fact-specific, courts have held that a key consideration in determining whether a social media post is an improper "solicitation" is the content and substance of the post, and whether the social media activity is passive or active.

To date, courts typically find that "passive, untargeted communications" to former employees and customers do not rise to the level of a "solicitation." See Bankers Life & Casualty Co. v. American Senior Benefits, LLC, 2017 WL 3393844 (Ill. App. Ct. Aug. 7, 2017) and Invidia, LLC v. DiFonzo, 2012 WL 5576406 (Mass. Super. Ct. 2012). On the other hand, courts have enforced non-solicitation agreements when confronted with active or aggressive social media activity on the part of the former employee. See, Coface Collections North America Inc. v. Newton, 430 Fed. Appx. 162 (3rd Cir. 2011).

Employer Action Steps: Employers looking to enforce non-solicitation agreements or other restrictive covenants in the social media age should take the following steps:

- STOP using outdated non-solicitation clauses that do not reference social media. Revise and update non-solicitation agreements to specifically address social media activity.
- Monitor former employee's social medial sites to the extent possible. Then, immediately print and preserve any posting by a former employee suspected of violating their agreement.
- Maintain administrative rights to your own social media site. Issues often arise where a disgruntled departing employee is the only person who knows the passwords and usernames, and essentially locks the company out of its own social media accounts.
- All employees should be required to sign agreements to provide access, username, and passwords to account information and other software, computer and devices upon the termination of their employment.