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Addressing Social Media in Restrictive Covenants

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Nearly all commercial businesses have a social media presence on websites like Facebook, LinkedIn, Twitter, and numerous others. These dynamic sites provide opportunities to identify current and future consumers, but they also pose substantial risks to an employer's ability to consolidate those gains and protect its trade secrets. To guard against unwanted disclosures, post-employment restrictive covenants increasingly must address the employee's post-termination social media use. For more information on restrictive covenants, see the practice notes on understanding, negotiating, and drafting various types of restrictive covenants, including Non-Competes; Employee Non-Solicitation Agreements; Customer Non-Solicitation Agreements; and Non-Disclosure Agreements.

While an employee or former employee's social media activity could potentially violate each of these types of agreements, disputes arising out of social media most frequently involve agreements with non-solicitation, non-competition, and customer restriction clauses. This practice note addresses the various interests protected by such agreements, the related potential risks posed by social media use, and the ways in which employers can protect their interests through restrictive covenants in the context of social media. For additional information on social media issues, see *Developing Social Media Policies*; and *Understanding Key Social Media Issues in Employment*.

Does the Employer's Social Media Resources Constitute a Protectable Interest?

Any restrictive covenant requires that an employer have a protectable interest. Examples of protectable interests include customer relationships and trade secrets or other confidential information (such as confidential customer lists) acquired by the employee through employment. Furthermore, an employer's social media resources alone, including its platform usernames, passwords, and contacts, may constitute valid protectable interests.

Example 1. In *Christou v. Beatport*, 849 F. Supp. 2d 1055, 1074 (D. Colo. 2012), a former business partner of a nightclub left the business but kept the login information and “friends list” of the nightclub's MySpace account, which he then used for his competing business. Denying the former business partner's motion to dismiss, the court recognized that social media account information may be considered a protectable interest. Ultimately, the court determined that the plaintiff's efforts and expense in “friending” thousands of potential dance club patrons, and thus having their contact information and permission to contact them, sufficed to make the plaintiff's MySpace friendships a protectable interest.

Example 2. In *PhoneDog v. Kravitz*, 2011 U.S. Dist. LEXIS 129229 (N.D. Cal. Nov. 8, 2011), the court acknowledged the possibility that the company's Twitter account could amount to a protectable interest. PhoneDog, a company that provides reviews and news about mobile devices, alleged that its former employee

refused to provide login details for a Twitter account associated with the company. The former employee established the account to tweet about the company and promote its services. The account subsequently garnered roughly 17,000 followers. Following his termination, the employee changed the account's Twitter handle and used it as his own. The company sued its former employee for misappropriation of its Twitter account, valuing its damages at \$340,000. While *PhoneDog* ultimately settled out of court, the case underscores the need for employers to be proactive in carefully protecting social media rights through restrictive covenants.

To What Extent Will Courts Enforce the Restrictive Covenants Concerning Social Media Use?

If a court determines that a protectable interest exists, it will enforce a restrictive covenant only to the extent reasonably necessary to protect that interest. Namely, the covenant must be reasonable as to time (length), scope (business to be protected), and geography (area to be protected). This inquiry is fact-based.

Generally, courts consider whether the restrictions placed upon the former employee are greater than necessary to protect the employer's interest. In this regard, courts have demonstrated reluctance to interpret restrictive covenants as prohibiting former employees from socializing through online media with their former colleagues and customers.

Example 1. Courts have declined to interpret non-solicitation agreements and customer restrictions as prohibiting former employees from becoming Facebook friends with their former employers' clients. *Invidia, LLC v. DiFonzo*, 2012 Mass. Super. LEXIS 273, at *15-16 (Mass. Super. Ct. 2012); see *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 813 F. Supp. 2d 489, 513 (S.D.N.Y. 2011).

Example 2. Similarly, an ex-employee updating his or her employment status on sites such as Facebook and LinkedIn or sending Twitter invitations to former coworkers are not reasonably interpreted as violating an interest protected by a non-solicitation agreement or customer restriction. *Pre-Paid Legal Servs. v. Cahill*, 924 F. Supp. 2d 1281, 1291 (D. Okla. 2013); see *Medi-Weightloss Franchising USA, LLC v. Las Colinas Medi Weightloss Clinics, LLC*, 2013 U.S. Dist. LEXIS 143874 (M.D. Fla. Sept. 4, 2013); *Kelly Servs. v. Marzullo*, 591 F. Supp. 2d 924 (E.D. Mich. 2008). In such cases, the courts have refused to construe non-solicitation agreements and customer restrictions to prohibit mere social media contact with a former employer's customers unless that contact expressly involved some form of solicitation.

Although few cases speak to these issues, the cases above suggest that former employees will not violate a non-compete or non-solicitation agreement simply by posting basic information to social media, such as updating job information and location. Instead, the courts interpreted restrictive covenants to prohibit only more targeted communication between the former employee and third parties.

Best Practices Concerning Post-Employment Restrictions on Social Media Use

Generally, restrictive covenants, particularly non-competition agreements, are viewed as a restraint of trade and, as a result, against public policy. Restrictive covenants should be drafted in light of such policy and counsel should assume that any covenant will be viewed in the light most favorable to the employee (or former employee). As a result, employers often fare better in court with a limited non-competition/non-solicitation covenant because they tailored the agreement more precisely to what the employer needs to protect.

Whether social media usage by a former employee violates a post-employment restrictive covenant will depend on the particular language of the employment contract and the conduct of the former employee. Although a restrictive covenant need not explicitly reference social media, employers will best protect their information, customers, and remaining employees when they expressly mention social media use and tailor restrictive covenants to the unique aspects of social media. This will help ensure that employees bear responsibility for breaching any post-employment restrictions, even in cases of mistake, ignorance, or willfulness.

The following sections contain sample clauses, alternate clauses, and accompanying commentary that you should consider when drafting restrictive covenants covering social media.

Customer Non-solicitation Clauses

When drafting non-solicitation clauses that restrict contacting the employer's customers, you should specifically define the protectable interest at stake. Although your client's social media presence may constitute a protectable interest, courts will enforce non-solicitation agreements only to the extent they are reasonably necessary to protect that interest.

State law governs non-solicitation agreements and defines the contours of protectable interests. Some states—such as Connecticut and Indiana, as well as the District of Columbia—limit non-solicitation agreements to an employer's current customers. Other states—such as Illinois, Iowa, Nebraska, and New York—require the employee to have had direct contact with the customer during his or her past employment. California law voids non-solicitation covenants as unlawful business restraints, except where necessary to protect trade secrets.

In addition to defining the protectable interests, you should tailor the duration of your agreement to the employer's needs. Keep in mind that some states expressly limit the permissible duration of non-solicitation agreements. For example, Louisiana and South Dakota permit employers to require employees to refrain from soliciting customers for a period of two years or less.

The Sample Non-solicitation Clause (Customer Restriction) below exemplifies a broad customer non-solicitation clause. For a provision that limits the non-solicitation restriction to the employer's current customers, see Alternate Non-solicitation Clause (Customer Restriction) below. For more information about state law on non-solicitation agreements, see the practice note "Navigating Restrictive Covenants" in the relevant state subtopics in the Labor & Employment module's Non-competes and Trade Secret Protection topic.

Sample Non-solicitation Clause (Customer Restriction)

Non-solicitation (Customer Restriction). To protect the Employer's valuable [define protectable interests (e.g., goodwill, customer relationships, trade secrets, confidential information, and professional information)], Employee agrees that, for a period of [insert term of days/months/years] immediately following the termination of [his or her] employment with Employer, [he or she] will not, without the prior written permission of Employer, directly or indirectly, for [himself or herself] or on behalf of any other person or entity, solicit, divert away, take away, or attempt to solicit or take away, by means of contact through social media, such as Facebook, LinkedIn, or Twitter, or any other form of communication, any Customer of Employer for purposes of [soliciting, offering, marketing, providing, selling] [products and/or services] that are offered by Employer, including but not limited to [insert key products or services] if Employer is then still engaged in the sale or provision of such products or services at the time of the solicitation. "Customer" means any person, firm, partnership, corporation, and/or entity that purchased or purchases [products and/or services] from the Employer, as well as any person, firm, partnership, corporation, and/or other entity reasonably expected by Employer to purchase [products and/or services] from Employer.

Alternate Non-solicitation Clause (Customer Restriction)

Non-solicitation (Customer Restriction). To protect the Employer's valuable [define protectable interests (e.g., goodwill, customer relationships, trade secrets, confidential information, and professional information)], Employee agrees that, for a period of [insert term of days/months/years] immediately following the termination of [his or her] employment with Employer, [he or she] will not, without the prior written permission of Employer, directly or indirectly, for [himself or herself] or on behalf of any other person or entity, solicit, divert away, take away, or attempt to solicit or take away, by means of contact through social media, such as Facebook, LinkedIn, or Twitter, or any other form of communication, any current Customer of Employer for purposes of [soliciting, offering, marketing, providing, selling] [products and/or services] that are offered by Employer, including but not limited to [insert key products or services] if Employer is then still engaged in the sale or provision of such products or services at the time of the solicitation. "Customer" means any person, firm, partnership, corporation, and/or entity that purchased or purchases [products and/or services] from the Employer, as well as any person, firm, partnership, corporation, and/or other entity reasonably expected by Employer to purchase [products and/or services] from Employer.

Employee Non-solicitation Clauses

In drafting a non-solicitation agreement restricting the hiring of the employer's employees, you should specifically identify the classes of employees covered by the agreement. Counsel should also research local laws to determine the applicability of such an agreement. Some states place restrictions on agreements prohibiting the solicitation of former coworkers; other states do not consider hiring away at-will employees to constitute an unfair trade practice absent exacerbating circumstances.

For example, in Mississippi, a non-solicitation agreement prohibiting the hiring of former coworkers is an unreasonable restraint on trade where it fails to specify the employees to which the agreement applies. In Montana, non-hire clauses may constitute a restraint of trade and might not be enforced by courts.

The Sample Non-solicitation Clause (Hiring of Employees) below broadly covers all of the employer's employees, including those who left the employer's employment during a prescribed period of time before the signatory employee's termination. For an employee non-solicitation clause that limits the restriction to certain classes of employees, see Alternate Sample Non-solicitation Clause (Hiring of Employees). For more information about state law on non-solicitation agreements, see the practice note "Navigating Restrictive Covenants" in the relevant state subtopics in the Labor & Employment module's Non-competes and Trade Secret Protection topic.

Sample Non-solicitation Clause (Hiring of Employees)

Non-solicitation (Hiring of Employees). During Employer's employment of Employee and for a period of [insert term of days/months/years] following the termination of Employee's employment with Employer for any reason, Employee will not, directly or indirectly, for [himself or herself] or on behalf of any other person or entity, solicit for employment or hire, by any means, including but not limited to social media, such as Facebook, LinkedIn, or Twitter, or any other form of communication, any employee of Employer who was employed with Employer within the [insert term of days/months/years] immediately prior to Employee's termination.

Alternate Sample Non-solicitation Clause (Hiring of Employees)

Non-solicitation (Hiring of Employees). During Employer's employment of Employee and for a period of [insert term of days/months/years] following the termination of Employee's employment with Employer for any reason, Employee will not, directly or indirectly, for [himself or herself] or on behalf of any other person or entity, solicit for employment or hire, by any means, including but not limited to social media, such as Facebook, LinkedIn, or Twitter, or any other form of communication, any [list categories of employees] who was employed with Employer within the [insert term of days/months/years] immediately prior to Employee's termination.

Non-competition Clauses

As mentioned above, courts view non-competition agreements skeptically as a restraint of trade. To increase the likelihood that a court will enforce such agreements, counsel should eschew overly broad agreements that prohibit more activity than necessary to protect the employer's legitimate interests. You should also keep in mind that the rules regarding non-competes vary widely across states. For more information about state law on non-competition agreements, see the practice note "Navigating Restrictive Covenants" in the relevant state subtopics in the Labor & Employment module's Non-competes and Trade Secret Protection topic.

Generally, in drafting non-competition clauses, you should specifically define the protectable interest at stake. Remember that an employer's social media presence may constitute a protectable interest, but courts will enforce non-competition agreements only to the extent they are reasonably necessary to protect that interest. You should also specifically define the acts prohibited by the non-competition agreement, keeping in mind that many states require narrowly tailored prohibitions.

In California, for instance, covenants not to compete are generally void under California Business and Professions Code §§ 16600, et seq. The California Supreme Court has even rejected "narrow restraints." (California Business and Professions Code §§ 16601 and 16602, however, do allow non-competes in the context of the sale of a business or partnership.) Similarly, Colorado, under Revised Statute §§ 9-2-113, voids covenants not to compete that restrict the rights of employees to work for any employer except for the protection of trade secrets or the recovery of training costs in some circumstances. Under North Dakota Code §§ 9-08-06, covenants not to compete between an employer and employee are not enforceable. Other states,

such as Arkansas, Florida, Kansas, Maryland, and Nevada, permit non-competition agreements only to protect certain interests. Some states, such as Alabama (professionals) and Georgia (salespeople, brokers, managers, professionals, and “key” employees), permit non-competition agreements only for certain classes of employees.

Although some states, including Illinois, have statutes that protect trade secrets, the laws generally offer narrow safeguards and do not prohibit working for a competitor. Sometimes employers will argue, however, that a non-compete provision should be imposed to protect the trade secrets.

With respect to the term, note that some states expressly limit the permissible duration of non-competition agreements. Montana restricts non-competition agreements to a period not to exceed 240 days. In most jurisdictions, periods of up to two years are common. Normally, longer periods are allowed only in the context of the sale of a business or practice. Remember that the restriction should last only as long as the protectable interest.

Also keep in mind that special rules may apply to specified industries. For instance, lawyers tend to be governed by ethical rules. Special rules also frequently apply to physicians (e.g., physicians are often forbidden by statute from abandoning their patients). Another example is section 10 of the Illinois Broadcast Industry Free Market Act, which governs non-compete agreements for broadcasting industry employees. Illinois courts have not yet interpreted whether section 10 applies to online media.

The Sample Non-competition Clause provides an example of a non-competition clause that limits post-employment social media activity. For a clause that is geared specifically toward marketing professionals working with social media, see Alternate Non-competition Clause.

Sample Non-competition Clause

Non-competition. During Employee’s employment by Employer and for a period of [insert term of days/months/years] following the termination of Employee for any reason, Employee shall not within [insert geographic restriction] directly or indirectly, either for Employee’s own account or as a partner, shareholder, officer, employee, agent, or otherwise, be employed by, participate in, consult, connect with, or otherwise associate, including by social media such as LinkedIn, Facebook, or Twitter, with any other business, venture, or enterprise that is similar to, or the same as, or competitive with Employer.

Alternate Non-competition Clause

Non-competition. Employee covenants and agrees that during the term of [his or her] employment with Employer and for a period of [insert term of days/months/years] immediately following the termination of said employment for any reason, [he or she] will not, on [his or her] own behalf or as a partner, officer, director, employee, agent, or consultant of any other person or entity, directly or indirectly, engage or attempt to engage in the business of [soliciting, offering, marketing, providing, selling] [products and/or services], including but not limited to [insert key products or services] in [insert applicable geographic region] that are [products or services] developed, provided, or offered by Employer at the time of the termination of [his or her] employment with Employer, whether by social media, such as Facebook, LinkedIn, or Twitter, or any other form of communication, unless waived in writing by Employer in its sole discretion. Employee recognizes that the above restriction is reasonable and necessary to protect the interests of Employer.

During the [insert term of days/months/years] period immediately following Employee’s termination from [his or her] employment with Employer, Employee may submit a written request to Employer outlining a proposed employment or other business opportunity that Employee is considering. Employer will review such request, and make a determination within 10 business days following receipt of such request, in its view, as to whether the opportunity would constitute a breach of the foregoing non-competition covenant.

Return of Social Media Account Information from Employee to Employer

When drafting provisions that address the return of social media account information, you should use inclusive language because the social media products used by the employer and employee likely will change over the duration of the agreement.

Sample Clause Providing for Return of Social Media Account Information

Return of Social Media Account Information. Employee hereby covenants and agrees that all social media accounts associated with Employer, including the information and goodwill contained therein, are the exclusive property of Employer. Employee covenants and agrees that immediately following the termination of said employment for any reason, [he or she] will provide Employer with the account information for electronic mail, computer networks or Internet bulletin boards, blogs, or social media, such as Facebook, LinkedIn, or Twitter, or any other form of communication, including but not limited to user names, login information, password reset information, associated e-mail addresses, and passwords for all social media accounts associated with Employer, including, but not limited to, Employer's [Facebook (insert account name), Twitter (insert Twitter handle), LinkedIn (insert account name), and Instagram (insert user name)] accounts. Employee covenants and agrees to deliver this social media account information to the [Director of Human Resources or other employee] immediately—and in no case later than three days—following the termination of said employment. Employee further covenants and agrees that immediately following the termination of said employment for any reason, [he or she] will cease and desist from use of social media accounts associated with [Employer,] including, but not limited to Employer's [Facebook, Twitter, LinkedIn, and Instagram] accounts.

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