Social Media And Trade Secrets

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Most employers are well aware of the various implications that the social media explosion has on the workplace. The various issues created by Facebook, LinkedIn, and other similar platforms lead to constant requests for input by management-side employment lawyers. Likewise, employers – especially those in industries with a heavy emphasis on relationships or research and development – are also focused on protection of their trade secrets and other confidential information.

But the intersection between social media and trade-secret protection represents a new frontier – one with relatively little case law, but with substantial implications.

It's Just A Customer List By Another Name

The most notable area in which social media can affect a company's protection of its confidential information comes with the most common form of a trade secret: a customer list. Employers often encourage their sales personnel to use LinkedIn or other social media platforms to establish and strengthen relationships with actual and potential customers. Social media can be a great way to stay on a customer's mind, update a customer on what the sales person and the company are doing, and project an image of success.

That said, what happens to that social-media account when salespeople leave and go to a rival company? They are walking out the door with a de facto customer list. It is likely that the names and contact information of some or all of a salesperson's key client relationships will reside on that social-media account.

It used to be that salespeople would have to sneak their customer lists out from under the watchful eyes of their employers, first in a physical file, then on some type of data storage device or by an email to a personal account. Now, they simply need to maintain access to their social-media accounts and they have a list without having to steal anything.

In order to deal with this situation, you need to take certain steps to ensure that you aren't allowing your trade secrets to drip out the door with every salesperson who departs your company:

Make Clear That The Company Owns The Social-Media Account

This can be accomplished either by agreement or by a written policy, preferably one that employees sign. Even better, have your salespeople set up new social-media accounts when they commence employment so the company can deactivate or transfer the accounts when the employee leaves.

Of course, many employees bring existing accounts with them when they start employment and prefer to add to their existing accounts. In that case, have the employees agree that at the end of employment, they will delete any business contacts that they established over the course of employment.

Insist On Privacy Settings

One good employee defense in a trade-secret action concerning a customer list is that the employer did not take reasonable means to protect its trade secret because anyone can look at the contacts of the company's salespeople on LinkedIn and find the relevant contents of the customer list. In other words, the information is not a secret.

The solution to this problem is simple: require employees to make their contact lists private on any social-media account that they use for business.

Address The Issue Of Status Updates

Employers frequently use restrictive-covenant agreements to prevent their employees from competing for a certain period after employment. One common provision in such an agreement is a non-compete provision, which prevents an employee from performing certain competitive acts in a given territory for a stretch of time after employment. But employees often push back against such provisions and judges can be reticent to enforce them because of the view that they prevent an individual from making a living.

Thus, employers will frequently use non-solicitation-of-customers covenants in place of (or sometimes in addition to) non-compete restrictions. Non-solicitation provisions prevent an employee from soliciting customers after the conclusion of an employment relationship. These restrictions are especially useful with salespeople and other categories of employees who have significant customer contact and relationships. Non-solicitation provisions are less onerous than non-compete restrictions and are usually easier to enforce.

However, non-solicitation restrictions create proof problems that non-compete provisions do not. It is usually straightforward to show that a former employee is competing in a given territory. It can be harder to show that an employee solicited a customer because the question "what is solicitation?" is sometimes hard to answer.

This is especially true in the social-media context. Say you have a salesperson named Pete who has agreed not to solicit actual or potential customers with whom he had contact for one year after the termination of employment. Pete resigns and then immediately posts a status update on LinkedIn or Facebook that he has left your company and joined a rival outfit.

Or maybe Pete is really subtle and simply changes his employment information on those websites, meaning that his customers get an automatic update regarding the identity of his new employer. Assuming that Pete has connections to customers on LinkedIn and Facebook, has Pete violated his agreement?

There is no definitive answer to that question, so it is up to a forward-thinking employer to plan ahead when drafting and revising restrictive covenant agreements. While no one can contract for every contingency, the status-update problem is one that can be solved by addressing that scenario in a non-solicitation covenant. Pete's agreement should say that providing information on a new employer through social media will be considered to be a solicitation.

The harder question is how to handle the simple act of changing one's employer on a social-media account. It does not make sense for an employer to require a former employee to keep incorrect information on an account, so the only viable solutions are the ones suggested earlier: employers should either own the social-media account in the first place, or require an employee to agree at the outset of a relationship that upon termination, the employee will delete business contacts added during the course of employment.

In other words, employers can handle the tricky issues presented by social-media relationships, but advanced planning is a necessity.

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