A Social Media Status Update: A Gray Area of Solicitation- Part 2

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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. However, 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 straight-forward 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 web sites, such 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 in the first part of this series: an employer either owning the social media account in the first place or having an employee agree at the outset of a relationship that upon termination, the employee will delete business contacts added during the course of employment. Employers can handle the tricky issues presented by social media relationships, but advanced planning is a necessity.

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