Who Poked Whom First: Does a Friend Request or Social Media Invite Count as Solicitation?

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When Gregory Gelineau quit his job at an Illinois-based insurance company to work for a competitor, he sent LinkedIn invitations to a group of his former co-workers. In response, Gelineau's former company sued him. The company, Bankers Life, alleged that Gelineau violated the non-solicitation provision in his employment agreement by recruiting or attempting to recruit several of his former co-workers. Bankers Life argued that employees who received Gelineau's invitation to connect on the professional networking site were able to follow a link to Gelineau's LinkedIn page, where they would then see a job posting for the competing firm. Moving for summary judgment, Gelineau submitted an affidavit in which he attested that he never used LinkedIn to send any "direct messages" to Bankers Life employees in the relevant geographic area, and that all individuals within his email contact list were sent generic "invitation" emails from LinkedIn, inviting them to connect with him on the networking site.

The trial court granted summary judgment in Gelineau's favor, finding that Bankers Life failed to identify any solicitation by Gelineau. On appeal, the Illinois appellate court affirmed the trial court's ruling. *Bankers Life & Casualty Co. v. American Senior Benefits LLC, et al.*, 2017 IL App (1st) 160687. The appellate court rejected Bankers Life's position that the LinkedIn invites constituted "solicitations" because they directed recipients to a job posting, and disregarded evidence suggesting that it was Gelineau's *modus operandi* to first utilize LinkedIn to make contact with potential job applicants.

In affirming the circuit court decision, the appellate court relied on several cases from other jurisdictions, including decisions from the Connecticut Superior Court and the 3rd Circuit. In the Connecticut case, a web designer updated his LinkedIn profile to list his new position, and posted a link to the site encouraging his contacts to "check out" a website he had designed for his new employer. Rejecting his former employer's suit for breach of a non-solicitation agreement, the Connecticut court noted that there was no evidence that any clients or customers actually viewed the former employee's LinkedIn activity or did business with the competitor as a result of the LinkedIn activity.

The *Bankers Life* court similarly found that the generic emails sent from Gelineau's LinkedIn account, constituted passive social media activity that did not rise to the level of solicitation. Reflecting a nationwide trend in similar cases, the Illinois court focused on the content and

substance of the communications. The decision differentiates such "passive" and untargeted activity from more active interactions, such as sending direct messages to former co-workers or other focused and deliberate activity directed to customers or employees.

Employers considering whether to use non-solicitation agreements or the enforceability of their existing agreements may want to consider the facts in Bankers Life. The reality is that employees often develop relationships with each other that continue after the employment relationship ends, and that they may use social media to stay in touch. Therefore, as the law on what forms of communication are permissible under non-competition or non-solicitation agreements continues to evolve, employers should consult their legal counsel about specifically addressing social media communications in those agreements. Lawyers should also consider the enforceability of non-solicitation agreements as they counsel clients about the types of communications that courts allow. This decision reflects a national trend toward evaluating the nature of the social media activity on a sliding scale of passive to active, and complements employers' understanding of what types of interactions between current and former employees or customers may be permitted despite a valid and enforceable non-solicitation agreement.