LinkedIn Over Her Head: When Broadcasting a Change in Employment Counts as Solicitation

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A recent blog post discussed an Illinois state court decision evaluating an employer's claim against a former employee for breach of a non-solicitation agreement, when the employee had added former co-workers on LinkedIn after going to work for a competitor. There, the court determined that the employee had not violated the non-solicitation agreement, finding that merely adding a former co-worker as a LinkedIn connection was a type of "passive" social media activity that did not rise to level of solicitation. The court differentiated between passive, untargeted social media activity and more "active" interactions, such as sending direct messages to former co-workers or targeting former customers with a sales pitch, and suggested that such activity could run afoul of a non-solicitation agreement.

As courts across the country evaluate what types of behavior constitute actionable "solicitation" in the age of social networking, a recent Minnesota federal court decision provides helpful illustration of the type of social networking activity that *can* run afoul of an employee's non-solicitation obligations. In *Mobile Mini, Inc. v. Vevea*, an employee of a portable storage business left to work for a competitor. Before the expiration of the non-solicitation provision contained in her employment agreement, she updated her LinkedIn profile to show that she now worked for the competing firm. Crucially, she also created two LinkedIn posts that were visible to her 500-plus LinkedIn "connections," including multiple existing customers of the former employer. The posts read like sales pitches for her new company, listing her phone number and urging readers to "[c]all me today for a storage container quote from the cleanest, newest, safest and best container fleet in the State of Minnesota." The U.S. District Court for the District of Minnesota entered a preliminary injunction against the employee and her new company, ordering that the employee remove all posts on her LinkedIn account that advertised the new company's products or services, and enjoining her from creating any similar posts on social media outlets for the duration of the non-solicitation provision.

In ordering preliminary injunctive relief, the Court determined that the employee's LinkedIn posts constituted "two blatant sales pitches" on behalf of her new employer, before the expiration of her non-solicitation provision. In the Court's view, an injunction was appropriate because of the strong likelihood that the LinkedIn posts constituted solicitations and thus breached the employment agreement. The Court rejected the employee's argument that the posts were "mere status updates" announcing her new position and contact information, and explained that "if that were the extent of the posts, then there would likely not be a breach of contract." However, the Court stopped short of

granting the former employer's request to restart the clock for the non-solicitation provision, reasoning that the company had yet to show any actual damage from the solicitous status updates.

While this decision does not explicitly characterize employees' social media activities as "passive" or "active," it is clear that actively targeting a former employer's customers via LinkedIn posts crosses the line into impermissible solicitation. This decision, largely in line with courts' decisions in similar claims across the country, further assists employers in evaluating whether an ex-employee's activities cross the line into impermissible solicitation. The court's holding is also a reminder that employees must be cognizant of their non-solicitation obligations when using a social media outlet to broadcast a change in employment.