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With Friends Like These…: Non-Solicitation Agreements and Social Media

by

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BIOGRAPHY

Robert ("Bob") Brian Fitzpatrick is the principal in the law firm of Robert B. Fitzpatrick PLLC in Washington, D.C. where represents clients in employment law matters. Mr. Fitzpatrick has concentrated his practice in employment law disputes for more than fifty years. He has represented clients in individual and class actions. He has represented clients in employment discrimination, workplace harassment, retaliation, age discrimination, FMLA, ADA, whistleblower, wrongful termination, non-compete, trade secrets, Computer Fraud and Abuse Act, and wage and hour claims, among others. He counsels numerous executive clients regarding employment agreements and compensation issues. He has negotiated literally thousands of severance agreements. He is also a frequent speaker on employment law topics, and has written countless articles on employment law, a few of which can be found on his website and his blog, Fitzpatrick on Employment Law.

Prior to entering private practice, Mr. Fitzpatrick served as a staff attorney in the Jackson, Mississippi office of the Lawyers' Committee for Civil Rights Under Law in the late 1960's; as a staff attorney in the Office of General Counsel of the Equal Employment Opportunity Commission in the early 1970's; and with the Washington Research Project (now the Children's Defense Fund) training minority attorneys in the Deep South to litigate employment discrimination cases. He has been in private practice in Washington, D.C. since 1970. He is an avid hiker and kayaker. He is a Fellow of the College of Labor & Employment Lawyers, having been inducted as a Fellow at the first annual induction ceremony in 1996. He has been listed as one of The Best Lawyers in America® for at least 25 continuous years.

He is admitted to practice in all courts of the District of Columbia (Superior Court, D.C. Court of Appeals, and the Federal District Court of the District of Columbia), the Federal District Court for Maryland, the Federal District Court for the Northern District of Mississippi, the Supreme Court of the United States, the Federal Circuit, the Court of Federal Claims, and the United States Courts of Appeals for the District of Columbia as well as the Fourth and Sixth Circuits.

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Non-Solicitation Agreements and Social Media

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As social media further permeates our work culture, courts are in the difficult position of drawing lines between what constitutes an impermissible behavior online and what does not. In the context of non-solicitation agreements, two recent cases demonstrate the lines beginning to emerge, oftentimes with little clarity or justification, around online behavior related to the workplace.

I. Failure to Consider Social Media During Drafting Can Unintentionally Limit the Reach of Restrictive Covenants

In *KNF&T Staffing v. Muller*, No. 13-3676 (Mass. Super. Oct. 24, 2013) (available at: http://pdfserver.amlaw.com/nlj/MassSuperiorKNF&TvMullerPIOrder.pdf), the Massachusetts Superior Court ruled that a former employee's update of her LinkedIn page was not a solicitation intended to compete with her former employer, with whom she had signed a non-competition agreement. Ms. Charlotte Muller worked for eight years at KNF&T Staffing in Boston, Massachusetts. She signed a non-compete agreement with KNF&T when she first started which prohibited her from "solicit[ing], recruit[ing], or hir[ing] away employees of the Company" or "enga[ging] in any activity involving personnel placement in the Company's Fields of Placement" within one year of her departure from the company. *Id*. at *2. The agreement defined "Fields of Placement" as the specific staffing areas in which Muller worked, which were mainly administrative and secretarial staffing. *Id*. at *3.

Within a few months after leaving KNF&T on April 12, 2013, Muller joined a new staffing firm in Boston, working exclusively in IT-focused staffing. She also updated her LinkedIn profile, including in her "Skills & Expertise" section "Internet Recruiting" as well as other general areas such as "Staffing Services" and "Recruiting". *Id*. Upon learning of this social media update and other activities, KNF&T filed a complaint as well as a motion for a temporary restraining order requiring defendant to abide by the terms of her non-compete agreement. In its motion for a temporary restraining order, which the court treated as a request for a preliminary injunction, KNF&T argued that the LinkedIn update constituted solicitation in violation of the non-compete, contending that Muller was reaching out to potential clients of KNF&T through her LinkedIn profile. Superior Court Judge Thomas Billings strongly disagreed, stating that "Muller was not and is not prohibited from soliciting or accepting any potential client for recruitment of IT professionals, or anyone else in a field in which KNF&T does not recruit." *Id*. at *7. Central to Judge Billings's reasoning was that Muller's LinkedIn profile listed staffing specialties that were either so general ("Staffing Services" and "Recruiting") or so different ("Internet Recruiting") that they did not fall under non-compete agreement's "Fields of Placement." Judge Billings denied KNF&T's motion for a preliminary injunction, holding that there was "no evidence of a past or present violation of the non-compete agreement." *Id*.

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Similarly, in *Enhanced Network Solutions Group, Inc. v. Hypersonic Technologies Corp.*, 951 N.E.2d 265 (Ct. App. Ind. 2011) ("*ENS*"), the plaintiff-contractor sued defendant-subcontractor to enforce a clause of the SubContractor Agreement which prohibited the parties from soliciting each other's employees. Plaintiff alleged that defendant had violated this agreement by posting an open sales representative position on its LinkedIn web portal, which led to one of plaintiff's employees to apply for, and ultimately accept, the open position. The Indiana Court of Appeals affirmed the trial court's determination that defendant had not "solicited" plaintiff's employee. In so holding, the Court relied on several facts: 1) the terms "solicit" and "induce" were undefined and their ordinary dictionary definitions did not support plaintiff's claim that the posting constituted a "solicitation" or "inducement"; 2) the employee made the initial contact with defendant; and 3) the employee initiated all conversations regarding the position.

II. Courts Look to Substance Over Form – Properly Drafted Non-Solicitation Agreements Can Reach "Passive" Solicitations

By contrast, in *Amway Global v. Woodward*, 744 F. Supp. 2d 657 (E.D. Mich 2010), the Eastern District of Michigan affirmed an arbitrator's decision that untargeted blog and website postings had violated the non-solicitation agreement executed by defendant. In *Amway*, plaintiff alleged that defendant 's postings on various websites, including a blog entry in which defendant announced his decision to join a competing company because "[i]f you knew what I knew, you would do what I do" , constituted solicitation in violation of defendant's contractual obligations. *Id.* at 673. In response, defendant argued that "passive, untargeted communications" could not, as a matter of law, constitute actionable solicitation. In affirming the arbitration decision to the contrary, the Court opined that "common sense dictates that it is the *substance* of the message conveyed, and not the medium through which it is transmitted, that determines whether a communication qualifies as solicitation." *Id.* at 674. In so holding, the Court noted that other courts to confront this issue had reached similar conclusions, most notably the Ninth Circuit in *United States v. Pirello*, 355 F.3d 728 (9th Cir. 2001), which rejected the dissent's argument that "passive placement" of information on the internet could not qualify as solicitation because it did not entail "one-on-one importuning" and was not "directed at specific individuals." *Pirello*, 355 F.3d at 733 (Berzon, J., dissenting); *See also Domino's Pizza PMC v. Caribbean Rhino, Inc.*, 453 F. Supp. 2d 998 (E.D. Mich. 2006) (finding that activities including posts on internet websites to constitute prohibited solicitation); *United States v. Zein*, No. 09-20237, 2009 U.S. Dist. LEXIS 115814 at *2 (E.D. Mich. Dec. 11, 2009) (holding in a criminal matter that a Craigslist advertisement "certainly qualifies as a plan to solicit by the internet.").

The First Circuit had occasion to address solicitation in the context of electronic communications in the case of *Corp. Technologies v. Harnett*, No. 12-12385, 2013 U.S. Dist. LEXIS 63598, 35 I.E.R. Cas. (BNA) 863 (1st Cir. May 3, 2013). In that case, Harnett had signed a

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non-compete and non-solicitation agreement with Corporate Technologies, and a decade later left the company and joined a competitor. Shortly after he joined the competitor, Harnett sent a blast email with an update on his new position to dozens of potential clients, of which approximately 40 percent were clients of Corporate Technologies. *Id*. at *4. Numerous Corporate Technologies clients replied to the email, and some completed sales with Harnett. Soon after, Corporate Technologies filed a motion for preliminary injunction against Harnett, arguing that Harnett violated the non-solicitation agreement through his email.

In the subsequent court filings, Harnett argued that it was the Corporate Technologies clients that had contacted and completed sales with him, and thus he had not solicited their business in violation of the agreement. The First Circuit disagreed, calling this attempt to shift the initial contact from Harnett to the clients a "linguistic trick." *Id*. at *7. The court declined to create an initial contact test, stating instead that the party making the initial contact is "just one factor in drawing the line between solicitation and acceptance." *Id*. at 10. Reasoning that Harnett's blast email was a" targeted mailing" to customers of Corporate Technologies, the court held that Harnett violated the non-solicitation agreement and granted the Corporate Technologies' motion for a preliminary injunction. *Id*. at 10.

III. Unexplored Boundaries

It is clear from the above that courts are still struggling to find a path through the ever-evolving thicket of means available to employees and businesses to promote themselves. The underlying question in many of these cases appears to center around whether the court, under the particular facts of the case, inferred that defendant *intended* to solicit the recipients of his or her communications. This can be well illustrated by comparing the facts of *ENS* with those in *Harnett*, both discussed above. In *ENS*, a job opening was posted on a LinkedIn website, and as a result was transmitted to one (or more) of plaintiff's employees in violation of defendant's non-solicitation agreement, while in *Harnett* defendant transmitted an "e-mail blast" to potential clients, approximately 40 percent of whom defendant was prohibited from soliciting.

Indeed, "intent" seems to have been the basis for the decision of the Eastern District of Oklahoma in *Pre-Paid Legal Servs., Inc. v. Cahill*, 924 F. Supp. 2d 1281 (E.D. Okla. 2013). In *Cahill* plaintiff alleged that defendant's practice of posting information to his Facebook account, which was viewable by plaintiff's "friends", including his former employees, constituted actionable solicitation. The Court disagreed, explaining that "[t]here was no evidence that Defendant's Facebook posts have resulted in the departure of a single [employee of plaintiff, nor was there any evidence that Defendant is targeting [plaintiff's employees] by posting directly on their walls or through private messaging. *Id.*; *See also* Jon Hyman, "Does Social Media Change the Meaning of 'Solicitation?'", Ohio Employer's Law Blog (Feb. 25, 2013) (available at: http://www.ohioemployerlawblog.com/2013/02/does-social-media-change-definition.html).

Of course, the question remains as to what level of contact, intentional or not, is needed to make out an actionable claim of solicitation. Unfortunately, several cases which may have

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provided an answer to this question have settled without reaching the merits. Nevertheless, these cases serve to illustrate the threat perceived by some employers in the growing use of social media.

In *Graziano v. NESCO Serv. Co.*, No. 1:09-cv-2661, 2011 U.S. Dist. LEXIS 33497 (N.D. Ohio March 4, 2011), after being terminated by defendant, an employment staffing agency, plaintiff created an account on LinkedIn, and used that account to contact several former co-workers. While the opinion is unclear, it appears that plaintiff did little more than request a "link" with his former colleagues. In response, defendant notified plaintiff that he should "cease all use of the LinkedIn website", as such conduct allegedly violated the terms of the non-solicit clause contained in plaintiff's severance agreement. When plaintiff refused to comply, defendant ceased the severance payments provided for in the severance agreement. The case settled before a determination could be made as to whether Graziano's conduct constituted a violation of his non-solicitation obligations. *See also* Erik B. von Zeipel, "When Does LinkedIn Activity Violate Non-Solicitation Agreements?", Trading Secrets (Nov. 4, 2013) (available at: http://www.tradesecretslaw.com/2013/11/articles/trade-secrets/when-does-linkedin-activity-violate-non-solicitation-agreements/).

Similarly, in *TEKsystems, Inc. v. Hammernick*, No. 0:10-cv-00819 (D. Minn. March 16, 2010) (Complaint) (available at: http://op.bna.com/pen.nsf/id/jmer-86fq5g/$File/linkedin-hammernick.pdf) (accessed Dec. 13, 2013). In *TEKsystems*, the plaintiff alleged that defendant had violated his non-solicitation obligations by "connecting" with contacts through social media websites. In the non-solicitation agreement defendant had agreed not to, whether directly or indirectly, "[a]pproach, contact, solicit, or induce any individual" to perform certain prohibited acts. *Id.* at par. 27(B). While other contacts were alleged by plaintiff, the focus of its complaint is on the fact that defendant had "connected" with at least sixteen of its employees through LinkedIn. This case also settled before a determination could be made as to whether defendant's conduct constituted a violation of his non-solicitation obligations. *See* Zeipel at http://www.tradesecretslaw.com/2013/11/articles/trade-secrets/when-does-linkedin-activity-violate-non-solicitation-agreements/.

IV. Going Forward

In response to these court decisions, there are several steps practitioners for both employers and employees might take in advising their clients.

1. Employers should advise his or her client to address social media within the terms of the restrictive covenant to be certain that even "passive" solicitation falls within the terms of the covenant. As with any other restrictive covenant, the terms should be narrowly drawn to protect the employer's legitimate business interests.
2. Employees should be advised of the potential dangers inherent in their use of social media websites. Where possible, Employees should negotiate specific carve outs to allow reasonable

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use of social media to obtain non-competitive employment even if that use entails incidental contact with employees or customers of the former Employer.

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