# Navigating the Intersection of the Social Media Highway and Restrictive Covenants

**by Thomas A. Muccifori**

The internet has made the world a smaller, more accessible place, opening the door to a global economy. The internet has also opened a Pandora's Box of potential headaches for employers, as the exponential growth in the use of social media by employees, for both business networking purposes and hybrid personal purposes, raises never before anticipated digital world risks for employers. These risks include the online piracy of company data and the potentially embarrassing disclosure of company secrets never intended to be shared with the world.

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This article will discuss how the use of social media platforms by employees intersects with employers' restrictive covenants. The article will also examine the dilemma employers face with departing employees who are active on social media, and provide practical advice for employers looking to better navigate the precarious intersection of social media and restrictive covenants, without an accident.

## What is a Restrictive Covenant?

While social media was born at the turn of the 21st century, covenants not to compete have a long history dating back at least to the early 1600s.[1] Restrictive covenants today are, in reality, no different than they were in 1613[2]—they restrict the activities of an employee following separation from employment. Employers generally use restrictive covenants to protect their legitimate business interests, including: trade secrets; confidential information; goodwill; customer and other business relationships; and investments in training and developing personnel. Common restrictive covenants include: non-compete agreements, which prohibit the employee from working for a competitor, however defined, or in a competitive role at another employer for a specified time period; non-solicit agreements, which prohibit the employee from soliciting customers or employees of the former employer for a specified time period; and non-disclosure agreements, which prohibit the employee from utilizing or disclosing the former employer's confidential and proprietary competitive information.

Many companies require their employees sign agreements that contain one or more of the above restrictive covenants. In the sales industry, the most common restrictive covenant is a non-solicitation agreement prohibiting an employee from soliciting customers or employees of the former employer. In the 'good old days,' solicitation occurred in the time-honored traditional sense of taking customers and prospects to lunch, cold calling, or some other easily defined activity. In today's digital world, the lines of solicitation have become blurred by active social media accounts that include hundreds, if not thousands, of business and personal contacts, where the employee's work-related and personal social media use is intertwined. In the age of Facebook, LinkedIn, Twitter and other mediums, the question of exactly what constitutes a wrongful solicitation isn't always easily answered when the communication in question is on a social media platform that contains business and social contacts.

## How Do State Courts Deal With Passive v. Active Social Media Activity?

Recently, courts in several states have been asked to grapple with these very issues. An Illinois case decided Aug. 2017, *Bankers Life,*[3] analyzed the potential liability that can arise through an employee's use of LinkedIn. The court held that a former employee sending invitations to former co-workers to connect via LinkedIn did not constitute solicitation in violation of his non-competition agreement because: the invitations to connect were sent through generic emails that invited recipients to form professional connections; the generic emails did not contain any discussion of the former or current employer; the invitation did not suggest recipients view open job positions on the former employee's profile page; and the invitation did not solicit recipients to leave their place of employment.

The facts of *Bankers Life* are straightforward. Bankers Life hired Gregory P. Gelineau to work as a branch sales manager responsible for its Warwick, Rhode Island office. As part of his employment, Gelineau signed a non-compete agreement that prohibited him from, among other things, recruiting any Bankers Life employees.[4] Around 2015, Gelineau stopped working for Bankers Life and was hired to work as vice president for American Senior Benefits LLC (ASB), which was one of Bankers Life's competitors.[5] Bankers Life contended that Gelineau breached his non-compete agreement by recruiting or attempting to recruit Bankers Life employees by sending them LinkedIn requests.[6] Gelineau, however, argued he never used LinkedIn to send direct messages to these employees, and that all of the individuals in his email contact list were sent generic emails asking them to join LinkedIn.[7]

The issue for the court was whether Gelineau, through his LinkedIn activity, "sought to induce or attempted to induce the Bankers Life employees to 'curtail, resign, or sever a relationship with [Bankers Life].'"[8] In making its decision, the court looked at other cases[9] discussing the intersection between social media and non-compete agreements.[10] The court held that Gelineau did not violate his non-compete agreement because the invitation to connect through LinkedIn was sent through generic emails that invited recipients to create their own LinkedIn accounts, and did not contain any discussion of Bankers Life or ASB, any suggestion that recipients view a job description on Gelineau's page, or any solicitation for them to leave their jobs and work for ASB.[11] The court found that in order for Gelineau to violate the non-compete agreement, he would have to directly solicit or recruit the plaintiff's employees, and the evidence did not show he had done so.[12]

### *Joseph v. O'Laughlin*[13]

At about the same time *Bankers Life* was decided, a Pennsylvania appellate court was faced with the issue of whether a Facebook posting violated a restrictive covenant in the purchase and sale agreement of a veterinary practice.

In 2014, Laurie A. Joseph (the plaintiff) purchased the Grace Veterinary Clinic from John B. O'Laughlin (the defendant).[14] The agreement contained a restrictive covenant that prohibited the defendant from soliciting any client within 50 miles of the Grace Veterinary Clinic for a five-year period.[15] Six months after the purchase agreement, the defendant requested permission from the Fayette County Zoning Hearing Board to operate a veterinary clinic within eight miles of the Grace Veterinary Clinic.[16] In addition, the defendant formed a limited liability company and named it O'Laughlin Veterinary Services, created a Facebook page that advised viewers the clinic was "coming soon," and included a link to the location of the business on a map.[17] The plaintiff sought a preliminary injunction to prevent the defendant from operating a veterinary clinic and from seeking a zoning variance that would allow him to start his clinic.[18] The trial court granted the injunction and the defendant appealed on the issue of whether his activities constituted engaging in a competing business or soliciting potential clients.[19]

In reviewing the trial court's holding, the superior court held that O'Laughlin engaged in prohibited activity because his actions constituted preparation to compete, and the non-compete agreement contained within the purchase agreement included a prohibition on preparation to compete.[20] In addition, the court held that O'Laughlin violated the non-compete agreement because he was using the Facebook page to actively contact former clients and indirectly solicit their business in anticipation of opening his new clinic.[21] The court stated that, "collectively, the posts, 'coming soon' announcement, and map directions, are tantamount to a solicitation of past or future clients in contravention of the non-compete clause."[22] The court, therefore, found that the permanent injunction against the defendant was appropriate.[23]

### *Morgan Stanley Smith Barney, LLC v. Abel*[24]

A few months after the *Joseph* case, the Middle District of Florida was asked to navigate the intersection of social media and restrictive covenants. In *Morgan Stanley*, Morgan Stanley Smith Barney, LLC (the plaintiff) filed an emergency motion seeking a temporary restraining order and preliminary injunction against Daniel J. Abel (the defendant), and anyone acting with him, from soliciting any of the plaintiff's customers.[25] As part of his employment agreement, the defendant signed a non-compete agreement with the plaintiff, which contained a non-solicitation clause.[26] After leaving Morgan Stanley, the plaintiff alleged the defendant sent out notifications through LinkedIn to various Morgan Stanley clients asserting he was starting his own firm.[27] In resolving the emergency motion, the court held, among other things, that issuing a temporary restraining order against the defendant until a full hearing was scheduled was proper.[28] Therefore, even though the court did not consider whether the defendant's actions in sending notifications via LinkedIn constituted solicitation, it acknowledged the solicitations as being harmful to the plaintiff's business and agreed to issue a temporary restraining order and consider it further at the full hearing.

This string of cases in the past year are the latest to address the intersection of social media and restrictive covenants, but are not the only ones to do so. In *Invidia v. DiFonzo*,[29] a 2012 Massachusetts case, the former employee was a hairstylist bound by a two-year non-solicitation agreement. She had become Facebook friends with at least eight clients of her former employer. Upon leaving her employment with Invidia, she announced on her Facebook page her new employment at another hair salon. In ruling that this did not violate her non-solicitation agreement, the court noted:

> In the comment section below that post, [Invidia customer] Ms. Kaiser posted a comment which said, "See you tomorrow Maren [DiFonza]. Ms. Kaiser then cancelled her appointment at Invidia for the next day. But it does not constitute "solicitation" of Invidia's customers to post a notice on Ms. DiFonza's Facebook page that Ms. DiFonza is joining David Paul Salons. It would be a very different matter if Ms. DiFonza had contacted her that she was moving to David Paul Salons, but there is no evidence of any such contact.

One could argue that the hairstylist's posts were more active than passive, but the *Invidia* court required more proof in the record before so concluding. Such was not the case when a Massachusetts federal court, in *Mobile Mini v. Vevea,*[30] considered a former employee's targeted LinkedIn social medial posts. In that case, Liz Vevea left her job with Mobile Mini and went to work with a competitor. She then posted several messages on LinkedIn inviting her social media network to contact her, identifying her new company was the "best" to work with, and inviting her network to "connect."

The court concluded that Vevea had violated the terms of her non-solicitation agreement, noting that her social media posts were "not mere status updates," but were "blatant sales pitches." The court held that instead of "merely announcing a job change, the language of the posts here demonstrates that Vevea's purpose was to entice members of Vevea's network to call her for the purpose of making sales in her new position."

## Applicability to New Jersey Practitioners

Even though a New Jersey court has not specifically addressed what type of social media posts or activities consti-

tute solicitation in violation of a non-solicitation provision, a New Jersey court is likely to take a similar approach to the courts in Illinois, Pennsylvania, and Florida.[31] In determining whether a post or an action taken through social media constitutes solicitation in violation of a non-solicitation provision, the *Banker's Life*, *Joseph* and *Morgan Stanley* courts analyzed how active and intentional the action or post was in order to determine whether it should be considered solicitation in violation of a non-solicitation provision.[32]

What these recent cases have in common is that the court based its decision on whether it was clear that the individual was intentionally and actively contacting the plaintiff's employees or clients for the sole purpose of soliciting business from them or whether it was an innocent or generic post that could not actually be read as an intent to solicit an individual for business.

In New Jersey, while the courts have not ruled on this specific issue, the New Jersey Supreme Court has delineated the type of actions considered to be solicitation in violation of a non-solicitation provision, and is likely to use the same standard for solicitation through social media.

In *Totaro,*[33] the New Jersey Supreme Court held that a package that was sent by the defendant accountant to previous clients clearly constituted solicitation in violation of a non-solicitation provision.[34] The defendant worked for an accounting firm and signed a non-compete agreement as part of a sale agreement, which included a non-solicitation provision.[35] After he left the firm to start his own accounting firm across the hall, he sent approximately 150 packages to former clients, which included: 1) a letter announcing the opening of his new office; 2) a comprehensive fee schedule that included pricing; 3) a form 'disengagement' letter for clients to send to the plaintiff to end their business relationship; and 4) a form 'engagement' letter to return to him to signify their status as his clients.[36] The court concluded the defendant's conduct clearly constituted solicitation in violation of the non-solicitation provision.[37]

Given how courts in other states have been handling the intersection between social media conduct and non-solicitation provisions, and how the New Jersey Supreme Court in *Totaro* handled solicitation through other means, it is likely that when this issue does come up in New Jersey the court will take a similar approach to the one taken by courts in Illinois, Pennsylvania, and Florida, and look to whether the individual is actively and intentionally reaching out to someone and inviting them to do business with him or her.

## Don't Leave it to Chance

As there is no New Jersey case law to provide guidance to New Jersey practitioners, employers would be wise to take matters into their own hands and include in their handbook, internet policies and restrictive covenants, specific definitions of solicitation that precisely describe permitted versus not permitted post-employment social media activity by the former employee, rather than leave it to chance or litigation.

For example, in *Enhanced Network Solutions v. Hypersonic*[38] the court evaluated the intersection between LinkedIn and a non-solicitation agreement and castigated the plaintiff employer for not providing a definition of 'solicit' or clearly specifying the kind of activity it wished to prohibit. Other courts have engaged in a detailed analysis of cases addressing whether certain contacts via social media did or did not constitute a solicitation, emphasizing that it is not necessarily whether the conduct occurred in a new or more traditional way, but whether the definition of solicitation in the operative non-solicitation agreement covered the precise conduct complained of.[39]

By allowing social media in the workplace, companies are exposed to multiple risks, including the theft of confidential information, the pirating of employees and customers upon departure and potential embarrassment to the company. To minimize these risks, employers should craft a social media policy that includes the following practical points:

- In light of the cases decided against employers as a result of passive solicitations by departing employees, such as those made available through LinkedIn, employers should consider including specific language in their employment agreements and policies prohibiting active solicitations governing the use of social media, specifically defining what the employer considers to be active solicitation.
- Employers should consider both imposing limitations on their employees' social media interactions with customers and colleagues during employment and prohibiting attempts to establish connections, or the sending of targeted messages, for a certain reasonable period of time following the end of employment for whatever reason.
- Update non-solicitation clauses that do not reference social media. Revise and update non-solicitation agreements to specifically address social media activity.
- Monitor former employees' social media sites to the extent possible and immediately print and preserve any posting by a former employee suspected of violating their agreement.
- Maintain administrative rights to the company's own social media site. Issues often arise where a disgruntled departing employee is the only person who knows the passwords and usernames. Employers need to insure

they are not inadvertently or unknowingly locked out of their own social media accounts.

- Require all employees to sign agreements to provide access, usernames, and passwords to account information and other software, computers and devices upon the termination of their employment.

### Bottom Line

The bottom line is that in defining an employee's obligations relating to social media usage, employers should make sure they have policies and agreements in place regarding the ownership of company social media accounts. Clear, written policies and agreements can help navigate a company through the intersection of social media and restrictive covenants and reduce the possibility of costly and time-consuming litigation occasioned by social media mayhem in the digital age. ⚖

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### Endnotes

1. Blake, Employee Agreements Not to Compete, 73 *Harv. L. Rev.* 625, 631-32 (1960).
2. Carpenter, Validity of Contracts not to Compete, 76 *U. Pa. L. Rev*. 244, 245 (1928).
3. *Bankers Life & Casualty Co. v. American Senior Benefits, LLC*, 83 N.E.3d 1085 (Ill. App. Ct. 2017).
4. *Id*.
5. *Id*. at 1088.
6. *Id*.
7. *Id*.
8. *Bankers Life & Cas. Co.*, 83 N.E.3d at 1089.
9. *See BTS, USA, Inc. v. Executive Perspectives, LLC*, No. X10CV116010685, 2014 Conn. Super. LEXIS 2644, 2014 WL 6804545 (Conn. Super Ct. Oct. 16, 2014) (holding the employee did not violate his non-compete agreement by posting on LinkedIn because there was no evidence that any of the employer's customers viewed or visited the LinkedIn website or did any business with the employee as a result of the post); *See also, Coface Collections North America Inc. v. Newton*, 430 F. App'x 162 (3d Cir. 2011) (upholding a preliminary injunction against an employee who posted on LinkedIn about his new company and specified when his non-compete would be over); *See also, Amway Global v. Woodward*, 744 F. Supp. 2d 657 (E.D. Mich. 2010) (considering whether an employee's use of website posting and a blog violated his non-compete and finding that courts must look at the substance of the message conveyed and not the medium through which it is conveyed to determine if it qualifies as solicitation).
10. *Id*. at 1089-91.
11. *Id*. at 1091.
12. *Id*.
13. No. 1706 WDA 2015, 2017 Pa. Super. Unpub. LEXIS 3191 (175 A.3d 1105, Pa. Super. Ct. Aug. 22, 2017).
14. *Joseph*, 2017 Pa. Super. Ct. at 1.
15. *Id*. at 1-2.
16. *Id*. at 2.
17. *Id*. 2-3.
18. *Id*. at 3.
19. *Id*. at 7.
20. *Joseph*, 2017 Pa. Super. Ct. at 11.
21. *Id*. at 17.
22. *Id*.
23. *Id*. at 19.
24. No. 3:18-cv-00141-J-34MCR, 2018 U.S. Dist. LEXIS 10412 (M.D. Fla. Jan. 23, 2018).
25. *Morgan Stanley Smith Barney, LLC v. Abel*, 2018 U.S. Dist. at 1.
26. *Id*. at 3.
27. *Id*. at 5.
28. *Id*. at 13.
29. *Invidia, LLC v. DiFonzo*, 2012 WL 5576406 (Mass. Super. Ct. 2012).
30. *Mobile Mini v. Vevea*, 2017 WL 3172712 (D. Minn. July 25, 2017).
31. *Bankers Life & Casualty Co. v. American Senior Benefits, LLC*, 83 N.E.3d 1085 (Ill. App. Ct. 2017); *Joseph v. O'Laughlin*, No. 1706 WDA 2015, 2017 Pa. Super. Unpub. LEXIS 3191 (Pa. Super. Ct. Aug. 22, 2017); *Morgan Stanley Smith Barney, LLC v. Abel*, No. 3:18-cv-00141-J-34MCR, 2018 U.S. Dist. LEXIS 10412 (M.D. Fla. Jan. 23, 2018).
32. In *Bankers Life*, for example, the court held that the defendant did not violate the non-solicitation provision because the email sent to other individuals was a generic email inviting the recipients to join LinkedIn and it did not actually invite them to look at his LinkedIn page or to leave their current employment. In *Joseph*, on the other hand, the court held that the defendant's conduct did constitute solicitation for purposes of a non-solicitation provision because he was actually contacting clients through a Facebook page and was informing them of the new veterinary clinic he was about to open and of its specific location.
33. *Totaro, Duffy, Cannova and Co., L.L.C. v. Lane, Middleton & Co., L.L.C.*, 921 A.2d 1100, 1103 (N.J. 2007).
34. *Id*.
35. *Id*.
36. *Id*.
37. *Id*. at 1105.
38. *Enhanced Network Solutions Group, Inc. v. Hypersonic Tech. Corp.*, 951 N.E.2nd 265, 269 n.1 (Ind. Ct. App. 2011).
39. *See, for example, Pre-Paid Legal Servs., Inc. v. Cahill*, No. 12-346, 2013 U.S. Dist. Lexis 19323, at *23-29 (E.D. Okla. Jan. 22, 2013).