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Client Alert

Social Media and Restrictive Covenants

For decades the justice system has lagged behind major cultural shifts and phenomena, often taking years for issues to wind their way through the judicial thicket. Think of the automobile, which clogged courts with personal injury cases, or workplace email, which has (ironically) buried litigators in paper. Similarly, while social media platforms such as Facebook and LinkedIn have been around for years, the courts are only now beginning to grapple with their use in the workplace.

A Federal Court in Minnesota recently had the opportunity to evaluate the appropriate use of social media in the context of customer non-solicitation covenants. With the employer's encouragement, the employee used LinkedIn as a business development tool. Consequently, many of her LinkedIn contacts were current or former customers of the employer. The employee later resigned and joined a competitor, after which she posted on LinkedIn her new position, the identity of her new employer and a description of its business, and her new telephone number. Her former employer then sued for breach of her customer non-solicitation agreement.

The court agreed that simply announcing a job change, without more, would not constitute improper solicitation. But it rejected the employee's argument that the LinkedIn post was a "mere status update." Rather, the court determined that the purpose of the post was to "entice members of her network to call her for the purpose of making sales in her new position." Because that network included her prior employer's customers, the court issued an injunction requiring the former employee to take down the offending post and refrain from further posts.

Employers have long used restrictive covenants to protect their confidential information, intellectual property, customer relationships and employees. While this recent case is helpful, the employer would have been better served having an agreement clearly delineating the employee's post-termination obligations with respect to social media. By way of example, the agreement could have addressed the content of any post-termination communications as well as required the employee to remove customers from her LinkedIn and other social networks.

Employers also need to stay abreast of changes in the legal landscape, which if not addressed can render restrictive covenant agreements inadequate to protect the employer's interest. For example, the recently enacted Defend Trade Secrets Act (the "*DTSA*") created a federal civil cause of action for trade secret misappropriation. While the

DTSA allows employers to seek injunctive relief and damages related to actual or threatened trade secret misappropriation, companies who fail to provide employees with written notice of certain immunity rights cannot recover the double damages and attorneys' fees available under the statute. The DTSA notice should be included in any employee, consultant or independent contractor agreements addressing the protection of trade secrets or confidential information. Alternatively, these types of agreements may cross reference a separate whistleblower reporting policy containing the DTSA notice provision.

In addition to the DTSA, recent case law developments have highlighted the importance of the following provisions in restrictive covenants:

- defining employer to include parents, subsidiaries and affiliates;
- defining "confidential information" to be compliant with the National Labor Relations Act (which applies to private employers, including those without unions);
- including "magic language" required by certain state statutes for effectively assigning ownership of intellectual property to the employer;
- acknowledging that the covenants survive any changes in the terms and conditions of employment;
- including provisions allowing the employer to recover its attorneys' fees and extend the post-employment restricted period for the duration of any breach;
- including appropriate clauses permitting employers to assign the agreement; and
- including clauses both authorizing the company and requiring the employee to provide the agreement to potential future employers.

While this is not an exhaustive list, if your restrictive covenant agreements neither address social media nor the DTSA, or the other issues discussed above, we recommend revising those agreements accordingly.
