

Social Media and Non-Solicitation Covenants – Another LinkedIn Cautionary Tale, but this One for Employers

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Written by [Jen Rubin](#)

Those of you who joined us for our November 13 webinar on “Post-Employment Solicitation of Customers & Employees in the Social Media Age” will be interested in a recent social media-related non-solicitation case from Connecticut that – you guessed it – echoes some of the guidance that I, together with my partners Michael Arnold and Bret Cohen, provided about how to take social media developments into consideration when drafting your post-employment non-solicitation covenants.

In *BTS USA Inc. v. Executive Perspectives, LLC*, a former employee posted his new job with a competitor to his LinkedIn account. He then, after updating his LinkedIn account to show his new employment affiliation, broadcast an invitation to his contacts to “check out” the new website he had designed for his new employer. Naturally, some of the contacts in the employee’s LinkedIn networks were customers of his former employer. He did not “unlink” these contacts when he joined his new employer and had no discussions with anyone at his new employer concerning his LinkedIn contacts. Moreover, many employees left behind at the old employer continued to have LinkedIn contacts with the same people through the former employee.

Unsurprisingly, the employer brought as part of its case (which was primarily founded on claimed violations of Connecticut’s trade secrets act), the claim that the former employee had violated his post-employment covenants when he solicited the former customers through LinkedIn.

The court soundly rejected these claims, finding after trial that the former employee announcing his new employment and inviting individuals to visit his new employer’s website did not constitute illegal solicitation because (1) there was no evidence any clients or customers actually received (or viewed) those posts; (2) the posts would only be viewed by customers whose settings were set up to receive the posts; and (3) there was no evidence that any customer actually accepted the invitation and viewed the new employer’s website (or did business with the new employer as a result of the LinkedIn broadcast).

Significantly (and here we wonder if the bench attended our webinar), the court found that the employer had no policies or procedures regarding the employee’s use of social media, nor did it request or require ex-employees to delete the former employer’s clients and customers from the employee’s LinkedIn accounts. In fact, the court found, “to this day [the employer] allows employees to maintain LinkedIn accounts without monitoring or restriction from the employer.” All of this evidence led the court to rule in favor of the employee on the breach of contract claim.

While *BTS* decision is subject to appeal (and subject, as well to a motion for reargument relating to the trade secrets claim), the findings relating to the LinkedIn accounts mirror the guidance we provided at the webinar: don’t ignore the impact that social media (in all its iterations) has on your business and management of post-employment contractual restrictions. Stay tuned for further developments, which we promise to track closely.

Authors