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Expert Analysis

Can LinkedIn Postings Violate Non-Compete Agreements?

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Regardless of industry or occupation, many employees have joined LinkedIn, which bills itself as the "world's largest professional network." LinkedIn provides each user with a webpage "account" where they can describe their current occupation, employer, skills and experience and other information related to their profession. In many cases, employees use their LinkedIn accounts to develop and maintain contacts with co-workers and their employer's customers and suppliers. Some employers encourage such contacts as good for business.

The growth in membership and use of LinkedIn raises legal questions about how it interacts with an employee's legal obligations under pre-existing restrictive covenant agreements that prohibit or restrict disclosure of confidential and proprietary information, competition and solicitation of customers or suppliers.

Of most frequent concern is the fact that when employees change jobs they are likely to update their LinkedIn account to reflect that they have changed employers. This LinkedIn update will usually be sent to all of the employee's LinkedIn contacts, which are likely to include former co-workers and the former employer's customers and/or suppliers. Can a former employee's LinkedIn update violate a pre-existing non-compete or non-solicitation agreement? If so, under what circumstances?

As explained below, the courts have not had many occasions to address these issues. Regardless, there are some general conclusions that can be reached and proactive steps that employers should consider so as to protect their legitimate business interests.

What Courts Have Said

A few courts from different states have considered the question of whether a LinkedIn posting can violate a non-solicitation or non-competition requirement. One of the more recent cases was decided by the Superior Court of Connecticut, *BTS USA v. Executive Perspectives*[1] In *BTS*, the employee, Marshall Bergmann, was a webpage designer and, after he joined a competitor, he updated his LinkedIn account to reflect his new job.[2] Bergmann also made a LinkedIn posting encouraging his contacts to "check out" a website he designed for his new company.[3] Bergmann's former employer, BTS, brought suit claiming that Bergmann's LinkedIn posting violated his legal obligations under a non-solicitation agreement that prohibited him from soliciting BTS customers for two years after his BTS employment ended.[4]

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Upon review, the court rejected BTS's claim that Bergmann's LinkedIn posting violated his non-solicitation agreement.[5] The court based its decision on the fact that there was no evidence that any BTS customer actually viewed or visited Bergmann's LinkedIn website or did any business with Bergmann's new employer as a result of the purported solicitation.[6]

The court also noted that BTS had no policies or procedures regarding its employees' use of LinkedIn or other social media, which prohibited or restricted what Bergmann had done.[7] Indeed, the court stated that "to this day" the employer permitted "employees to maintain LinkedIn accounts without monitoring or restriction from the employer."[8]

As summarized by the court: "BTS had no policies or procedures regarding employee use of social media; did not request or require ex-employees to delete BTS clients or customers from LinkedIn accounts; [and] did not discuss with Bergmann his LinkedIn account in any fashion…Thus, under the circumstances, Bergmann's use of his LinkedIn account after he left BTS did not breach his employment contract." As the court noted, its decision is similar to that of a few other courts, which had considered the issue.[9]

On the other hand, there have been circumstances where courts have found an employee's use of LinkedIn has violated a non-compete/non-solicitation agreement. A federal court in Michigan in the case of *Amway Global v. Woodward*[10] considered whether an employee's use of his LinkedIn account violated his non-solicitation agreement.[11] The employee in that case argued that his LinkedIn postings and other social media communications could not be considered improper solicitations because they were "passive, untargeted communications."[12]

The court disagreed and stated that "it is the substance of the message conveyed, and

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not the medium through which it is transmitted, that determines whether a communication is a solicitation."[13] As stated by the court, "communications qualifying as solicitations do not lose this character simply by virtue of being posted on the Internet."[14]

Although not entirely clear, the difference between the results in *BTS* and *Amway Global* appear to boil down to what exactly was communicated. In *BTS*, the communication showed that the employee changed jobs, it identified the new employer and it provided an example of the employee's work.[15] In contrast, in *Amway Global*, the former employee went a bit further in arguably soliciting his former co-workers to leave Amway by stating, "If you knew what I knew, you would do what I do."[16] The court found that this message "would readily be characterized as solicitation."[17]

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Finally, another case to consider is *KNF&T Staffing v. Muller.*[18] In this case, a staffing agency recruiter, Charlotte Muller, joined a competitor.[19] Thereafter, her former employer sued her for alleged violation of her non-compete/non-solicitation agreement.[20] The former employer's agreement prohibited Muller from competing in her former employer's "fields of placement" for a period of one year after her resignation.[21]

After her resignation, Muller updated her LinkedIn profile to reference her new employment with a competitor and to list her skills as "Internet recruiting," "temporary staffing," "staffing service" and "recruiting."[22] The court found that this was insufficient to demonstrate a breach of her non-compete or non-solicitation obligations reasoning that Muller's listing of her general skills without specific reference to her former employer's "fields of placement" did not constitute a violation of her covenant not to compete.[23] Again, like the Amway case, the court was concerned about what was communicated rather than how it was communicated.

It seems fair to conclude that the mere fact that an employee may announce on LinkedIn to clients or suppliers that he or she has changed jobs is usually not—without more—sufficient to prove violation of a non-solicitation or non-competition agreement. On the other hand, permitting former employees to continue their relationships and contacts through LinkedIn with an employer's customers, suppliers and other employees could very well enable unfair competition. What is an employer to do?

What Are Employer's Options?

Considering the above, what should employers do to protect their business interests in a world where LinkedIn has become ubiquitous? Below are some alternatives that employers should consider. None of these suggestions is a cure-all, and not all will be appropriate for all employers.

- Amend non-compete and non-solicitation agreements and employee handbooks to make clear that the definition of solicitation includes use of LinkedIn accounts for post-termination communication with the employer's existing customers, vendors and co-workers.
- Alternatively, require departing employees to delete LinkedIn contacts with co-workers, customers or suppliers upon termination and to not re-initiate contacts for a period of time thereafter. Another alternative would be to simply ban employees from maintaining a LinkedIn account as a condition of employment and for a reasonable period of time post-employment.
- Amend confidentiality agreements to include provisions expressly prohibiting employees from posting on LinkedIn or other social media any of the employer's confidential or proprietary information or trade secrets. Make clear that violation of this policy may result in termination.
- Without running afoul of federal labor law protections protecting employees' ability to engage in concerted activity, try to stay aware of employee use of social media and LinkedIn.
- If litigation should arise, make sure that any "litigation hold" request, requiring the preservation of electronic evidence that may bear on the lawsuit, includes the preservation of LinkedIn account information and communications. Likewise, if litigation arises, document discovery requests should encompass information about the former employee's LinkedIn or other social media accounts.

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1. *BTS, USA v. Executive Perspectives, and Marshall Bergmann*, Docket No. x10 CV 116010685, 2014 Conn. Super. LEXIS 2644 (Oct. 16, 2014).
2. See id.
3. Id. at 10.
4. See id. at 1–2.
5. See id. at 37–38.
6. Id.
7. Id. at 38.
8. Id.
9. See *BTS, USA* at 38, citing *Enhanced Network Solutions Group v. Hypersonic Techs.*, 951 N.E.2d 265 (Ind. Ct. of App. 2011) (posting of job opportunity on LinkedIn page was not a solicitation); *Invidia v. DiFonzo*, 2012 WL 5576406 (Mass. Super. 2012) (Becoming "friends" with former clients on Facebook did not by itself violate non-compete clause); *Pre-Paid Legal Services v. Cahill,* 924 F.Supp.2d 1281 (E.D. Okla. 2013) (Former employee's postings on Facebook which touted his new employer's product and which was viewed by former colleagues did not violate agreement to not recruit employees from his former employer).
10. 744 F. Supp.2d 657 (E.D. Mich. 2010).
11. See id.
12. Id. at 674.
13. Id.
14. Id.
15. See *BTS, USA*
16. *Amway Global* at 473.
17. Id. at 673.
18. 31 Mass. L. Rep. 561 (Mass. Super. Ct. 2013).
19. See id.
20. See id.
21. Id. at 3–6.
22. Id. at 12, n.5
23. See id. at 11–12.