

The **Impact** of Social Media on Non-Solicitation Clauses

What Companies Need to Know



Table of Contents

Introduction	4
Possible Scenarios	5
Real Life Cases	9
Social Media & the Legal Landscape	11
Gaining Protection	12
Conclusion	13
References	14

A Letter from Steve

Inarguably, social media affects recruiting in a multitude of ways. While it can be a beneficial tool to leverage and has made the talent acquisition process easier in some instances, the use of social media in hiring has also brought on an abundance of privacy issues.

What was once private business information is now being made public, and a rise in non-compete policy issues has been directly correlated to the increase of business professional social media usage.

As a result of this phenomenon, I spoke with my attorneys who have kindly researched these incidents of non-compete issues and provided us with the following documentation to further comprehend how to prevent issues with non-solicitation agreements on social media. I find this information to be extremely relevant to both recruiters and employers.

For more information on how to craft a non-solicitation agreement for your company, or for any other business legal advice, please feel free to contact Michael N. Santeufemia and Jonathan H. Schwartz, attorneys for myself and Qualigence International, at msanteufemia@seyburn.com or by calling (248) 353-7620.

- Steve

Introduction

To prevent employees from pilfering customers, employees, and business opportunities when they leave a company, many employers require their new hires to sign a non-solicitation agreement (or to sign an employment agreement containing a non-solicitation clause) at the outset of the employment relationship.

A non-solicitation agreement generally prohibits an employee from reaching out to (i.e. soliciting) the employer's current or potential customer base for business, and/or trying to steal employees away from the employer, whether for the benefit of the employee or their new employer, for a specified period of time.

Employers work hard and devote significant resources to develop goodwill, loyal customers and a knowledgeable workforce. When a new employee is hired into a company, he or she unquestionably gains unique access to the company's inner workings, secrets, and contacts.

As a result, when an employee leaves a company, there is always a risk that he or she can use that knowledge and access to gain an unfair advantage in the market place, or to wreak havoc on the former employer's business.



For example, not only could a former employee capitalize on the relationships developed and nurtured with vital customers (while on the employer's dime), the employee could also use knowledge of the employer's business to undercut prices, or point out faults in an attempt to steal the business.

Recognizing this risk of unfair competition, courts are generally willing to enforce non-solicitation agreements. For some time, the analysis that courts have long used to determine whether an employee violated their obligation to refrain from solicitation was fairly straightforward.

However, the exponential growth in the use of social media by professionals, especially for business networking purposes, has added significant complexity to the analysis of whether certain actions in the digital sphere constitute a violation of non-solicitation obligations.

This paper will discuss and shed light on how the use of social media platforms, including LinkedIn, Facebook, and Twitter, impact, interact, and potentially undercut non-solicitation agreements. In addition, it will provide suggestions on how businesses can modify their non-solicitation agreements to better protect themselves.

Possible Scenarios John Doe

Company A specializes in the manufacture and sale of automotive parts. In order to expand its business, Company A decided to hire a new sales representative. John Doe had experience in automotive part sales, and jumped at the chance to apply for the job at Company A advertised in the local paper. Company A hired John as a sales representative.



At the time John was hired, he entered into a standard Company A employment agreement, containing a non-solicitation clause.

The non-solicitation clause states that “during the term of the Contract, and for two years following the termination or expiration of the Contract, the Employee, on behalf of him/herself or any third party, shall not contact or solicit for any business purposes, any customer or employee of Company A, or interfere with or attempt to disrupt any relationship between Company A and any customer, employee, or other party doing business for or with Company A.”

John worked for Company A for approximately six years. During that time, he gained extensive knowledge of Company A’s operations, customers, products, product development, sales pricing and margins.

John also developed close relationships with the company’s largest customers and his fellow coworkers, including key employees that were essential to the company’s success.

Just after his six-year anniversary with Company A, John was approached by the President of Company B, the main competitor of Company A, with a job offer. Company B offered to hire John as the Head of Sales, with a significantly larger salary, and great benefits.

John was interested, but informed Company B’s President of the two year non-solicitation clause he had signed. John was told that it wouldn’t be a problem, and they could work around any such issues.

After giving his two weeks’ notice at Company A, John began working for Company B. Pressured to “drum up new business” at Company B, John was asked and agreed to send a letter to all of Company A’s customers, letting them know he had changed jobs, the name and address of his new employer, and introducing Company B’s existing and soon to be released product line, along with pricing information.

Upon their receipt of John’s letter, many of Company A’s loyal customers contacted Company A to inform it of receipt of John’s letter. Soon thereafter, Company A sued John for violation of the non-solicitation clause.²



At a hearing on Company A's claims, the court determined that John violated his non-solicitation obligations when he contacted Company A's customers. Ultimately, the court awarded Company A damages for all the business Company A could prove it lost as a result of John's solicitation.

Possible Scenarios

Jane Doe

For approximately eight years, Jane Doe worked for Company C, which specializes in providing outside IT services. At the time she was hired, Jane signed a non-solicitation agreement, whereby she agreed to refrain from "soliciting any current or former customer or employee of Company C, for one year after termination of her employment."

During the course of her employment, Jane rose through the ranks from an entry level worker, to supervisor, to the head of IT management services for all of the company's customers.



While Jane enjoyed working for Company C, she had long aspired to start and run her own company.

As a result, for two years prior to her departure, Jane worked on a detailed plan to open her own IT company, called Company D. Jane developed a business plan, found office space, purchased business cards, and got Company D's website ready to "go live" while still working at Company C.

As part of her plan to make her new business venture an immediate success, Jane also made a point to maintain connections with all of Company C customers by “linking” with those contacts on LinkedIn, “friending” those same people on Facebook, and encouraging everyone to follow her on Twitter. Jane maintained similar connections with her Company C coworkers.

Once Jane was ready to hit the ground running with her new company, she quit Company C. As part of her new company launch, Jane changed her job title to “Chief Operating Officer of Company D” on LinkedIn and Facebook.



She also sent a mass message/status update to all of her LinkedIn connections, Facebook friends, and Twitter followers, letting them know that she had left Company C, and had opened Company D, with her new contact information and a general description of her services.

As Jane’s profile updates and mass social media notifications began to pop up on Company C’s customers’ social media accounts, some of those customers began contacting Jane. Those customers had developed close relationships with Jane, and asked if they could hire her new company now that she left Company C.

Jane gladly accepted the new business. Soon, Jane’s former coworkers also began asking her for jobs, and sending her their resumes. Jane ended up hiring some of her former coworkers away from Company C to work at Company D.

It did not take long for Company C to sue Jane (and Company D) for violating the non-solicitation clause contained in Jane’s employment agreement with Company C. In response, Jane raised the common defense that she didn’t contact/solicit anyone, they contacted her!³

After analyzing the facts, the court agreed with Jane and dismissed Company C’s case against Jane and her new company. In its decision, the court explained that Jane had not engaged in solicitation by merely changing her job title on LinkedIn and Facebook and informing her social media contacts that she had changed jobs. It agreed that the customers and employees solicited Jane, not the other way around.

Real Life Cases

Applied to John and Jane Doe's Scenarios

In John Doe's scenario, the court is faced with a clear cut example of John Doe sending a solicitation to his former clients. As a result, the court issues a decision against him, and awards Company A damages for lost business. In the case of Jane Doe, while her plan seems much more calculated (and premeditated), her use of social media is narrowly tailored in such a way that the court determined it did not run afoul of her non-solicitation obligations. The two scenarios above are not far-fetched, and they are in line with several real life cases.

Take, for example, the following cases, which deal with more traditional solicitation by employees.

- In *Brown Dairy Equipment, Inc. v Lesoski*⁴, the court upheld an injunction against a former employee who had signed a non-solicitation covenant, where he called on his former employer's customers on behalf of his new employer, and two customers started purchasing the new employer's products.
- In *McRand, Inc. v Beelens*⁵, the court held that a preliminary injunction against a former employee was appropriate for violation of a non-solicitation agreement, where he targeted the prior employer's customers with a mailing notifying them of his new business, and prepared proposals for certain customers.
- In *YCA, LLC v Berry*⁶, an employee entered into a non-solicitation agreement, preventing the solicitation of the employer's clients. After the employee left, the employer sued for an alleged violation of the covenant. The court denied the employee's motion to dismiss the lawsuit because the employee notified his former employer's client that he was changing jobs, contacted the client several times, and prepared a list setting forth the probability of his new employer servicing other clients of the employer.



Now consider several cases where social media interacts with non-solicitation agreements:

- In *KNF&T Staffing Inc. v Muller*⁷, the court considered whether a former employee's LinkedIn profile change that alerted her 500+ contacts that she had changed jobs, and was now working for a competitor, constituted prohibited solicitation. The employer alleged the profile change was tantamount to targeting contacts that the employee acquired during the course of her employment. In denying the employer's motion for a preliminary injunction, the court held that a LinkedIn post advertising a job change does not, in itself, constitute solicitation, even if the employer's customers were "linked" to the employee.⁸



- In *Pre-paid Legal Services Inc. v Chahill*⁹, the court determined that a former employee's Facebook posts about a new job did not violate a non-solicitation agreement. The case involved a regional vice president of sales, who posted general information on his public and private Facebook pages about his new job, three days after his resignation. In denying the employer's requested injunction, the presiding magistrate (later upheld by the judge) found that the posts did not expressly solicit anyone to join him at the new company.¹⁰ The court also found that while a specific request made by an employee for someone to follow his twitter feed could potentially constitute solicitation, a mass invitation to join twitter itself did not constitute solicitation.
- In *Invidia, LLC v DiFonzo*¹¹, the court found that a new employer's announcement on Facebook that it was hiring a new employee did not violate that employee's non-solicitation agreement with her former employer, even though the post resulted in clients leaving the former employer for the new company. The court further held that "[s]o long as [the former employer's clients] reached out to [the employee] and not vice versa, there is no violation of the non-solicitation provision of the Agreement."¹²

Social Media Changes the Legal Landscape

Before recently, social media's impact upon longstanding contractual and employment issues such as non-solicitation agreements would never even have entered into the conversation.¹³



However, it is crystal clear from the two scenarios and case law above that the use of social media by employees can have significant consequences upon the relevance and enforceability of traditional non-solicitation clauses.

This development may deprive companies of their traditional contractual protection from former employees, and can translate into a huge potential risk for employers.

Therefore, it is essential for employers to understand the newfound interplay between social media and the law, and the significant gray area that presently exists.

Only then will companies be able to formulate better ways to protect their businesses.

Where Courts Are Headed

Court decisions thus far provide the following guidance on the intersection between traditional non-solicitation clauses and social media.

1. Informing social media contacts of an employee's new job and the name of the employee's new company alone is allowed, even if the new employer is a competitor.
2. Specifically asking for business or for workers to join a new company, via social media, can violate a non-solicitation covenant if a former employer's customers or employees receive the message.¹⁴

3. A former employee who targets his or her social media updates or messages specifically to a former employer's customers or employees may constitute a violation of the non-solicitation covenant, depending upon the content (e.g. if it explicitly asks for business, or for former coworkers to join the employee's new company).
4. Status updates and mass message that are sent to all of the former employee's social media contacts, and not specifically to a former employer's customers or employees, is less likely to violate a non-solicitation clause, assuming the content is not clearly violative. A general update or message provides the employee with plausible deniability that they did not intend to simply solicit former customers or employees of the employer.

How Employers Can Gain More Protection

There are several ways that employers can modify their existing non-solicitation clauses/agreements to counteract some of the challenges caused by social media. These alterations can include, but are not limited to the following:

1. Do not merely rely upon the term "solicit" to describe prohibited conduct. Utilize other terms such as "attract," "seek," "entice," and "lure." These terms broaden the scope of prohibited conduct, and allow courts to create new case law that may not be bound by the prior precedent involving social media and the term "solicitation."



2. Explicitly state in the non-solicitation covenant that certain uses of social media constitute a violation.¹⁵ Also cite examples of specific social media uses that constitute a violation. Moreover, make sure to include a coverall disclaimer that such examples are not the only types of solicitation prohibited by the covenant.

3. Require employees to adhere to other restrictions, such as confidentiality, non- compete, and non-disparagement.

Conclusion

The influence of social media on non-solicitation clauses is definitely a hot new topic. Given the significant risk of harm to employers if an employee can disregard or maneuver around a non- solicitation clause by utilizing social media, it is essential for employers to work diligently to respond to this challenge.

As with any other change in the business landscape, companies that take the necessary steps to evolve will be best able to preserve and protect their hard earned business success.



References

- 1 The enforceability of non-solicitation clauses may vary depending on state.
- 2 Company A also sued Company B, claiming Company B's interference with John's contract with Company A (specifically related to the non-solicitation clause), and interference with its business expectancy (as to its relationship with Company A's customers).
- 3 See The Parameters of "Solicitation" in an Era of Non-Solicitation Covenants, David L. Johnson, ABA Journal of Labor & Employment Law, Volume 28, Number 1, Fall 2012, p. 99.
- 4 Unpublished Per Curiam Opinion of the Michigan Court of Appeals, (November 9, 2010, Docket No. 291372) former employer's customers on behalf of his new employer, and two customers started purchasing the new employer's products.
- 5 486 N.E.2d 1306 (Ill. App. Ct. 1985).
- 6 No. 03-C-3116, 2004 WL 1093385 (N.D. Ill. May 7, 2004)
- 7 No. 13-3676-BLS1 (October 24, 2013),
- 8 Can A Social Media Post Constitute Solicitation in Violation of Non-Compete Agreement?, BostonBusiness LitigationLawyer.com, Feb. 27, 2014.
- 9 No. 6:12-cv-00346-JHP (E.D. Okla. Feb. 12, 2013)(adopting Report and Recommendations for Case No. CIV-12-346-JHP, Jan. 22, 2013)
- 10 Facebook Posts & Non-Solicitation Agreements, Norton Rose Fulbright's Social Medial Law, March 8, 2013.
- 11 No. MICV20123798H, 2012 WL 5576406, at *1 (Mass. Super. Oct. 22, 2012)
- 12 Non-Solicitation Clauses and Social Media, Nola Garcia, Wassom.com, September 13, 2013.
- 13 LinkedIn launched in 2003, Facebook in 2004, Twitter in 2006, and it took years for their popularity to grow.
- 14 See Social Media in the Workplace: 6 Tips Regarding Non-Solicitation Agreements, James Wu, maximizesocialbusiness.com, May 9, 2013.
- 15 Id.