Focus LABOUR & EMPLOYMENT

Will social media kill the non-solicitation clause?

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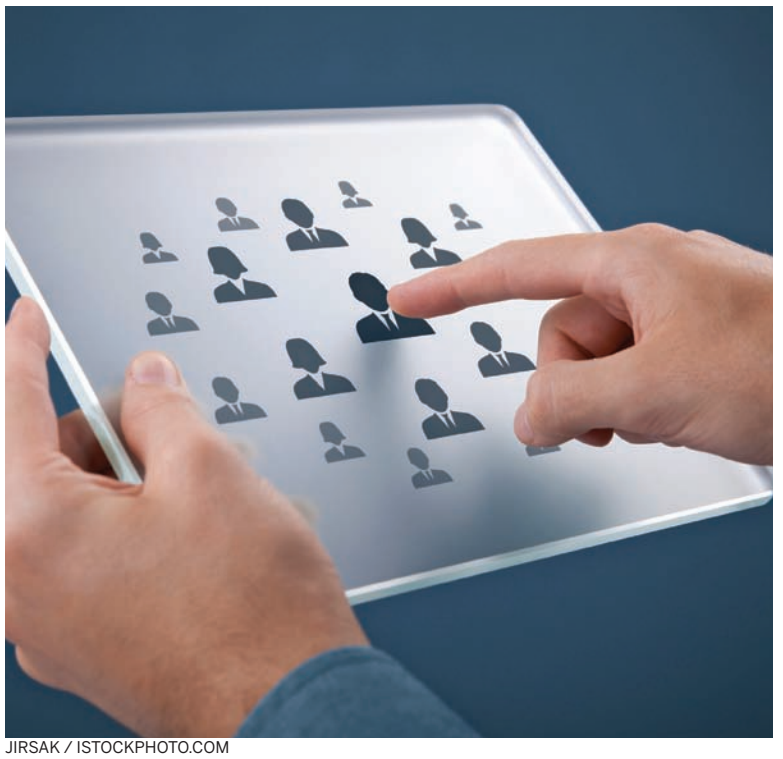

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Social networking communication presents a challenge to traditional non-solicitation clauses, which often restrict direct communications with clients beyond a generic broadcast of departure. Social media blurs the distinction between directed communication and public communications. Posts on Facebook or LinkedIn are unlike letters or e-mails in that they are not directed to particular parties, but also unlike public communication as their viewership is often restricted to a narrow and specific class of users. This presents a problem for the drafting and enforcement of non-solicitation clauses as the new communication framework does not neatly fit into existing legal categories.

Courts are increasingly being asked to consider the obligations of departing employees with reference to their use of LinkedIn and other social media sites. In two recent decisions, the Ontario courts considered the material available on social media sites in order to determine if information collected by a former employee qualified as "confidential information." In both cases, the court concluded that the information is public and therefore not confidential. Although no Canadian court has yet directly ruled on social media communication in the context of non-solicitation, two American cases provide valuable guidance. In *Pre-Paid Legal v Cahill*, 924 F. Supp. 2d 128 (Eastern District, Oklahoma), the defendant left his employment at Pre-Paid Legal Services International (PPLSI) to join a marketing company called Nerium. Cahill was Facebook friends with a number of his customers at PPLSI and, after leaving his job, posted information on his Facebook page "touting both the benefits of Nerium products and his professional satisfaction with Nerium." The judge dismissed PPLSI's claim for an interim injunction restraining the employee's Facebook communication because there was no evidence that the posts "resulted in the departure of a single PPLSI associate, nor was there any evidence indicating that Defendant [was] targeting PPLSI sales associates by posting directly on their walls or through private messaging."

In *Enhanced Network Solutions v. Hypersonic Technologies Corp.*, 951 N.E.2d 265, two companies agreed to a non-solicitation clause as part of their contractual arrangement, which prevented either company from inducing the other company's employees to leave their employment. During the contractual relationship, Hypersonic posted a job opportunity on their LinkedIn page. Robert Dobson, an employee of Enhanced Network Solutions, responded and was eventually hired by Hypersonic.

The Indiana Court of Appeal concluded that Hypersonic's conduct did not amount to solicitation under the agreement because they were passive in their hiring of Dobson. The courts in both *Cahill* and *Hypersonic* took a purposive approach to solicitation. Rather than focus on how messages are sent and received, they looked at the intention of the soliciting party and the effect of the message. The courts did not consider that social media provides a unique platform for communication with employees and clients, even if the communication is not solely directed at or towards them. This is consistent with the approach to interpreting whether actions qualify as actual "solicitation" rather than a generic announcement of job listing.

As Canadian courts have taken similar approaches to technology in other areas, it is likely they will take the same approach in interpreting solicitation activities on social media. Employers should consider drafting non-solicitation clauses with specific restrictions on social media solicitation. The difficulty with restrictions on social media usage is that they are blunt instruments, which may be too broad and intrusive to be reasonable. Non-solicitation clauses are only enforceable if they are necessary to safeguard the employer's proprietary interests, are reasonable as between the parties and are in the public interest. As noted in *Martin v. ConCreate USL Limited Partnership* [2013] O.J. No. 515, the reasonableness of the clause is considered with reference to "the geographic coverage of the covenant, the period of time that it is in effect and the extent of the activity prohibited." A blanket restriction on what former employees can post will likely not be minimally intrusive because it restricts their communication with people who are not related to their prior employer. Similarly, a restriction on the makeup of the network will also not be minimally intrusive because it prevents innocuous communication with former clients or colleagues. Restrictions on social network readership are most likely to be enforced because they are tailored to both the audience and the type of communication. If the content of a social media post fell within the subject matter covered by the restrictive covenant, the employee would have to limit the audience of the post to those people who were not part of the class covered by the covenant.

It is important for employers to craft enforceable restrictive covenants from the outset because courts have made it clear they will not read down restrictive covenants in order to save them. Employers will need a strong working knowledge of social media platforms in order to draft effective and enforceable clauses.

Given the ever-changing technology and expanding social networking world, it may prove unduly burdensome for employers to both draft appropriate clauses and enforce them. Social media may prove the death knell for effective and enforceable non-solicitation clauses. The case law that will inevitably follow in the coming years will determine that.

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Termination: Court expands common employer doctrine

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International's business and the commencement of DSL, such that DSL is an entity under different ownership and cannot be liable.

The court agreed with King, finding all of the defendants, including DSL, jointly and severally liable. In reaching this decision, the court focused on the common employer doctrine established in the leading Court of Appeal decision, *Downtown Eatery (1993) Ltd. v. Ontario* [2001] O.J. No. 1879 (leave to appeal to S.C.C. refused).

The common employer doctrine recognizes that a group of companies functioning as a single, integrated unit in relation to the operation of a business may be labeled a common employer for the purposes of liability. The court will assess the degree of integration between the companies, with the determining element of common control, when deciding if related entities are a common employer.

The doctrine, as applied in *Downtown Eatery*, extended liability to legal entities which were operating during the course of an individual's employment. In this case, the court went further and extended the doctrine to place liability on an entity that never commenced business during the plaintiff's employment. In comparing the operations of DSL with the prior companies that traded under the Danbury name, the court found that DSL is essentially the "current incarnation of the business that the Plaintiff worked for over a period of 38 years." DSL was so interconnected with Danbury that there was no clean break between the termination of Danbury Industrial and the start-up of DSL. Consequently, all of the defendants were considered a single employer. The court awarded the agreed-upon amount of 24 months and upheld King's entitlement under a retirement compensation agreement.

By piercing the corporate veil, the common employer doctrine prevents employers from establishing complex corporate structures in order to escape liability from employment obligations. In this case, DSL was the only company in which the plaintiff could reasonably collect from, as the other entities were essentially dormant and/or judgment proof. As such, the substance of the employment relationship is now more important than the form in order to determine who the employer is. Allowing a plaintiff to claim against a company that started up after their employment, but which is sufficiently connected to their prior employer, shows how far courts are willing to go to insure an individual is properly compensated.

Corporations intending to carry on the same or similar business of a company that has wound up should be aware that if there is no "clear break" between the two, liabilities may carry forward. Simply incorporating under a new name and changing ownership and management may not be enough to break free from obligations owed by the prior employer. The expanding scope of the common employer doctrine is something that even arm's-length purchasers of a business will need to consider.

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