Seeking a LinkedIn(R) Connection May Invite a Lawsuit Too

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Does a former employee's contact with her colleagues and customers through her own personal account on the popular social networking site LinkedIn(R) violate the noncompete and nonsolicitation promises she made in an employment agreement? This is the question before the United States District Court for the District of Minnesota in *TEKsystems, Inc., v. Hammernick*, Case No. 10-cv-819 (filed March 16, 2010).

The complaint in *TEKsystems* alleges that former employees of TEKsystems breached their employment agreements and confidentiality agreements and interfered with TEKsystems' existing customer and employee relationships when they misappropriated the company's trade secrets and confidential information. The complaint further alleges that the former employees used those trade secrets and confidential information to compete unfairly against TEKsystems on behalf of another recruiting firm. TEKsystems seeks an order enjoining future violations of the employment agreements, money damages (including punitive damages) and other relief.

TEKsystems is a recruiting agency that places IT personnel on a temporary or permanent basis with companies throughout the United States. From January 2007 until November 13, 2009, Brelyn Hammernick worked for TEKsystems' Edina, Minnesota office as a recruiter. At the beginning of her employment, she signed an employment agreement containing noncompetition, nonsolicitation and nondisclosure covenants. The noncompetition clause prohibited Hammernick from directly or indirectly engaging in or preparing to engage in, or from being employed by, any business that is engaging in or preparing to engage in any aspect of TEKsystems' business in which she performed work within the two year period preceding her termination, within a radius of 50 miles from the Edina, Minnesota office, and for a period of 18 months following her termination.

The nonsolicitation clause provided that, for a period of 18 months following her termination, Hammernick could not "[a]pproach, contact, solicit or induce any individual, corporation or other entity which is a client or customer of TEKsystems, about which [she] obtained knowledge by reason of [her] employment by TEKsystems, in an attempt to enter into any business relationship with a client or customer." The covenant also prohibited Hammernick from soliciting employees to leave TEKsystems and soliciting "Contract Employees" of TEKsystems. "Contract Employee" is defined as an employee or candidate for employment who Hammernick recruited and then placed on a contract basis with TEKsystems' customers and clients, but who remained employed through TEKsystems.

The nondisclosure provision prohibited Hammernick from using or disclosing TEKsystems' confidential information, including customers' names, addresses, telephone numbers, contact persons and other customer-specific information.

The restrictive covenants in Hammernick's employment agreement did not refer specifically to competition, solicitation or disclosure through social media.

When Hammernick left TEKsystems, she joined a competing IT recruiting firm, Horizontal Integration, as its business developer. The complaint alleges that, after Hammernick joined Horizontal Integration, she communicated with at least 20 Contract Employees through LinkedIn(R) and that she "connected" with at least 16 of TEKsystems' employees. The complaint quotes one LinkedIn(R) message that Hammernick sent to a TEKsystems' employee asking if he was "still looking for opportunities," and stating that she "would love to have [you] come visit my new office and hear about some of the stuff we are working on."

In a time when companies often encourage employees to use social networking channels to promote their business, this case highlights the challenges that employers face regarding ownership of social networking connections. When the social networking accounts are used both for personal and professional activities, is the departing employee required to "de-friend" (on Facebook) or remove the social connection (on LinkedIn(R)) that she already has established? Although updating a LinkedIn(R) profile with the new employer's information is probably not enough to breach a restrictive covenant, whether a former employee can "connect" with its former employer's customer, client, or employee through LinkedIn(R) without violating his or her noncompete or nonsolicitation promises will likely be determined by the corresponding state's trade secret and restrictive covenant laws.

In North Carolina, courts may be reluctant to find that an "announcement" of an update to a social networking site profile to provide contact information about the departing employee's new employment constitutes "solicitation," particularly when the announcement is not targeted at the prohibited population of former employees or customers. *But see NovaCare Orthotics & Prosthetics East,Inc. v. Speelman*, 137 N.C. App. 471, 528 S.E.2d 918 (2000). On the other hand, a North Carolina court may consider "announcements" via updating profile information with substantive content about a departing employer's new business offerings as circumstantial evidence in a breach of restrictive covenant case, especially if the departing employee's social network includes significant client or customer contacts. At a minimum, former employees' activity

on social networking sites is the proper subject of discovery. In other employment litigation, courts have ruled that social networking site communications are not shielded from discovery, despite the account owner's expectations that the content will be kept private or viewed only among those on his or her network. *See, e.g., EEOC v. Simply Storage Mgmt., LLC*, 1:09-cv-1223, 2010 U.S. Dist. LEXIS 52766 (S.D. Ind. May 11, 2010) (ordering production of the sexual harassment claimants' "profiles, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) and [social networking site] applications ... that reveal, refer, or relate to the events that could reasonably be expected to produce a significant emotion, feeling, or mental state").

The questions surrounding the "unlawful" contact with former employees and customers by an employee bound by a restrictive covenant prohibiting such contact are not new to restrictive covenant litigation. Numerous cases have addressed such contact made through email, texts, and other less sophisticated technology. However, *TEKsystems* appears to be one of the first times that an employer has alleged that the unlawful contact was initiated through a social media networking site maintained by the departing employee.

Similar issues about who owns the employee's professional contacts arise in circumstances involving a company-issued blackberry, iPhone, or email system where employees' contacts stored in the device include both business and personal contacts. Many employers have electronic media policies that provide that the business owns the electronic information (*i.e.,* emails, texts, and contact information) stored in a copy email archive and/or company-owned phone, blackberry, or PDA. While policies governing an employee's use of email and the internet are common, social media present a slightly different challenge in that social networking sites such as Facebook, Twitter, and LinkedIn(R) allow users to send and receive messages and post content to the community of people in their social networks.

TEKsystems highlights the need for employers to update their electronic communications policies to address social media. In addition, given that courts scrutinize restrictive covenants, employers can take proactive measures to avoid confusion as to whether such covenants apply to social media by referring specifically to social media in agreements that restrict contact between employees and former employees, customers, and clients.

An outright prohibition on employees using social media may not be in the employer's best interest given that the company may benefit from the employee's social networking. However, companies should develop guidelines that require company approval for certain "posts" and that explain that employees are responsible and liable for posts made outside the company's request. This is particularly important in FDA-regulated industries as the agency's current agenda suggests that it will address product promotion through social media communications in a guidance document or rulemaking. In addition, a company's social networking policy should forbid its employees from posting personally identifiable information of others, including customers and fellow employees, without permission. Likewise, a social media policy should prohibit the disclosure of the company's confidential information or trade secrets. Such policies may not prevent a former employee from reaching out to the company's customers, but it may make an existing employee think twice about responding to "solicitations" from former employees.

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