

2011

Social Media, Trade Secrets, Duties of Loyalty, Restrictive Covenants and Yes, the Sky is Falling

Marisa Warren

Arnie Pedowitz

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/hlelj>



Part of the [Law Commons](#)

Recommended Citation

Warren, Marisa and Pedowitz, Arnie (2011) "Social Media, Trade Secrets, Duties of Loyalty, Restrictive Covenants and Yes, the Sky is Falling," *Hofstra Labor and Employment Law Journal*: Vol. 29: Iss. 1, Article 5.
Available at: <http://scholarlycommons.law.hofstra.edu/hlelj/vol29/iss1/5>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Labor and Employment Law Journal by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

SOCIAL MEDIA, TRADE SECRETS, DUTIES OF LOYALTY, RESTRICTIVE COVENANTS AND YES, THE SKY IS FALLING

*Marisa Warren and Arnie Pedowitz**

INTRODUCTION

With the rise of social media, there has virtually been an explosion in the amount of personal and professional information that has been thrust into the public light. Websites such as Facebook, LinkedIn, Twitter, and newly formed Google+ allow people to connect with friends, relatives, colleagues, or complete strangers. Normative behaviors with respect to what should and should not be posted on these types of websites have not yet been established. Facebook has more than 750 million active users,¹ and LinkedIn has more than 120 million members in over 200 countries and territories.² As of June 2011, Google ranked Facebook.com as the most frequently visited website on the internet.³ The popularity of these websites cannot be understated.

In addition to personal use, social media is frequently used in a business setting to recruit new employees, connect with current employees, network with other professionals, and promote one's business.⁴ The ubiquitous nature of these mega social networks gives rise to new legal considerations and responsibilities in the employment

* Pedowitz and Meister, LLP.

1. *Statistics*, FACEBOOK.COM, <http://www.facebook.com/press/info.php?statistics> (last visited Aug. 28, 2011).

2. *About Us*, LINKEDIN PRESS CENTER, <http://press.linkedin.com/about> (last visited Sept. 2, 2011).

3. Google determined that Facebook.com had over 870 million unique visitors in June 2011. *The 1,000 Most-Visited Sites on the Web*, GOOGLE DOUBLECLICK AD PLANNER (July 2011), <http://www.google.com/adplanner/static/top1000/>. LinkedIn, on the other hand, ranked twenty-seventh with 89 million unique visitors in that particular month. *Id.*

4. See generally JEANNE C. MEISTER & KARIE WILLYERD, *THE 2020 WORKPLACE: HOW INNOVATIVE COMPANIES ATTRACT, DEVELOP, AND KEEP TOMORROW'S EMPLOYEES TODAY* (2010) (discussing, in part, how social media can play a crucial role in attracting, motivating, engaging, developing, and retaining employees and can enable a business to connect with prospective and current customers).

law context for both employees and employers. In particular, social media will have a considerable effect on the protection of trade secrets, the scope of an employee's duty of loyalty, and the coverage of non-compete agreements. The courts have begun to address the impact of social media on the employment relationship.⁵ However, many issues have yet to be determined. As a result, employers continue to wrestle with employees' use of Facebook and other forms of social media.⁶ Employees, on the other hand, are left struggling to identify whether social media activities are legally protected.⁷

BUT IT'S A SECRET!: HOW SOCIAL MEDIA CAN THREATEN TRADE SECRET PROTECTION

Social media presents a major problem for employers desiring to maintain trade secret protection over information. The problem arises from its ease of use and the absence of an awareness among those causing the breaches as to what improper conduct consists of. For

5. See, e.g., *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430 (S.D. Ind. 2010) (requiring that all information from plaintiffs' social networking profiles and postings that relate to their general emotions, feelings, and mental states be produced in discovery when plaintiffs allege severe emotional trauma and harassment against their employer); *Pietrylo v. Hillstone Rest. Group*, No. 06-5754 (FSH), 2009 WL 3128420, at *1, *3 (D.N.J. Sept. 25, 2009) (upholding a jury verdict finding that employer was liable for violating the federal Stored Communications Act (SCA) when employer intentionally accessed a private chat group on an employee's MySpace account without having received authorization from the MySpace member to join the group); *Moreno v. Hanford Sentinel, Inc.*, 91 Cal. Rptr. 3d 858, 862-63 (Ct. App. 2009) (holding that an employee MySpace user had no reasonable expectation of privacy for a post the employee made on her MySpace page, despite the fact that the employee's MySpace page identified her by her first name only and she deleted the post after six days).

6. One recent issue has been whether employees' communications on social networks constitute a "protected concerted activity" under the National Labor Relations Act (NLRA). A report released by the National Labor Relations Board's (NLRB) Acting General Counsel on August 18, 2011, provides some guidance on this issue. See *Acting General Counsel Releases Report on Social Media*, NLRB, <http://nlrb.gov/news/acting-general-counsel-releases-report-social-media-cases> (last visited Sept. 1, 2011). Specifically, the report states that in four cases, the NLRB's Division of Advice found that employees were "engaging in protected concerted activity" because they were using social media to discuss the terms and conditions of employment with fellow employees. *Id.* However, when an employee, acting alone, simply makes a posting on social media (either as their status on Facebook, on someone's Facebook wall or via Twitter, for example), this is not concerted activity and therefore not legally protected activity under the NLRA. See *id.*

7. See, e.g., *Morse v. JP Morgan Chase & Co.*, No. 8:11-CV-779-T-27EAJ, 2010 U.S. Dist. LEXIS 143520, at *3-4 (M.D. Fla. June 23, 2011) (dismissing plaintiff's retaliation claim finding that her Facebook post that "voiced her disagreement with her employer's payment practices" was just the plaintiff "letting off steam" and failed to meet the formality requirement of filing a complaint under the FLSA). The FLSA makes it unlawful "to discharge . . . any employee because such employee has filed any complaint" concerning the violation of the FLSA. *Id.* (citing 29 U.S.C. § 215(a)(3) (2006)).

example, although it is typical for employees to vent about their employers, there have been many cases where employers have fired employees because the employees posted complaints about their employers on social media websites. In one instance, an employee in Connecticut was terminated when she posted on Facebook that her boss was “a scumbag as usual” after they had gotten in an argument earlier that day.⁸ Another employee, a waitress in North Carolina, was fired after she posted on her Facebook account that a customer was a “cheap piece of s***” after the customer had left her a disappointing tip.⁹ Employees also have the ability to post, with the same widespread impact, their employers’ confidential information such as new products in development, internal sales figures, or upcoming layoffs of employees.¹⁰

Provided that this confidential information qualifies as a “trade secret,” it is legally protected.¹¹ A trade secret may consist of “any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.”¹² To qualify as a trade secret, the information must be maintained in confidence, have commercial value from not being generally known, and not be readily ascertainable by proper means.¹³ “As a general rule, the more detailed and difficult to obtain the information, the more likely it is that [the information] will be considered a trade secret.”¹⁴ If a trade secret is “misappropriated” or improperly used by a third party, the holder of a trade secret (in most cases a corporation) may seek civil remedies

8. See Jessica Martinez, *NLRB v. American Medical Response: A Rare Case of Protected Employee Speech on Facebook*, BERKELEY TECH. L.J.: THE BOLT (Mar. 7, 2011), <http://btlj.org/?p=1111>. The NLRB brought an action against the company, American Medical Response (AMR) of Connecticut alleging that this firing constituted an unfair labor practice since under the National Labor Relations Act employees are able to discuss the “terms and conditions of employment.” See *id.* The case settled in February 2011. See *id.* The terms of the settlement are private. See *id.*

9. See Eric Frazier, *Facebook Post Costs Waitress Her Job*, THE CHARLOTTE OBSERVER (May 17, 2010), <http://www.charlotteobserver.com/2010/05/17/1440447/facebook-post-costs-waitress-her.html>.

10. See Pamela Fyfe, *Facebook + Employees = Yikes!*, BLUE AVOCADO (Apr. 2 2010), <http://www.blueavocado.org/node/511> (describing how one nonprofit manager posted on Facebook that his agency was considering layoffs).

11. See RESTATEMENT (FIRST) OF TORTS § 757 (1939).

12. *Id.* § 757 cmt. b.

13. See UNIFORM TRADE SECRETS ACT § 1 (amended 1985).

14. Russell Beck, *Social Networking and Trade Secret Protection*, NEW ENGLAND IN-HOUSE (Feb. 19, 2011, 4:03 PM), <http://newenglandinhouse.com/2011/02/09/social-networking-and-trade-secret-protection/>.

including an injunction to stop the misappropriating individual from using this information, compensatory damages, and, in cases of bad faith or willful and malicious misappropriation, “exemplary” damages and reasonable attorney’s fees.¹⁵

The requirement that the information be “not generally known” poses particular issues for social media users. Indeed, even the well-intentioned poster of information can find that despite so-called “privacy settings,”¹⁶ social media exposes to the public information that is thought to be “maintained in confidence.” Facebook’s privacy policy, for example, states that “information you share on Facebook can be copied or re-shared by anyone who can see it” and that Facebook may “share your information in response to a legal request (like a search warrant, court order or subpoena) if we have a good faith belief that the law requires us to do so.”¹⁷ Although LinkedIn’s privacy page states that users may share as much or as little information as they so choose, the page also warns that when you post content to a LinkedIn group or bind your LinkedIn profile to your Twitter account, your personal information may be subjected to public access.¹⁸ Google+ (also known as “Google Plus”), which is new to the social media scene (launched on June 28, 2011), was celebrated for its “circles” feature, which permits the user to distinguish what information is shared with different groups of people.¹⁹ Although many perceive the “circles” feature as a solution to privacy concerns, the Google+ policy explicitly states that “[w]e will record information about your activity – such as posts you comment on and the other users with whom you interact – in order to provide you and other users with a better experience on Google services.”²⁰

Maintaining the secrecy of customer lists has been particularly complicated by the use of social media. Customer lists may qualify for trade secret protection if they meet the previously discussed criteria for trade secrets, and the identities of the customers are not generally known

15. See UNIFORM TRADE SECRETS ACT §§ 2-4.

16. Privacy settings enable individual social media users to limit who is able to see their personal information.

17. *Facebook Data Use Policy*, FACEBOOK.COM, www.facebook.com/full_data_use_policy (last updated Sept. 23, 2011).

18. *LinkedIn Privacy Policy*, LINKEDIN, http://www.linkedin.com/static?key=privacy_policy (last visited Aug. 28, 2011).

19. See *A Quick Look at Google+*, GOOGLE+, <http://www.google.com/+learnmore/> (last visited Sept. 1, 2011) (“Circles makes it easy to put your friends from Saturday night in one circle, your parents in another, and your boss in a circle by himself, just like real life”).

20. *Google+ Privacy Policy*, GOOGLE+, <http://www.google.com/intl/en-US/+policy/index.html> (last updated June 28, 2011).

in the marketplace.²¹ While a corporation and its employees are unlikely to use social media to overtly post documents entitled “Confidential Customer Lists” or “Trade Secrets,” an employee’s readily-accessible contact list on professional social networking sites such as LinkedIn, Facebook, or Twitter could set the stage for an argument that a customer list has been disclosed and is no longer confidential. On LinkedIn, for example, individuals typically “connect” with their customers or clients by sending them an invitation. If that customer accepts, the employee and the customer will be electronically—and publicly—connected. From that point on, the customers will appear on a list of the employee’s contacts. Few courts have addressed social media’s impact on the ability of a customer list to be considered a legally protected trade secret. In *Sasqua Group, Inc. v. Courtney*,²² a decision out of the Eastern District of New York, the court held that although an employer’s customer list can qualify for trade secret protection, “the exponential proliferation of information made available through full-blown use of the Internet [presents] a different story.”²³

The Sasqua Group is “an executive search consulting firm specializing in the recruitment and placement of professionals for the financial services industry.”²⁴ Sasqua maintains a central database of client information formed by its employees over the years, which includes client contact information, individual profiles, contact hiring preferences, documentation of previous interactions with clients, resumes, and other information.²⁵ The database is maintained by a computer technician and, according to Sasqua, it contains “highly confidential” information.²⁶

One of Sasqua’s recruiters, Lori Courtney, decided that she was

21. See *FMC Corp. v. Taiwan Tainan Giant Indus. Co.*, 730 F.2d 61, 63 (2d Cir. 1984) (“[C]ustomer lists are trade secrets only if the names on the list are not ‘readily ascertainable’ from sources outside an employer’s business”) (citing *Leo Silfen, Inc. v. Cream*, 278 N.E.2d 636, 640-41 (N.Y. 1972)); *Consol. Brands, Inc. v. Mondy*, 638 F. Supp. 152, 156 (E.D.N.Y. 1986) (holding that customer lists may qualify as trade secrets where customers are not readily ascertainable as users or consumers of the former employer’s goods or services); *Arnold’s Ice Cream Co. v. Carlson*, 330 F. Supp. 1185, 1187 (E.D.N.Y. 1971) (holding that customer lists are protected trade secrets if names of customers were acquired over a period of time by significant effort, advertising and expenditure of time and money).

22. No. CV 10-528, 2010 WL 3613855 (E.D.N.Y. Aug. 2, 2010) (Magistrate Report and Recommendation adopted in its entirety by District Judge Arthur D. Spatt in *Sasqua Group, Inc. v. Courtney*, No. 09-cv-528, 2010 WL 3702468 (E.D.N.Y. Sept. 7, 2010)).

23. See *id.* at *22.

24. *Id.* at *1.

25. See *id.* at *2.

26. *Id.*

going to leave the company and start her own executive search consulting firm in New York.²⁷ Upon her departure, Sasqua's computer technician removed Courtney's access to the customer database.²⁸ In the weeks that followed, several of Sasqua's customers informed the company that they would no longer be working with them, but rather will be working with Courtney through her new consulting firm.²⁹ Sasqua subsequently sought to enjoin Courtney from using company contacts as they are "confidential and proprietary" trade secrets and the customer information "is not available from a public source" and cannot "be easily duplicated."³⁰

Courtney argued that Sasqua's customer lists should not be entitled to trade secret protection as "virtually all personnel in the capital markets industry that Sasqua serves have their contact information on Bloomberg, LinkedIn, Facebook, or other publicly available databases."³¹ During the hearing, Courtney testified that "the identity of capital markets businesses is readily ascertainable through an Internet search, in the phonebook, in trade publications or through a firm's own media advertising."³² She also said that she could obtain a professional's name, current job title, resume, and employment preferences from sources such as Bloomberg, LinkedIn, Facebook and general Google searches.³³

The Court found that since Courtney demonstrated that the allegedly secret information could be properly acquired through social media and a basic Internet search, the company's customer list was not entitled to trade secret protection.³⁴

27. *Id.*

28. *Id.*

29. *Id.* at *3.

30. *See id.*

31. *Id.* at *4.

32. *Id.* at *9.

33. *Id.* Courtney also testified that "people put their whole profile on LinkedIn." *Id.* at *14.

34. *See id.* at *22. It is important to note that Sasqua did not require Courtney to sign a confidentiality or non-solicitation agreement. *Id.* at *16. Nor did the company take reasonable measures to protect the database in question. *Id.* at *19. Its computers were not password protected and all employees had free access to the database, including at work and remotely from home. *Id.* at *16, *18. The database did not contain legends designating confidential information embedded within its pages to remind employees that the information was confidential. *Id.* at *18. The database was shared with potential business partners without restriction. *See id.* at *16. As the court stated, "Sasqua failed to take even basic steps to protect the secrecy of the information contained in its database." *Id.* at *19.

BLOGGING ON THE SIDE: WHEN AN EMPLOYEE'S USE OF SOCIAL MEDIA VIOLATES HIS DUTY OF LOYALTY

Each employee, regardless of the existence of a written employment contract, owes the employer a duty of loyalty that stems from the theory that each employee is an agent of their employer.³⁵ Section 387 of the Restatement (Second) of Agency provides that “[u]nless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency.”³⁶ Courts have frequently applied the Restatement’s agency principles to define an employee’s duty of loyalty to his employer.³⁷ “This duty requires an employee to act ‘solely for the benefit of the [employer] in all matters connected with the [employment].’”³⁸ “In particular, an employee is ‘prohibited from acting in any manner inconsistent with [his] agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of [his] duties.’”³⁹ When an employee violates his duty of loyalty, the employer may recover any benefits conferred upon the employee during the period of disloyalty, including wages paid to the employee.⁴⁰

Courts have found that an employee’s communication to the public regarding his employer may violate the duty of loyalty. For example, in *Marsh v. Delta Airlines, Inc.*,⁴¹ a Delta customer service agent who had worked at Delta for twenty-nine years was suspended and later terminated because he wrote a letter to the editor, which was published in the Denver Post, criticizing Delta.⁴² This letter strongly criticized Delta’s decision to hire hourly contract employees to replace laid-off full time employees.⁴³ After the letter’s publication, Marsh was fired “for

35. See *Scanwell Freight Express STL, Inc. v. Chan*, 162 S.W.3d 477, 479 (Mo. 2005) (en banc); RESTATEMENT (SECOND) OF AGENCY § 387 (1958) (defining agent’s duty to principal).

36. RESTATEMENT (SECOND) OF AGENCY § 387.

37. See *Scanwell*, 162 S.W.3d at 479; *Prof’l Bus. Servs. Co. v. Rosno*, 680 N.W.2d 176, 189 (Neb. 2004); *Jet Courier Serv., Inc. v. Mulei*, 771 P.2d 486, 492 (Colo. 1989) (en banc).

38. *Schanfield v. Sojitz Corp. of Am.*, 663 F. Supp. 2d 305, 349 (S.D.N.Y. 2009) (quoting *Kaufman v. Int’l Bus. Machs. Corp.*, 97 A.2d 925 (N.Y. App. Div. 1983)).

39. *Schanfield*, 663 F. Supp. 2d at 349 (quoting *Herrera v. Clipper Grp., L.P.*, No. 97-560, 1998 WL 229499, at *2 (S.D.N.Y. May 6, 1998).

40. See *W. Elec. Co v. Brenner*, 360 N.E.2d 1091, 1094 (N.Y. 1977).

41. 952 F. Supp. 1458 (D. Colo. 1997).

42. *Id.* at 1460.

43. See *id.* (citing to the letter in full).

conduct unbecoming a Delta employee.”⁴⁴ Marsh later brought suit for wrongful termination under Colorado’s off-duty conduct law and for breach of contract.⁴⁵ The court determined that Marsh’s activity constituted a breach of his implied duty of loyalty to Delta since Marsh was not attempting to inform the public of a safety concern, and because he did not attempt to solve his grievance through Delta’s grievance system.⁴⁶

With the holding of *Marsh* in mind, an employee’s use of social media may violate the individual duty of loyalty owed to his employer. In *Hahn v. OnBoard, L.L.C.*,⁴⁷ OnBoard paid the plaintiff, Robert Hahn, and other employees to attend a trade conference on its behalf.⁴⁸ During the conference, Hahn conducted a focus group and participated in various meetings on behalf of the company.⁴⁹ While at the conference, Hahn distributed “blog” cards listing his personal website, Twitter account, and blog address.⁵⁰ Although OnBoard knew that Hahn maintained a website, Twitter account, and a blog, they did not know that he was distributing these cards and promoting these activities while at the conference.⁵¹ The court found that by distributing his own individual blog card at the conference, Hahn may have violated his duty of loyalty to his employer, and thus denied Hahn’s motion for summary judgment on this issue.⁵²

OnBoard’s “Proposed Findings of Fact and Conclusions of Law,” submitted after a three day bench trial, contends that Hahn breached his duty of good faith and loyalty to OnBoard by, among other things, advertising his new business and blog at the conference.⁵³ OnBoard stated that Hahn attended the conference “solely on behalf of and for the benefit of” OnBoard,⁵⁴ but that at the conference, Hahn failed to act as if he was affiliated with OnBoard.⁵⁵ Instead, he was “actively, brazenly, and publicly” promoting his own personal business and blog, including distributing as many as two dozen of his personal business cards that

44. *Id.* at 1461.

45. *Id.* at 1461, 1465.

46. *See id.* at 1463.

47. No. 09-3639 (MAS), 2011 WL 703836 (D.N.J. Feb. 19, 2011).

48. *Id.* at *2.

49. *Id.*

50. *Id.* & n.3.

51. *Id.* at *2.

52. *See id.* at *7.

53. Defendant’s Amended Proposed Findings of Fact and Conclusions of Law at 27, ¶ 6, *Hahn v. OnBoard, L.L.C.*, No. 09-3639 (MAS) (D.N.J. Feb. 18, 2011), 2011 WL 703836.

54. *See id.* at 13, ¶ 50.

55. *See id.* at 14-15, ¶¶ 54-56.

listed his blog and Twitter account and none of his contact information at OnBoard.⁵⁶ The court disagreed and held that although Hahn distributed his blog cards during the conference, OnBoard's "pre-existing knowledge and lack of objection to Plaintiff having a blog is particularly damaging to their claim."⁵⁷ Accordingly, the court dismissed OnBoard's breach of loyalty claim.⁵⁸

ADDING FACEBOOK FRIENDS AND LINKEDIN CONNECTIONS: A
VIOLATION OF AN EMPLOYEE'S NON-SOLICITATION AND NON-
COMPETE AGREEMENT?

In addition to the potential loss of trade secret protections and impacts on an employee's duty of loyalty, social media also affects an employee's obligations under a non-solicitation or non-compete agreement. Although American law by and large encourages a free market where employees can work or not work for whatever employer they choose, clauses limiting what companies a former employee can work for are often enforceable if they are reasonable in duration and geographic scope, and are designed to protect a legitimate business interest.⁵⁹

Due to use of social media, employees may find themselves (either intentionally or unintentionally) in violation of a non-solicitation or non-compete agreement. Courts have found that updating your current job title on LinkedIn and "friending" individuals on Facebook may violate a non-compete agreement. For example, in *Coface Collections North America v. Newton*,⁶⁰ the Third Circuit affirmed the district court's grant of a preliminary injunction for the defendant, William Newton, for the breach of his non-competition and non-solicitation agreement.⁶¹ On September 8, 2006, William Newton entered into an asset purchase agreement with Coface, a Delaware corporation engaged in the business of collections and receivables management.⁶² The agreement contained several restrictive covenants, including a non-compete provision

56. See *id.* at 14-15, ¶¶ 54-58.

57. Opinion and Final Judgment at 24, *Hahn v. OnBoard, L.L.C.*, No. 09-3639 (MAS) (D.N.J. Feb. 18, 2011), 2011 WL 703836.

58. See Order of Judgment at 33, *Hahn v. OnBoard, L.L.C.*, No. 09-3639 (MAS) (D.N.J. Feb. 18, 2011), 2011 WL 703836.

59. See, e.g., *A.M. Medica Commc'ns Grp. v. Kilgallen*, 90 F. App'x 10, 11 (2d Cir. 2003).

60. 430 F. App'x 162 (3d Cir. 2011).

61. *Id.* at 169.

62. See Amended Complaint ¶ 1, *Coface Collections N. Am., Inc. v. Newton*, 430 F. App'x 162 (3d Cir. 2011) (No. 11-1482).

providing that Newton would not: “(i), for a period of five years following the sale, compete with Coface or solicit—or interfere with Coface’s relationships with—Coface’s employees and customers, or (ii) include the name ‘Newton’ in the name of any entity in competition with Coface.”⁶³ On January 5, 2011, about eight months before the non-compete was set to expire, Newton formed and began operating a company called “Newton, Clark & Associates, LLC.”⁶⁴ “Around this time, he posted [on] LinkedIn that he was ‘Chairman of the Board’ at Newton Clark, and [posted] on Facebook that his ‘non-compete ends on 12/31/2010 & [he has] decided that the USA needs another excellent, employee oriented Commercial Collection Agency.”⁶⁵ The posts encouraged professionals to contact him to apply for a position with his new company.⁶⁶ While the non-compete and non-solicitation agreement was still in effect, Newton also sent friend requests on Facebook to current Coface employees.⁶⁷ The Third Circuit affirmed the district court’s finding that Newton’s involvement with social media violated the non-compete and non-solicitation provisions of his Asset Purchase agreement and thus upheld the injunction.⁶⁸

In another case, various actions on LinkedIn served as part of the predicate for the employer’s claim that its former employee violated the non-competition and non-solicitation provisions of their employment agreement. In *TEKsystems, Inc. v. Hammernick*,⁶⁹ TEKsystems, a Maryland company engaged in the business of recruiting, employing and providing the services of technical, industrial and office personnel, filed a lawsuit in the United States District Court for the District of Minnesota against three former employees – Brelyn Hammernick, Quinn VanGorden, and Michael Hoolihan – and their new employer, Horizontal Integration, Inc.⁷⁰ While working for TEKsystems, each of the three employees signed an employment agreement which provided, in part, that, for a period of eighteen months following termination of their employment, they were prohibited from directly or indirectly approaching, contacting, soliciting, or inducing any person who had been a “Contract Employee” during the two-year period prior to the date

63. *Id.*

64. *Coface*, 430 F. App’x at 164.

65. *Id.*

66. *Id.*

67. *Id.* at 165 n. 2.

68. *See id.* at 169.

69. Complaint for Damages and Injunctive Relief Exhibit D, *TEKsystems, Inc. v. Hammernick*, No. 10-CV-00819 (D. Minn. Mar. 16, 2010), 2010 WL 1624258 (on file with author).

70. *See id.* ¶¶ 1-5, 8.

of termination and about whom they knew of by reason of their employment with TEKsystems, to “cease working for TEKsystems at clients or customers of TEKsystems,” “refrain from beginning work for TEKsystems at clients or customers of TEKsystems,” or “provide services to any individual, corporation, or entity whose business is competitive with TEKsystems.”⁷¹

These restrictive covenants did not reference competition, solicitation, or disclosure through social media in particular.⁷² The definition of “Contract Employee” in the employment agreement covers those IT professionals that the employees recruited and then placed on a contract basis with TEKsystems’ clients and customers, but who remain employed by TEKsystems.⁷³

Several months after leaving TEKsystems, Hammernick, VanGordon, and Hoolihan joined Horizontal Integration, a business engaged in recruitment and placement of employees on a temporary or permanent basis and that competes in the same marketplace as TEKsystems.⁷⁴ Among other allegations, TEKsystems claimed that Hammernick, in her new job, used social-networking sites to communicate with at least twenty of TEKsystems contract employees.⁷⁵ The complaint cites LinkedIn connections with at least sixteen TEKsystems employees as evidence.⁷⁶ An exhibit to the complaint contains the following correspondence on LinkedIn between Hammernick and a TEKsystems Contract Employee, Tom:

Tom—

Hey! Let me know if you are still looking for opportunities! I would love to have [you] come visit my new office and hear about some of the stuff we are working on!

71. *Id.* ¶ 27.

72. *See id.*

73. *See id.*

74. *Id.* ¶¶ 33, 34, 53, 71.

75. *Id.* ¶ 37.

76. *See id.* Interestingly, similar to Courtney, Hammernick’s answer asserted that TEKsystem’s customer lists were publicly disclosed through social media and is no longer protected. *See Defendants’ Joint and Separate Answer to Complaint and Counterclaims, Separate Defenses* ¶ 11, *TEKsystems, Inc. v. Hammernick*, No. 10-CV-00819 (D. Minn. Apr. 7, 2010), 2010 WL 1624304. Specifically the answer said that “Plaintiff, or its employees, have thrust said information into the public domain through the use of sites such as, LinkedIn and Facebook, and/or to the extent Plaintiff encouraged its employees to place said information into the public domain.” *Id.*

Let me know your thoughts!

Brelyn

* * * *

Hi Brelyn,

Indeed I am still looking. I have time, though!

Lets get together. Where are you working these days? Your profile still has you working at TEK Systems. BTW - my email address is []@gmail.com if you would prefer the non-LinkedIn route.

Tom⁷⁷

Although *Coface* and *Hammernick* look as if they engaged in blatant solicitation in violation of non-solicitation agreements, other potential claims involving LinkedIn and other social media sites may not be so clear. For example, consider whether the following scenarios would constitute solicitation:

A former employee bound by a non-solicitation agreement leaves his current employer to work for a competitor. He updates his LinkedIn profile to reflect his new position. Due to no action of his own, LinkedIn automatically sends a message to the employee's contacts via email informing them of the employee's new position. The former employee, however, is aware that LinkedIn automatically sends these updates to all contacts.

A former employee bound by a non-solicitation agreement leaves his current employer to work for a competitor. He then sends a notice throughout his LinkedIn network announcing that he is newly employed and goes on to explain his job duties and responsibilities and the details of his new positions. Some of his LinkedIn contacts are

77. Complaint for Damages and Injunctive Relief Exhibit D, *TEKsystems, Inc. v. Hammernick*, No. 10-CV-00819 (D. Minn. Mar. 16, 2010), 2010 WL 1624258 (on file with author). The case has subsequently settled. See Stipulation for Permanent Injunction and Dismissal of Action, *TEKsystems, Inc. v. Hammernick*, No. 10-CV-00819 (D. Minn. Sept. 3, 2010), 2010 WL 3514960. Although the terms of the settlement were confidential, the stipulation precludes the defendants from contacting their former co-workers and customers for an entire year, as well as requiring a forensic computer specialist to check the defendants' computers to ensure that they have deleted all documents that they took with them when they left their employment for TEKsystems. See *id.* at ¶ A-B.

customers or clients that he serviced while employed by his former employer, and some are customers with whom he sold products to prior to beginning work with the former employer.

What if the employee from the example above added the former employer's key customer contacts to his LinkedIn immediately before his departure?

A former employee covered by a non-solicitation agreement writes an article about the industry and sends a message to all of his LinkedIn contacts, which include customers of his former employer.

A former employee covered by a non-solicitation agreement starts a discussion on LinkedIn about a hot topic in the former employer's industry and a message goes to all of his LinkedIn contacts, including customers of the former employer.

A former employee covered by a non-solicitation agreement posts a Facebook "status" update regarding his new position at a competitor. Although the employee typically uses Facebook for personal rather than business purposes, he has several former clients that are friends. The former employee's status update then gets automatically processed on Facebook's "newsfeed"⁷⁸ and becomes available to his former employer's clients.

An employee covered by a non-solicitation agreement has a Twitter page that he began while working for his former employer. The employee uses this twitter page to "tweet"⁷⁹ about recent updates in the industry and many of the former employer's clients "follow" the employee. The employee continues to use his Twitter account to make updates about the industry while working for a competitor. The former employer's clients continue to get the updates via Twitter.

Should the analysis of the above situation change in light of the fact that many, though admittedly not all, courts have held that contacting former clients regarding a change in employment constitutes a

78. Facebook's News Feed is the center column of a user's Facebook home page. It is "a constantly updating list of stories from people and Pages that you follow on Facebook." See *News Feed Basics*, FACEBOOK.COM, <http://www.facebook.com/help/?page=408> (last visited Aug. 28, 2011).

79. According to Merriam Webster's Dictionary, tweeting is to "post a message to the Twitter online message service." MERRIAM-WEBSTER, <http://www.merriamwebster.com/dictionary/tweeting> (last visited Aug. 28, 2011).

solicitation?⁸⁰ The bottom line is that if courts are called upon to determine what kind of social media activity will support a claim for breach of a non-solicitation covenant; such cases will likely be decided on their own specific facts and circumstances. As a general matter, courts will likely treat communications through social media the same as they treat other forms of communication.⁸¹ Decisions to date suggest that the nature and degree of the social media activity will be critical in any analysis.

PLANNING FOR THE FUTURE: PROTECTING YOUR CLIENTS FROM THE PITFALLS OF SOCIAL MEDIA

Keeping Your Client's Trade Secrets, Secret

As the *Courtney* case instructs us, if an employer wishes to preserve protection of its confidential proprietary information, it must take precautions to prevent employees from disclosing that information. In today's world, this includes on social media sites.

It is important that employers restrict access to confidential company information on a strict need-to-know basis. For employees that have access to the confidential information, employers should have these employees sign confidentiality agreements and should place legends on certain documents designating that it contains confidential information. Confidentiality agreements should mention that the protected information may not be used or disclosed for any purpose other than on behalf of the employer, including through social media. This may also require the employer to educate employees on social media privacy settings. For employees that do not have access to the employer's confidential information, employers should take reasonable measures to protect these files including password protecting computers

80. See, e.g., *Merrill Lynch v. Schultz*, No. 01-0402, 2001 WL 1681973, at *3 (D.D.C. Feb. 26, 2001) (noting that "such initiated, targeted contact is tantamount to solicitation because there is no reason to believe that a customer on the receiving end of such a [communication] does not assume that the [employee] wishes for him to transfer his account").

81. Similar conclusions have been drawn in ethics opinions in both New York and Oregon, finding that "friending" someone via social media websites constitutes contacting that individual for the purposes of the Rules of Professional Conduct. See New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 843 (2010), available at <http://www.nysba.org/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=43208>; Pennsylvania Bar Ass'n Prof'l Guidance Comm., Op. 2009-02 (2009), available at http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf; Oregon State Bar, Formal Op. 2001-164 (2001), available at http://www.osbar.org/_docs/ethics/2005-164.pdf.

and installing firewalls and security software.⁸²

*Addressing Potential Non-Solicitation and Non-Competition Concerns
Raised by Social Media*

One obvious takeaway from the *Coface* and *Hammernick* decisions is that both the employer and the employee must carefully negotiate non-competition and non-solicitation provisions to include social media considerations. A solid agreement should address whether a former employee may notify clients of a change in employment through social media, either directly or indirectly, and the permissible scope of employees use of LinkedIn, Facebook, Twitter, blogs and other social media, both while the employee works for the company and after the employee leaves the company. Employers and employees should update any non-competition or non-solicitation agreements that are currently in force, but do not make reference to social media.

CONCLUSION

Lawyers can no longer think of social media as something they are not interested in, have no time for, don't understand, have no use for, don't see the benefit of, or that is for their kids. You cannot protect your clients from the problems raised by social media if you don't understand it. The use of social media is an evolving area and if you do not get ahead of the curve, you may never catch up.

82. See *Sasqua Grp., Inc. v. Courtney*, No. CV 10-528, 2010 WL 3613855, at *19 (E.D.N.Y. Aug. 2, 2010) (holding that password protecting computers and installing firewalls and security software are "basic steps" that the plaintiff failed to take in protecting its customer database).

