

Who owns employee social media profiles?



by Scott Apking, Associate (left), and Chris Pickett, Officer (right), Greensfelder, Hemker & Gale, P.C. Pickett is co-leader of their restrictive covenant and trade secret group and the securities and financial service group.

Social media can be an extremely efficient way for businesses to create and deepen relationships with existing and prospective clients. It can alert employees and employers to a host of client information that previously took businesses decades to collect. However, employers, by having their employees utilize social media are increasing the risk that their client lists will lose their status as a trade secret. Similarly, social media poses new challenges defining what types of conduct and/or communications may be considered breaches of non-solicitation provisions. As well-connected employees depart, the risks and benefits of employees using social media are becoming clear and, as with most technology advances, litigants face the challenge of applying established legal concepts to new questions posed by social media.

OWNERSHIP OF SOCIAL MEDIA CONNECTIONS

Often, the threshold question is simply “who owns the social media connections?” In 2013, a Pennsylvania court held that in the absence of a social-media policy, a LinkedIn profile – and *all of its connections* – belonged to the individual, not the employer. *Eagle v. Morgan*, 2013 WL 943350 (E.D. Pa. Mar. 12, 2013). In *Eagle*, the employer, Edcomm, encouraged its employees to use LinkedIn as a “sales and marketing tool for Edcomm business.” Plaintiff, Linda Eagle, created her own LinkedIn account using her Edcomm e-mail address. Per the LinkedIn user agreement, the account belonged to Eagle. Edcomm never adopted a policy that informed the employees that their LinkedIn accounts were the property of the employer. After Eagle’s employment ended, Edcomm argued it owned the LinkedIn profile. The court disagreed finding that the LinkedIn

profile belonged to Eagle because, among other things, Edcomm’s lack of policies were indicative that the account and connections were the employee’s property.

SOCIAL MEDIA CONNECTIONS AS TRADE SECRETS

Client lists generally are trade secrets if they meet three requirements. First, the list must not be “not generally known” in the industry. Second, it must have some independent economic value to the competitor. Lastly, the company or employer must have taken reasonable efforts to maintain the secrecy of the information.

In 2010, a federal court in New York considered whether a recruiting firm’s client list constituted a trade secret, *Sasqua Group, Inc. v. Courtney*, 2010 WL 3613855 (E.D. N.Y. Aug. 2, 2010). The court found that the client list was not a trade secret, partly because the information was available on LinkedIn. The court noted that “[t]he information in [the recruiting firm’s] database concerning the needs of its clients, their preferences, hiring practices, and business strategies...may well have been a protectable trade secret in the early years... when greater time, energy and resources may have been necessary to acquire [the information and] to build and retain the business relationships at issue here. However...the exponential proliferation of information made available through full-blown use of the Internet and the powerful tools it provides to access such information in 2010 is a very different story.”

SOCIAL MEDIA POSTS AND NON-SOLICITATION CLAUSES

Courts also are analyzing whether notifications made via social media websites constitute conduct that may breach a non-solicitation provision. Generally, courts are finding that such notifications are not solicitations.

In 2011, an Indiana Court found that a job posting on LinkedIn did not constitute an improper solicitation of employees as set forth in an agreement. *Enhanced Network Solutions Group, Inc. v. Hypersonic Technologies Corp.*, 951 N.E.2d 265 (In. Ct. App. 2011). In *Hypersonic*, the plaintiff instituted an action for breach of a “non-solicitation of employees” provision because *Hypersonic* posted on its LinkedIn page a notice of an employment opportunity. An *Enhanced Network Solutions* employee reached out to *Hypersonic* and, ultimately, accepted employment. The court found

that the LinkedIn posting was not a “solicitation” in violation of the agreement because the terms of the agreement only prohibited solicitation and the court defined solicitation as requesting or inducing.

In 2013, a federal court in Oklahoma considered whether a Facebook post constituted solicitation in violation of a non-solicitation agreement. *Pre-Paid Legal Services, Inc. v. Cabill*, 924 F. Supp.2d 1281 (2013). The court noted that the “novel issue, then, is whether defendant’s Facebook posts on his public, personal account constitute solicitations under the terms of the non-solicitation agreement.” The court ultimately found that the posts were not solicitations because there was no evidence that defendant made any targeted contacts of employees by posting on their walls or through private messaging.

SOLUTIONS

These precedents raise concerns for any relationship-driven business. Employers always need to take steps to protect their client information, but there are specific steps that employers can, and should, take when they require or suggest that employees utilize social media to interact with clients and prospective clients. First, businesses should implement clear policies regarding the use of social media including policies stating who owns the profile and imposing obligations upon the employee to maintain the secrecy of the information. These policies should require employees to use and educate those employees about the privacy options of social media. Second, if the business uses agreements to govern relationships with employees, those agreements should include provisions that impose obligations upon the employee regarding the social media profile or the connections. Those provisions, among other things, could require the deletion of the profile or the connections at the end of the contractual relationship. Finally, businesses should diligently remind departing employees of their social media obligations and establish clear expectations for the employee’s post-employment conduct. LinkedIn estimates it has more than 332 million users. Such an information rich resource for businesses may also prove to be a stage for critical litigation as businesses continue to establish strong and clear protections for their client information. ■