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5 Tips For Drafting Employment Pacts In The Social Media Era

By **Ben James**

Law360, New York (April 02, 2013, 2:39 PM ET) -- Facebook, LinkedIn and Twitter have radically changed how companies and employees connect to each other as well as clients or customers, and those changes have left the law — and employment contracts — struggling to keep up, lawyers say.

"Technology and society move quicker than the law, and the law is catching up right now," said Peter Steinmeyer, co-chairman of the noncompetes, unfair competition and trade secrets practice group at EpsteinBeckerGreen.

Though courts may still be in the early stages of molding the legal landscape, attorneys gave Law360 five suggestions that can help companies get the most out of their efforts to use confidentiality, noncompete and nonsolicitation agreements to protect themselves.

Specifically Define 'Solicitation'

Exactly what constitutes "solicitation" may be the biggest unresolved question for lawyers trying to enforce agreements barring departing workers from luring clients or former co-workers away from a company in the social media realm, Steinmeyer said.

Nonsolicitation agreements often don't take into account the way people send out or receive information across social or professional networks, according to Steinmeyer.

Letters or phone calls trying to convince customers or employees to jump ship may fall clearly within the scope of a nonsolicitation agreement's proscriptions. But what about a status update touting a move to a new job? Has the employee behind that update solicited former co-workers to come along and join the new employer's ranks? Has he or she invited a previous employer's clients to get in touch?

"In the social media era, it makes sense to have a more specific definition of solicitation, but an awful lot of agreements simply use the word 'solicit' without defining what that means," Steinmeyer said.

There are still open questions about when social networking conduct amounts to solicitation, but companies that want to put themselves in the best possible position to defend against ex-workers using services like LinkedIn and Twitter need to specifically address that prospect in their nonsolicitation agreements, Jonathan Hyman of Kohrman Jackson & Krantz PLL said.

“A business really needs to define what a 'communication' means and define what 'solicitation' is,” Hyman said.

Consider Keeping Mum on Affiliations with Competitors

Employers can also take a more aggressive tack and include language that prohibits general announcements of any affiliation with a competitor on social media for a certain amount of time, said Paulo B. McKeeby, co-chairman of the noncompete and trade secrets practice at Morgan Lewis & Bockius LLP.

But while a no-announcement clause might offer some clarity about exactly what a company is looking to forbid in the social media sphere, whether such a provision would be upheld in court remains up for debate, McKeeby said.

Courts have been reluctant to hold that social media announcements constitute solicitations, but whether employers can bar such announcements through restrictive covenants hasn't been addressed yet, he noted.

“Whether or not a court would enforce that is another question,” McKeeby said. “That's kind of an untested area.”

Set Up Accounts Clearly Under Company Rule

One issue companies and ex-workers have found themselves embroiled in litigation over is who owns a particular social media account. Last month, for example, a Pennsylvania federal judge ruled that Edcomm Inc. was liable for invasion of privacy for commandeering a former executive's LinkedIn account after she was fired, though the court also said that plaintiff and Edcomm co-founder Linda Eagle hadn't shown she was entitled to damages.

Companies can stave off the possibility of such a dispute by making it clear who owns a given account — as well as friends, “likes,” followers or other connections, as well as laying out what will happen with the account if the employee departs, Hyman said.

Establishing and maintaining a separate social media account — as opposed to an employee's existing Facebook or LinkedIn account — that a worker can use to represent the company is a good idea, Hyman said.

“It makes for a cleaner break when someone leaves,” Hyman said, adding that untangling information that a company wants to keep control of from a worker's personal account can prove difficult.

Setting up a new account that the employer explicitly claims ownership of would be a “great idea,” said Clifford Atlas, co-chairman of Jackson Lewis LLP's noncompetes and protection against unfair competition practice group. Taking that step can bring clarity on the key question of who owns an account's contacts and gets to dictate how they're used, he said.

“The whole issue of ownership of the contacts, on LinkedIn, for example, is one where the law is very slow to catch up to the facts of life,” Atlas said. “Anything the employer can do to make it more clear that it is asserting a business interest in this information can only help the employer at the end of the day.”

Pair Nonsolicitation Prohibitions with Noncompetes

More and more employers have been favoring nonsolicitation agreements — as opposed to noncompete agreements — to keep workers moving on to a new employer from poaching clients or customers, Steinmeyer said.

“The trend had been more toward restrictive covenants that prohibit client solicitation,” Steinmeyer said, adding that noncompete clauses can present thornier enforceability questions than nonsolicitation provisions.

But in light of the uncertainty swirling around what constitutes a solicitation on the social media sphere, employers might want to go against the grain and make sure their nonsolicitation agreements are accompanied by restrictions that prohibit departing employees from doing business with their former customers, Steinmeyer said.

Noncompetes can restrict former employees from doing work for a previous customer, which makes the question of whether there was an improper solicitation moot, Steinmeyer said.

A restriction that bars ex-employees not only from soliciting, but from actually doing business with their prior customers will mean the question of who solicited whom doesn't have to come up if there's a dispute, Atlas noted.

Be Crystal-Clear About Confidentiality

The widespread use of social media makes it more important than ever that companies educate their employees about the importance of keeping confidential information under wraps and what their obligations are in that regard.

In addition to making sure workers understand the significance of any confidential information they may have access to, companies should clearly label confidential information as such and hold exit interviews with departing employees that stress the need to protect confidential data, according to Steinmeyer.

A Facebook update or a Tweet about what an employee is working on may inadvertently give up sensitive information, Steinmeyer said, adding that those kinds of postings don't always get the same forethought as more traditional communications.

“Way too many people use electronic communications and devices very freely,” Atlas said. “One does need to be careful.”

While making sure workers are aware of their obligations with respect to confidential information may have always been a smart move for employers, it's even more important now that social media use is pervasive.

“It has always been a best practice, but with the advent of social media, it's even easier for employees to deliberately or accidentally disclose confidential info,” Steinmeyer said. “You can Tweet confidential information without even thinking about it.”

--Editing by John Quinn and Richard McVay.