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# The Impact of Social Networks on Restrictive Covenants: Why Rapid Change Should Meet Rapid Improvement

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## Introduction

Over the past 10 years, with the advancements in technology and the rapid spread of online networking among professionals, the effectiveness of traditional restrictive covenants such as confidentiality agreements, noncompetition agreements, and nonsolicitation agreements has been called into question.[1] When employers have leverage in the labor market, it generally makes business sense for them to act aggressively to protect their confidential information as well as personal contact with clients after key employees terminate their employment.[2] Of course, employees prefer to avoid restrictive covenants because they limit employees' ability to move on and conduct new business after their termination.[3]

If a former employee's post-termination conduct stirs an employer to enforce a nonsolicitation or noncompetition agreement, it is common to ''expect the employer to allege that the employee contacted its clients or customers and may have actually performed the same or similar services for those individuals during the restricted timeframe.''[4] Recently, however, a federal district court case, *TEKsystems, Inc. v. Hammernik*[5] for the first time raised the social networking issue as it relates to employee communications and traditional restrictive covenants found in employment agreements. Although the case was subsequently settled, it raises many questions that warrant careful consideration by employers and employees.[6]

The discussion below begins with the social media issues raised by *TEKsystems*. It then expands into how social media issues can be addressed in future restrictive covenant situations. Our examination of relevant case law indicates that it is not the medium of the communication that should control in litigation, but rather the content and message conveyed in the very communication itself. Questions certainly remain about ''passive solicitation'' via online social networks. These questions—whether an employer has a right to monitor an employee's social networking account during employment and following termination, and if so, whether any constitutional problems may subsequently arise—are also addressed. Our discussion concludes with

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[1] *See* Greg T. Lembrich, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 Colum. L. Rev. 2291, 2295 (2002) (listing the types of restrictive covenants found within employment agreements).

[2] *Id.*

[3] *Id.* at 2296.

[4] How Employers Face the Challenges of Litigation Associated with Dismissals, Restructuring, and Layoffs, 31 No. 6 Quinlan, Employee Terminations Law Bulletin art. 6 (June 2010).

[5] *TEKsystems, Inc. v. Hammernik*, No 0:10-cv-00819 (D. Minn. Mar. 16, 2010).

[6] *TEKsystems, Inc. v. Hammernik*, No 0:10-cv-00819 (D. Minn. Oct. 18, 2010).

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thoughts about methods and effective language for use when drafting enforceable restrictive covenants in employment agreements in relation to social networking policies.

## I. *TEKsystems, Inc. v. Hammernik*

TEKsystems is a staffing firm that recruits, hires, and contracts out its employees to companies that are seeking technical IT experts.[7] Brelyn Hammernik was formerly employed by TEKsystems as a recruiter, where her job was to scout out talented IT professionals who would be hired by TEKsystems and who would then be placed for a defined period as a ''temp'' employee at one of TEKsystems' clients.[8] Hammernik had signed, upon her hiring, an employment agreement that contained ''Covenants Not To Compete, Not to Solicit and Not To Divulge Confidential Information.''[9] The terms of the provisions were considered reasonable and enforceable. On Nov. 13, 2009, Hammernik's employment with TEKsystems came to an end.[10]

Following Hammernik's termination, she obtained a recruiting position with Horizontal Integration, which is a main competitor of TEKsystems.[11] Horizontal Integration was also a named Defendant in the lawsuit.[12] Hammernik's employment by Horizontal Integration was a per se violation of the noncompetition agreement that she had signed prior to her employment at TEKsystems.[13] While the breach of the noncompetition clause of Hammernik's employment agreement is clear and straightforward,[14] it is her alleged breach of the nonsolicitation clause that is of particular interest to this article.

According to the complaint, Hammernik had communicated with at least 20 of TEKsystems' employees using social networks such as LinkedIn.[15] The complaint specifically named 16 TEKsystems employees who Hammernik had connected with via LinkedIn.[16] In addition to broadly ''connecting'' with her ex-colleagues at TEKsystems via LinkedIn, Hammernik took her interactions one step further. According to the complaint, she actually communicated with at least one current employee of TEKsystems. [17] ''In her contacts with Tom Peterson, Hammernik asked Peterson if he was 'still looking for opportunities.' She then stated that she 'would love to have [you] come visit my new office and hear about some of the stuff we are working on.' ''[18]

None of the restrictive covenants found within Hammernik's employment agreement contained any references to online social networks.[19] Therefore, the question in litigation became whether or not merely connecting with someone via an online social network is a per se breach of restrictive covenants, even absent any specific provision regarding social networks within the applicable employment agreement itself.[20] In this case, there was clearly more than just a post-employment connection because Hammernik made affirmative and active solicitations to those with whom she was forbidden to speak about new employment opportunities. Nevertheless, there was no mention of online social networking in the employment agreement containing the restrictive covenants.[21]

*Do agreements imposing restrictive covenants need to expressly mention online social networks in order to safeguard an employer against a former employee's use of post-employment solicitation via websites such as LinkedIn and Facebook?*

*TEKsystems* merely opened the door for this issue, but did not address it directly.[22] The unanswered social networking question and related issues warrant deeper attention from employers who want to enforce their restrictive covenants, and thus is the subject matter of the remaining sections of this article.

## II. It's Not the Medium That Matters, But the Content of the Communication

Courts tend to narrowly construe noncompetition and nonsolicitation agreements between employers and employees. When evaluating the enforceability of a restrictive covenant, U.S. courts in many states look at several key factors to determine if the terms are reasonably directed toward the protection of a valid business interest.[23] ''A post-employment restraint is generally reasonable if it (1) is no greater than is required for the protection of the employer's legitimate interest, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public.''[24] 'The determination of '[r]easonableness is a fact-intensive inquiry that de-

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[7] *TEKsystems*, *supra*, at 6.
[8] *Id.* at 24.
[9] *Id.* at 25.
[10] *Id.* at 30.
[11] *Id.* at 33
[12] *Id.*
[13] *Id.* at 34-35.
[14] The court never expressly stated that the employment was a per se violation of the employment agreement. In the Order For Permanent Injunction and Dismissal of Action, the court stated that Hammernik was prevented from conducting business with certain parties pursuant to the original employment agreement. The court, however, never disallowed Hammernik from working for Horizontal, but it did in essence prevent Hammernik from performing most of her job functions, since the court order severely limited her business contacts. See note 22, *infra*.
[15] *Id.* at 37.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] Renee M. Jackson, *Restrictive-covenant Federal Lawsuit Over Social Media Conduct Raises Novel, Far-reaching Questions for Employers*, NIXON PEABODY EMPLOYMENT LAW ALERT (June 2, 2010), http://www.nixonpeabody.com/publications_detail3.asp?ID=3335.
[20] *See* Jill L. Rosenberg, How Social Networking is Changing the Face of Employment, 860 PLI/Lit 485, 497 (June 23, 2011) (''The issue was whether a person who ''connects'' with another via LinkedIn violates that person's non-solicitation contract which prohibits contact.'').
[21] Jackson, *supra* note 19.
[22] The employer obtained a permanent injunction against Hammernik, and the case was dismissed by stipulation between the parties. Order for Permanent Injunction and Dismissal of Action, *TEKsystems, Inc. v. Hammernik*, No 0:10-cv-00819 (D. Minn. Oct. 18, 2010) (ordering the employee turn over to TEKsystems certain computers and pieces of external storage).
[23] *See* Harlan M. Blake, Employee Agreements Not to Compete, 73 HARV. L. REV. 625, 648 (1960).
[24] *Id.* at 648-49, *citing* Restatement (First) of Contracts § 515 (1932).

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pends on the totality of the circumstances.' ''[25] Courts need to evaluate the interests that the employer is trying to protect and decide whether or not the restrictions, whether implicit or explicit, are justifiable under the totality of the circumstances.

*Are restrictions on an employee's right to utilize online social networks necessary to protect the employer's business interests? If so, how much protection is truly needed for the employer's business interests?*

For example, imagine an employee who signed a noncompete and nonsolicit agreement prior to terminating employment. One day, a friend of the former employee posts a message on the former employee's Facebook wall. The friend asks the former employee how he likes his new job. The former employee clicks on the reply button, and writes the following: ''The new job is amazing. I love getting paid a ton of money, and the hours are very manageable. Anyone looking to get out of their current job should put in an application here.'' The former employee has 1,110 friends on Facebook. By clicking ''reply'' on his friend's post, all 1,110 of his Facebook friends, including ex-coworkers who he is forbidden to speak with regarding new business opportunities pursuant to a nonsolicit clause, have the opportunity to see the message.

The former employee did not intend to solicit anyone, let alone the prohibited parties, but inadvertently, might have done so.[26] According to the Nevada Law Journal:

> The problem is that these new ''friends'' might be working for competing companies, and, depending on the information exchanged, the new relationships might unintentionally violate the non-compete and non-solicitation agreements. The ease and blazing speed with which messages can be dispatched might result in information being transferred that, if the sender had paused and reflected, never would have been sent. And if an employee is intent on violating company confidentiality rather than simply communicating carelessly, then she can reach an unlimited worldwide audience instantly.[27]

Consider a different scenario, where a former employee acts deviously, but technically, might or might not violate his noncompete agreement. For example, on the eve of his termination, the now former employee sends his customers a message on LinkedIn or Facebook such as ''just saying hello,'' or, ''is there anything that I can help you with?'' The former employee has set the stage for the customer to make a post-employment reply. Such devious behavior would seem to involve a wrong deserving a remedy, but technically, the employer might be out of judicial recourse.

In the hypotheticals discussed above, there might not be a clear-cut answer as to whether or not the former employee should be liable for breaching his employment agreement. This type of uncertainty could be discomforting to both employers and employees. At the end of the day, the answer will come from a jury or a judge who will likely be weighing precise facts about the nature of the former employee's online communications against perhaps a sentence or two of relevant text setting forth the restrictive covenant.

Not all cases will be as clear-cut as *Iron Mountain Info. Mgmt., Inc. v. Viewpointe Archive Servs., LLC*,[28] where a violation of a restrictive covenant was evidenced in the form of a Facebook post that explained the former employee's new job duties and start date, or as in *Kelly Servs., Inc. v. Marzullo*,[29] where a former employee's LinkedIn profile described his new job as being in the same geographic area and involving similar services as his old one, in violation of a noncompete agreement.

In *Graziano v. Nesco Serv. Co.*, an employer had its employee sign a noncompete agreement during the course of employment.[30] The agreement did not expressly prohibit the use of any forms of social networking following the employee's termination.[31] The employee was subsequently terminated, and thereafter, entered into a severance agreement. The severance agreement stated that the noncompete agreement previously entered into would remain enforceable.[32] When the former employee joined LinkedIn and connected with his former colleagues, the employer sent him a cease and desist letter stating that the use of LinkedIn violated the severance agreement.[33] The former employee continued to use the social networking site, and the employer ceased performance under the severance agreement.[34]

In the litigation that followed, the court never directly addressed whether or not the mere usage of LinkedIn violated the severance agreement absent any express language prohibiting such usage, but it did rule against the former employee on one of his claims.[35] One can infer that the court determined that the former employee's LinkedIn conduct, by affirmatively connecting with former colleagues and communicating with them, established a breach of the noncompete and severance agreements.[36]

The analysis that U.S. courts apply in ordinary restrictive covenant cases indicates that it is the message conveyed in the communication, not the form of the communication that truly matters. Former employees can violate a noncompete, nonsolicit, or nondisclosure agreement by using a telephone, postal mail, e-mail, or fax, even absent any mention of those forms of communication in the employment agreement. There is no reason to expect that communications sent via an online social network be subject to a materially different standard.[37] However, online social networks such as Linke-

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[25] *Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.*, 213 Ariz. 24, 26, 138 P.3d 723, 725 (Ariz. 2006), *citing Valley Med. Specialists v. Farber,* 194 Ariz. 363, 369 ¶ 20, 982 P.2d 1277, 1283 (1999).

[26] *See* David Allen Larson, *''Brother, Can You Spare A Dime?'' Technology Can Reduce Dispute Resolution Costs When Times Are Tough and Improve Outcomes*, 11 NEV. L.J. 523, 531 (2011) (recognizing that, in some situations, technology can cause new and unforeseen problems for employers).

[27] *Id.*

[28] *Iron Mountain Info. Mgmt., Inc. v. Viewpointe Archive Servs., LLC*, 707 F. Supp. 2d 92, 104 (D. Mass. 2010).

[29] *Kelly Servs., Inc. v. Marzullo*, 591 F. Supp. 2d 924, 931 (E.D. Mich. 2008).

[30] *Graziano v. Nesco Serv. Co.*, No. 1:09CV2661, 2011 WL 1219259, at *4, 6 (N.D. Ohio Mar. 4, 2011).

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *See Lawsuit Posits Social Network Connects are a Non-compete Violation*, WIRED (June 16, 2010), http://www.wired.com/epicenter/2010/06/lawsuit-posits-social-network-connects-are-a-non-compete-violation/2/ (asking the question ''[d]oes the medium matter, or just the message?

dIn raise novel questions, especially because they facilitate mass communications.

## III. Passive Solicitation and Employer Protections

In the past, a ''passive'' solicitation clause in the context of restrictive covenants has meant, for example, that a former employee may not solicit or accept business from clients that he or she had worked with while under the employ of the former employer.[38] In the online social networking world, it may be challenging to determine when a former employee crosses the line from broadcasting or publishing an allowable public announcement into an impermissible solicitation. Consider, for example, a former employee who posts updated job information to social media networks that reach hundreds or thousands of personal contacts. Imagine too that the former employee developed some business contacts over years of past employment, and made other contacts solely by virtue of introductions from the employer to whom the employee made nonsolicitation and noncompetition commitments. In the absence of clear contractual terms, both employers and employees should brace for an uncertain future, as the online social networking world continues to grow and change, along with the jurisprudence relating to the overlap with restrictive covenants.[39]

There is little doubt that it is best practice to narrowly draft the terms of restrictive covenants to avoid both ambiguity and their invalidation as being overly broad.[40] Conversely, specificity is generally crucial to the enforceability of restrictive covenants.[41] ''There must be reasonable and definite restrictions on the scope of activities. The prohibited activities should include only those activities necessary to protect the employer's business interests.''[42]

Applying these contract principals to online social networking, employers should consider including specific and articulate provisions in their restrictive covenant agreements. *TEKsystems* ''emphasizes the need for employers to take a proactive approach when managing such use'' of online social networks, and employers ''may want to consider including a provision prohibiting employees from uploading work-related contacts or customer or employee lists to their LinkedIn or a similar account.''[43] Further, employers may want to affirmatively require that former employees delete (e.g., de-friend or de-link) all or a designated category of business contacts made during their period of employment with the employer, and not re-connect for the duration of the restricted period. By implementing a policy like this, an employer would be narrowing its protections by permitting the former employee to stay connected with contacts established prior to termination. However, this calculus is worth considering because narrower post-employment prohibitions should fare better under judicial scrutiny.

Not only should an employer articulate whom former employees can and cannot connect with on given online social networks, but the employer should also address the initial question: What online social networks will its policy reach and expand to cover?

Best practices suggest that, when drafting social networking provisions within restrictive covenants, employers should limit the restrictions to websites whose primary mission is connecting people and allowing them to communicate in any easy manner. Facebook, LinkedIn, Twitter, and possibly Google Plus would all seem reasonable to include specifically in the employment agreement. By contrast, employers may not feel as compelled to limit post-employment communications through websites whose primary purpose is something other than actual communication, such as Zynga, which focuses on ''social gaming,'' or YouTube, which allows users to share online videos.

Another problem that employers face is the rapid growth and acceleration of the World Wide Web. Internet companies swiftly gain prominence and just as swiftly fade into oblivion. For example, an employment agreement might have been initially well-considered in listing the online social networks to which the restrictive covenants applied, but the passage of time may make its listing (even if illustrative) too narrow and outdated. Provisions written five years ago may not have considered Twitter or Google-Plus, and those written today are unlikely to anticipate the range of future technologies by which people and businesses will use to connect to one another. Employers should regularly plan to update and amend the online social networking provisions within their restrictive covenant provisions. Intervals such as 18 months to two years would seem suitable and feasible because it is frequent enough to allow the employer to ensure adequate relevance but not too often that it becomes an administrative burden. Employers should also be aware that, as a matter of contract law, many states require a form of consideration to guaranty the validity of the amendment to an employment agreement.[44]

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Would such communication be treated the same as e-mail, or does 'social media' require its own standard'').

[38] Dan Frith, *Virginia Should Not Follow Georgia: No State Should*, VIRGINIA NONCOMPETE BLOG (May 10, 2010), http://virginianoncompete.blogspot.com/2010/05/virginia-should-not-follow-georgia-no.html.

[39] *See, e.g.*, *PhoneDog v. Kravitz*, C 11-03474 MEJ, 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011) (alleging improper use by former employee of a Twitter account that was created and used by the former employee while under the employ of the former employer).

[40] *See* Wayne N. Outten, Anne Golden & Nantiya Ruan, *Non-Compete Agreements: Emerging Issues from the Perspective of Employee's Counsel*, Outten & Golden LLP (Feb. 2001), http://www.outtengolden.com/files/NonCompeteAgreements.pdf (stating that attorney should ''[m]ake the contract as narrow as possible by limiting the kinds of activity that will constitute a breach (be as specific as possible)'').

[41] *See* Paul H. Tobias, *Restrictive Covenants and Covenants Not to Compete*, 2 LIT. WRONG. DISCHARGE CLAIMS § 7:57 (Updated Nov. 2011) (providing a comprehensive overview of noncompete and nonsolicit agreements).

[42] *Id.*

[43] Margaret M. DiBianca, *Employer Uses Employee's Social Networking as Evidence in Noncompete Case,* 15 No. 5 DEL. EMP. L. LETTER 4.

[44] *See* Ferdinand S. Tinio, *Sufficiency of Consideration for Employee's Covenant not to Compete, Entered into After Inception of Employment*, 51 A.L.R.3d 825, § 3(a) (1973) (stating as a general rule that ''in order to be valid and enforceable, a covenant not to compete executed after the commencement of employment must be supported by a new consideration''); but

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## Conclusion

The world of online social networks has met the workplace, and its creative growth is likely to challenge employers who want to protect their legitimate business interests through more precise restrictive covenants. As more cases such as *TEKsystems* reach the courts, employers will gain a better understanding of what best practices should be implemented. Facebook, LinkedIn, and Twitter have all been created within the last 10 years. There's no saying what new online social networking platform can come into existence in the next 10 years. Well-prepared employers will likely take a proactive, forward thinking approach that accepts this rapidly expanding online social networking landscape, and just as rapidly considers possible improvements to existing restrictive covenants.

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see § 3.5 citing case law to the contrary in Arizona, Connecticut, North Carolina, and Pennsylvania.