



Employment Law Alert

Legal developments affecting human resource management

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Restrictive-covenant federal lawsuit over social media conduct raises novel, far-reaching questions for employers

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On March 16, 2010, TEKsystems, Inc., an IT staffing firm, sued three of its former employees and their new employer, Horizontal Integration, Inc., over alleged violations of the non-competition, non-solicitation, and non-disclosure agreements those employees entered into with TEKsystems. The lawsuit, *TEKsystems, Inc. v. Hammernick et al.*, No 0:10-cv-00819, was filed in the United States District Court for the District of Minnesota, and is the first-known restrictive covenant lawsuit regarding allegedly unlawful conduct via social media (in this case, LinkedIn). The outcome of this case could have far-reaching implications for the law governing restrictive covenants in employment, and employers should take early lessons from this case rather than find themselves on the delivering or receiving end of such a lawsuit.

TEKsystems, Inc. is an IT staffing firm that recruits programmers, engineers, network specialists, systems administrators, technical support specialists, helpdesk support, and security analysts, and then places them—on a temporary or permanent basis—in various companies throughout the United States. In the IT staffing industry, those placed on a temporary basis generally remain employed by the staffing firm, while those placed on a permanent basis generally become employees of the company in which they are placed.

Brelyn Hammernick worked as a recruiter for TEKsystems, and signed a non-competition, non-solicitation, and non-disclosure agreement with TEKsystems. Hammernick's employment agreement provided that, for a period of eighteen months following termination of her employment, she was 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 of her termination and about whom she knew of by reason of her 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. Importantly, these restrictive covenants in Hammernick's employment agreement *did not* reference competition, solicitation, or disclosure via social media specifically.

The definition of “Contract Employee” in the employment agreement covers those IT professionals that Hammernick recruited and then placed on a contract basis with TEKsystems’ clients and customers, but who remain employed by TEKsystems.

When Hammernick’s employment with TEKsystems ended, she went to work for Horizontal Integration, Inc., also an IT staffing firm. The complaint alleges that, after her employment with TEKsystems ended, Hammernick unlawfully communicated, on behalf of Horizontal Integration, with at least twenty “Contract Employees” via LinkedIn, the premiere social networking website used for business and professional purposes.

Registered users of LinkedIn can create a profile listing their current and former employment and education, “connect” to other professional contacts, join professional groups and associations, and “recommend” other contacts. LinkedIn users, of which there are currently 65 million, can find jobs, professional contacts, and business opportunities by using the site.

The allegations against Hammernick list, by name, the sixteen Contract Employees that she allegedly “connected” with on LinkedIn, in violation of her employment agreement with TEKsystems. This case raises the novel legal question whether merely “connecting” with professional contacts via professional networking websites constitutes a violation of a restrictive covenant prohibiting such “solicitation” or “contact.” Does the mere existence of a network of professional contacts equal solicitation? Will compliance with a non-solicitation restriction require individuals to “disconnect” or “de-friend” colleagues, customers, or clients of former employers until the non-solicitation period expires? Will compliance require individuals not to “connect” with or “friend” colleagues, customers, or clients of a former employer until the non-solicitation period expires?

Of note, an exhibit to the complaint details 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 come visit my new office and hear about some of the stuff we are working on!

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 lipidfish@gmail.com if you would prefer the non-LinkedIn route.

Tom

Here, the outright solicitation is more clear, but does this type of conduct violate a restrictive covenant that does not *specifically* reference solicitation or disclosure via social media? Does the medium matter, or just the message? Would such communication be treated the same as e-mail, or does “social media” require its own standard?

Employers should address these novel issues now—and avoid any confusion about the applicability of social media—by specifically referencing social media in any policy or agreement that attempts to restrict contact between employees, former employees, customers, and suppliers. Courts read such restrictive covenants very narrowly, so employers should reference explicitly contractor solicitation through social media in their policies and requirements. These provisions typically appear in:

- information technology, code of conduct, anti-harassment, anti-violence, confidentiality, and post-employment reference policies in employee handbooks;
- non-disclosure, non-disparagement, and post-employment reference provisions of separation and settlement agreements; and
- non-solicitation and non-disclosure provisions of restrictive covenants.

TEKsystems, Inc. v. Hammernick et al. is currently pending in the United States District Court for the District of Minnesota, and is scheduled for trial by August 1, 2011. Stay tuned for any important decisions and developments in this case.

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