Employer Update

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When May LinkedIn Requests and Other Social Media Posts Violate Non-Solicitation Obligations?

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Today, people commonly use social media for professional, not merely personal, purposes. People use social media to promote themselves professionally and maintain their professional networks, and frequently turn to social media to find and apply for new jobs. Recognizing this, businesses may likewise encourage employees to connect with acquaintances as a recruiting tool. When employees have contractual obligations not to solicit a former employer's employees or customers, however, questions may arise about whether the use of social media for professional purposes violates those obligations. Below, we discuss the case law that has addressed this question and offer advice for employers confronting former employees' use of social media with the employer's remaining employees and clients.

Generic Social Media Posts Likely Do Not Qualify as Actionable "Solicitation"

In evaluating whether communications over social media constitute actionable solicitation in violation of a non-solicitation covenant, courts look to whether the communication was a targeted, individualized communication or a general public announcement or update not aimed at any particular individuals. In general, courts have found that general announcements or updates on social media do not constitute actionable solicitation because they are not directed at specific individuals.

Courts generally have found that "status updates" sent over social media announcing a former employee's new position and contact information do not constitute actionable solicitation. For example, in *BTS, USA, Inc. v. Exec. Perspectives, LLC*, 2014 WL 6804545 (Conn. Super. Ct. Oct. 16, 2014), after leaving his employment with one company for a position with a competitor, an employee updated his LinkedIn profile to list his new job with the competitor and also included an invitation to "check out" the new website he had designed for his new employer. The update, along with the invitation to "check out" the new employer's website, was then broadcast to the employee's LinkedIn network. The court held that the employee had not violated his non-solicitation agreement with his former employer. Noting that social media "has become embedded in our social fabric" and announcing new employment is a "common occurrence on LinkedIn," the court held that an expansive interpretation of the non-solicitation agreement to restrict the use of social media would be inappropriate, given the absence of an express

provision in the contract regarding social media use and the employer's lack of policies governing employee use of social media during or after employment, including the lack of any policy requiring former employees to delete connections with the employer's clients or employees. Further, the court noted the posts would only be viewed by customers whose account settings were set configured to alert them of these types of updates, and there was no evidence that any clients actually viewed the former employee's LinkedIn activity or did business with the former employer's competitor as a result of the LinkedIn activity.[1]

Nor have affirmative requests to connect over social media been held to constitute solicitation. For example, in *Bankers Life & Cas. Co. v. Am. Senior Benefits LLC*, 2017 IL App (1st), 83 N.E.3d 1085 (Ill. App. 1st Dist. Aug. 7, 2017), the Illinois Appellate Court affirmed the trial court's ruling on summary judgment that a former Bankers Life employee did not violate his employee non-solicitation covenant by sending former co-workers generic requests to connect on LinkedIn, even though if they accepted the invitation and clicked on the link to view his profile page, they would have seen a job posting for his new employer. The court noted that the requests to connect that the former employee caused to be sent through LinkedIn were merely "generic e-mails," which "contained no discussion of Bankers Life" or any "suggestion that the recipient should view a job description on [the former employee's] profile page" or any solicitation of the recipients to leave their current employer. *Id.* at ¶ 23. If the recipients accepted the invitation to connect, "the next steps, whether to click on … [the former employee's] profile or to access a job posting on … [his] LinkedIn page, were all actions for which … [the former employee] could not be held responsible." *Id.* The former employee's admission that he used LinkedIn to recruit for his new employer "ma[de] no difference" because violating the non-solicitation agreement required "actual[], direct[]" recruitment, which requests to connect, by themselves, were not. *Id.*

Targeted Social Media Communications May Constitute Actionable Solicitation

In contrast to general, untargeted posts on social media activity, communications over social media that are targeted to certain customers or employees may violate a non-solicitation agreement. For example, in *Mobile Mini, Inc. v. Vevea*, 2017 WL 3172712 (D. Minn. July 25, 2017), the court granted a preliminary injunction ordering a former employee to remove any posts on her LinkedIn profile that advertised her new employer's products or services, and prohibited the employee from creating any similar posts until the expiration of the non-solicitation obligation with her former employer. In that case, a former Mobile Mini employee who had left the company for a position with Citi-Cargo, a direct competitor of Mobile Mini, updated her LinkedIn account to reflect her new position at Citi-Cargo. She further wrote in her LinkedIn profile:

> I'm excited to have joined the Citi-Cargo Sales Team! We lease and sell clean, safe, and solid storage containers and offices. We are locally owned and operated, with local live voice answer. We offer same day delivery to the Metro, and have consistent rental rates with true monthly billing. Give me a call today for a quote. 651-295-2982.
>
> …
>
> Call me today for a storage container quote from the cleanest, newest, safest and best container fleet in the State of Minnesota. Let's connect! 651-295-2982.

The court found that the employee's LinkedIn posts amounted to sales pitches on behalf of Citi-Cargo, which violated the employee's non-solicitation agreement with her former employer. Noting that if the posts had been "mere status updates announcing [the employee's] new position and contact information[,] … there would likely not be a breach of contract," the court found that "the language of the posts … demonstrate[d] that … [the employee's] purpose was to entice members of … [her] network to call her for

the purpose of making sales in her new position at Citi-Cargo." The court further found that "in all likelihood, … [the employee's] LinkedIn network includes at least one, if not many, Company Customers," and "[t]hus, the posts likely amount to direct solicitation of business from Company Customers."

Advice for Employers

Case law regarding whether social media use violates non-solicitation agreements continues to develop, and, as the cases discussed above demonstrate, is highly fact specific. As courts continue to grapple with this issue, employers may wish to review their non-solicitation agreements and consider whether to specifically address social media use post-employment. Explicitly addressing social media use in a non-solicitation agreement, potentially in the definition of "solicitation," may help an employer establish a breach, in the event that a former employee uses social media to reach out to former co-workers or clients post-employment. Regardless, employers may also consider reminding departing employees during exit interviews that any contractual non-solicitation obligations include an obligation not to improperly solicit the company's customers or employees over social media.

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[1] Other courts have reached similar conclusions. *See, e.g.*, *Mini Mobile, Inc. v. Vivea*, 2017 WL 3172712, at *5-6 (D. Minn. July 25, 2017) (status updates announcing a former employee's new position and contact information, without more, would not likely constitute breach of a non-solicitation agreement); *Arthur J. Gallagher & Co. v. Anthony*, 2016 WL 4523104 (N.D. Ohio Aug. 30, 2016) (holding that a company's press release posted on its LinkedIn page announcing its hiring of an employee did not constitute indirect solicitation of the employee's former clients); *KNF & T Staffing, Inc. v. Muller*, 2013 WL 7018645 (Mass. Super. Oct. 24, 2013) (holding that a former employee's LinkedIn profile update that included her new employer, title, contact information, as well as the employee's "skills and expertise" did not constitute actionable solicitation).

Recent Developments Under U.K. Employment Law

By Ivor Gwilliams and David Palmer

Three U.K. Court decisions recently handed down have clarified the law in relation to post-employment non-compete covenants, the "public interest" test in relation to whistleblowing claims and whether voluntary overtime should be included in the calculation of holiday pay. We have explained below the implications of these decisions and their relevance to employers.

Case 1: Non-Compete Not Upheld Due to Drafting Flaw

In *Tillman v Egon Zehnder Ltd* [2017] EWCA Civ 1054, the Court of Appeal refused to enforce an employee's six-month post-employment non-compete covenant because it did not expressly exclude minority shareholding(s) in listed companies that might be held by the departing employee for investment purposes. Employers in the U.K. should check to see if their employment contracts contain any post-termination non-compete covenants which may not be enforceable and for this reason and, if so, consider agreeing new covenants with their employees.

Background

It is common in the U.K. to ask key employees to agree to restrictions which prevent them from competing with their employer for a period of time (typically up to 12 months) following termination of employment. However, the U.K. courts take a strict approach to enforcement of such covenants and they will only enforce a covenant if it is no wider than reasonably necessary to protect an employer's business interests. This means that care has to be given to drafting a non-compete so that it only prevents an employee from competitive activities that could harm the employer.

Ms. Tillman was employed by Egon Zehnder Ltd (Egon) as a headhunter. On January 23, 2017, she gave notice of her resignation and then Egon terminated her employment with immediate effect by making a payment in lieu of notice in accordance with her contract of employment. Ms. Tillman informed Egon that she intended to start work for a competitor of Egon on May 1, 2017. Egon sought an injunction on the basis that this would breach Ms. Tillman's non-compete covenant which lasted for six months following termination and expired on July 30, 2017.

The High Court granted Egon's application for an injunction and upheld the non-compete covenant to prevent Ms. Tillman working for the competitor until July 30, 2017. However, Ms. Tillman appealed and the Court of Appeal (CoA) set aside the injunction. The non-compete covenant stated that Ms. Tillman would not be "concerned or interested in" a competing business during the six months after her employment ceased and the CoA held that such a restriction prevented Ms. Tillman from holding a minor shareholding in a competing (albeit publicly listed) business held for investment purposes. The CoA held that the covenant was, therefore, too wide to be enforceable, even though the employee had no such minority interests nor an intention to acquire any.

Further, the CoA refused to sever (*i.e.*, strike out) the offending wording (known as "blue pencilling") in order that the remaining wording would be enforceable, stating that its ability to sever a covenant is limited to striking through a whole distinct covenant, not deleting the occasional word within a covenant so that the remaining words would be an enforceable restriction.

Key Implications

This judgment is not welcome news for employers as any post-employment non-compete provision is likely to be void if it prohibits an employee from holding a minority shareholding in a listed company, whether or not the employee has any intention of holding such an interest, and the judgment confirms that a court's power to "blue pencil" any defective covenants (so as to cure any drafting flaws) is limited.

Practical Tips for Employers

The practical tips for employers are as follows:

- Employers should consider auditing the post-employment non-compete provisions of key

employees to check whether the employee can hold a minority interest (typically 1% or 3%) for investment purposes in publicly listed companies. If not, this covenant may not be enforceable and it is recommended that employers should seek specialist legal advice regarding potential options to address this issue.

- Any non-compete covenants agreed with employees in future should permit the employee to hold such a minority interest.
- Wherever possible, each individual covenant (including any non-solicitation and non-dealing covenants) should be split into separate sub-clauses to increase the prospect that a court might be prepared to sever any impermissibly wide drafting but leave the other covenants intact.
- Covenants should be accompanied by a blue pencil clause (*i.e.*, a clause stating that each of the restrictions are intended to be separate and severable and, if any of the restrictions shall be held to be void but would be valid if part of their wording were deleted, such restriction shall apply with such deletion as may be necessary to make it valid or effective).

Case 2: When is a Whistleblower Acting in the Public Interest?

In *Chesterton Global Ltd (t/a Chestertons) and another v Nurmohamed and another* [2017] EWCA Civ 979, the Court of Appeal gave guidance for the first time on the factors which will determine whether an employee's disclosure about wrongdoing was made in the public interest and, therefore, qualify the employee for protection from suffering a detriment or being dismissed as a consequence of his/her disclosure (*i.e.*, whistleblower protection).

Background

In the U.K., whistleblowers have been protected from the actions of their employer for almost two decades. However, in 2002 the Employment Appeal Tribunal (EAT) decided in *Parkins v Sodexho Ltd* [2002] IRLR 109 that a complaint about a breach of an employee's own contract could confer whistleblower protection on the employee. The decision in *Sodexho* was criticised by some on the basis that whistleblower legislation should not apply where the employee's allegation about the employer's wrongdoing relates only to the employee and his contract of employment, as the general public's interests are not affected by that wrongdoing.

In an effort to reverse the *Sodexho* decision, the U.K. Government amended the whistleblower legislation in June 2013, by requiring a disclosure to be (in the reasonable opinion of the employee) in the public interest, in order for it to be a qualifying disclosure which confers whistleblower protection on the employee making the disclosure. Accordingly, the relevant legislation now has the effect that employees will only be protected from detriment or dismissal if they have made a disclosure about certain types of wrongdoing in the reasonable belief that the disclosure is in the public interest.

However, not too long after the U.K. Government inserted the public interest test into the legislation, the EAT heard an appeal in the *Chesterton* litigation. Mr. Nurmohamed had made a disclosure to his managers, essentially accusing Chestertons of intentionally misreporting financial performance in order to reduce the amount of commission awarded to him and approximately 100 other employees. The EAT decided that this was a disclosure which was made in the reasonable belief that it was in the public interest, even though the disclosure related to only around 100 employees of Chestertons. Some commentators stated that the U.K. Government's amendments to the whistleblower legislation had been undermined by the EAT's decision as, once again, a disclosure about a private dispute between an employee and the employer could be a qualifying disclosure resulting in whistleblower protection for the employee.

When the case came before the CoA, it concluded that Mr. Nurmohamed had reasonably believed that his disclosure was in the public interest when he complained to his managers about alleged financial misreporting in interim financial accounts. The CoA was not persuaded by legal arguments that a disclosure could not qualify for whistleblower protection just because the content of the disclosure

related to the interests of a small number of (or even one) employee.

In determining the public interest test, the CoA decided that there are no set rules and the quantity of people affected by the alleged wrongdoing is not determinative. Instead, it endorsed the submissions of Mr. Nurmohamed's barrister, who had suggested to the CoA that the following factors should be taken into account:

1. The number of people affected by the issue.
2. The nature and extent of the interests affected.
3. The nature of the alleged wrongdoing (particularly if it is deliberate).
4. The identity of the alleged wrongdoer.

Implications for Employers

The CoA also confirmed in its judgment that the public interest test involves subjective and objective elements. The question to ask is whether an employee (subjectively) thought that the disclosure he/she made was in the public interest and whether it was (objectively) reasonable for him/her to have held that belief. It does not matter whether the employee's belief in the subject matter of the disclosure is wrong (though that might suggest it was not reasonable of him/her, to think the disclosure was in the public interest).

Unfortunately for employers, this case does, however, make it easier for employees to allege they are a whistleblower and protected from detriment and dismissal, when their complaint of wrongdoing relates to a private dispute with the employer, and not wrongdoing which may affect the interests of the wider public.

Practical Tips for Employers

An employer should have a whistleblowing policy and robust procedures in place to address employees' complaints about wrongdoing in the workplace. If an employer suspects, having investigated a complaint, that the complaint is without merit, made for an ulterior motive or relates to a private dispute between the employee and the employer, it is important for the employer to carefully document all of the surrounding factors which relate to the dispute. Doing so will help to demonstrate, in any subsequent litigation that, even if the employee subjectively thought their complaint was made in the public interest, objectively it was not reasonable for the employee to do so, and therefore the complaint is not a qualifying disclosure which attracts whistleblower protection.

Case 3: Holiday Pay Should Include Voluntary Overtime

In *Dudley Metropolitan Borough Council v Willetts and others* UKEAT/0334/1, the EAT confirmed that voluntary overtime (and certain other elements of variable pay) should be included in the calculation of an employee's four weeks of annual leave guaranteed by the European Working Time Directive (EU Holidays). This decision clarifies some of the doubt surrounding the calculation of holiday pay liabilities, although grey areas remain.

Background

In our Employer Update dated November 2014, we explained that the EAT had given its long awaited judgment in *Bear Scotland Ltd v Fulton and others* UKEATS/0047/1, the effect of which was that U.K. employers should take into account payments of non-guaranteed overtime when calculating pay for employees' EU Holidays (EU Holiday Pay). Whilst *Fulton* followed the precedent set by the Court of Justice of the European Court (CJEU) in the earlier landmark case of *Lock v British Gas*, the practice of most employers in the U.K. until that time had been to calculate all holiday pay with reference to basic pay only, and resulted in serious financial implications for many employers and thousands of employment tribunal claims across the U.K.

The decision in *Dudley* was the first time the EAT had considered whether voluntary overtime – where an employee has no obligation to work or be offered overtime – should be included in EU Holiday Pay.

In *Dudley*, employees presented employment tribunal claims alleging an underpayment of their EU Holiday Pay. Specifically, they alleged that their EU Holiday

Pay should include pay relating to: (i) the overtime they worked on a voluntary basis; (ii) standby allowance for being on the on-call rota; (iii) call-out payments which were due if they were required to work whilst on the on-call rota; and (iv) mileage allowances for work travel. The employees could not be compelled by Dudley council to work overtime or be on the on-call rota; the employees did so on a voluntary basis.

The EAT decided that that voluntary overtime pay, on-call allowances and on-call payments should count towards EU Holiday Pay, provided these payments were part of an employee's "normal pay". Interestingly, the EAT commented that overtime pay would be part of normal pay even if it was paid only one week per month or one week in five. Further, the EAT held that: (i) it did not matter that the employees were not contractually required to do overtime or on-call work; and (ii) any reduction in remuneration due to taking holidays infers there is a deterrent effect on the employee taking holidays, and it is not necessary for the employees to show that they were actually deterred from taking their holidays.

For separate reasons, the taxable portion of the mileage allowances were also found to be part of the employees' normal pay and, therefore, should be reflected in their EU Holiday Pay.

Implications for Employers

This judgment is not unexpected as the tribunals and courts have been fairly consistent in finding that different types of variable pay should be included in EU Holiday Pay, but now there is little doubt that voluntary overtime pay should be included too (provided it is part of an employee's normal pay). Also, it appears reasonably clear that employers cannot argue that only overtime/allowance payments which are set out in an employment contract should be included in EU Holiday Pay. However, there are still no definitive criteria for determining whether a payment is paid regularly enough to be considered part of an employee's normal pay. The judgment provides some help in that variable pay which is received one week per month or one week in five appears likely to be part of normal pay but it is a fact specific issue that has to be determined on a case by case basis.

Practical Tips for Employers and Purchasers of Businesses

Many employers do not include any or certain aspects of variable pay in the calculation of employees' EU Holiday Pay, for a variety of reasons, but often because they have been waiting to see what the outcome of the case law would be. This means that many employees in the U.K. may continue to have potential liabilities relating to historic, underpaid holiday pay. Whilst this judgment may yet be appealed, it appears unlikely that the decision will be overturned by a higher court. Any employers who are considering changing their practice in relation to holiday pay should consider taking legal advice as this is a complex area of the law, and there remain uncertainties, not least what impact Brexit might have on holiday pay laws when, as appears to be the case, the U.K. will exit from the jurisdiction of the CJEU.

Holiday pay liabilities will continue to be a commercial issue which employers (and also purchasers acquiring U.K. businesses) will have to consider. Purchasers will need to continue to factor these potential liabilities into their purchase price calculations and/or require indemnity protection from sellers.

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