



Are you Connected?

Social Media and Employment Law

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6 December 2011

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This report is an extract from a much fuller article about many aspects of social media and employment law. Daniel has allowed me to edit it to reflect the main issues relating to LinkedIn. For the full report write to Daniel.Isaac@withersworldwide.com

1. Social media in context

1.1 As social media¹ becomes increasingly popular, employers are beginning to explore how this new form of communication affects the workplace and to what extent employees have a right to privacy. Different policies will develop, some of which will work and others will not, before a consensus emerges. Employers are likely to have varied approaches to this issue depending on whether they believe that social media is a useful business tool for the employees concerned.

Putting confidential information in the public domain

1.2 Social media presents two main risks regarding confidential information.

(a) The first, employees posting confidential information online (whether maliciously or unthinkingly), is a new manifestation of an old problem. It should be prohibited by policy, addressed in training and breaches responded to as the particular circumstances demand, whether that be by way of disciplinary proceedings, deletion of the material, litigation and/or (in the most serious cases) a PR response.

(b) The second is a feature of social media itself. Employers who consider their client or contact database to be confidential should be wary of allowing their employees to put this in the public domain on LinkedIn or similar sites and allowing them to do so would render it no longer confidential.

2. Social media and restrictive covenants

2.1 The use of social media and, in particular, LinkedIn presents new problems for employers trying to enforce non-solicitation clauses. There has been a great rush to LinkedIn over recent years with many employers giving little thought to the fact that employees may remain linked to clients and contacts after termination of the employment relationship. If that employee then updates his LinkedIn profile (as would be proper, because he should not represent himself as continuing to be employed by the previous employer) the new contact information will be available to the clients in question. Moreover, it is likely that

(depending on the settings) they will receive an e-mail from LinkedIn announcing the new post (or will see it on their LinkedIn timeline). In some cases, their LinkedIn e-mail will even invite the clients to send a congratulatory e-mail to the person who has changed jobs, thus carrying out the solicitation automatically!

- 2.2 Furthermore, the departed-employee might post an article to LinkedIn, start a discussion topic or even a new LinkedIn group, thereby encouraging former contacts to get in touch.

In *Taylor Stuart & Co v Croft* Stanley Burnton QC said that a communication which does no more than inform a client that an employee has left his employer is not solicitation, even if it contains the address of the former employee and even if sent in the hope that the client will transfer his custom. An employed salaried partner of a firm of chartered accountants sent the following letter on headed notepaper he had designed, to clients of the firm for whom he had been responsible:

“this is to inform you that I left the Partnership of Taylor Stuart & Company on 18 November 1994. With effect from 1 December 1994 I shall be establishing my own professional practice and can be contacted as above.”

The judge concluded that this did amount to solicitation because although *“the letter did not unequivocally invite clients to transfer their work to the Defendant...I do regard the words ‘I...can be contacted above’ as an invitation to the addressees to contact him”*.

- 2.3 I am not aware of any case law on whether updating a LinkedIn profile with an employee's new job with a competitor amounts to solicitation. For employers there is a real risk that it does not – if the Taylor Stuart analysis is correct, it may fall short of solicitation and merely be the updating of an address. Nevertheless, for employees there is a real risk that it does constitute solicitation. This is clearly unsatisfactory.
- 2.4 In any event, most employers do not want to 'catch out' an employee for soliciting: they would rather prevent the solicitation in the first place. This can only realistically be done by requiring the employee to unlink from clients and/or any other category of protected person. Many people may regard this as a draconian affront but I know of companies who have introduced such provisions and tell me that their employees understand why it has to be done. At present, LinkedIn does not notify a member when a contact unlinks from him.
- 2.5 It seems to me that there are four possible responses to the increased difficulty LinkedIn creates for non-solicitation clauses and not all of them are equally likely.

- (a) An employer might recognise that the use of LinkedIn can create a real problem with the enforcement of non-solicitation and therefore direct employees not to use LinkedIn or, at least, not to link to clients. Such swimming against the tide may prove futile.
- (b) An employer may recognise that non-solicitation covenants are more difficult to enforce in the age of social media and therefore forget about them entirely, focusing instead on ensuring that clients are properly 'institutionalised' and the business is not at risk of individuals stealing clients. This is, of course, an option now, but people repeatedly resort to legal proceedings and such an approach is unlikely to catch on.
- (c) Recognising the problems with non-solicitation, employers may decide instead to rely on more onerous restrictions such as blanket non-compete or longer periods of garden leave.
- (d) Finally, and perhaps most likely, employers are likely to amend restrictive covenants to explicitly require unlinking from clients on termination of employment and not re-linking with them during the period of restraint (and/or add this to compromise agreements).

2.6 There has been much debate over who 'owns' LinkedIn contacts (the candidates being LinkedIn, the employer or the employee) and the extent to which database rights might apply. Many LinkedIn accounts are likely to defy a neat legal analysis being an amalgam of friends, contacts already on the database from previous jobs and contacts made in the course of employment. The need to debate this ought to disappear with an enforceable contractual obligation to unlink from clients.

2.7 No discussion of this topic would be complete without mentioning **Hayes Specialist Recruitment (Holdings) Limited v Ions**. This was a High Court case in which Hayes obtained an order for pre-action disclosure under CPR 31.16 of:

- (a) emails or other communications sent to or received by the Defendant's LinkedIn account from the Claimant's computer network; and
- (b) all documents evidencing the use made and business obtained by the Defendant from business contacts uploaded to LinkedIn while he was employed at the Claimant.

Again, this is an application that would not have been necessary had Hayes had and enforced a policy of unlinking from clients.

2.8 Non-solicitation aside, other problems which can arise include:

- (a) LinkedIn profiles usually contain a career history: is this using an ex-employer's name to promote a competing business?
- (b) How would an ex-employer feel about 'recommendations' from its clients remaining on a departing employee's LinkedIn page?
- (c) To what extent might the ex-employee listing his achievements on his profile amount to passing-off the ex-employers work as his own?

3. **Social media policies**

- 3.1 Many companies publish their social media policies online. Those drafting policies might want to consider the style and content of the Coca-Cola and BBC policies.
- 3.2 There are two types of policy: those that deal with people who post on social media as part of their employment; and those that deal with what employees post privately (and, of course, those that deal with both). Needless to say, there will generally be a lot more to policies falling within the former category than required from a pure employment law perspective. A common mistake of employers is to overlook the latter category completely.

4. **Conclusion**

Social media presents employers with some new problems and a new platform for perennial problems. Employers should understand the risk posed by social media and draw up policies appropriate to their organisation and likely use of social media. Even employers that prohibit the use of social media in the workplace should have social media policies addressing private use.

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2 December 2011