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LABOR RELATIONS

Expert Analysis

Social Media and Departing Employees

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A company's social media page, account and followers are valuable business assets. Legal issues arise when employees or contractors create or develop social media accounts that benefit the company, but eventually leave and use the accounts to benefit a competitor. While the law still is developing in this area, this month's column discusses some cases in which courts have considered who actually owns these social media accounts—the employer or the departing employee? This column also addresses circumstances in which departing employees' social media posts may violate customer or employee non-solicitation covenants.

Account Ownership

BH Media Group, parent company of Roanoke Times, recently sued its former Virginia Tech sports reporter after he left Roanoke Times for The Athletic, a subscription sports site, where he continued to cover Virginia Tech sports and refused to relinquish control of the Twitter account he used while at Roanoke Times to tweet about Virginia Tech athletics. *BH Media Group v. Bitter*, Case No. 7:18cv0038 (W.D. Va. 2018). The August 2018 complaint alleged, rather, that the reporter pinned a tweet on that Twitter feed urging its over 27,000 followers to subscribe to The Athletic and continue reading his sports journalism. BH Media argued Roanoke Times owned that Twitter account and the reporter's refusal to turn over the account constituted a misappropriation of trade secrets. It pointed to an employee handbook that stated communication accounts "provided by the Company" are property of the company. However, the reporter claimed he personally was given the Twitter account by a departing sportswriter, so it was not provided by the company.

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On Sept. 27, 2018, the court denied a motion by BH Media for a preliminary injunction, which would have given it control over the Twitter account pending trial. The court found the company did not provide clear and convincing evidence that it owned the Twitter account or that it was a Roanoke Times branded account, nor did it establish the existence of a trade secret given the public nature of the Twitter content and followers. The parties resolved the dispute following a settlement conference held this past November. Notably, the employee retained access to the Twitter account at issue and merely issued a statement directing followers how to follow his successor at

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the Roanoke Times at its new Twitter account if they were inclined.

This dispute demonstrates the importance of having a written agreement that addresses social media account ownership with employees who use such accounts to promote their employer's business. While Roanoke Times addressed social media account ownership generally in an employee manual, it did not have an agreement with the reporter that specified that any social media account used by the employee for business purposes is the property of the employer.

Written Policies

The importance of written policies establishing ownership over social media accounts previously was made clear in *Eagle v. Morgan*, No. 11-4303, 2013 WL 943350 (E.D. Pa. March 12, 2013). In that case, an employer encouraged employees to create LinkedIn accounts to pursue the company's sales and marketing initiatives, and provided guidelines regarding content that employees would then share online. The company did not require that employees create LinkedIn accounts nor did it pay to have such accounts maintained. The company also did not have a policy on the transfer of an employee's LinkedIn account to the company upon an employee's departure.

A principal and executive of the company created a LinkedIn account affiliated with an email address provided to her by the company, and shared her password with certain coworkers to assist in management of the account. When her employment ended, the other employees to whom she had given account access changed the password and restricted her access to the account for several weeks until she had LinkedIn step in and give her back exclusive access. During this period, the company altered the account information to include the name, picture, education and experience of its interim CEO.

The former executive sued the company in the United States District Court for the Eastern District of Pennsylvania, which held the company liable under claims of unauthorized use of name, invasion of privacy by misappropriation of identity and misappropriation of publicity because it took over her account and replaced the content with the interim CEO. Specifically, the court found the former executive's name and likeness held commercial value because of the investment of time and effort in developing her reputation in the industry, and the company used her name without her consent for commercial and advertising purposes.

The court rejected the company's claim that the former executive's recovery of the LinkedIn account was misappropriation. The court's reasoning, which is instructive for employers, was that (1) the company did not have a policy requiring its employees use LinkedIn, did not dictate the precise contents of an employee's account, and did not pay for its employees' LinkedIn accounts; (2) the LinkedIn User Agreement expressly stated that the former executive's account (that she set up with LinkedIn) was between LinkedIn and her; and (3) the company failed to show the former executive's contact list was "developed and built through investment of the [company's] time and money as opposed to [the executive's] own time, money and extensive past experience."

Access Information

In *Ardis Health v. Nankivell*, No. 11 Civ. 5013, 2011 WL 4965172 (S.D.N.Y. Oct. 19, 2011), the U.S. District Court for the Southern District of New York relied on a written agreement with a former employee in ruling a group of affiliated companies owned the rights to information for accessing their social media accounts. The court granted the companies' motion for injunctive relief and ordered a former employee to return the login, password and other social media access information that she refused to provide upon her departure from the company.

The former employee had been hired as a social media producer and in that capacity maintained websites, blogs and social media pages for a group of affiliated marketing companies. At the start of her employment, she signed a Work Product Agreement which provided all work created or developed by her while employed "shall be the sole and exclusive property of [the employer], in whatever stage of development or completion." The same agreement required her to return all confidential information upon the employer's request.

Notwithstanding that agreement, when the employee was terminated, she refused to provide the companies with the access information to the social media accounts, emails and websites she maintained. As a result,

they were unable to access several of their online accounts and websites, to their detriment.

In granting injunctive relief to the employer, the court found, based on the Work Product Agreement, "[i]t is uncontested that plaintiffs own the rights to the Access Information" and the former employee's "unauthorized retention of the information may therefore form the basis of a claim of conversion." Accordingly, it held the former employee must turn over the login, password and other access information.

Although the companies prevailed in *Ardis*, it serves as a lesson that an employer should not allow only one person to be the sole custodian of access data. A prudent company will keep multiple copies of all access information for social media accounts in secure locations, and immediately document changes to such information. In addition, the *Ardis* case demonstrates that when an employee is to be terminated, the employer should change the passwords to the company's social media accounts, and lock the employee out of those accounts, immediately prior to the employee's termination.

Online Solicitation

When a departing employee has entered into an agreement not to solicit the former employer's customers or employees, questions may arise about whether that individual's use of social media for professional purposes breaches those obligations.

In general, courts have found general announcements or status updates on social media do not constitute actionable solicitation because they are not directed at specific individuals. For example, in *Bankers Life & Cas. Co. v. Am. Senior Benefits*, 83 N.E.3d 1085 (2017), the Illinois Appellate Court affirmed the trial court's ruling that a former employee did not violate the employee non-solicitation covenant in his employment agreement by sending LinkedIn requests to connect to his former co-workers even though, if they accepted the invitation and viewed his profile, they would see a job posting for an open position with his new employer. The court stated the former employee "would have to actually, directly recruit individuals" to violate the non-solicitation provision in his employment agreement, and found simply sending a request to connect with former co-workers on social media was insufficient to violate a non-solicitation agreement. Here, the court found that if the recipients accepted the former employee's invitation to connect on LinkedIn, the next steps of clicking on his profile and accessing the job posting on his LinkedIn page were actions for which the former employee could not be held responsible.

As case law addressing whether social media use breaches non-solicitation covenants continues to develop, employers may wish to review their non-solicitation agreements and consider whether to specifically address social media after an employee's departure.

On the other hand, communications over social media that are targeted to certain customers or employees have been found to violate a non-solicitation covenant. For example, in *Mobile Mini v. Vevea*, No. 17 Civ. 1684, 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 her from creating similar posts until expiration of the customer non-solicitation obligation with her former employer. In that case, after leaving her employer to work for a direct competitor in the portable storage unit business, the former employee posted in her LinkedIn profile that her new employer has "the cleanest, newest, safest and best container fleet in the state" and provided a phone number instructing readers to "give me a call today for a quote." The court categorized these posts as blatant sales pitches, distinguishing them from mere status updates regarding her new position. The court also found relevant that the social network who could see the former employee's LinkedIn posts included at least one, if not many, of her former employer's customers.

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