

Do Your Non-Compete and Non-Solicitation Agreements Reach Social Media Posts?
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Social Media sites like LinkedIn and Facebook have become the source of much attention for human resources professionals, business owners and employees alike. They have also drawn the attention of the NLRB and the EEOC. The message is clear: social media is a tool that can be both beneficial and problematic for employers. Moreover, the law is still playing catch-up with the emergence of social media. One such area that is extremely undeveloped is the use of social media as a source of unfair competition. One recent case out of Massachusetts serves to highlight how this issue might play out.

In *KNF&T v. Muller*, Case No. 13-3676 (Mass. Sup. Ct.), a staffing agency brought suit against its former Vice President and Manager of the Company's Boston temporary staffing division, its largest and most profitable business unit. Muller had worked for KNF&T for eight years until her resignation and had come to KNF&T with no prior experience in the field. Muller was in charge of the Company's largest account, and she had substantial contact with the employers who used KNF&T's services, and the applicants whom KNF&T placed. Muller had signed a Non-Compete Agreement which prohibited her from engaging in any activity involving personal placement in KNF&T's Fields of Placement for one year after leaving the Company within a 50 mile radius of any KNF&T office. Muller was also precluded from soliciting, recruiting or hiring away KNF&T employees and temps.

Muller left to work in a non-competing business, but shortly thereafter, went to work for a staffing firm in Boston. The firm was, in some areas but not all, directly competitive with KNF&T. Several events drew KNF&T back to Muller. The first was news that Muller recommended a former colleague at KNF&T to a potential employer. The colleague had taken over Muller's old position as manager of the temporary staffing division. The second event occurred shortly after Muller took the job for the competitor. KNF&T learned from a client that Muller had contacted the client, informed it of her new position and inquired about referring potential employees. Moreover, KNF&T became aware that Muller had updated her LinkedIn profile disclosing her new employment, title, and contact information, and counting among her "Skills & Expertise" such things as "Internet Recruiting," "Temporary Staffing," "Staffing Services" and "Recruiting."

KNF&T brought suit to enforce its Non-Compete Agreement and for injunctive relief. The Massachusetts Superior Court Judge held that although the Non-Compete Agreement was enforceable, the facts did not warrant a preliminary judgment. First, the Judge concluded that giving a former colleague's name to a potential employer with which Muller was not affiliated did not constitute "solicit[ing], recruit[ing] or hir[ing] away" the former colleague. Muller did not contact the former colleague, try to persuade her to leave KNF&T, or offer her job. Next, the Judge found that contacting the former client did not violate the Agreement because Muller's new position in information technology recruiting did not directly compete with the type of work she was performing while at KNF&T. The Judge applied the same reasoning to Muller's mention of her new position in her LinkedIn profile. It was important to the Judge that Muller's updated LinkedIn profile did not mention any of the fields for which she had been responsible while at KNF&T. According to the Judge, as long as Muller does not solicit or accept business in the fields of placement for herself or others (including her new employer), she will not have violated the covenant not to compete.

Although the Court did not find a problem with Muller's updated LinkedIn profile and, therefore, saw no need to restrict her use of social media, the case presents some very interesting opportunities and challenges for employers. Certainly, the outcome of the KNF&T case may have turned out differently had Muller's updated LinkedIn profile identified her new responsibilities as directly competitive with KNF&T. Businesses should anticipate the use of social media as a potential tool for unfair competition and should explicitly address social media in its non-solicitation agreements to eliminate any suggestion that the restrictive covenant does not reach social media posts.

