NON-SOLICITATION AGREEMENTS IN THE INTERNET AGE

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The Vice President of Sales for your company recently resigned and went to work for a competitor. Unfortunately, your company did not have a non-compete agreement in place before her resignation. On the bright side, she did sign the company's standard confidential information and non-solicitation agreement. You've recently noticed, however, that the volume of work from your best customers is declining – is your former VP of Sales soliciting their business away from your company? You send a cease and desist letter to your former VP of Sales, citing the confidential information and non-solicitation agreement, which garners the following response from your former employee's attorney: "Your former VP of Sales has not solicited anyone, they all reached out to her independently." Her attorney argues this does not violate the boilerplate non-solicitation agreement because it was not "solicitation," rather, it was mere acceptance of business. What now?

This is a common situation, especially in the modern Internet age of social media and business networking websites, such as Facebook and LinkedIn. But what constitutes "solicitation" in the Internet age? Can a former employee accept business from your clients if they call? How can employers protect themselves from post-employment client and employee poaching? The answer should be a well drafted non-solicitation agreement.

Employers regularly use written non-solicitation agreements in an effort to prevent former employees from poaching existing customers and employees from their business. Often,

[1] Thanks to Megan Carboni and Kathryn Thiel, who contributed extensively to the research and drafting of this whitepaper.

employers attempt to draft overbroad agreements in the hopes of covering all the bases. As restrictive covenants, however, non-solicitation agreements are closely scrutinized by courts to protect an individual's ability to earn a living and to prevent undue restriction on trade by an employer. Complicating the issue further, judicial interpretation of the term "solicitation" in the context of employment agreements varies substantially by jurisdiction. This inconsistency in judicial interpretation and enforcement can especially cause problems for multi-jurisdictional employers. Because employers frequently use standardized language in their non-solicitation agreements for all employees, the terms of non-solicitation agreements are often ambiguous, leading to increased litigation.

This whitepaper explores some of the key issues that arise regarding non-solicitation agreements. Specifically, this whitepaper discusses issues related to drafting enforceable non-solicitation agreements across multiple jurisdictions. This whitepaper examines judicial enforcement of the term "solicitation," which turns primarily on the distinction between "direct" and "indirect" solicitation, and whether a former employee is actively soliciting a former client or employee or merely accepting business. Additionally, this whitepaper discusses jurisdictional limits on the scope of non-solicitation agreements, including limits on *who* can be bound by restrictive covenants based on an individual's knowledge of trade secrets or work in a particular industry. This whitepaper will also explore how courts in federal and state jurisdictions employ a baseline test of reasonableness of non-solicitation agreements in terms of geographic, time period, and line of business restrictions. Finally, this whitepaper will address social media use by former employees as an additional layer of complexity in implementing and enforcing non-solicitation agreements. Employers who pay special attention to drafting and enforcement considerations discussed herein can better protect business interests and even avoid costly litigation.

I. CONSIDERATIONS IN DRAFTING ENFORCEABLE NON-SOLICITATION AGREEMENTS ACROSS MULTIPLE JURISDICTIONS.

A. Scope of Solicitation Covered By The Agreement.

The foundational question in drafting, interpreting, or enforcing a non-solicitation agreement is whether the agreement defines the term "solicit" or relies on common usage of the term. There are a variety of sources in attempting to discern the common usage of the word "solicit" in a jurisdiction, including state statutes, industry practice, and even the dictionary.

The most common issue arising in the drafting and enforcement of solicitation agreements is whether the term "solicit" includes "direct" *and* "indirect" forms of solicitation. In recent cases, courts have primarily interpreted non-solicitation agreements to include both direct and indirect forms of solicitation where a former employee engages in affirmative or proactive conduct to elicit business away from his or her former employer.[2] In making a distinction between "direct" and "indirect" solicitation, "direct" solicitation may include a former employee's direct contact (*e.g.*, contact via E-mail, phone call, or in person) with a former employer's customers with the intent to divert business away from his or her former employer. "Indirect" solicitation, however, may consist of a former employee's advertising packages to a former employer's customers; targeted announcements of new employment to a former employer's customers; proactively encouraging a former employer's customers to leave, *even if* the customer may have initiated contact with the former employee; or the use of a third party, such as a new co-worker, to initiate contact with a former employer's customers.[3]

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[2] *See, e.g.*, *Quality Transportation Services, Inc. v. Mark Thompson Trucking, Inc*., 90 N.E.3d 485, 491 (Ill. App. Ct. 2017); *GE Betz, Inc. v. Conrad*, 752 S.E.2d 634, 644 (N.C. 2013); *McRand, Inc. v. van Beelen*, 486 N.E.2d 1306 (Ill. App. Ct. 1985).

[3] *See, e.g.*, *Tomei v. Tomei*, 602 N.E.2d 23, 26 (Ill. App. Ct. 1992) (holding that a targeted "general" advertisement package for future services constituted solicitation in violation of former employee's non-solicitation agreement); *USE Ins. Serv. LLC v. Miner*, 801 F.Supp.2d 176, 192-93 (S.D.N.Y. 2011) (holding that a former employee solicited by sending a targeted email announcing his job transition and promoting his new employer);

The increased focus on enforcement of indirect solicitation has dramatically reduced the importance of determining who initiated contact between a former employee and a potential client and/or current employee.[4] Instead, courts conduct a fact-based inquiry to determine whether a former employee engaged in proactive conduct, or merely accepted or received business from a former employer's customer.[5] Inconsistent judicial interpretation of indirect solicitation remains an issue, however, especially in relation to social media posts and advertisements.[6]

1. Defining Solicitation

Both state legislatures and courts have adopted nuanced interpretations of "solicit" within the context of employment agreements. This presents a challenge for multi-jurisdiction employers when drafting and seeking enforcement of non-solicitation agreements.[7] In interpreting restrictive covenants, courts typically enforce non-solicitation agreements that include an unambiguous, reasonable, and detailed definition of what constitutes solicitation.[8] Absent a clear definition provided in an agreement, however, courts are left to define the meaning of "solicitation" in a non-solicitation agreement, and many courts do not interpret "solicit" to include direct *and* indirect solicitation, even if the non-solicitation provision includes the term "indirectly."[9]

Ecolab, Inc. v. K.P. Laundry Machinery, Inc., 656 F.Supp. 894, 896 (S.D.N.Y) (stating that a former employee's goodbye letters to his former employer's customers "were actually intended as a first step in the solicitation of the customers on behalf of [the employee's new employer]."); *American Family Mutual Ins. Co. v. Hollander*, No. C-08-1039, 2009 WL 535990, at *17 (N.D. Iowa Mar. 3, 2009) (concluding that a former insurance employee indirectly induced his former employer's customers to cancel insurance policies by responding to customer inquiries, offering quotes to customers, and helping others to complete cancellation forms).

4 *See Quality Transportation Services, Inc.*, 90 N.E.3d at 491.

5 *See id*.

6 *See* Michael Skapyak, *Battling Non-Solicitation Clauses in Employment Agreements in the Social Media Age*, 16 MINORITY TRAIL LAW. 6, 8-9 (2017).

7 *See generally* David L. Johnson, *The Parameters of "Solicitation" in an Era of Non-Solicitation Covenants*, 28 A.B.A. J. LAB. & EMP. L. 99 (2012).

8 *Id.* at 99.

9 *Id.* at 104.

Without a clear definition in a written agreement, courts often look first to the plain meaning of the term "solicit" to determine the scope of restriction in non-solicitation agreements.[10] Courts regularly look to Black's Law Dictionary as one source of plain meaning for terms left undefined in employment agreements. Black's Law Dictionary defines "solicitation" as the "act or instance of requesting or seeking to obtain something; a request or petition."[11] In addition to the question of what it means to "solicit," many courts also consider the circumstances surrounding the non-solicitation restriction, such as whether the former employee was bound by other restrictive covenants and the relevance of employee-initiated versus customer-initiated communication.[12]

Today, a minority of courts endorse strict compliance with the plain (or dictionary) meaning of solicitation, which prohibits only direct, employee-initiated communication with a former employer's customer.[13] For example, under this approach, the United States Court of Appeals for the Fourth Circuit strictly required employee-initiated contact with a former employer's customer or employee in order to violate a non-solicitation restriction.[14] In the absence of a specific definition of conduct that constitutes impermissible solicitation, the Fourth Circuit relied on a strict plain meaning of "solicitation" in interpreting non-solicitation agreements.[15]

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10 *Id.* at 99.

11 Garner, Bryan A., ed. *Black's Law Dictionary*, 8th Ed. West Group (2004).

12 *Alexander & Alexander, Inc. v. Danahy*, 488 N.E.2d 22, 30 (Mass. App. Ct. 1986) ("As a practical matter, the difference between accepting and receiving business, on the one hand and indirectly soliciting on the other, may be more metaphysical than real").

13 *See, e.g.*, *Mona Elec. Group, Inc. v. Truland Service Corp.*, 56 Fed.Appx. 108, 110-11 (4th Cir. 2003) ("[T]he plain meaning of 'solicit' requires the initiation of contact."); *Autry v. Acosta, Inc.*, 410 P.3d 1017, 1023 (Okla. Civ. App. 2017) (holding that a non-solicitation agreement was void because it prohibited more than direct solicitation of established clients).

14 *See Mona Elec. Group, Inc.*, 56 Fed.Appx. at 110-11 (interpreting Maryland law regarding non-solicitation agreements).

15 *See id.* at 111.

Under the strict compliance approach, a clear definition of "solicitation" describing the specific conduct constituting impermissible solicitation would have provided additional clarity and protection for the employer.[16]

Some courts will enforce the specific language of a non-solicitation agreement if it includes "direct or indirect" language in the provision.[17] In *GE Betz, Inc. v. Conrad*, the North Carolina Supreme Court enforced a non-solicitation agreement that prohibited both direct and indirect solicitation.[18] The agreement at issue in *GE Betz* expressly prohibited the employee from "directly or indirectly … call[ing] upon, communicat[ing] or attempt[ing] to communicate with any customer."[19] The former employee claimed that covenants restricting indirect solicitation were ambiguous and against the state's public policy.[20] Based on the party's choice of law, the North Carolina Supreme Court applied Pennsylvania contract law, which interprets the terms "directly or indirectly" as clear and unambiguous in a restrictive covenant.[21] Thus, the court found that barring indirect solicitation did not exceed the scope necessary to protect the employer's legitimate business interests and did not violate North Carolina's public policy.[22]

Similarly, in *Cardoni v. Prosperity Bank*, the United States Court of Appeals for the Fifth Circuit enforced the specific terms of a non-solicitation agreement under Texas law.[23] The agreement at issue in *Cardoni* prohibited "direct or indirect" solicitation of existing or prospective

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16 *See id.*

17 *GE Betz, Inc.*, 752 S.E.2d at 644.

18 *Id.*

19 *See id.*

20 *Id*.

21 *Id*. (quoting *In re Miller's Estate*, 26 Pa. Super. 443, 449 (1904)).

22 *See id*.

23 *See Cardoni v. Prosperity Bank*, 805 F.3d 573, 587 (5th Cir. 2015).

customers that the employee contacted within twelve (12) months prior to termination.[24] The Fifth Circuit held that the former employees breached the agreement under the specific language of the non-solicitation provision.[25]

In the absence of a specific definition, courts generally interpret "solicit" to include direct and indirect solicitation.[26] In *Quality Services, Inc. v. Mark Thompson Trucking, Inc.*, the Appellate Court of Illinois concluded that although the language in the agreement was vague, the non-solicitation agreement effectively included both direct and indirect solicitation.[27] Based on the ambiguous language, however, the court further acknowledged that "solicit" connotes affirmative action and remanded the case for the jury to determine if actual breach occurred.[28] The *Quality Services, Inc.* decision emphasizes the importance of drafting clear and precise language to avoid an adverse court interpretation of a non-solicitation agreement.

2. Active Solicitation vs. Mere Acceptance of Business

Courts are often tasked with determining what constitutes indirect solicitation as opposed to mere acceptance of business. Unfortunately, there is no bright line rule distinguishing between "soliciting business from" and merely "receiving business from" a former employer's customers.[29] The distinction between solicitation and accepting business often turns on whether the former employee engaged in affirmative or proactive conduct to induce his former employer's customer(s)

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24 *Id.*

25 *See id.*

26 *See, e.g., Quality Transportation Services, Inc.*, 90 N.E.3d at 491.

27 *See id.*

28 *See id.*

29 *See e.g., McRand, Inc.*, 486 N.E.2d at 1310; *Alexander & Alexander, Inc.*, 488 N.E.2d at 30.

or employee(s) to enter into business or employment with the employee's new company or business venture.[30]

Courts engage in a fact-based inquiry to assess whether the employee's behavior was affirmative or proactive to elicit business from the customer.[31] In *McRand Inc. v. van Beelen*, the employer's customer initiated contact with the former employees' new company to conduct business.[32] Although other colleagues at the employees' new company primarily handled the customers' business, the former employees prepared and presented a proposal, sent an invoice to the customer, and sent a targeted mailing to the former employer's customers announcing the new employment.[33] The Illinois court found this level of proactive behavior on the part of the former employee to fall within the purview of direct and indirect solicitation in violation of the employment agreement.[34] The court reasoned that the former employees' actions, however indirect, were intended to induce (and did induce) the former employer's customers to end their business relationships with the former employer in direct violation of the employees' non-solicitation agreement.[35]

In *Aetna Building Maintenance Company v. West* and *New Method Laundry Co. v. MacCann*, the Supreme Court of California acknowledged that there is a distinction between "soliciting" and "receiving" work, concluding that acceptance of business from a former employer's customer did not constitute solicitation based on the Black's Law Dictionary

30 *See McRand, Inc.*, 486 N.E.2d at 1311.

31 *McRand, Inc.*, 486 N.E.2d at 1310.

32 *See id.*

33 *See id.* at 1313.

34 *See id.*

35 *See id.*

definition.[36] Also relying on Black's Law Dictionary definition of "solicit" in the absence of clear and unambiguous contract language, the Appellate Court of Illinois observed that solicitation connotes "affirmative action," compared to the "mere passive acceptance of business" that would not violate a non-solicitation agreement.[37] In both *Quality Transportation Services, Inc. v. Mark Thompson Trucking, Inc.* and *McRand, Inc. v. van Beelen*, the Appellate Court of Illinois remanded for a finder-of-fact to determine if the defendant employees affirmatively acted to solicit business in breach of non-solicitation agreements.[38] In an earlier case, *Tomei v. Tomei*, the Appellate Court of Illinois stated that solicitation depends "upon the method employed and the intent of the solicitor to target a specific client."[39] In *Tomei*, the court construed the term "solicit" broadly and held that a former employee's targeted announcement of new employment to his former employer's clients was a violation of the non-solicitation agreement.[40]

Depending on jurisdiction, courts may refuse to enforce a provision that prohibits an employee from both soliciting *and* "accepting or receiving" business from the former employer's customers.[41] Unlike other contract provisions where boiler-plate language may suffice, non-solicitation agreements and other restrictive covenants must be tailored to the employee and

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36 *Aetna Bldg. Maintenance Co. v. West*, 39 Cal.2d 198 (1952); *New Method Laundry Co. v. MacCann*, 174 Cal. 26, 32 (1916).

37 *Quality Transportation Services, Inc.*, 90 N.E.3d at 491; *see McRand, Inc.*, 486 N.E.2d at 1306.

38 *Id.*

39 *Tomei v. Tomei*, 602 N.E.2d 23, 26 (Ill. App. Ct. 1992).

40 *See id.*; *see also Mercer Health & Benefits LLC v. DiGregorio*, 307 F.Supp.3d 326, 351-52 (S.D.N.Y. 2018) (holding that defendant employees' targeted email announcements of new employment and promotion of new employer's services to former employer's clients was in breach of the employees' non-solicitation agreements).

41 *See, e.g., Akron Pest Control v. Radar Exterminating Co.*, 455 S.E.2d 601, 603 (Ga. Ct. App. 1995); Johnson, *supra* note 6, at 100. *See also Farm Bureau Life Ins. Co. v. Dolly*, 910 N.W.2d 196, (S.D. 2018) (affirming lower court's decision to enjoin a former captive insurance agent from *soliciting* Farm Bureau's clients but declining to prohibit him from *selling* to Farm Bureau's clients); *but see HRB Prof'l Res. LLC v. Bello*, No. 17-CV-7443 (KMK), 2018 WL 4629124, at *5 (S.D.N.Y. Sept. 27, 2018) (confirming arbitration award against a former employee, which included a permanent injunction enjoining the former employee from soliciting *and* accepting clients from his former employer).

jurisdictional requirements to ensure enforceability.[42] Employers should draft non-solicitation agreements to strike a balance between broad and narrow language to guarantee enforceability and adequate protection of their business interests.[43]

A restriction on receiving business may be reasonable if "there are a large number of competitors with which the general public is free to do business."[44] Under such a restriction, courts consider whether prohibiting a former employee from accepting business "unreasonably impairs 'the public's ability to choose the business it prefers.'"[45]

The distinction between indirect solicitation and merely receiving or accepting business from a former employer's customer is muddled. If, however, a former employee engages in any affirmative conduct to acquire the customer's business, the former employee will likely be held in breach of a non-solicitation agreement.[46]

B. Customers Protected Under Non-Solicitation Agreements

Another important consideration when drafting or enforcing a non-solicitation agreement is which of the employer's customers fall within the purview of protection. Employers generally have a protectable interest in existing customers and employees.[47] While there is no federal law prohibiting agreements between an employer and a former employee regarding the non-solicitation of current employees, a no-poach agreement prohibiting solicitation of employees between two

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42 *See* Elizabeth E. Nicholas, *Drafting Enforceable Non-Solicitation Agreements in Kentucky*, 95 Ky. L.J. 505, 508 (2006).

43 *See id.*

44 Johnson, *supra* note 6, at 99.

45 *Id.* at 109 (citing *Abbott-Interfast Corp. v. Harkabus*, 615 N.E.2d 1337, 1343 (Ill. App. Ct. 1993)).

46 *See* Nicholas, *supra* note 42, at 508.

47 *See* Johnson, *supra* note 6, at 99; *see also, e.g.*, *Quality Transportation Services, Inc.*, 90 N.E.3d at 492; *Mercer Mgmt Consulting, Inc. v. Wilde*, 920 F. Supp. 219, 237 (D.D.C. 1996).

employers generally violates the Sherman Anti-Trust Act.[48] The scope of permissible non-solicitation agreements between an employer and a former employee may also include the non-solicitation of existing customers, as well as the non-solicitation of potential customers who were engaged with the employer within a reasonable period of time prior to the employee's termination.[49] Generally, however, employers do not have a protectable interest in the non-solicitation of *former* clients.[50]

1. Solicitation of Current Customers or Clients

When drafting non-solicitation agreements, employers must determine whether there are jurisdictional limits in enforcing agreements with respect to the non-solicitation of current (or actual) customers or clients. An employer's customers and clients are generally protected by a non-solicitation agreement, as long as the former employee had contact with the customer prior to termination, and the customer was not engaged by the former employer through the employee's independent recruitment efforts, neither subsidized nor otherwise financially supported by the former employer.[51]

The non-solicitation of existing customers with whom the employee had contact during employment is generally an enforceable restriction.[52] Some jurisdictions like Oklahoma, however, statutorily limit non-solicitation agreements to "direct" solicitation of a former employee's current

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[48] *See, e.g.*, Press Release, U.S. Dept. of Justice, Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees (Apr. 3, 2018) (on file with author); Clifford Atlas and Colin Thakkar, *Department of Justice Fires Warning Shot Over Unlawful No-Poach Agreements*, JD Supra, LLC, https://www.jdsupra.com/legalnews/department-of-justice-fires-warning-80444/ (last visited May 21, 2018).

[49] *See Turnell v. CentiMark Corp*, 796 F.3d 656, 665 (7th Cir. 2015).

[50] *See, e.g.*, *Kennedy v. Metropolitan Life Ins. Co.*, 759 So.2d 362, 366 (Miss. 2000); *Palmer & Cay of Georgia, Inc. v. Lockton Co.*, 629 S.E.2d 800 (Ga. 2006).

[51] *See Hall v. Edgewood Partners Ins. Center*, 878 F.3d 524, 529 (6th Cir. 2017); *Cardoni*, 805 F.3d at 587.

[52] *Cardoni*, 805 F.3d at 587; *see also Autry*, 410 P.3d at 1017.

"established" customers.[53] The United States Court of Appeals for the Eleventh Circuit and Georgia's Supreme Court also concur that an agreement is enforceable when limited to the employer's current customers that the former employee had contact with prior to termination of employment.[54]

Conversely, the United States Court of Appeals for the Sixth Circuit found that a former employee would breach a non-solicitation agreement if the former employee had previous contact with customers, but not if the former employee obtained the customers through "independent recruitment efforts."[55] In *Hall v. Edgewood Partners Insurance Center*, an employee identified certain clients with whom he had established relationships before working for his former employer and without any contribution from his former employer.[56] The *Hall* court held that the employer had no legitimate interest in prohibiting the former employee from soliciting those select clients with whom the employee had a prior relationship, but the court did enforce the non-solicitation agreement with respect to customers who were not obtained through the former employee's independent efforts.[57]

As a baseline protection, existing customers are covered by the non-solicitation agreement if a former employee had specific knowledge of or contact with the employer's customer prior to termination.[58]

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53 Okla. Stat. Ann. § 15-219A.

54 *See H&R Block Eastern Enterprises, Inc. v. Morris*, 606 F.3d 1285 (11th Cir. 2010); *Palmer & Cay of Georgia, Inc. v. Lockton Co.*, 629 S.E.2d 800 (Ga. 2006); *W.R. Grace & Co., Dearborn Div. Conn. v. Mouyal*, 422 S.E.2d 529 (Ga. 1992).

55 *Hall*, 878 F.3d at 529.

56 *See id.*

57 *See id.*

58 *See Cardoni*, 805 F.3d at 587.

2. Solicitation of Prospective Customers

In addition to the non-solicitation of existing customers, courts have also addressed the issue of whether a non-solicitation agreement can be enforced against a former employee who solicits an employer's potential or prospective customers. A minority of jurisdictions enforce non-solicitation agreements prohibiting the solicitation of potential customers when the former employee had contact with or knowledge of the potential customer within a reasonable time period prior to termination.[59] Thus, in *Cardoni*, the Fifth Circuit noted that a non-solicitation agreement barring the solicitation of existing *and* prospective customers may be enforceable under Texas law, which favors parties' freedom to contract.[60]

A non-solicitation agreement could be considered overbroad, however, if it attempts to include both prospective and current customers outside of the employee's knowledge because the inclusion of prospective clients would potentially constitute an overbroad *non-compete* restriction.[61] For example, in *Turnell v. CentiMark Corp.*, the United States Court of Appeals for the Seventh Circuit held that a non-solicitation agreement barring the solicitation of prospective and current clients was too broad, vague, and impracticable.[62] The court reasoned that the former

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[59] *See Cardoni*, 805 F.3d at 587; *Turnell*, 796 F.3d at 662. *But see Corporate Synergies Group, LLC v. Andrews*, No. 18-13381 (D.N.J. Oct. 3, 2018) (order granting expanded temporary restraining order against former employees for soliciting former employer's clients in violation of non-solicitation agreement, but stating that the injunctive relief *did not* apply to former or potential clients), *vacated*, 2019 WL 2359398 (3d Cir. June 4, 2019) (order vacated on due process grounds).

[60] *See Cardoni* at 589 (remanding the issue as to whether the non-solicitation agreement was enforceable under Texas law).

[61] *See Turnell*, 796 F.3d at 662; *see also Mercer Health & Benefits LLC v. DiGregorio*, 307 F.Supp.3d at 350-51 (holding that a customer non-solicitation agreement was enforceable to the extent it applied to *current* clients of the employer, but that the employer did not have a legitimate interest in expanding the scope of the non-solicitation clause to *prospective* clients).

[62] *Id.* at 665.

employee could not know every customer that the former employer contacted and that the agreement hindered the former employee's ability to earn a living.[63]

Another judicial approach is to "blue pencil," or re-write, the provision to narrow it to existing customers. In *Turnell*, the court went on to apply Pennsylvania's blue penciling policy to modify the non-solicitation agreement with respect to a former employer's existing customers, excluding any prohibitions against soliciting prospective or former customers.[64]

C. Additional Drafting & Enforcement Considerations for Employers

When drafting non-solicitation agreements, employers must consider the reasonableness of the non-solicitation restriction, evaluating the interests of both the employer and employee. In reviewing whether a non-solicitation agreement is enforceable, courts employ a "reasonableness" standard, requiring limitations on employee activity to be no more restrictive that necessary to protect the employer's legitimate business interests.[65] Courts assess the reasonableness of non-solicitation provisions by considering the time, geographic area, and the scope and extent of the restricted activity.[66] Given the changes in the modern commercial landscape and nature of non-solicitation agreements, geographic restrictions are used less frequently in non-solicitation agreements than in non-compete agreements.[67]

Additionally, most state statutes and court rulings limit the time or temporal restriction of non-solicitation agreements to one or two years following separation of employment.[68] In some

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63 *Id.*

64 *See id*. at 661.

65 *See, e.g.*, *Strauman*, 353 N.E.2d at 593.

66 *See id.*

67 *See* Nicholas, *supra* note 42, at 524.

68 *See GE Betz, Inc.*, 752 S.E.2d at 634; La. Rev. Stat. Ann. § 23:921; S.D. Codified Laws § 53-9-11; Nicholas, *supra* note 42 at 518.

cases, courts will enforce non-solicitation agreements with longer time restraints if the restriction as a whole is reasonable, evaluated in terms of the interests of the employer, the employee, and the public.[69] In evaluating the reasonableness of a non-solicitation agreement or provision, employers should carefully select appropriate employees to enter into non-solicitation agreements.[70]

1. Selecting Appropriate Employees to Enter into Non-Solicitation Agreements

When entering into a non-solicitation agreement, employers must decide which employees are appropriate for such agreements. Depending on jurisdiction, a court may decline to enforce an agreement between an employer and particular employees.[71] Non-solicitation agreements are appropriate for key employees, such as executives involved in acquiring and maintaining customer relationships or employees with knowledge of trade secrets or special skills.[72]

Non-solicitation agreements cannot interfere with an employee's ability to earn a living when his or her employment is terminated.[73] Additionally, non-solicitation agreement terms must meet the reasonableness standard enforced by the applicable court.[74] Courts determine whether a non-solicitation agreement is appropriate given the status and responsibilities of the individual employee.[75] An employee "who could significantly disadvantage the company in the marketplace" if they began working for a competitor is an appropriate candidate for a non-

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69 *See* Nicholas, *supra* note 42, at 518; *see also Pam's Academy of Dance/Forte Arts Ctr. v. Marik*, No. 3-17-0803, 2018 WL 6499506, at **4-5 (Ill. App. Ct. Dec. 11, 2018) (declining to adopt a bright line rule that a three-year non-solicitation agreement is *per se* unenforceable and further stating that a three-year restrictive covenant (such as a non-solicitation agreement) may be valid so long as reasonable in light of the totality of the facts and circumstances surrounding such an agreement).

70 *See id.* at 507-510.

71 *See id.*

72 *See id.*

73 *See id.*

74 *See id.*

75 *See Strauman*, 353 N.E.2d at 590.

solicitation agreement.[76] An employer's "legitimate interest in protecting its existing client base from depletion" justifies entering into an agreement with an employee involved in customer relations.[77]

In most jurisdictions, non-solicitation agreements are best suited for executives, high level employees, or employees with specific knowledge of trade secrets or customer relationships.[78] New York, however, is one of a minority of jurisdictions that requires an employee to have knowledge of trade secrets, a unique skill, or engaged in the piracy of a former employer's customer lists in order for non-solicitation agreements to be enforceable.[79] In *Greenwich Mills Co. v. Barrie House Coffee Co.*, the Appellate Division of New York Supreme Court held that the restrictive non-solicitation covenants in question were unenforceable unless it could be shown that defendants were privy to trade secrets.[80] The former salesmen of Greenwich Mills Co., a wholesale coffee and tea supplier, used confidential customer information concerning customers' preferences for precise blends of coffee and the prices the customers are willing to pay, which the court determined could be considered trade secrets by a finder of fact on remand.[81] The New York court observed that its ruling in *Greenwich Mills Co.* "renders non-solicitation covenants virtually purposeless […] for if trade secrets *are* involved, an injunction may lie in the absence of a covenant."[82]

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76 *See* Nicholas, *supra* note 42, *at* 507-510.

77 Johnson, *supra* note 6, at 101.

78 *See* Nicholas, *supra* note 42, at 507-510.

79 *See Strauman*, 353 N.E.2d at 592.

80 *Greenwich Mills Co. v. Barrie House Coffee Co.*, 91 A.D.2d 398, 403 (N.Y. App. Div. 1983).

81 *Id.* at 404.

82 *Id.*

In addition to key employees, such as executives and high-level employees, employers must also consider whether there are jurisdictional restrictions on the enforcement of non-solicitation agreements against employees with or without specific knowledge of trade secrets or customer relationships.[83]

2. Restrictions for Specific Professions or Industries

Courts and state legislatures are increasingly determining whether employees across industries are permitted to enter into non-solicitation agreements with their employers. Depending on jurisdiction or applicable state law (discussed in greater detail below), certain professions and industries may be excluded from or limited in entering into restrictive covenants.[84]

Typically, non-solicitation agreements are not appropriate for professions or industries where a court would likely conclude that the harm to the consumer's choice outweighs the employer's legitimate business interest.[85] Exempted industries and professions include lawyers, physicians, certain financial advisors, and other industries depending on the state.[86] For example, Rule 5.6 of the American Bar Association's Model Rules of Professional Conduct specifically prevents lawyers from offering or agreeing to restrictive covenants.[87] Similarly, the American Medical Association's ethical code discourages the use of restrictive covenants in the practice of medicine.[88] Section 9.02 of the American Medical Association Code of Ethics states, "restrictive

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83 *See* Nicholas, *supra* note 42, at 507-510.

84 *See, e.g.*, *Harris v. Univ. Hosp. of Cleveland*, Nos. 76724,76785, 2002 WL 363593 (Oh. Ct. App. Mar. 7, 2002); Kerri A. Moerschel, "Five Things Every Lawyer Should Know About Agreements That Restrict, Or Effectively Restrict, A Lawyer's Practice After Termination" (Mar. 23, 2013).

85 *See id.*.

86 *See id.*; Haw. Rev. Stat. § 480-4; MODEL RULES OF PROF'L CONDUCT R 5.6 (2016). *See also* S.D. Codified Laws § 53-9-12 (limiting the scope of restrictive covenants for captive insurance agents).

87 *See* MODEL RULES OF PROF'L CONDUCT R 5.6 (2016).

88 *See* A.M.A. CODE OF MEDICAL ETHICS § 9.02 (1998).

covenants are unethical if they are excessive in geographic scope or duration in the circumstances presented, or if they fail to make reasonable accommodation of patients' choice of physician."[89]

An employee in such a profession who establishes client relationships of "personal trust and confidence" is typically barred from entering into restrictive covenants, such as a non-solicitation agreement.[90] In *Prudential Securities, Inc. v. Plunkett*, the United States District Court for the Eastern District of Virginia held that financial brokers possessed a special relationship with customers to the extent that "clients should be free to deal with the broker of their choosing and not subjected to the turnover of their accounts to brokers…unfamiliar to the client, unless the client gives informed consent."[91] Unlike the *Plunkett* court, in *Hilb Rogal & Hobbs of Florida, Inc. v. Grimmel*, a Florida District Court of Appeal enforced a non-solicitation agreement prohibiting an insurance broker from soliciting his former clients.[92] The court observed that requiring a customer to use a different insurance broker did not violate public policy.[93]

3. State Law Exceptions

State legislatures also limit the scope of non-solicitation agreements by enacting legislation imposing durational limits, industry exemptions (as discussed above), and other jurisdiction-specific requirements.[94] Multi-state employers must comply with these state or local specific requirements, or risk that non-solicitation agreements be deemed void and unenforceable.[95]

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89 *Id.*

90 Johnson, *supra* note 6, at 101.

91 *Prudential Securities, Inc. v. Plunkett*, 8 F. Supp.2d 514, 520 (E.D. Va. 1998).

92 *Hilb Rogal & Hobbs of Florida, Inc. v. Grimmel*, 48 So.3d 957, 962 (Fla. Dist. Ct. App. 1987).

93 *See id.*

94 *See, e.g.*, Haw. Rev. Stat. § 480-4; Mo. Rev. Stat. Ann. § 431.202. *See also* H.B. 1450, 66th Leg., Reg. Sess. (Wash. 2019) (eff. Jan. 1. 2020) (restricting enforcement of broad non-solicitation covenants that restrict such activities as hiring an employer's employees, contacting the employer's customers *for a purpose other than* taking away business from the employer, or soliciting contractors or vendors).

95 *See id.*

States are increasingly passing legislation to limit the scope of permissible non-solicitation agreements by industry or employee position within a company. Hawaii's prohibition on using non-solicitation agreements in the technology industry demonstrates the state's interest in promoting commercial activity and reducing the impact of restrictive covenants within that field.[96] In Missouri, a non-solicitation agreement will not be enforced against custodial or secretarial employees.[97] Rather, enforceable non-solicitation agreements should be reserved for key employees with access to trade secrets or involved in maintaining and establishing customer relationships.[98] As discussed above, state statutes and some courts limit the enforcement of non-solicitation agreements to employees with knowledge of trade secrets.[99] In doing so, these jurisdictions safeguard the employee's ability to find future employment after termination.[100] These limitations on non-solicitation agreements encourage fair competition between employers and employees.[101]

Where the state legislature has not provided explicit restrictions on non-solicitation agreements, some courts step in to further limit the scope of enforceable agreements. For example, a California Court of Appeal recently held a non-solicitation provision in an employee confidentiality agreement unenforceable.[102] Under California law, employers are prohibited from entering into a non-compete agreement with employees, with few exceptions, however, the law

96 *See* Haw. Rev. Stat. § 480-4.

97 *See* Mo. Rev. Stat. Ann. § 431.202.

98 *See id.*

99 *See Greenwich Mills Co.*, 495 N.Y.S.2d at 460.

100 *See* Johnson, *supra* note 6, at 114.

101 *See id.*

102 *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.*, 28 Cal.App.5th 923, 928 (2018).

does not explicitly prohibit employee non-solicitation restraints.[103] In *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.*, the court ruled that the contested provision prohibiting direct or indirect solicitation was void because the customer list and identities of the recruiting company's temporary workers were not protected trade secrets, and the company was not harmed by their disclosure.[104] More recently, in *Barker v. Insight Global, LLC*, a federal district court in California, found a non-solicitation agreement unenforceable based on the above Court of Appeal's interpretation of California law regulating non-compete and non-solicitation agreements.[105] At present, the California Supreme Court has not provided a definitive ruling to clarify the enforceability of non-solicitation agreements under state law.

Depending on the jurisdiction, employers may be subject to different industry specific, geographic, or temporal requirements relating to non-solicitation agreements.[106] As such, employers (particularly multi-state employers) must take care to carefully draft jurisdiction-specific non-solicitation agreements, else risk that those agreements will be held void in court enforcement proceedings.

D. Hiring Prospective Employees Bound By Non-Solicitation Agreements

Employers should also consider prior employment agreements of prospective employees during the hiring process.[107] Prospective employees may be encumbered by a non-solicitation agreement with a previous employer. This poses a risk for a hiring employer, as the prospective employee's breach of a prior non-solicitation agreement, and liability thereunder, *may* be imputed

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103 *See* Cal. Bus. & Prof. Code § 1600 *et seq.*

104 *AMN Healthcare, Inc.*, 28 Cal.App.5th at 335-39.

105 *See Barker v. Insight Global, LLC*, 2019 WL 176260 (N.D. Cal. Jan. 11, 2019).

106 *See* Johnson, *supra* note 6, at 114.

107 *See* Johnson, *supra* note 6, at 125.

to the new employer.[108] Liability would extend to the new employer for breach of a non-solicitation agreement if the former employer could prove that the new employer had sufficient knowledge of the terms of the employee's non-solicitation agreement with the former employer.[109] The risk to an employer exists even if the new employee *indirectly* assists the new employer in engaging clients or employees from the employee's former employer.[110]

In *B.G. Balmer & Co. v. Frank Crystal & Co.*, an insurance brokerage firm, B.G. Balmer & Co., brought an action against its former executives and officers, as well as their new employer, Frank Crystal & Co., for breach of employment agreement (including breach of non-solicitation provisions) and various tort claims.[111] The Superior Court of Pennsylvania affirmed the lower court's ruling, holding that that Frank Crystal & Co. was equally liable for soliciting B.G. Balmer's clients because it was familiar with the non-solicitation provision in the employment agreement, and further finding that a majority of Frank Crystal & Co.'s yearly revenue came from B.G. Balmer's clients solicited by B.G. Balmer's former employees.[112]

In light of the *B.G. Balmer & Co.* decision, it is critical for employers to sufficiently review a prospective employee's previous employment agreement to ensure the prospective employee's compliance under the agreement and to mitigate risk of imputing liability to the company due the employee's breach of contract.[113]

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108 *See B.G. Balmer & Co. v. Frank Crystal & Co.*, 148 A.3d 454, 465-466 (Pa. Super. 2016).

109 *See id.*

110 *See id.*

111 *See id.*

112 *See id.*

113 *Id.*; *see also Mona Elec. Group, Inc. v. Truland Service Corp.*, 45 Fed.Appx. at 110 (stating that under Maryland law, an employer may be liable for an employee's impermissible solicitation of clients if there is evidence that the employer either induced the employee to "solicit" or hindered the employee's performance of a non-solicitation agreement with a former employer); *St. Jude Medical, S.C., Inc. v. Biosense Webster, Inc.*, 994 F.Supp.2d 1033, 1048-50 (D. Minn. 2014) (holding an employer liable for the tortious interference with a contractual relationship based on the employer's awareness of an employee's non-solicitation agreement with his former employer

II. IMPLICATIONS OF SOCIAL MEDIA ON NON-SOLICITATION AGREEMENTS.

Employee conduct on social media and professional networking websites, such as LinkedIn, presents a unique challenge for employers and courts when determining the enforceable scope of non-solicitation agreements.[114] While *directly* contacting a former employer's customer through social media to solicit business would likely breach an employment agreement, determining what conduct would constitute impermissible *indirect* solicitation remains a pertinent issue facing the courts and employers.[115] There is no bright line rule regarding whether an employee's social media use violates a non-solicitation agreement, however, courts assess the substance of the social media content, its frequency, and whether the content was targeted at the former employer's employees or customers.[116]

Recent cases dealing with a former employee's social media use turn on the distinction between active solicitation and "passive social media interaction between former employees and restricted class."[117] In *Bankers Life and Casualty Co. v. American Senior Benefits, LLC*, the Appellate Court of Illinois recently addressed this issue, holding that a former employee's "generic" social media communications or posting did not constitute indirect solicitation in violation of the employee's non-solicitation agreement.[118] In *Bankers Life*, the court determined

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and the employer's intentional procurement of the employee's breach of the agreement); *Modis, Inc. v. Bardelli*, 531 F.Supp.2d 314, 322-23 (D. Conn. 2008) (holding a new employer liable for tortious interference of a contract based on its inducement of an employee to breach her employment agreement by soliciting her former employer's customers); *MasterCard Int'l Inc. v. Nike, Inc.*, 164 F.Supp.3d 592, (S.D.N.Y. 2016) (holding that a former employer had sufficiently alleged a claim of tortious interference with a contract based on allegations that the new employer (Nike) acted improperly and with improper purpose when it caused MasterCard's former employees to breach non-solicitation agreements of which Nike was aware).

114 *See* Skapyak, *supra* note 5, at 6.

115 *See id.*

116 *See id.*

117 *Id.*

118 *Bankers Life & Casualty Co. v. American Senior Benefits, LLC*, 83 N.E.2d 1085, 1087-93 (Ill. App. Ct. 2017).

that the employee's LinkedIn invitations to connect and job postings on his public LinkedIn profile did not target his former employer's customers or employees.[119] The court also emphasized that in order for the employee to violate his non-solicitation agreement, he "would have to actually, directly recruit" Bankers Life's employees in the restricted geographic area, which he did not.[120] Instead, the former employee sent generic LinkedIn invitations to his personal email contact list.[121] While he did send text messages to a coworker about connecting with Bankers Life employees on LinkedIn to "see where it leads," none of those employees referenced in his text messages were within the restricted geographic area.[122]

In its analysis, the *Banker's Life* court focused on the legal trends in other jurisdictions concerning social media use by former employees in the context of their employment agreements.[123] Specifically, the court compared the facts in *Bankers Life* to *BTS, USA, Inc. v. Executive Perspectives, LLC* in Connecticut and *Amway Global v. Woodward* in Michigan.[124] In *BTS*, a former employee updated his LinkedIn profile with his new job, identified his new employer, and encouraged his connections to "check out" a new website he designed for his new

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119 *See Bankers Life & Casualty Co*., 83 N.E.2d at 1091-92.

120 *Id*. at 1091.

121 *See id*. at 1091-92.

122 *Id*.

123 *See id*. at 1089-91. The court also analyzed relevant cases in Indiana, Massachusetts, Oklahoma, and the U.S. Court of Appeals for the Third Circuit. *See Enhanced Network Solutions Group, Inc. v. Hypersonic Technologies Corp.*, 951 N.E.2d 265 (Ind. Ct. App. 2011) (holding that posing of job opportunity on LinkedIn profile was not a solicitation); *Invidia, LLC v. DiFonzo*, No. MICV2012379H, 2012 WL 5576506 (Mass. Super. Ct. Oct. 22, 2012) (holding that becoming "friends" with former clients on Facebook did not violate a noncompete agreement); *Pre-Paid Legal Services, Inc. v. Cahill*, 924 F.Supp.2d 1281 (E.D. Okla. 2013 (holding that an employee's postings on Facebook touting new employer's product and which was viewed by former co-workers did not violate the employee's non-solicitation agreement); *but see Coface Collections North Am. Inc. v. Newton*, 430 Fed. Appx. 162 (3d Cir. 2011) (upholding a preliminary injunction against a former employee based on the employee's LinkedIn and Facebook postings stating, "[his] noncompete ends on 12/31/2010", and encouraging former co-workers to apply for a position with his new company).

124 *Id*.

employer.[125] In contrast, the former employee in *Amway* went further by encouraging his former co-workers to leave his former employer by stating, "[i]f you knew what I knew, you would do what I do," which the Connecticut court characterized as indirect solicitation.[126]

The *Bankers Life* court reconciled the two cases by focusing on the substance and content of the communications in the disputed social media posts.[127] Unlike either *BTS* or *Amway*, the former employee in *Bankers Life* did not mention his new employer, did not suggest that the recipient of the invitation view the job description on his profile, and did not encourage Bankers Life employees in the restricted area to leave their current employment .[128] The court therefore concluded that the mere invitation to form a professional connection on LinkedIn did not meet the threshold of impermissible solicitation.[129]

In *Morgan Stanley Smith Barney, LLC v. Abel*, the U.S. District Court for the Middle District of Florida recently granted an employer's emergency motion for temporary restraining order against a former employee precluding him from soliciting the employer's customers.[130] In its complaint and emergency motion, the employer alleged that the former employee breached the non-solicitation provision in his employment agreement by soliciting at least five Morgan Stanley clients via LinkedIn notifications.[131] While the court has yet to rule on the substantive issue of whether the LinkedIn notifications constitute solicitation in violation of the employment

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125 *Bankers Life & Casualty Co.*, 83 N.E.2d at 1090.

126 *Id*. at 1091.

127 *Id*.

128 *See id.*

129 *See id.* at 1091-92

130 *Morgan Stanley Smith Barney, LLC v. Abel*, NO. 3:18-CV-00141, 2018 WL 515348, at *1, *5 (M.D. Fla. Jan. 23, 2018).

131 *See id.* at *1.

agreement, the court noted that entry of a temporary retraining order "would serve the public's interest in…the protection of contractual rights."[132]

The above cases provide helpful guidance to employers regarding what courts may or may not deem impermissible solicitation. Generally, an employee's generic job posting on LinkedIn or other professional networking site is permissible social media use that does not rise to the level of solicitation in violation of a non-solicitation agreement.[133] Additionally, Facebook posts boasting about a new employer without evidence that an employee was targeting the former employer's employees and/or customers do not likely violate a non-solicitation agreement.[134] Likewise, a competitor's "public announcement" on an employee's Facebook page, and the fact that the employee became Facebook "friends" with a former employer's client, does not alone constitute indirect solicitation.[135] Courts consistently analyze the substance of individual social media posts or communications, but courts have yet to draw a bright-line rule as to whether *repeated* social media use as described above would constitute impermissible solicitation.[136]

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132 *Id.* at *4 (citing *Se. Mech. Servs. V. Brody*, No. 8:08-CV-1151-T-30EAJ, 2008 WL 4613046, at * (M.D. Fla. Oct. 15, 2008) ("The loss of customers or good will is an irreparable injury and is difficult to measure."); *Moon v. Medical Technology Assocs., Inc.*, No. 8:13-cv-2782-EAK-EAJ, 2014 WL 1092291, at *3 (M.D. Fla. Mar. 19, 2018) ("Public interest favors the protection of enforcement of contractual rights….").

133 *See, e.g.*, *Enhanced Network Solutions Group, Inc. v. Hypersonic Tech. Corp*., 951 N.E.2d 265, 267 (Ind. App. Ct. 2011).

134 *See e.g.*, *Pre-Paid Legal Services, Inc. v. Cahill*, 924 F.Supp.2d 1281, 1293-94 (E.D. Okla. 2013).

135 *See e.g.*, *Invidia, LLC v. DiFonzo*, No. MICV20123798H, 2012 WL 5576406, at **5-6 (Mass. Super. Ct. Oct. 22, 2012) (stating that (1) it does not constitute solicitation of an employer's customers to post notice on a former employee's Facebook page that the employee is now employed with a competing company, and (2) it does not constitute solicitation where a former employee "friends" an employer's client on Facebook without an additional showing of efforts to solicit that client's business).

136 *See id.*; *Arthur J. Gallagher & Co. v. Anthony*, No. 16-CV-00284, 2016 WL 4523104, at *15 (N.D. Oh. Aug. 30, 2016) (arguing that that multiple posts on Twitter and LinkedIn should constitute bulk advertising under prior case law, and therefore, be considered indirect solicitation).

III. CONCLUSION

Non-solicitation agreements remain an effective tool for employers to protect their trade secrets, goodwill, and customer relationships. Use of such agreements, however, requires special consideration due to evolving case law and statutes governing non-solicitation agreements. To combat inconsistent interpretation and enforcement of non-solicitation agreements across jurisdictions, employers should draft unambiguous and reasonable employment agreements. For multi-jurisdiction employers, a one-size-fits-all non-solicitation agreement is unlikely to comply with varying state and judicial limitations on non-solicitation agreements. Employers must consider state and local laws limiting the scope of enforceable non-solicitation agreements, as well as certain industry and profession exemptions. In an effort to avoid the burden and expense of litigation, employers should draft non-solicitation agreements with detailed definitions and agreement terms clearly indicating what activity constitutes impermissible solicitation of customers and/or employees.

In addition to drafting concerns, employers should also consider which employees should execute non-solicitation agreements and whether newly hired employees are encumbered by prior non-solicitation agreements. By reviewing new employee's prior agreements *before* the employee starts work, employers may be able to take steps to avoid liability in the event the employee breaches any such agreement.

Finally, social media and professional networking websites further complicate how employers and courts enforce non-solicitation agreements. While relevant case law is still evolving, existing case law involving a former employee's use of social media to directly or indirectly solicit customers or employees provides significant guidance regarding what courts consider impermissible solicitation under the individual terms of non-solicitation agreements.

With an understanding of relevant state and local laws, as well as recent case law analyzing and interpreting the meaning of "solicitation," employers can protect business interests by drafting enforceable non-solicitation agreements. As always, employers should consult legal counsel if unsure whether current non-solicitation agreements are enforceable under applicable law.