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Forbidden Friending: A Framework for Assessing the Reasonableness of Nonsolicitation Agreements and Determining What Constitutes a Breach on Social Media

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FORBIDDEN FRIENDING: A FRAMEWORK FOR ASSESSING THE REASONABLENESS OF NONSOLICITATION AGREEMENTS AND DETERMINING WHAT CONSTITUTES A BREACH ON SOCIAL MEDIA

*Erin Brendel Mathews**

Social media has changed the way people conduct their day-to-day lives, both socially and professionally. Prior to the proliferation of social media, it was easier for people to keep their work lives and social lives separate if they so wished. What social media has caused people to do in recent years is to blend their personal and professional personas into one. People can choose to fill their LinkedIn connections with both their clients and their college classmates, they can be Facebook friends with their coworkers right along with their neighbors, and they can utilize social media sites to market themselves or their businesses to a wide audience. Finding a job, filling a position, or building a customer base has never been easier.

What lurks behind the convenience of combining these worlds into one online persona is the potential to violate certain restrictive covenants that bind many employees beyond the end of an employment relationship. Nonsolicitation agreements have become a popular choice for employers who wish to restrict their former employees from soliciting their former clients or coworkers, as these agreements are less restrictive and more likely to be upheld in court than noncompetition clauses. What has come up in recent litigation over these agreements is their enforceability with respect to social media activity and what exactly constitutes a solicitation via social media. This Note proposes a flexible standard for assessing the reasonableness and enforceability of nonsolicitation agreements that aim to cover employees' social media activity.

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INTRODUCTION

The idea of leveraging social media connections to find a new job, to advertise a job opening, or to grow one's clientele seems like second nature to many people in the workforce today. This is especially true of millennials and members of Generation Z,¹ who have essentially grown up with a social media presence complete with lists of friends, followers, and connections that likely encompass the majority of people they know in real life. Millennials and younger generations have also been characterized by some as "job

1. "Millennials" were born roughly between 1980 and 1995, while "Generation Z" members were born roughly between 1996 and 2010. Alex Williams, *Move Over, Millennials, Here Comes Generation Z*, N.Y. TIMES (Sept. 18, 2015), <https://www.nytimes.com/2015/09/20/fashion/move-over-millennials-here-comes-generation-z.html> [https://perma.cc/T6VY-R29Y].

hoppers” with a tendency to look for the next best opportunity,² a task that has become as easy as typing in a few search terms, posting to let connections know they are in the market for a new job, or just browsing the newsfeeds on various platforms to see if others have posted looking for applicants. Social media has increased efficiency not only in the job search, but also in the tasks of recruiters³ and salespeople looking to grow their businesses.⁴ However, with this increased efficiency and ease of use comes an increased ability to run into legal trouble when one’s social media activity runs afoul of a restrictive covenant, such as an agreement not to solicit former clients or coworkers.

To illustrate the issue, imagine an employee who has an employment contract that contains a nonsolicitation agreement that she has not read closely for years. She resigns from that position and joins another company, a competitor of her former employer, where she will perform similar functions to those at her former job. The employee logs into LinkedIn and posts an update about her new employment. She goes onto Facebook to add some former coworkers to make sure they stay in touch, and a few weeks later she shares a job posting for her new employer with the caption, “I love working here—you would too!” She goes onto Instagram and posts a photo of her new office, tags the location, and receives a “like” and a comment from a former client that says, “Congrats! I’m glad I saw this—call me next week!”

Has any improper solicitation (or attempted solicitation) happened here? The language of the nonsolicitation agreement in the employee’s contract would be the relevant starting point of this inquiry, but complexities arise when deciding whether a nonsolicitation agreement prohibits social media activity and, if so, what exactly constitutes a solicitation on social media.

While the use of social media for professional or business purposes is relatively new, the practice of employers restricting the actions and communications of their employees post-separation via restrictive covenants is not.⁵ Despite a long history of dealing with restrictive covenants, courts

2. See Amy Adkins, *Millennials: The Job-Hopping Generation*, GALLUP (May 12, 2016), <https://www.gallup.com/workplace/236474/millennials-job-hopping-generation.aspx> [<https://perma.cc/L4AY-F6VN>]; Heather Long, *The New Normal: 4 Job Changes by the Time You’re 32*, CNN MONEY (Apr. 12, 2016, 11:22 AM), <http://money.cnn.com/2016/04/12/news/economy/millennials-change-jobs-frequently/index.html> [<https://perma.cc/XJZ9-EV3M>].

3. See Kimberlee Morrison, *Survey: 92% of Recruiters Use Social Media to Find High-Quality Candidates*, ADWEEK (Sept. 22, 2015), <http://www.adweek.com/digital/survey-96-of-recruiters-use-social-media-to-find-high-quality-candidates/> [<https://perma.cc/FHJ7-ETZE>].

4. Mark Fidelman, *LinkedIn Exec Says This Simple Tactic Will Make You a Better Closer*, FORBES (Aug. 2, 2016, 12:23 AM), <https://www.forbes.com/sites/markfidelman/2016/08/02/linkedin-says-this-simple-tactic-will-make-you-a-better-closer/> [<http://perma.cc/826Q-265S>].

5. The earliest recorded case of an attempted enforcement of a noncompete agreement occurred in England in 1414 when a clothes dryer attempted to prevent his former employee from competing in the same town for six months after the employee was terminated. Orly Lobel, *By Suppressing Mobility, Noncompete Pacts Suppress Innovation*, N.Y. TIMES (June 11, 2014, 4:46 PM), <https://www.nytimes.com/roomfordebate/2014/06/10/should-companies-be-allowed-to-make-workers-sign-noncompete-agreements/by-suppressing-mobility->

across the United States are constantly faced with new developments in this area of employment law as they attempt to properly balance employer and employee interests.⁶ Social media breaches of nonsolicitation agreements have come up in recent cases, but the application of law to facts in this context is far from settled. Complicating matters further, all fifty states have different ways of regulating and interpreting restrictive covenants.⁷ Some states regulate nonsolicitation agreements by statute, while others leave the matter entirely to the courts. The current legal framework across the United States does not adequately address nonsolicitation clauses in the social media context, and a more updated, uniform approach would reduce litigation of the matter while putting employers and employees on notice of their rights.

This Note describes the varied legal landscape, comprised of state legislation and common law, surrounding nonsolicitation agreements. In light of the evolving ways in which people communicate via social media today, this Note proposes updated factors that courts should consider to decide the reasonableness of a nonsolicitation agreement, as well as different considerations courts should take into account when deciding whether a breach of an agreement has occurred. Part I presents a brief overview of social media's role in the professional world today, followed by a summary of the way nonsolicitation cases are litigated and the employer and employee interests that come into play. This Part also highlights various state positions on nonsolicitation agreements. Part II surveys the recent case law and reasoning that courts have employed in evaluating the reasonableness of nonsolicitation agreements and whether actions on social media constitute breaches of these agreements. Finally, Part III proposes more tailored factors for courts to consider in deciding both the reasonableness of nonsolicitation agreements that involve social media and whether a social media breach has occurred.

I. BACKGROUND

First, it is important to understand social media's role in the professional world today. Social media has evolved from a way to connect with friends and family online⁸ to a crucial business tool used across many different industries.⁹ Part I.A discusses this evolution and how this type of

noncompete-deals-suppresses-innovation [<https://perma.cc/EKJ9-B7NF>]. The court did not look favorably upon the plaintiff's cause of action and threatened to put him in jail. *Id.*

6. Angie Davis et al., *Developing Trends in Non-Compete Agreements and Other Restrictive Covenants*, 30 A.B.A. J. LAB. & EMP. L. 255, 255 (2015).

7. See generally FOX ROTHSCHILD LLP, NATIONAL SURVEY ON RESTRICTIVE COVENANTS (2017), <https://www.foxrothschild.com/content/uploads/2015/05/National-Survey-on-Restrictive-Covenants-July-2017.pdf> [<https://perma.cc/FK72-EH5D>].

8. Anabel Quan-Haase & Alyson L. Young, *Uses and Gratifications of Social Media: A Comparison of Facebook and Instant Messaging*, 30 BULL. SCI. TECH. & SOC'Y 350, 355 (2010) ("It is not surprising that friendship networks play an important role in the adoption of Facebook, considering that [social network sites'] primary purpose is social connectivity.").

9. See generally TRACKMAVEN, 2016 SOCIAL MEDIA INDUSTRY INDEX (2016), <http://pages.trackmaven.com/rs/251-LXF-778/images/social-media-industry-report.pdf>

communication is distinct from others, such as phone or email. Part I.B explains what nonsolicitation agreements are and how they relate to noncompetition clauses. Part I.C discusses the nonsolicitation agreement litigation process and the employer and employee interests that courts and legislatures set out to balance. Finally, Part I.D highlights states' diverse approaches to placing various statutory restrictions on the enforceability of nonsolicitation and noncompetition agreements.

A. Social Media in the Professional World Today

In recent years, networking via social media has grown to be a ubiquitous aspect of people's lives, both socially and professionally. According to a study conducted in 2015, 54 percent of adults surveyed said they have used the internet as part of their job search.¹⁰ In a survey of recent job switchers in April 2017, 38 percent said they used LinkedIn to gather information before applying to a job and 12 percent said they used Facebook for this purpose.¹¹ This section discusses the utility of four social media platforms in the professional world: LinkedIn, Facebook, Instagram, and Snapchat.

The social networking platform that is arguably the most relevant to professional interaction and communication is LinkedIn,¹² which boasts over five hundred million users around the world and whose mission is to "connect the world's professionals to make them more productive and successful."¹³ In a study conducted in 2018, 56 percent of marketing professionals surveyed said they used LinkedIn to market their businesses.¹⁴

LinkedIn allows users to create a professionally oriented profile, complete with their educational background, work experience, accomplishments, skills, certifications, and interests.¹⁵ Users may request to connect with other LinkedIn users (or send invitations to email contacts who are not yet registered with LinkedIn), send direct messages to other users, endorse connections for professional skills, post jobs, apply for jobs, share updates on current employment, share articles or links, and comment on or "like"

[<https://perma.cc/2HBA-D7RH>] (analyzing Facebook, Twitter, Instagram, and LinkedIn activity of over 40,000 companies across 130 industries).

10. STATISTA, ONLINE RECRUITING AND SOCIAL MEDIA 15 (2017), <https://www.statista.com/study/16597/online-recruiting-and-social-media-statista-dossier/> [<https://perma.cc/HWG4-FG6Q>]. Eighty-three percent of adults aged eighteen to twenty-nine, 68 percent of adults aged thirty to forty-nine, 43 percent of adults aged fifty to sixty-four, and 10 percent of adults aged sixty-five and over have looked online for jobs. *Id.* at 16.

11. *Id.* at 24.

12. See *Most Popular Social Networks Used by Inc. 500 Companies in 2017*, STATISTA, <https://www.statista.com/statistics/626872/fortune-500-corporate-social-media-usage/> [<https://perma.cc/6NDC-2JCT>] (last visited Nov. 15, 2018) (showing that LinkedIn was used by 92 percent of Fortune 500 companies in 2017).

13. *About Us*, LINKEDIN, <https://about.linkedin.com/> [<https://perma.cc/Z54B-UXNU>] (last visited Nov. 15, 2018).

14. STATISTA, SOCIAL MEDIA MARKETING IN THE U.S. AND WORLDWIDE 19 (2018), <https://www.statista.com/study/15449/social-media-marketing-in-the-us-statista-dossier/> [<https://perma.cc/B65A-YKP2>].

15. See generally LINKEDIN, <https://www.linkedin.com/> [<https://perma.cc/9MNA-LSGU>] (last visited Nov. 15, 2018).

other users' updates.¹⁶ Despite its professionally geared nature, LinkedIn may also be used to connect with social acquaintances or friends.¹⁷

Other social media platforms that are more typically used for social purposes, such as Facebook, Instagram, Snapchat, or Twitter, are often used for professional purposes as well.¹⁸ Facebook allows users to create profiles; post text, photos, videos, and links; "like" or leave comments on other users' content; request other users to be friends; direct message other users; and more.¹⁹ Facebook profiles may be completely public or users may opt in to an array of privacy controls, including blocking certain users and shielding certain content they post.²⁰

While it originated as a way to connect with friends and family, Facebook has increased its capabilities in numerous ways, including a recent foray into the professional world of social networking that may rival LinkedIn.²¹ Facebook hosts over seventy million business pages, with over five million businesses actively advertising via Facebook.²² In a study conducted in 2018, 94 percent of marketing professionals surveyed said they used Facebook to market their business.²³

In 2017, Facebook launched the "Jobs" feature, which allows business profiles to post jobs and field applicants directly through the Facebook platform.²⁴ Users can go to the Jobs portion of their homepage and browse postings according to location, industry, or employment type; they may also type in terms and search through job postings.²⁵ Facebook also recently started to roll out a "Resume" feature that builds upon the "Work and Education" portion of users' profiles to allow them to share more information

16. *Id.*

17. *Id.*

18. See TRACKMAVEN, *supra* note 9; Brian Solomon, *How to Use Snapchat: A Small Business Guide*, FORBES (Aug. 25, 2015, 10:00 AM), <https://www.forbes.com/sites/smallbusinessworkshop/2015/08/25/how-to-use-snapchat-a-small-business-guide/> [<https://perma.cc/JC36-M9TS>]; *Most Popular Social Networks Used by Inc. 500 Companies in 2017*, *supra* note 12. While Twitter is a social network people use professionally, it will not be a focus of this Note.

19. See generally FACEBOOK, <https://www.facebook.com/> [<https://perma.cc/P9NH-C49Y>] (last visited Nov. 15, 2018).

20. See generally *Manage Your Privacy*, FACEBOOK, <https://www.facebook.com/about/basics/manage-your-privacy> [<https://perma.cc/E7WP-4MMZ>] (last visited Nov. 15, 2018).

21. See Josh Constine, *Facebook Rolls Out Job Posts to Become the Blue-Collar LinkedIn*, TECHCRUNCH (Feb. 28, 2018), <https://techcrunch.com/2018/02/28/facebook-job-posts/> [<https://perma.cc/979K-6APF>]; Jaakko Paalanen, *The Death of LinkedIn*, OBSERVER (Apr. 26, 2017), <http://observer.com/2017/04/the-death-of-linkedin-social-media-sales-marketing-facebook-business-relationships/> [<https://perma.cc/BBY6-2JF2>].

22. *First Quarter 2017 Results Conference Call*, FACEBOOK, INC. 4 (May 3, 2017), https://s21.q4cdn.com/399680738/files/doc_financials/2017/Q1-17-Earnings-transcript.pdf [<https://perma.cc/E8MS-UJUB>].

23. STATISTA, *supra* note 14, at 19.

24. See generally *Jobs on Facebook*, FACEBOOK, <https://www.facebook.com/jobs> [<https://perma.cc/4W3G-7CTM>] (last visited Nov. 15, 2018).

25. *Id.*

about their work experience with other users.²⁶ This feature would be similar to how people use LinkedIn as it would allow users to have a more professional version of their profiles visible to some users while keeping more personal photo or status sections of their profiles visible to others.²⁷ The current Facebook Jobs and Resume features do not yet appear to be as robust as LinkedIn's features, nor do they appear to cater to the same level of skilled workers.²⁸ However, these features do present Facebook users with more opportunities to solicit their Facebook friends for professional purposes.

Instagram began as a unique social platform where users could create a public or private profile for editing and sharing photos and videos with followers.²⁹ Instagram now has more than one billion users, including over twenty-five million business profiles worldwide.³⁰ Two million businesses pay for Instagram's advertising services³¹ and 66 percent of worldwide marketers surveyed in a study in 2018 said they used Instagram to market their businesses.³² Instagram allows users to post photos and videos that followers can "like" or comment on.³³ Users can also post a "story" that contains photos and videos, which are viewable for twenty-four hours.³⁴ Instagram lets users opt for a private profile, where other users must request to follow them, or a public profile, which is viewable to anyone without permission.³⁵

Instagram also allows for direct messaging where users can send messages or forward other users' posts.³⁶ Business profiles may take advantage of these features, as well as keep track of their engagement with followers and other users.³⁷ Instagram is a highly visually oriented platform where many types of employees can easily showcase their talents, advertise their products, or spread the word about a job opening to a wide-ranging audience.³⁸

26. See Ingrid Lunden, *Facebook Tests a Resume "Work Histories" Feature to Boost Recruitment Efforts*, TECHCRUNCH (Oct. 17, 2017), <https://techcrunch.com/2017/10/17/facebook-takes-another-bite-of-linkedin/> [<https://perma.cc/EQ34-SRN9>].

27. See *id.*

28. See Constine, *supra* note 21.

29. See *generally About Us*, INSTAGRAM, <https://www.instagram.com/about/us/> [<https://perma.cc/U5KE-KEC3>] (last visited Nov. 15, 2018).

30. See *id.*; *Getting Started*, INSTAGRAM, <https://business.instagram.com/getting-started> [<https://perma.cc/86CU-RWVT>] (last visited Nov. 15, 2018).

31. See *Getting Started*, *supra* note 30.

32. STATISTA, *supra* note 14, at 19.

33. See *Exploring Photos & Videos*, INSTAGRAM, <https://help.instagram.com/140491076362332/> [<https://perma.cc/2C5C-5CQE>] (last visited Nov. 15, 2018).

34. See *Stories*, INSTAGRAM, <https://help.instagram.com/1660923094227526> [<https://perma.cc/QHQ5-83L6>] (last visited Nov. 15, 2018).

35. See *Controlling Your Visibility*, INSTAGRAM, <https://help.instagram.com/116024195217477> [<https://perma.cc/BH4A-C5LR>] (last visited Nov. 15, 2018).

36. See *Direct Messaging*, INSTAGRAM, <https://help.instagram.com/1750528395229662/> [<https://perma.cc/8PTF-XJPM>] (last visited Nov. 15, 2018).

37. See *generally Getting Started*, *supra* note 30.

38. See Jonathan Long, *7 Marketing Tips to Help Grow Your Brand on Instagram*, ENTREPRENEUR (Aug. 18, 2016), <https://www.entrepreneur.com/article/280964> [<https://perma.cc/8VQD-ADRM>].

Another social networking platform gaining professional relevance is Snapchat, a mobile application that started as a private, direct way to send photos or videos to another user that disappeared after a specified time—usually no more than a few seconds.³⁹ Snapchat now has a homepage for users where they can post photos or videos with the “My Story” feature, meaning they are not sent directly to anyone but are simply posted for their friends to view for up to twenty-four hours.⁴⁰ Users may see a list of the friends who watch or take a screenshot of their story, but their friends cannot like or comment on the photos or videos as they would be able to on Facebook or Instagram.⁴¹

Businesses have begun to create Snapchat accounts to use the “My Story” feature to advertise and keep their followers up to date on the goings-on of their companies.⁴² Eight percent of worldwide marketing professionals surveyed in a study in 2018 said they used Snapchat to market their businesses,⁴³ but that percentage may grow in the near future.⁴⁴ Snapchat presents a particularly novel opportunity for solicitation of both clients and job seekers due to the nature of Snapchat—proof of the interaction may disappear after a very short time period.

In light of the creative and dynamic ways that employees and employers across many different industries are using social media, it is necessary to consider whether the legal landscape addressing how employers may restrict their former employees’ communication on social media fairly accounts for both employer and employee interests.

*B. Nonsolicitation Agreements: Restrictive Covenants
in Employment Contracts*

Restrictive covenants are provisions in employment contracts that restrain employees’ conduct during their employment, upon termination of the employment relationship, or both in order to protect the employers’ business interests.⁴⁵ Employers have the ability to include restrictive covenants in their employment contracts as part of the bargained-for employer-employee relationship, as long as the terms of the covenants are “reasonable” in scope and applicability.⁴⁶ Courts determine the reasonableness of a restrictive covenant after considering the facts of the particular employment

39. See Solomon, *supra* note 18.

40. See *generally About My Story*, SNAPCHAT, <https://support.snapchat.com/en-US/article/view-stories> [<https://perma.cc/UZ3W-TYNL>] (last visited Nov. 15, 2018).

41. See *generally Snapchat Support*, SNAPCHAT, <https://support.snapchat.com/en-US> [<https://perma.cc/938W-K5MA>] (last visited Nov. 15, 2018).

42. See Solomon, *supra* note 18.

43. STATISTA, *supra* note 14, at 19.

44. See *id.* at 22 (showing that roughly 15 percent of marketers surveyed said they plan to increase their use of Snapchat for marketing their businesses in the near future).

45. See 10 N. PETER LAREAU, LABOR AND EMPLOYMENT LAW § 265.01 (2017).

46. See RESTATEMENT (SECOND) OF CONTRACTS § 186 (AM. LAW INST. 1981).

relationship, as well as relevant economic and social circumstances surrounding the relationship.⁴⁷

Nonsolicitation agreements and other restrictive covenants that restrain competition must be imposed ancillary to a valid contract or relationship, such as at-will employment, and supported by adequate consideration to avoid being unreasonable restraints of trade.⁴⁸ The restrictions imposed on an employee through restrictive covenants, such as nonsolicitation agreements, are closely related to the employee's common-law fiduciary duty of loyalty to the employer. Part I.B.1 discusses the common-law duty of loyalty as it relates to the underlying obligations of restrictive covenants. Part I.B.2 defines and give examples of nonsolicitation agreements, and Part I.B.3 discusses the overlapping relationship between nonsolicitation agreements and noncompetition agreements.

1. Common-Law Duty of Loyalty

Employees generally have a common-law fiduciary duty of loyalty to their employers for the duration of their employment simply by reason of the employment relationship.⁴⁹ This means that the employee is to “act solely for the benefit of” the employer “in all matters connected with” his or her employment.⁵⁰

Falling under the employee's duty of loyalty to the employer is the duty not to compete with his or her employer in the same line of business.⁵¹ While an employee may generally make preparations to compete with his or her employer after termination of the employment relationship, an employee “violates his duty of loyalty if he engages in pre-termination solicitation of customers for a new competing business” or engages in other pretermination activity that competes with the employer.⁵²

In general, the employee's duty of loyalty and duty not to compete terminate with the employment relationship.⁵³ However, if an employee is bound by a restrictive covenant that extends beyond the term of employment,

47. *Id.* § 186 cmt. a.

48. *See id.* §§ 186–188; *see, e.g.*, *SKF USA, Inc. v. Bjerckness*, 636 F. Supp. 2d 696, 709–10 (N.D. Ill. 2009).

49. *See, e.g.*, *Robert N. Brown Assocs., Inc., v. Fileppo*, 327 N.Y.S.2d 133, 135 (App. Div. 1971) (per curiam) (“Implicit in the employer-employee relation is that the employee will not compete with his employer.”); *Williams v. Dominion Tech. Partners, LLC*, 576 S.E.2d 752, 757 (Va. 2003) (“We have long recognized that under the common law an employee, including an employee-at-will, owes a fiduciary duty of loyalty to his employer during his employment.”).

50. RESTATEMENT (SECOND) OF AGENCY § 387 (AM. LAW INST. 1958). In the context of agency law, the principal is the employer and the agent is the employee. *Id.*

51. *See id.* § 393; *see, e.g.*, *Williams*, 576 S.E.2d at 757 (“Subsumed within this general duty of loyalty is the more specific duty that the employee not compete with his employer during his employment.”).

52. *Am. Express Fin. Advisors, Inc. v. Topel*, 38 F. Supp. 2d 1233, 1247 (D. Colo. 1999); *see* RESTATEMENT (SECOND) OF AGENCY § 393 cmt. e (AM. LAW INST. 1958).

53. *See Jostens, Inc. v. Kauffman*, 842 F. Supp. 352, 354 (C.D. Ill. 1994); *In re Uniflex, Inc.*, 319 B.R. 101, 106–07 (Bankr. D. Del. 2005).

the employee's duty not to compete with the employer may remain effective.⁵⁴ Whether the former employee still owes a duty not to compete with the employer will depend on the enforceability of the restrictive covenant.⁵⁵

2. Defining Nonsolicitation Agreements

A nonsolicitation agreement ("NSA") is a type of restrictive covenant used in employment contracts where an employee promises "to refrain, for a specified time, from either (1) enticing employees to leave the company, or (2) trying to lure customers away."⁵⁶

An example of a typical employee-specific ("nonraiding") NSA provides:

During my employment with the Company and for a period of six (6) months following the date of voluntary or involuntary termination of my employment, regardless of reason, I will not hire or solicit to hire any employee of the Company for employment other than with the Company⁵⁷

An example of a typical client-specific NSA provides:

Associate shall not [for a period of two years following the expiration of the agreement, or the resignation or termination of the employee], directly or indirectly, solicit or attempt to solicit any of the Company's clients for the purpose of providing . . . any . . . service or product that Associate provided or offered as an employee of Company.⁵⁸

Deciding whether a covenant is reasonable and what constitutes a solicitation are highly fact-dependent inquiries,⁵⁹ even when dealing with more customary modes of communication such as phone, mail, or email. A problematic example that often arises with NSAs is when an employee announces his or her new employment and lets clients at the former employer know how to reach him or her.⁶⁰ Mere announcement can turn into an impermissible solicitation under certain circumstances. For example, in *Compass Bank v. Hartley*,⁶¹ the court held that a letter announcing new employment, which the former employee mailed to a targeted list of fifty-six clients of the company and which contained his phone number, email address, and mailing address, constituted a solicitation.⁶² In finding a breach

54. See *Jostens*, 842 F. Supp. at 354 ("[T]he presence of a restrictive covenant is an exception to the general rule that an ex-employee owes no fiduciary duty to his former employer.").

55. See *id.* at 354–55.

56. *Nonsolicitation Agreement*, BLACK'S LAW DICTIONARY (10th ed. 2014).

57. *PrecisionIR Inc. v. Clepper*, 693 F. Supp. 2d 286, 289 (S.D.N.Y. 2010).

58. *H&R Block E. Enters. v. Morris*, 606 F.3d 1285, 1289 (11th Cir. 2010).

59. See *Sysco Food Servs. of E. Wis., LLC v. Zicarelli*, 445 F. Supp. 2d 1039, 1047 (E.D. Wis. 2006); *Invidia, LLC v. DiFonzo*, No. MICV20123798H, 2012 WL 5576406, at *3 (Mass. Super. Ct. Oct. 22, 2012).

60. David L. Johnson, *The Parameters of "Solicitation" in an Era of Non-Solicitation Covenants*, 28 A.B.A. J. LAB. & EMP. L. 99, 113 (2012).

61. 430 F. Supp. 2d 973 (D. Ariz. 2006).

62. See *id.* at 981.

of the NSA, the court highlighted the targeted mailing, the inclusion of contact information, the fact that the former employee mailed the letters on the day he resigned, and evidence that the former employee did not transfer certain clients he was supposed to transfer to another employee following a previous promotion.⁶³

Still other courts have found that sending a new employment announcement to a targeted list of clients constituted a solicitation even without the inclusion of contact information.⁶⁴ In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McClafferty*,⁶⁵ the court found that the former employee's sending of a targeted mail announcement to his former clients constituted a solicitation; despite the possibility of it being a "professional courtesy," the court held that such directed communication likely violated his NSA.⁶⁶ Similarly, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Schultz*,⁶⁷ the court held that the former employee's "initiation of targeted contact through the use of client information gained through his employment" was a solicitation, despite his argument that he was merely announcing his new job.⁶⁸ Courts applying New York law have followed a similar line of reasoning.⁶⁹

3. Overlap of Nonsolicitation Agreements and Noncompete Clauses

Noncompete clauses ("NCCs") also fall under the category of restrictive covenants. Because NCCs function to restrict an employee's actions and are intended to protect an employer's business interests,⁷⁰ it follows that NCCs are closely linked to NSAs. NCCs restrict a former employee from working for a competitor of his or her former employer or from starting a business that would compete with that employer upon termination.⁷¹ They can also restrict a current employee from working for or owning an interest in a competing business while still employed.⁷²

An NSA is sometimes described as a "form of an agreement not to compete" due to the similarity between the effects of NSAs and NCCs.⁷³

63. *Id.* at 982. The court concluded that this evidence "support[ed] the inference that Hartley intended to maintain a close relationship with clients in the event he left Compass." *Id.*

64. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McClafferty*, 287 F. Supp. 2d 1244, 1248 (D. Haw. 2003); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Schultz*, No. 01-0402, 2001 WL 1681973, at *3 (D.D.C. Feb. 26, 2001).

65. 287 F. Supp. 2d 1244 (D. Haw. 2003).

66. See *id.* at 1248.

67. No. 01-0402, 2001 WL 1681973 (D.D.C. Feb. 26, 2001).

68. *Id.* at *3.

69. See *Marsh USA Inc. v. Schuhriemen*, 183 F. Supp. 3d 529, 535–36 (S.D.N.Y. 2016), for an example of where the court applied New York law with a similar line of reasoning.

70. See *Whelan Sec. Co. v. Kennebrew*, 379 S.W.3d 835, 844 (Mo. 2012) ("The general purpose of non-compete agreements is to protect an employer from unfair competition without imposing an unreasonable restraint on the former employee.").

71. 1 JOSEPH D. ZAMORE, BUSINESS TORTS § 4.01 (rev. ed. 2017).

72. See *id.*

73. *Saturn Sys., Inc. v. Militare*, 252 P.3d 516, 526 (Colo. App. 2011); see also Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of*

This similarity results in a fair amount of common law and statutory language that applies to NCCs and NSAs alike.⁷⁴ The key difference between NCCs and NSAs is the heightened nature of the NCCs' restrictions on the employee.⁷⁵ "Because [nonsolicitation agreements] do not restrain an employee from pursuing a particular line of work, they are far less likely to be invalidated in a judicial proceeding."⁷⁶

Employers may wish to include an NSA in conjunction with an NCC in their employment contracts;⁷⁷ however, if customer relationships are the only interest the employer is seeking to protect via restrictive covenant, some courts will strike a broad NCC if an enforceable NSA is also present in the contract.⁷⁸ Whereas most jurisdictions require NCCs to be reasonably limited in time, geographic area, and prohibited activity in order to be enforceable,⁷⁹ NSAs are not always so limited.⁸⁰

Noncompetition Clauses and Other Restrictive Postemployment Covenants, 68 VAND. L. REV. 1, 7 (2015) (referring to nonsolicitation agreements as "a subcategory of" noncompete clauses).

74. See *infra* notes 143–44 and accompanying text.

75. John Brown, *Non-Solicitation Agreements Can Protect Your Business and Benefit Your Employees*, FORBES (June 24, 2016, 10:20 AM), <https://www.forbes.com/sites/johnbrown/2016/06/24/non-solicitation-agreements-can-protect-your-business-and-benefit-your-employees/> [https://perma.cc/43M6-R73K] (highlighting the less restrictive nature of NSAs as opposed to NCCs).

76. Kenneth J. Vanko, "You're Fired! And Don't Forget Your Non-Compete . . .": *The Enforceability of Restrictive Covenants in Involuntary Discharge Cases*, 1 DEPAUL BUS. & COM. L.J. 1, 6–7 (2002).

77. See, e.g., *H&R Block E. Enters. v. Morris*, 606 F.3d 1285, 1288–89 (11th Cir. 2010). The court laid out the relevant portion of the employment contract at issue, which included both a noncompetition and a nonsolicitation covenant, respectively:

Associate shall not, directly or indirectly, provide any of the following services to any of the Company's Clients: (i) prepare tax returns, (ii) file tax returns electronically, or (iii) provide any alternative or additional service or product that Associate provided or offered as an employee of the Company The restrictions contained in Section 11(a) are limited to (i) Associate's district of employment, and (ii) a twenty-five (25) mile radius as measured from the office to which Associate is assigned.

. . . . Associate shall not, directly or indirectly, solicit or attempt to solicit any of the Company's clients for the purpose of providing (i) tax return preparation, (ii) electronic filing of tax returns, or (iii) any alternative or additional service or product that Associate provided or offered as an employee of Company.

Id. at 1288–89 (first alteration in original).

78. *Veramark Techs., Inc. v. Bouk*, 10 F. Supp. 3d 395, 402 (W.D.N.Y. 2014).

79. See, e.g., GA. CODE ANN. § 13-8-53(a) (2018) (providing that restrictive covenants are enforceable "so long as such restrictions are reasonable in time, geographic area, and scope of prohibited activities"); TEX. BUS. & COM. CODE § 15.50(a) (2018) ("[A] covenant not to compete is enforceable if . . . it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable"); *Buffkin v. Glacier Grp.*, 997 N.E.2d 1, 10 (Ind. Ct. App. 2013) (stating that noncompetition agreements must be "reasonable in scope as to the time, activity, and geographic area restricted" in order to be enforceable).

80. See, e.g., GA. CODE ANN. § 13-8-53(b) ("No express reference to geographic area or the types of products or services considered to be competitive shall be required in order for the [nonsolicitation agreement] to be enforceable.").

C. Nonsolicitation Agreement Litigation

Restrictive covenants in employment contracts, including NCCs and NSAs, are governed by a combination of state legislation and state common law. Whether an employer seeks to enforce an NSA or NCC in court, the clause must typically pass the state's iteration of a common-law "reasonableness" test to ensure that the agreement is not overly broad or unreasonably restrictive to the employee in protecting the employer's interests.⁸¹

For example, the common-law reasonableness test that Maryland courts apply provides that: "(1) the employer must have a legally protected interest, (2) the restrictive covenant must be no wider in scope and duration than is reasonably necessary to protect the employer's interest, (3) the covenant cannot impose an undue hardship on the employee, and (4) the covenant cannot violate public policy."⁸² Courts across the country vary in the specific factors and terms used in employing their common-law reasonableness tests, though all hinge on the elusive concept of "reasonableness."⁸³

After the court has taken into account the employer interests and applied the reasonableness test to decide the covenant's enforceability, the court will assess whether a breach of the covenant is likely to occur or has occurred, depending on the relief sought. To show that a breach is likely to occur and to obtain a preliminary injunction against the former employee, the employer must show: "(1) likelihood of success on the merits, (2) irreparable harm, (3) that the balance of the hardships between the parties favors injunctive relief, and (4) that the injunction would not harm the public interest."⁸⁴ If the employer is bringing a claim of breach of contract against the former employee to show that a breach has occurred, the employer must prove: "(1) the existence of a valid and enforceable contract, (2) substantial performance by the plaintiff, (3) a breach by the defendant, and (4) resultant damages."⁸⁵

81. See, e.g., *Veramark*, 10 F. Supp. 3d at 406 ("A restraint is reasonable only if it: (1) is *no greater* than is required for the protection of the *legitimate interest* of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public." (quoting *BDO Seidman v. Hirshberg*, 712 N.E.2d 1220, 1223 (N.Y. 1999))); see also *infra* Part I.C.1.

82. *Deutsche Post Glob. Mail, Ltd. v. Conrad*, 116 F. App'x 435, 438 (4th Cir. 2004).

83. State courts also vary in some procedural aspects of employing their versions of the common-law reasonableness test. For example, in *Brown & Brown, Inc. v. Johnson*, the court highlighted a difference between Florida and New York law. 34 N.E.3d 357, 360–61 (N.Y. 2015). Under Florida law, after the party seeking enforcement shows that the restrictive covenant was necessary to protect a legitimate business interest, the burden shifts to the defendant to show that the restrictive covenant was overbroad or unnecessary. *Id.* at 360. Under New York law, the burden shifts to the employee only after the employer satisfies all three prongs of the New York reasonableness test. *Id.* at 361.

84. *Corp. Techs., Inc. v. Harnett*, 943 F. Supp. 2d 233, 237 (D. Mass. 2013); see also *Lucky Cousins Trucking, Inc. v. QC Energy Res. Tex., LLC*, 223 F. Supp. 3d 1221, 1224 (M.D. Fla. 2016).

85. *Bankers Life & Cas. Co. v. Am. Senior Benefits LLC*, 83 N.E.3d 1085, 1089 (Ill. App. Ct. 2017); see also *Burrell v. City of Mattoon*, 378 F.3d 642, 651 (7th Cir. 2004).

The main source of controversy in the litigation of both NSAs and NCCs is the balancing of employer interests against employee interests and public policy concerns. Part I.C.1 discusses key interests that employers seek to protect via NSAs, including customer relationships, trade secrets and confidential information, and investment in the training of employees. Part I.C.2 discusses employee and public policy interests that should be balanced against employer interests in enforcing NSAs, such as employee mobility and protecting employees' freedom to engage in social media networking.

1. Employers' Interests

Employers use NSAs and other restrictive covenants to restrain employees from leaving and using the skills, training, and customer relationships they acquired during their time with the employer to entice clients or other employees to follow them "while the employer is vulnerable"⁸⁶ after losing the employee. When seeking to enforce an NSA, an employer must ordinarily show that the agreement must be enforced in order to protect a legitimate business interest and that the agreement is narrowly tailored to protect that interest.⁸⁷ Such interests include protecting customer relationships and goodwill, both in general and in the event of purchasing a business; protecting trade secrets and confidential information; and the employer's investment in the training of the employee.⁸⁸

Customer relationships are a key interest that employers aim to protect through the use of NSAs and one that courts are willing to recognize as legitimate. Some courts will limit the reasonable protection of these customer relationships to those that the employer enabled the employee to form or to customers with whom the employee actually interacted.⁸⁹ For instance, in an accounting-industry case, the New York Court of Appeals stated that "[e]xtending the anti-competitive covenant to [plaintiff's] clients with whom a relationship with defendant did not develop through assignments to perform direct, substantive accounting services" would allow

86. *Highway Techs., Inc. v. Porter*, No. CV-09-1305-PHX-DGC, 2009 WL 1835114, at *2 (D. Ariz. June 26, 2009) (quoting *Bryceland v. Northey*, 772 P.2d 36, 40 (Ariz. Ct. App. 1989)).

87. See 1 ZAMORE, *supra* note 71, § 4.05; see also, e.g., *Instant Tech. LLC v. DeFazio*, 793 F.3d 748, 750 (7th Cir. 2015).

88. See, e.g., FLA. STAT. § 542.335(b) (2018) (defining "legitimate business interests" as including "[t]rade secrets," "[v]aluable confidential business or professional information," "[s]ubstantial relationships with specific prospective or existing customers, patients, or clients," and "[c]ustomer, patient, or client goodwill"); RESTATEMENT OF EMPLOYMENT LAW § 8.07 (AM. LAW INST. 2017) (setting forth possible legitimate employer interests, including "(1) trade secrets . . . ; (2) customer relationships; (3) investment in the employee's reputation in the market; or (4) purchase of a business owned by the employee").

89. See, e.g., *BDO Seidman v. Hirshberg*, 712 N.E.2d 1220, 1224–25 (N.Y. 1999); *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 388 (Tex. 1991) (holding a provision that prevented a departing partner from "engaging accounting services for clients who were acquired after the partner left, or with whom [he] had no contact while associated with the firm" to be "overbroad and unreasonable").

the enforcement of a restraint greater than necessary to protect the employer's legitimate interest in customer relationships.⁹⁰

In Indiana, one court held that an NSA that restricted a former employee from soliciting “past, present, or prospective” clients was unenforceable as to the “past” and “prospective” clients because those terms were unrestricted and overly broad.⁹¹ Similarly, Oklahoma limits NSAs to “established” customers of the former employer.⁹²

It has also been held that, to protect information about customers, an NSA may cover customers with whom the employee did not have direct contact, “so long as the employee gained significant knowledge or understanding of those customers during the course of his or her employment.”⁹³ This interest overlaps with the employer interest in protecting confidential information.⁹⁴

An employer may also want to protect customer relationships and goodwill in the purchase of a business that has an established client base. North Dakota's statute provides an exception to its general rule of voiding all contracts that restrain lawful trade for situations where “[o]ne who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business” within a specified area “so long as the buyer . . . carries on a like business therein.”⁹⁵ This statutory exception also extends to contracts for the dissolution of a partnership.⁹⁶

Another interest that may motivate the use of both client-specific and employee-specific NSAs is the protection of trade secrets and confidential information.⁹⁷ Some courts have held customer lists to be trade secrets in the context of customer-specific NSAs.⁹⁸ In the employee-specific NSA context, if a former employee poaches a former coworker to go join him or her in working for a competitor, that poached employee may possess knowledge of trade secrets or confidential information that an employer wants to protect.

Almost every state in the United States has enacted a version of the Uniform Trade Secrets Act (UTSA) framework, which was written by the

90. *BDO Seidman*, 712 N.E.2d at 1225.

91. *See Seach v. Richards, Dieterle & Co.*, 439 N.E.2d 208, 213 (Ind. Ct. App. 1982). *But see* GA. CODE ANN. § 13-8-53(b) (2018) (stating that NSAs may apply to an employer's “actively sought prospective customers, with whom the employee had material contact”).

92. *See* OKLA. STAT. tit. 15, § 219A (2008).

93. *Syncom Indus. v. Wood*, 920 A.2d 1178, 1186 (N.H. 2007).

94. *See infra* notes 97–115 and accompanying text.

95. N.D. CENT. CODE § 9-08-06(1) (2018); *see also* ALA. CODE § 8-1-190(b)(3) (2018).

96. *See* N.D. CENT. CODE § 9-08-06(2).

97. *See Saturn Sys. v. Militare*, 252 P.3d 516, 526 (Colo. App. 2011); *Passalacqua v. Naviant, Inc.*, 844 So. 2d 792, 795 (Fla. Dist. Ct. App. 2003). *See generally* Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800–1920*, 52 HASTINGS L.J. 441 (2001).

98. *See Morlife, Inc. v. Perry*, 66 Cal. Rptr. 2d 731, 735–37 (Ct. App. 1997); *Saturn Sys.*, 252 P.3d at 527. *But see Sasqua Grp., Inc. v. Courtney*, No. CV 10-528(ADS)(AKT), 2010 WL 3613855, at *22 (E.D.N.Y. Aug. 2, 2010) (denying an application for a preliminary injunction because the contact information in the plaintiff's customer database was available through sources such as Google and LinkedIn).

Uniform Law Commission in 1979 and amended in 1985.⁹⁹ The UTSA defines a “trade secret” as:

[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.¹⁰⁰

Even in very employee-friendly jurisdictions, it is generally accepted that a former employee may use the “general knowledge, skill, and experience acquired in his or her former employment in competition with a former employer” but that the former employee is prohibited from using her former employer’s confidential information or trade secrets pertaining to its business.¹⁰¹

Employers may argue that client lists are protectable trade secrets, but simply referring to this information as a “trade secret” or as “confidential” does not necessarily mean it will be seen as either by a court.¹⁰² For example, the Ninth Circuit held that “a customer list may constitute a protected trade secret if it includes nonpublic information that provides a ‘substantial business advantage’ to competitors,” which may include information such as “the customer’s ‘particular needs or characteristics.’”¹⁰³ Information that is easy to obtain via publicly available resources is not likely to constitute a trade secret.¹⁰⁴

Some states have added statutory protection to otherwise void NCCs if they are made for the purpose of protecting trade secrets. Colorado’s statute, for example, provides that “[a]ny covenant not to compete which restricts the right of any person to receive compensation for performance of skilled or unskilled labor for any employer shall be void.”¹⁰⁵ However, this prohibition does not apply to “[a]ny contract for the protection of trade secrets.”¹⁰⁶ This statutory protection has been held to extend to NSAs, as a form of NCCs, in Colorado.¹⁰⁷

99. *Legislative Fact Sheet—Trade Secrets Act*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trade%20Secrets%20Act> [<https://perma.cc/SU26-JQFM>] (last visited Nov. 15, 2018). Except for Massachusetts, New York, and North Carolina, this framework has been enacted in every state as well as the District of Columbia, Puerto Rico, and U.S. Virgin Islands. *Id.* The framework was introduced as a bill in the state legislature of New York in 2018. *Id.*

100. UNIF. TRADE SECRETS ACT § 1.4 (amended 1985).

101. *Morlife, Inc.*, 66 Cal. Rptr. 2d at 734.

102. *See* *Thompson v. Impaxx, Inc.*, 7 Cal. Rptr. 3d 427, 430–31 (Ct. App. 2003); *Morlife, Inc.*, 66 Cal. Rptr. 2d at 735–36.

103. *Pollara v. Radiant Logistics, Inc.*, 650 F. App’x 372, 373 (9th Cir. 2016) (quoting *Morlife, Inc.*, 66 Cal. Rptr. 2d at 735–36).

104. *See Morlife, Inc.*, 66 Cal. Rptr. 2d at 735.

105. COLO. REV. STAT. § 8-2-113(2)(b) (2018).

106. *Id.*

107. *See Saturn Sys. v. Militare*, 252 P.3d 516, 527 (Colo. App. 2011).

Employers may also justifiably seek to protect other confidential or proprietary information that does not rise to the level of “trade secrets” through NSAs or NCCs,¹⁰⁸ which may include “nonpublic commercial information that provides a clear economic advantage to the employer by virtue of its confidentiality.”¹⁰⁹ Information that has become publicly available or that could be considered “part of the general experience, knowledge, training, and skills that an employee acquires in the course of employment” is not considered confidential or proprietary, and is thus not a protectable interest.¹¹⁰

Customer lists have been held to be “confidential, proprietary, and protectable.”¹¹¹ However, in *Instant Technology, LLC v. DeFazio*,¹¹² the court took special notice of the industry in which the parties worked and declined to find a protectable interest in a technology staffing firm’s client data, which included data about client hiring needs and potential IT workers.¹¹³ The court acknowledged that the firm obtained this purportedly confidential information through public postings on websites such as LinkedIn or by cold-calling or emailing and that the competitive, fast-paced nature of the staffing industry made this type of information rapidly obsolete.¹¹⁴ Thus, the court held that the firm did not have a protectable interest in its client data as confidential information.¹¹⁵

Another employer interest that is closely tied to the protection of trade secrets and confidential information is the interest in protecting the investment in the training of employees. Particularly regarding employee-specific NSAs, employers may argue that they have a protectable business interest in their investment in the training and development of their employees.¹¹⁶ This interest is one that some courts are willing to deem a protectable employer interest when determining the reasonableness of a restrictive covenant.¹¹⁷ This interest is also recognized as legitimate by statute in Florida.¹¹⁸ The key to having this interest recognized by courts is that the training must be specialized or convey some sort of confidential information or trade secrets, beyond general knowledge, that could allow the

108. *See, e.g.*, *Invidia, LLC v. DiFonzo*, No. MICV20123798H, 2012 WL 5576406, at *5 (Mass. Super. Ct. Oct. 22, 2012) (finding the NSA at issue to be protecting a legitimate business interest in a hair salon’s confidential client list).

109. RESTATEMENT OF EMPLOYMENT LAW § 8.07 (AM. LAW INST. 2017); *see, e.g.*, *SKF USA, Inc. v. Bjerkness*, 636 F. Supp. 2d 696, 711–12 (N.D. Ill. 2009) (holding that documents constituted confidential information because they contained costs-per-month charges, price quotes, services offered, amounts paid, and frequency of machinery inspections).

110. RESTATEMENT OF EMPLOYMENT LAW § 8.07 (AM. LAW INST. 2017).

111. *Ex parte Caribe, USA, Inc.*, 702 So. 2d 1234, 1241 (Ala. 1997).

112. 40 F. Supp. 3d 989 (N.D. Ill. 2014), *aff’d*, 793 F.3d 748 (7th Cir. 2015).

113. *See id.* at 1012.

114. *See id.* at 1012–13.

115. *See id.* at 1013.

116. *See Metro Traffic Control, Inc. v. Shadow Traffic Network*, 27 Cal. Rptr. 2d 573, 579 (Ct. App. 1994).

117. *See Passalacqua v. Naviant, Inc.*, 844 So. 2d 792, 795 (Fla. Dist. Ct. App. 2003); *Moore Bus. Forms, Inc. v. Foppiano*, 382 S.E.2d 499, 501 (W. Va. 1989).

118. *See* FLA. STAT. § 542.335(1)(b)(5) (2018).

employee to compete unfairly with the employer when he or she takes a new job.¹¹⁹

While legitimate employer interests exist and merit protection under the law, there are also competing employee and public policy interests for courts to consider that may render a restrictive covenant unreasonable.

2. Employee and Public Interests

Restrictive covenants that restrain trade are generally disfavored in the law.¹²⁰ Thus, it is important to discuss the employee and public interests implicated in the law of NSAs which can make the enforcement of restrictive covenants problematic. The protection of employee mobility is a key concern for employees and for public policy. Moreover, there are positive effects of and public interest in the usage of social media.

Depending on the nature of the employee's profession, a client-specific NSA could be detrimental to her ability to find work in her industry¹²¹—especially if she is planning to work within the same geographic area as her former employer. For example, an accountant for high-net-worth individuals who is bound by an NSA may have a very difficult time building a client base at a new job. This concept could apply across many service- or client-oriented industries. Thus, with respect to all restrictive covenants, a common argument against enforcement is that they restrict employee mobility and competition among businesses.¹²²

A related issue with restrictive covenants is that there is often unequal bargaining power between an employer and an employee.¹²³ An employee may not have the means or realistic leverage to hire a lawyer or challenge a provision in an employment contract, especially in times of economic downturn.¹²⁴ Thus, the employee may not fully understand or contemplate the future restraints on their mobility that result from signing a restrictive covenant, such as the impact it could have on securing future employment.¹²⁵

119. *See 7's Enters. v. Del Rosario*, 143 P.3d 23, 32 (Haw. 2006); *Vantage Tech., LLC v. Cross*, 17 S.W.3d 637, 645 (Tenn. Ct. App. 1999); *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 769 (Tex. 2011).

120. *See* TEX. BUS. & COM. CODE § 15.05(a) (2018) ("Every contract . . . in restraint of trade or commerce is unlawful."); *Mont.-Dakota Utils. Co. v. Williams Elec. Coop., Inc.*, 263 F.2d 431, 433 (8th Cir. 1959) ("In general, a contract which unreasonably restrains trade is contrary to public policy and void."); *Dicen v. New Sesco, Inc.*, 839 N.E.2d 684, 687 (Ind. 2005) ("Covenants not to compete are not favored in the law."); *Brown & Brown, Inc. v. Johnson*, 34 N.E.3d 357, 361 (N.Y. 2015).

121. *See* Mary L. Mikva, *Drafting Confidentiality, Non-Compete and Non-Solicitation Agreements: The Employee's Wish List*, 50 PRAC. LAW., June 2004, at 11, 13.

122. *See Brown & Brown*, 34 N.E.3d at 361 (noting, in an NSA case, that policy concerns cause covenants not to compete to be strictly construed in order to prevent the loss of a person's ability to work); *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 769–70 (Tex. 2011).

123. *See Invidia, LLC v. DiFonzo*, No. MICV20123798H, 2012 WL 5576406, at *3 (Mass. Super. Ct. Oct. 22, 2012).

124. *See* Norman D. Bishara & Michelle Westermann-Behaylo, *The Law and Ethics of Restrictions on Employee's Post-Employment Mobility*, 49 AM. BUS. L.J. 1, 4 (2012).

125. *See id.*

The interest in protecting employee mobility and competition is particularly urgent in recent times, as the economy has evolved from “the old employer-employee arrangement” to a “fast-moving and competitive labor marketplace,” especially with the innovative rise of the technology industry.¹²⁶ Employees are less likely to remain with employers for a long-term, reward-fueled relationship because employers are facing more pressure on a global scale to compete; this causes employees to prioritize their ability to market themselves as valuable.¹²⁷ If, for instance, employees are restricted from reaping the benefits of building up a strong client base at a former employer, this limits their ability to compete in the marketplace.

In addition, there is a public interest in protecting employees’ freedom to communicate and connect with people on social media. Social media is an important part of people’s personal and professional lives, and it allows for these sometimes separate aspects of people’s lives to converge in an efficient and productive way.¹²⁸

Researchers Nicole Ellison, Charles Steinfield, and Cliff Lampe found a statistical correlation between usage of social media platforms like Facebook and the proliferation of social capital in a study of college students and their Facebook usage.¹²⁹ Social capital is the “positive effect of interaction among participants in a social network.”¹³⁰ The researchers found that “[t]he strong linkage between Facebook use and high school connections suggests how [social media sites] help maintain relations as people move from one offline community to another” and that these “connections could have strong payoffs in terms of jobs, internships, and other opportunities.”¹³¹ This suggests that social media has become a truly important and beneficial part of how people interact with others and advance their social and professional lives.

In terms of professional benefits, social media has provided a wide-reaching and inexpensive (or free) way for people to find jobs and to market their businesses.¹³² Social media has changed the way people market and conduct business and its benefits are reaped throughout many industries.¹³³ Employers often encourage employees to develop social media relationships with clients or coworkers as an important part of client relations or employee morale.¹³⁴ When thinking about whether employees bound by NSAs should be required to remove certain social media contacts from their friend or connection lists upon separation from an employer, it seems that this would not reasonably serve the employer’s business interests unless there is

126. *See id.* at 6.

127. *See id.* at 8.

128. *See supra* Part I.A.

129. *See* Nicole B. Ellison, Charles Steinfield & Cliff Lampe, *The Benefits of Facebook “Friends:” Social Capital and College Students’ Use of Online Social Network Sites*, 12 J. COMPUTER-MEDIATED COMM. 1143, 1164 (2007).

130. *Id.* at 1145.

131. *Id.* at 1164.

132. *See supra* Part I.A.

133. *See supra* notes 9, 18 and accompanying text.

134. *See* Daniel R. Anderson, *Restricting Social Graces: The Implications of Social Media for Restrictive Covenants in Employment Contracts*, 72 OHIO ST. L.J. 881, 899 (2011).

evidence that the employee engaged in any improper solicitation on social media.¹³⁵

In addition to professional and social benefits, social media has been found to “exert[] a significant and positive impact on individuals’ activities aimed at engaging in civic and political action.”¹³⁶ Moreover, a statistical relationship has been identified between using social media as a news source and “higher levels of social capital[,] which implies that social media may also facilitate community life beyond the strict measures of civic participation.”¹³⁷

In sum, social media has had many positive effects on employees, businesses, and people in general, which have been studied and noted by scholars and researchers. These positive effects are likely to expand and continue in the future and must be considered by courts weighing the employer and employee interests in litigation over restrictive covenants as they relate to an employee’s use of social media.

D. States’ Varying Approaches to Nonsolicitation Agreements

Every state has its own unique combination of statutory and common law that deals with the reasonableness and enforceability of NSAs and other restrictive covenants.¹³⁸ Where a state has a statute that deals directly with NSAs, or a statute dealing with NCCs which has been held to apply to NSAs, the court must apply the statute along with any other applicable common-law reasonableness requirements. This Part discusses state statutes that place general prohibitions on covenants that restrain trade, overlap between NSAs and NCCs under state law, some states’ industry-based restrictions on NCCs and NSAs, and the blue-pencil doctrine that courts may employ to enforce portions of an overly broad restrictive covenant.

Many states have statutes that generally nullify contracts that restrain people from participating in a lawful trade, profession, or business.¹³⁹ However, these statutes typically include explicit exceptions to the general rule against restrictive covenants. Examples include exceptions for contracts for the purchase and sale of a business¹⁴⁰ or contracts to protect trade secrets or confidential information.¹⁴¹

135. *Id.* at 899–900.

136. Homero Gil de Zúñiga, Nakwon Jung & Sebastián Valenzuela, *Social Media Use for News and Individuals’ Social Capital, Civic Engagement and Political Participation*, 17 J. COMPUTER-MEDIATED COMM. 319, 329, 332 (2012) (arguing that social media as a “venue for information” could strengthen the network of society and democracy).

137. *Id.*

138. Kyle B. Sill, *Drafting Effective Noncompete Clauses and Other Restrictive Covenants: Considerations Across the United States*, 14 FLA. COASTAL L. REV. 365, 368–69 (2013).

139. *See* ALA. CODE § 8-1-190 (2018); CAL. BUS. & PROF. CODE § 16600 (2017); COLO. REV. STAT. § 8-2-113(2) (2018); FLA. STAT. § 542.18 (2018); MONT. CODE ANN. § 28-2-703 (2017); TEX. BUS. & COM. CODE § 15.05 (2018).

140. *See, e.g.*, COLO. REV. STAT. § 8-2-113(2); *see also supra* Part I.C.1.

141. *See, e.g.*, FLA. STAT. § 542.335(1)(b)(1)–(2); *see also supra* Part I.C.2.

Most states do not have a statute that explicitly addresses NSAs. However, South Dakota does have such a statute; it provides: “[a]n employee may agree with an employer . . . at any time during his employment . . . not to solicit existing customers of the employer within [a specified area] . . . for any period not exceeding two years from the date of termination of the agreement,” as long as the employer remains in that business for that time.¹⁴²

Several states treat NCCs and NSAs the same way. Some do this by applying their NCC statutes to apply to NSAs, while others apply their common-law reasonableness tests for NCCs to NSAs. Texas’s statute has been held to apply to NSAs “because of the analogous nature of noncompetition and non-solicitation covenants.”¹⁴³ In Connecticut, the five-prong common-law reasonableness test has been held to apply to both NCCs and NSAs, despite admittedly differing levels of scrutiny for NCCs and NSAs.¹⁴⁴

Some states even proscribe NCCs or NSAs according to the employee’s industry. Hawaii’s statute, for example, provides that NCCs and NSAs entered into between employers and employees in the “technology business” are “void and of no force and effect.”¹⁴⁵ Other examples of employees for whom states have chosen to void NCCs are physicians¹⁴⁶ and broadcast-industry employees.¹⁴⁷

Another area of restrictive covenant law where states vary in their approaches is in the practice of blue-penciling. Blue-penciling occurs when a court alters an NSA or NCC by striking overly broad or unenforceable language while keeping the enforceable terms in the covenant.¹⁴⁸ Under Indiana’s blue-pencil doctrine, courts will strike unreasonable restrictions within restrictive covenants if they are divisible from the rest of the otherwise reasonable language.¹⁴⁹ Indiana courts will not “craft a reasonable restriction

142. S.D. CODIFIED LAWS § 53-9-11 (2018).

143. *Merritt Hawkins & Assocs., LLC v. Gresham*, 79 F. Supp. 3d 625, 639 (N.D. Tex. 2015) (“Texas courts apply the Covenant Not to Compete Act to [NSAs] as well.”). See TEX. BUS. & COM. CODE § 15.50 (2018) for the Texas Covenant Not to Compete Act.

144. See *Braman Chem. Enters. v. Barnes*, No. CV064020633S, 2006 WL 3859222, at *3 (Conn. Super. Ct. Dec. 12, 2006) (applying the same five-prong reasonableness test to both NCCs and NSAs, but noting that Connecticut courts tend to view NCCs less favorably than customer-specific NSAs). For another example of the application of the common-law reasonableness test to both NCCs and NSAs, see *TruGreen Cos. v. Mower Bros.*, 199 P.3d 929, 932 (Utah 2008), which states that restrictive covenants, including noncompete and nonsolicit provisions, are enforceable if “supported by consideration, negotiated in good faith, necessary to protect a company’s good will, and reasonably limited in time and geographic area.”

145. HAW. REV. STAT. § 480-4(d) (2018).

146. See, e.g., DEL. CODE ANN. tit. 6, § 2707 (2018) (declaring noncompete provisions based on time or geographical area void as related to physicians).

147. See, e.g., 820 ILL. COMP. STAT. 17/10 (2018).

148. See, e.g., *Compass Bank v. Hartley*, 430 F. Supp. 2d 973, 980 (D. Ariz. 2006) (“[A] court is empowered to cross out over broad, unreasonable provisions in an agreement while keeping in place less onerous, enforceable ones.”).

149. *Dicen v. New Sesco, Inc.*, 839 N.E.2d 684, 687 (Ind. 2005).

out of an unreasonable one under the guise of interpretation” but will only enforce the severable parts that exist in the agreement.¹⁵⁰

In some instances, employers will include “step-down provisions” in their restrictive covenants in order to take advantage of a state’s blue-pencil doctrine.¹⁵¹ These provisions provide a range of certain temporal or geographical restrictions for the court to choose from.¹⁵² This allows the court to decide the extent of the covenant’s enforceability without having to create a provision that the parties did not contemplate.¹⁵³

In contrast to states that allow for blue-penciling, California courts will not selectively enforce lawful restrictions amidst unlawful ones, as this would undermine the policy behind the state’s general prohibition against restraints of trade.¹⁵⁴

In sum, the legal landscape surrounding NSAs as forms of NCCs in employment contracts is complicated and varies from state to state. In Part II, this Note reviews how some courts have analyzed NSAs or NCCs and decided whether the agreements were breached via social media.

II. SAMPLING OF SOCIAL MEDIA NSA BREACH CASES THUS FAR

In recent years, courts have begun to see more and more cases alleging breaches of NSAs via social media. The complications presented by the medium of social media in this context have been warned of for years.¹⁵⁵ Because of the fact-dependent nature of restrictive-covenant cases, the novelty of social media as a mode of communication, and the difficulty of ascertaining a former employee’s intent, deciding whether communications on social media constitute solicitations has proven to be a complex inquiry. This Part discusses some of the reasoning that courts have used in recent cases dealing with alleged social media breaches of NSAs.

A. Lack of Social Media–Specific Language in Contracts

In *BTS, USA, Inc. v. Executive Perspectives, LLC*,¹⁵⁶ defendant Marshall Bergmann, who was previously employed by plaintiff BTS, left his job and

150. *Clark’s Sales & Serv., Inc. v. Smith*, 4 N.E.3d 772, 779 (Ind. Ct. App. 2014). An exercise of the Indiana blue-pencil doctrine occurred in *Seach v. Richards, Dieterle & Co.*, 439 N.E.2d 208, 213 (Ind. Ct. App. 1982).

151. *See Compass Bank*, 430 F. Supp. 2d at 980.

152. *Id.* at 981 (“The step-down provision includes a narrow duration range of 1–2 years and a reasonable geographical scope of 25–50 miles.”).

153. *Id.* (preserving the covenant by choosing to enforce a duration of one year and geographic scope of twenty-five miles).

154. *See Kolani v. Gluska*, 75 Cal. Rptr. 2d 257, 259–60 (Ct. App. 1998).

155. *See generally* Marisa Warren et al., *Practitioners’ Note: Social Media, Trade Secrets, Duties of Loyalty, Restrictive Covenants and Yes, the Sky Is Falling*, 29 HOFSTRA LAB. & EMP. L.J. 99 (2011) (warning of the imminent complications of social media sites like LinkedIn and Facebook as related to restrictive covenants); Daniel R. Anderson, Note, *Restricting Social Graces: The Implications of Social Media for Restrictive Covenants in Employment Contracts*, 72 OHIO ST. L.J. 881 (2011).

156. No. X10CV116010685, 2014 WL 6804545 (Conn. Super. Ct. Oct. 16, 2014).

went to work for a competitor, Executive Perspectives.¹⁵⁷ Bergmann's employment contract with BTS contained a noncompetition clause that would take effect upon his departure.¹⁵⁸ The agreement contained a client-specific nonsolicitation agreement.¹⁵⁹ BTS's claim of breach of this provision rested on several bases, all of which were denied by the court for lack of any actual harm to BTS.¹⁶⁰ One of these bases was that Bergmann announced his new employment on LinkedIn and invited his LinkedIn connections to visit the website he had recently created for Executive Perspectives.¹⁶¹

The court, while noting the lack of evidence that any BTS client or customer actually viewed the Executive Perspectives website or did business with Executive Perspectives as a result of Bergmann's post, relied heavily on the fact that BTS did not have any policies or restrictions in place that dealt specifically with current or former employee social media usage.¹⁶² The court reasoned that without an explicit restrictive provision governing social media usage by former employees, it would be "hard pressed" to read restrictions of that nature into the employment contract.¹⁶³ The court held that this NSA would likely be overly broad and unenforceable if it restricted Bergmann from posting the way he did on LinkedIn.¹⁶⁴

Without going into much detail about the NSA's reasonableness, the court supported its holding by citing the Connecticut common-law reasonableness test for restrictive covenants, which includes five criteria: "(1) the length of time . . . ; (2) the geographic area covered . . . ; (3) the degree of protection afforded to the party in whose favor the covenant is made; (4) the restrictions on the employee's ability to pursue his occupation; and (5) the extent of interference with the public's interests."¹⁶⁵

Beyond focusing on the language of the covenant, courts have also focused on the language of the former employee's communication.

157. *Id.* at *3.

158. *Id.* at *2–3.

159. *Id.* The nonsolicitation provision provided:

Employee shall not for a period of two (2) years immediately following the end of the Employee's active duties with Employer, either directly or indirectly, either for himself or for any other person, company or other business entity:

. . . .
b. Call on solicit or take away or attempt to call on solicit or take away or communicate in any manner whatsoever, with any of the clients of Employer;

c. Call on, solicit, or take away, or attempt to call on solicit, or take away or communicate in any manner whatsoever, with any of the clients of Employer on behalf of any business which directly competes with employer.

Id.

160. *Id.* at *11–12.

161. *Id.*

162. *Id.*

163. *Id.* at *12.

164. *Id.*

165. *Id.* A finding of unreasonableness for any criterion would be enough to render the covenant unenforceable. *Id.*

B. Substance and Content of Communication

The court in *Bankers Life & Casualty Co. v. American Senior Benefits LLC*¹⁶⁶ relied upon an important consideration for all NSA cases, not just social-media-related cases: the substance and content of the communication over the form.¹⁶⁷ Defendant Gregory Gelineau was a branch sales manager in Bankers Life's Warwick, Rhode Island, office who signed an employment contract containing a two-year, territorial NSA.¹⁶⁸ Gelineau went on to work for American Senior Benefits, a competitor of Bankers Life, after his employment there ended in January 2015.¹⁶⁹

Bankers Life alleged, *inter alia*, that Gelineau breached his NSA by sending LinkedIn email requests to connect to three Bankers Life employees from the Warwick office and that these emails would lead those employees to click on Gelineau's profile and see a job posting for American Senior Benefits.¹⁷⁰ Gelineau argued that these were generic emails sent from LinkedIn to all of his email contacts and that he did not specifically send any direct messages to Bankers Life employees in Warwick regarding his new employer.¹⁷¹

The court noted that Gelineau's emails did not explicitly mention Bankers Life, American Senior Benefits, or the job posting on Gelineau's profile, and therefore the emails were not solicitations; they were merely LinkedIn requests to connect.¹⁷² Despite evidence that at least one Bankers Life employee did see the job posting on Gelineau's profile, the court stated that the Bankers Life employees had the choice to connect or not and that Gelineau could not be responsible for what they would see on his profile.¹⁷³

In another case that focused on the substance of the communication, *Mobile Mini, Inc. v. Vevea*,¹⁷⁴ Mobile Mini sought a preliminary injunction to enforce the terms of an employment contract with former employee Liz Vevea.¹⁷⁵ The contract contained a NSA stating that, upon termination, Vevea would not make portable storage sales to Mobile Mini customers for nine months, "directly or indirectly solicit" Mobile Mini customers "for the purpose of making portable storage sales," "make referrals for profit" related to Mobile Mini customers for one year, or "poach current or former [Mobile Mini] employees with whom Vevea interacted to work for a competitor" for one year.¹⁷⁶

166. 83 N.E.3d 1085 (Ill. App. Ct. 2017).

167. *Id.* at 1091.

168. *See id.* at 1087.

169. *See id.* at 1087–88.

170. *Id.* at 1088.

171. *See id.*

172. *See id.* at 1091.

173. *See id.* at 1088, 1091.

174. Civil No. 17-1684 (JRT/KMM), 2017 WL 3172712 (D. Minn. July 25, 2017).

175. *Id.* at *1.

176. *Id.*

Vevea resigned and went to work for a Mobile Mini competitor, LSI.¹⁷⁷ Less than six months later, Vevea updated her LinkedIn to show her new position at LSI and posted:

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. [Her phone number].¹⁷⁸

Mobile Mini alleged that Vevea's LinkedIn posts were visible to her more than five hundred connections, which included at least one Mobile Mini customer or customer representative.¹⁷⁹ The court did not decide on the validity of the restrictive covenants in Vevea's contract because that issue was not disputed by the defendants, but it found that the agreement was reasonably limited in geography and duration and that Mobile Mini had a legitimate interest "in ensuring Vevea's replacement ha[d] the opportunity to establish himself or herself before Vevea engage[d] in robust direct competition in the same market on behalf of another company."¹⁸⁰ The court cited *Bankers Life* in concluding that the substance of Vevea's posts showed that her goal was to solicit business from people in her LinkedIn network and not simply to announce a new job.¹⁸¹

The court found Vevea's posts to be "relatively minor" breaches of her NSA, granted the injunction to enforce the contract's original restrictive covenants, required Vevea to remove the LinkedIn posts, and enjoined her from posting any more advertisements of her new employer's services until the expiration of the NSA.¹⁸² The court also stated that the restriction on Vevea's posting extended "with equal force to any other social media sites other than LinkedIn to the extent that Vevea's friend list or network on such a site includes at least one Company Customer or their representative" but that she was free to post "mere 'status updates' listing her place of work and contact information."¹⁸³

The decision in *Mobile Mini* stands in almost direct contrast to parts of the reasoning in both *BTS* and *Bankers Life*. With respect to the substance-over-form consideration, *Mobile Mini* comports with those cases as Vevea's posts evidenced an intent to solicit business.¹⁸⁴ However, *Mobile Mini* seems analogous to *BTS* in that there was no clear evidence that clients from the defendants' former employers saw the posts or did business with the

177. *Id.* at *2.

178. *Id.* About a week later, Vevea posted again on LinkedIn: "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! [Her phone number]." *Id.*

179. *Id.* Mobile Mini also alleged that "at least some if not all of these connections may have received an email notification about the new posts." *Id.*

180. *Id.* at *5.

181. *Id.* at *6.

182. *Id.* at *8.

183. *Id.* at *9.

184. *See supra* note 181 and accompanying text.

defendants' new employers as a result.¹⁸⁵ Moreover, it does not appear that Vevea's NSA contained social media-specific language,¹⁸⁶ which the court in *BTS* noted as an important factor in determining the reasonableness of a NSA's restrictions.¹⁸⁷ Additionally, Vevea's NSA defined customers she was prohibited from soliciting as "any past, present, or prospective [Mobile Mini] customer (or customer representative or affiliate) with whom or which [Veeva] had [Mobile Mini] business related contact (in person, by phone, by videoconference, or in writing)" within the year prior to her termination.¹⁸⁸ This description arguably does not encompass customers with whom Vevea had merely connected on social media.

Regardless of these differences, Vevea was found to have breached her NSA whereas Bergmann was not. While Vevea's posts contained stronger language of solicitation than Bergmann's, both were arguably advertising their services and inviting people to inquire about them via social media.

In *Bankers Life*, Gelineau sent generic LinkedIn invitations to former coworkers he was not already connected with, which led at least one of them see his job posting.¹⁸⁹ In *Mobile Mini*, it does not appear that Vevea sent invitations to Mobile Mini customers with whom she was not already connected. Yet Gelineau's emails, which arguably drew more attention to his posts because they targeted former coworkers with whom he was not already connected, were not found to be solicitations¹⁹⁰ while Vevea's posts were.¹⁹¹

C. Direct Versus Indirect Communication

An important characterization of social media communication is that of active or direct versus passive or indirect. In *Invidia, LLC v. DiFonzo*,¹⁹² the court held that a hair salon failed to show that a former employee violated her NSA when she friended eight clients from her former salon on Facebook after leaving the salon.¹⁹³ Maren DiFonzo's new employer posted on her Facebook profile announcing her new job and one of the eight clients commented on the post saying she would see DiFonzo for her appointment soon.¹⁹⁴ The court reasoned that because there was no evidence of DiFonzo actively communicating to clients that she was moving salons and that they should move their appointments to her new salon, DiFonzo's actions on Facebook likely were not breaches of her NSA.¹⁹⁵

185. See *supra* notes 162, 179 and accompanying text.

186. See *Mobile Mini*, 2017 WL 3172712, at *1.

187. See *supra* notes 163–64 and accompanying text.

188. *Mobile Mini*, 2017 WL 3172712, at *1 n.2 (alterations in original).

189. See *supra* notes 170, 179 and accompanying text.

190. See *supra* note 172 and accompanying text.

191. See *supra* note 182 and accompanying text.

192. No. MICV20123798H, 2012 WL 5576406, at *5 (Mass. Super. Ct. Oct. 22, 2012).

193. See *id.* at *6. As a result, the court denied Invidia's motion for a preliminary injunction. *Id.*

194. See *id.* at *5. That client also cancelled her upcoming appointment with DiFonzo's former salon. *Id.*

195. See *id.* at *6.

In *Amway Global v. Woodward*,¹⁹⁶ several former employees of a beauty-supply seller who were bound by an NSA argued that their posts on blogs and websites could not be violations of the NSA because “such passive, untargeted communications fail as a matter of law to qualify as actionable solicitations.”¹⁹⁷ The court highlighted a post by Orrin Woodward on his blog that discussed his decision to leave Amway for its competitor in which he stated, “If you knew what I knew, you would do what I do.”¹⁹⁸ Focusing on the substance of the communication instead of its active or passive nature, the court held that this type of statement qualified as a solicitation “despite the diffuse and uncertain readership of the site.”¹⁹⁹

The procedural posture of this case is worth noting, as the court was reviewing an arbitral award and seemed to be reaching for precedent when it cited to the sentencing portion of a criminal case to support its proposition that the passive nature of the communication did not matter as to whether it was a solicitation.²⁰⁰ The court, with deference, ultimately upheld the arbitrator’s conclusion that a solicitation occurred (despite the fact that the solicitation itself was unsuccessful) and did not assign any weight to the petitioner’s argument that the communication was passive.²⁰¹

In *Enhanced Network Solutions Group, Inc. v. Hypersonic Technologies Corp.*,²⁰² the court held that a vendor did not breach its NSA with a company when it shared a job posting in a public group on LinkedIn.²⁰³ After seeing the job posting in the group, an employee from the company with whom the vendor had the NSA reached out to the vendor, applied for the job, and was hired.²⁰⁴ The court reasoned that the employee who eventually got hired took the first active step in discussing the position with the vendor and that “Hypersonic merely followed where [the employee] led.”²⁰⁵

The fact patterns and outcomes in *Invidia* and *Enhanced Network Solutions* are difficult to reconcile. In *Enhanced Network Solutions*, the defendant company did not make the first active step in interacting with the allegedly solicited person,²⁰⁶ and consequently the court did not find them to have breached the NSA. But in *Invidia*, DiFonzo arguably made the first active step in attempting to solicit her former customers by friending them on Facebook—yet her actions, coupled with the post by her new employer on her Facebook profile, did not constitute a solicitation.²⁰⁷

Moreover, in *Amway Global*, the court’s simple rejection of an argument based on the distinction between active and passive communication left

196. 744 F. Supp. 2d 657 (E.D. Mich. 2010).

197. *Id.* at 674.

198. *Id.* at 673.

199. *Id.* at 674.

200. *Id.*

201. *Id.* at 674–76.

202. 951 N.E.2d 265 (Ind. Ct. App. 2011).

203. *Id.* at 267, 269.

204. *Id.* at 269.

205. *Id.*

206. *See id.*

207. *See supra* notes 192, 195 and accompanying text.

something to be desired in terms of exploring this concept.²⁰⁸ This is particularly true given the complex nature of internet and social media communication. A blog post is arguably more passive than the post on DiFonzo's Facebook profile because one typically does not have followers or friends on a blog; thus, it is almost impossible to direct communication at anyone. Platforms like Facebook allow for much more direct communication because Facebook users are capable of knowing exactly who is able to see their posts.

In sum, there is room for change in the way courts assess the reasonableness of NSAs purporting to restrict social media communication and how courts decide whether a breach has occurred on social media.

III. GOING FORWARD: HOW COURTS SHOULD EVALUATE REASONABLENESS AND ASSESS ALLEGED BREACHES ON SOCIAL MEDIA

Current approaches to cases involving breaches of NSAs on social media do not adequately address the complexity of social media communication. Courts can address this issue by tailoring their assessments of the reasonableness of NSAs (or NCCs, depending on the framing of the agreement at issue) to accommodate for changes in the ways employees and employers communicate and operate their businesses today. Courts should also tailor how they assess whether a solicitation via social media occurred.

If evidence exists to support the conclusion that a former employee's social media activity was simply complementary to other clearer showings of solicitation (e.g., voicemails, emails, or letters that contain definite language of solicitation), then the analysis of the social media activity itself will not be as important. This Part focuses on how courts should approach cases that deal with alleged solicitations that occur solely via social media. Part III.A proposes considerations for courts in deciding the reasonableness of the restrictive covenants in social media cases. Part III.B proposes factors that courts should take into account when deciding whether a breach has occurred via social media.

A. Redefining "Reasonableness" in Light of Changing Modes of Communication

In light of the rise of social media as a professional mode of communication and employers' increased desire to restrict employee activity on social media, there are several concepts that courts should incorporate into their common-law reasonableness tests when determining the enforceability of NSAs that deal specifically with social media usage. Because social media presents opportunities for communication that are not comparable to making a phone call, sending an email, or mailing a letter,²⁰⁹ courts should employ a flexible standard of reasonableness when an employer alleges a strictly social-media-related NSA breach. This flexible standard would come into

208. See *supra* note 199 and accompanying text.

209. See *supra* Part I.A.

play where courts look at the nature of the covenant, discuss the time and geographic area factors, and discuss the respective interests of employers and employees.

1. Nature of the Restrictive Covenant's Language

The court's inquiry into the reasonableness and enforceability of the restrictive covenant should begin with a determination of the nature of the restriction based on the language of the covenant—whether it is a noncompete provision, nonsolicitation provision, or a combination of the two.²¹⁰ If the court determines that an NCC was written solely for the purpose of protecting customer relationships or protecting against the poaching of its employees, the court should not consider it a reasonable means for protecting those interests.²¹¹

Because the fast-paced modern economy disadvantages more heavily restricted employees,²¹² broad NCC provisions should not be allowed to prevail if the only protectable employer interest is customer relationships. In this case, if the contract contains both an NCC and an NSA (or a blue-pencil-friendly provision containing elements of both types of restrictions), then the court should choose to enforce just the NSA if it is found to be reasonable.²¹³ If the restrictive covenant is not blue-pencil-friendly or if the state statute does not permit blue-penciling, the court should strike the entire provision.²¹⁴ This threshold determination of whether an enforceable NSA exists aids courts in determining whether the NSA is sufficiently reasonably tailored to restrict social media activity.

In assessing the language of the restrictive covenant, the court should next look to whether the covenant contains social media-specific language.²¹⁵ Employees and employers would benefit from including specific language about the extent of restricted communication so that all parties are on notice about one another's expectations. In light of the community and professional benefits of social media, courts should require NSAs that restrict social media communication to contain explicit language defining what type of communication is covered.²¹⁶ An example of permissible social-media-restricting language might be: "Employee shall not directly message, post on the profile of, or tag any current client or employee of the Company on social media in an attempt to solicit business of the kind the Company performs from a client or to entice an employee to leave the Company."

Language that bars any open posting of potential solicitations (i.e., posting on one's social media profile in a manner that is visible to all friends or all users of the site) should be seen as too broad, given the fact that people may

210. *See, e.g., supra* note 77 and accompanying text.

211. *See supra* note 78 and accompanying text.

212. *See supra* notes 124–27 and accompanying text.

213. *See supra* note 78 and accompanying text.

214. *See supra* notes 148–54 and accompanying text.

215. *See supra* Part II.A.

216. *See supra* notes 129–37 and accompanying text.

have past clients or coworkers as friends on social media whom they have forgotten to remove after leaving a job.²¹⁷ This is also too broad because posting on one's own profile should not be seen as a form of communication that is direct or active enough to constitute a solicitation.²¹⁸

2. Length of Time and Geographic Area Covered

Courts should look at the industry that is implicated in the case in order to determine if the duration and geographic scope of the NSA are reasonable. For example, in *Compass Bank v. Hartley*, the court cited several cases where employers sought to enforce NSAs in the financial-services industry and highlighted that those NSAs only contained one-year duration requirements, as opposed to the two-year duration the plaintiff wanted to enforce.²¹⁹ Consideration of the implicated industry is crucial to account for a dynamic economy and the fact that certain restrictions on employees may be reasonable in some industries but not in others.²²⁰

Further, the geographic area implicated in an NSA's scope of restriction should only matter when an employee directly messages a former client or coworker located in a specific, narrowly tailored area in an attempt to solicit him or her on social media. If a restrictive covenant attempts to restrict the geographic location of a former employee posting on his or her social media profile without directly messaging, tagging, or otherwise actively drawing a former client or coworker's attention to the post, then courts should see this as overbroad and unnecessary in protecting employer interests.

3. Employer Interests

Among the employer interests in having an NSA, courts should always consider trade secrets and confidential information to be legitimately protectable interests.²²¹ However, if an employer argues that a client list is protectable as a trade secret or confidential information, the employer should have the burden of showing that this client information is: (1) not available to the public via the internet or otherwise, and (2) that it contains specific client information with a distinct competitive advantage.²²² If one could simply conduct a few Google, Facebook, or LinkedIn searches to identify the employer's clients and determine how to reach them, this should not be considered protectable confidential information.²²³

As to the employer's interest in protecting customer relationships, courts and legislatures should follow the lead of states that require the employee to have had actual, substantive contact with the clients prior to separation from

217. *See supra* notes 134–35 and accompanying text.

218. *See supra* notes 61–69 and accompanying text.

219. 430 F. Supp. 2d 973, 980 (D. Ariz. 2006).

220. *See supra* notes 124–27 and accompanying text; *see also infra* Part III.A.4.

221. *See supra* notes 97–107 and accompanying text.

222. *See supra* notes 102–04 and accompanying text.

223. *See supra* notes 102–04 and accompanying text.

the employer.²²⁴ These are the clients with whom employees are likely to be “friends” on social media, so this requirement would further the reasonableness of the NSA if employers are worried about former employees’ ability to easily send a solicitation to a former client the employee worked with frequently.

4. Restrictions on Employees

Courts should consider the industry in which the employee works and decide whether it would be unfair for the employee to be restricted from engaging in certain social media activity. For employees like hairdressers, makeup artists, interior designers, photographers, and others who offer specialized, creative services and rely heavily on social media for marketing and promoting their businesses, it is unreasonable to require these employees to refrain from posting any type of solicitation on their social media accounts just because they are connected with one or more clients of their former employer.²²⁵ Employees in creative industries would be silly not to connect with their existing and potential clients on social media in order to market their services. Courts should not ignore the role social media plays in these industries.

Due to how prevalent the use of social media marketing is and how easy it is to connect with a wide audience through social media, employers cannot expect employees to go through their friend list to make sure their posts are not seen by a former client or coworker. People are expected to keep up with today’s fast-paced, competitive economy by putting their best professional image on display as widely as possible. This is often achieved by connecting on social media with as many professional acquaintances as one can. Given this, courts should at least consider the industry of the employee in determining the enforceability of a social media-specific NSA against them.

Expanding on this concept, it is unreasonable under most circumstances for an employee to abide by an NSA that, for example, demands that the employee remove or block all clients and coworkers from their social media accounts upon separation from an employer.²²⁶ NSAs are only valid for a relatively short period of time, and people are often friends in real life with their clients and coworkers. It would not serve the public interest to require people to weed through all of their social media platforms and remove people in anticipation of them possibly seeing future posts by the employee that may constitute solicitations.²²⁷

Because not all communication on social media is direct or active, an NSA that prohibits all social media engagement with any former client or coworker beyond private or direct messaging should be seen as unreasonable.²²⁸

224. *See supra* notes 89–90 and accompanying text.

225. *See supra* note 183 and accompanying text.

226. *See supra* notes 134–35 and accompanying text.

227. *See supra* notes 129–37 and accompanying text.

228. *See supra* notes 61–69 and accompanying text.

B. Considerations for Determining Liability

Once the court has decided that the NSA is enforceable and applies to social media activity, the court should take certain factors into account when determining whether the social media activity in question is a breach of the NSA. Courts should look beyond simply the substance of the communication to see whether it was targeted and active²²⁹ and whether the timing of the employee's engagement with clients or coworkers on social media was suspect.

The substance of the communication should always be a key factor in determining liability for an alleged breach of a NSA.²³⁰ However, this factor should not end the inquiry. Even if a communication is deemed a solicitation, as it was in *Mobile Mini*, it should not immediately follow that this solicitation violated the NSA at hand.

Social media communication that constitutes a solicitation and is active and targeted at a specific client or coworker (or group of clients or coworkers) should weigh in favor of finding a breach of an NSA. For example, a former employee who shares a job posting on his LinkedIn and tags former coworkers in the post, or who sends a private message or posts a solicitation directly on the profile of a client, should probably be found to have violated his NSA. However, if the solicitation is posted on one's own profile and does not cause any notification emails to be sent directly to any specific friends, followers, or connections, then this should not be seen as a breach. As discussed above, it does not make sense to require employees to monitor the recipients of their untargeted and passive posts.²³¹

Social media allows for people to communicate both actively and passively. A prime example of passive social media communication that seemingly lacks an analogous form of communication is the "story" function on Instagram and Snapchat. If someone posts on her story about products she is selling or services she is providing, assuming she does not tag former clients or coworkers in the post, this should constitute passive communication that does not violate an NSA. It is one thing for a user to post something directly on a client or coworker's profile, send him a direct message, or tag him, but it is another thing to post what may be deemed a solicitation without actively trying to direct former client or coworker attention to the post.²³²

Finally, much of the above analysis hinges on the assumption that most people who use social media in a professional context are not systematically or purposefully trying to find ways to solicit their former clients or coworkers in violation of an NSA. Because some employees who are sued by their former employers may not be so innocent, courts should consider the timing of adding or friending former clients or coworkers on social media in determining whether a breach of an NSA occurred.

229. See *supra* notes 61–69, 192–208 and accompanying text.

230. See *supra* Part II.B.

231. See *supra* Part III.A.4.

232. See *supra* Part II.C.

For example, if the court is presented with evidence that an employee left the employer, then subsequently decided to add former clients or coworkers on social media, then sent those new friends seemingly innocuous messages leading them to see strategically placed solicitation posts on his profile, the court may be inclined to find that a breach occurred. NSA breach cases will always be very fact-dependent,²³³ so the court should look to the timing of the initial connection or friending on social media and subsequent interactions between the former employee and former clients or coworkers to gauge whether there was improper intent on the part of the former employee.

CONCLUSION

Professional modes of communication have changed dramatically in recent years and will continue to change as social media evolves. Social media has become embedded in who we are and what we do in our daily lives, be it socially, professionally, or politically. At the same time, the global economy has shifted to an ultracompetitive environment where employees generally do not have the same job security they once did. Courts should take these changes into account when assessing the reasonableness of nonsolicitation agreements and other restrictive covenants. Courts should scrutinize NSAs that do not contain specific language about social media, consider the industry implicated, and decide whether certain restrictions on certain types of employees—especially those who rely on social media marketing for their livelihood—are unreasonable. Courts should also take heed of the fact that social media communication is very different from other types of communication. If courts can consider the substance of the communication, the targeted or untargeted nature of the communication, and the timing of social media activity, they can make a clearer decision as to whether an NSA breach occurred on social media.

233. *See supra* note 59 and accompanying text.