

When Is Facebook Activity "Solicitation?"

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**William A.
Nolan**

Partner
Columbus
Managing Partner



Employers who have restrictive covenants with employees likely are familiar with non-solicitation agreements, where employees agree not to "solicit" the employer's customers or other business associates after the employment relationship terminates. After an employee leaves and questions are raised about whether the employee is violating his or her contractual obligations to the now-former employer, often there is a question as to when communication and contact with customers becomes prohibited solicitation.

A Massachusetts court's decision in the recent case, *Invidia LLC v. DiFonzo* 2012 WL 5576406 (Mass. Super., Oct. 22, 2012) looks at this old question in a modern social media context. The case involved a hair stylist who had agreed to a two-year post-employment restriction on soliciting her employer's clients. Just four days after she left employment, a competing salon

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announced on Facebook that she was now employed as a stylist with it. One of the stylist's clients commented on the post that she was looking forward to an upcoming appointment. The stylist also became Facebook friends with at least eight of the customers she had worked with at the former employer.

The former employer sued the stylist and moved for a preliminary injunction restricting her employment with her new employer. The court denied the motion, saying the former employer did not show that the stylist had violated the nonsolicitation agreement, saying that being Facebook friends does not necessarily mean solicitation.

Restrictive covenant cases are what lawyers call "fact specific," meaning that a holding in one case cannot be assumed to apply to slightly different facts before a different tribunal. This case, however, underscores some of the issues that may arise in non-solicitation contexts and social media.

Employers who wish to enforce such provisions are advised to review them and ensure that they sufficiently address possible solicitation through social media. Employers who are bringing on an employee subject to a restrictive covenant should consult with counsel and coordinate with the new employee to minimize the risk that social media activity may raise issues with the former employer.