

Trade Secrets at the Employee Crossroads

Protecting Your Company and Managing Risk

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- ▶ Nearly two decades of experience advising and speaking on trade secret law in California and across the U.S.
- ▶ Extensive experience counseling clients, leading investigations, and handling litigation and trials in state and federal courts — representing both plaintiffs and defendants, from companies to individuals.
- ▶ Practice focused on the intersection of trade secrets and restrictive covenants

Key Issues for Discussion



What are
Trade Secrets?



Key Issues for
Offboarding
Employees



Key Issues for
Onboarding
Employees



Practice Tips

What are Trade Secrets?





What Is A Trade Secret?

- Defend Trade Secrets Act (**DTSA**) and State Law both generally protect information that:
 1. is the subject of “reasonable measures” or “efforts” to protect its secrecy; and
 2. has “independent economic value . . . from not being generally known.”
- Under, **DTSA**, information must also be not “readily ascertainable through proper means by another person who can obtain economic value from” its “disclosure or use”
- In some states, like California, ascertainability is an affirmative defense
- Defend Trade Secrets Act (**DTSA**), protects information including:

“all forms and types of financial, business, scientific, technical, economic, or engineering information . . . if—(A) the owner thereof has taken *reasonable measures to keep such information secret*; and (B) the information derives *independent economic value*, actual or potential, from *not being generally known* to, and *not being readily ascertainable* through proper means by, another person who can obtain economic value from the disclosure or use of the information”

18 U.S.C. § 1839(3) (emphasis added).





What Are “Reasonable Efforts” to Maintain Secrecy?

Very fact-intensive inquiry, depending on factors like:

- Nature of the secret
- Economic value of the secret relative to costs of security measures
- Probability of misappropriation
- Magnitude of harm that misappropriation would cause
- Size of the business
- Business’s need to disseminate the secret to exploit its economic value



Trade Secrets: 101

- Laws Vary State-to-State
- Sometimes depart from federal law
- Trade secret disclosure under Cal. Civil Procedure Code § 2019.210:

In any action alleging the misappropriation of a trade secret under the Uniform Trade Secrets Act . . . , before commencing discovery relating to the trade secret, the party alleging the misappropriation shall identify the trade secret with reasonable particularity

- Trade secrets and non-competition agreements
 - **California** does not recognize “inevitable disclosure doctrine” because it functions as a non-competition agreement, which California law prohibits.
 - **DTSA** also does not recognize “inevitable disclosure doctrine.” **BUT** federal law does *not* currently prohibit non-competes.



Codes and Compilations

- **DTSA:** “the term ‘trade secret’” can include “patterns, plans, *compilations*, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, *programs*, or *codes*”
 - Similar under CUTSA
- This means that a compilation can be a trade secret, even if the individual components are not
 - E.g. Customer list
 - Must meet other statutory requirements (e.g., secret, economically valuable)
 - Compilations that include public components can still be protectable, depending in part on the time, effort, and expense used to create the trade secret

Misappropriation means:

- “acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means”
- 18 U.S.C. § 1839(5).



Misappropriation means:

- “disclosure or use of a trade secret of another without express or implied consent ...”
- 18 U.S.C. § 1839(5).



“Improper means”

- “includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means; and”
- “does not include reverse engineering, independent derivation, or any other lawful means of acquisition”
- 18 U.S.C. § 1839(5).





What Remedies are Available?



Damages

- Actual Harm
- Many ways to measure including
 - Lost profits
 - Lost enterprise value
 - Reputational damages



Damages

- Unjust Enrichment
 - Avoided costs
 - Ill-gotten gains
- Injunctive Relief
- Reasonable Royalty
- Attorneys' Fees for willful and malicious misappropriation OR a lawsuit brought in bad faith
- Exemplary Damages

Key Issues for Offboarding Employees



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Practice Tips



Trade Secret Risk From Employee Departures

Layoffs and Terminations

- Chaos/upheaval of sudden corporate action or restructuring, or RIF
- Bad feelings from sudden departure
- Likelihood of moving to competitors



Trade Secret Risk From Employee Departures

Employee Mobility

- More common in certain industries
 - E.g., Insurance brokerage
 - E.g., Finance
- Remote work → likelihood of possessing confidential information
- Likelihood of movement to competitors



Trade Secret Risk From Employee Departures

Limitations on Restrictive Covenants

- E.g., California Business & Professions Code Section 16600
 - No noncompetes
 - No client nonsolicits
 - Fate of Employee nonsolicits and NDAs Uncertain
- E.g., FTC Rule (now rescinded)
- Trade Secrets have become a Viable Alternative



Trade Secret Risk From Employee Departures

New Management/Acquisitions

- Change in personnel dynamics
- Team loyalty can lead to departures



Trade Secret Risk From Employee Departures

It's all about emotions!



-
- Take reasonable steps to protect your trade secrets
 - No one size fits all course of action
 - Depends on your company and needs
 - Potential examples:
 - Password protection
 - Other security
 - Employee Handbook
 - Contracts with confidentiality clauses
 - Limit sharing to need-to-know basis
 - Code names
 - Don't sit on your rights! (Example...)



Mitigation of Risk from Departures

Exit Interview

- Key questions:
 - Who to use (HR or attorneys)?
 - Issues of privilege
 - In person or written only?



Mitigation of Risk from Departures

Have departing employees sign
certification



Mitigation of Risk from Departures

-
- **Preserve computer**
 - **Return of Information**
 - Ask specifically
 - E.g., cloud, phones, messages, photos, removable devices, social media, personal devices, personal email
 - Everyone has something!



Mitigation of Risk from Departures

Ask about next employment

- And follow up!
- If a competitor...take action
 - Remove them from ability to access confidential information



Mitigation of Risk from Departures

What to do when faced with potential wrongdoing?

- Analyze computer
 - Forensic investigation
- Internal or External?
- Demand letter
- Litigation
 - TRO/PI
 - Risk of \$\$ and legal quagmire
 - Risk of countersuit

Key Issues for Onboarding New Employees





Trade Secret Risk from New Employees

Similar to departures → Converse

- Layoffs/terminations in industry
- Business growth
 - It's a good thing! But it comes with risk...
- Employees have friends



Mitigation of Risk from Onboarding

Understand their restrictive covenants

- Obtain a copy and assess risk
- Not always enforceable, but better to know than not know



Mitigation of Risk from Onboarding

Include contractual obligations not to bring over or use employee trade secrets

- Options include (not exhaustive):
 - Employee handbook
 - Onboarding certification
 - Employment agreement



Mitigation of Risk from Onboarding

Guidance to team on interviews/recruiting

- Don't hire folks for their confidential information
- Don't solicit information while still at OldCo
- Don't encourage anyone to be a “mole”



Mitigation of Risk from Onboarding

In depth onboarding

- Actually walk through
- Questions:
 - To do in privileged or non-privileged setting?
 - What to do if new employee has retained OldCo information?

Practice Tips





Practice Tips & Strategic Considerations

- ✓ Put in place sound written policies about confidential information
- ✓ Ensure consistent onboarding and offboarding practices
- ✓ Protect your confidential information
- ✓ Investigate suspicious departures and don't sit on your rights
- ✓ Provide concrete but practical guidance to the business

Questions?

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