LEGAL STRATEGIES

A Legal Newsletter From Hochfelsen&KaniLLP

Spring 2010

How To Protect your Company's Trade Secrets

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In today's information age, knowledge is power. More and more companies nowadays are in the business of profiting by using and selling information, rather than by manufacturing goods. As a result, a company's "trade secrets" or confidential information are its stock-in-trade. Lose them, and profits nosedive.

Our society recognizes the importance of keeping the confidentiality of certain information and as a result, 40 states and the District of Columbia have adopted the Uniform Trade Secrets Act ("UTSA"), with some modification in each state.

Among other things, the definition of "trade secret" that was adopted as part of the UTSA varies slightly from state to state. The UTSA was adopted in California in 2003 and now exists beginning at Section 3426 of the California Civil Code. In California, a trade secret it is defined as information, including a formula, pattern, compilation, program, device, method, technique or process, that:

- derives independent economic value, actual or potential, from not being generally known to the public or other persons who can obtain economic value from its disclosure or use, and

- is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

If an item is recognized as a trade secret or confidential information, the UTSA provides you with many rights and remedies if it is stolen. This includes damages and court orders prohibiting its use by competitors who acquired it improperly, among other things.

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Trade Secrets And Confidential Information

Quite a bit of information can be protected as a trade secret under the UTSA. Essentially, trade secrets are almost any information that gives a business entity a competitive advantage if they are kept secret from the competition. This can include: customer lists, software, manufacturing processes, the formula for manufacturing a product, information about customer needs, ordering patterns and preferences, business plans,

marketing techniques, and even information about your general business strategy and direction.

Even items that might not be trade secrets under the law may be protected in California if their disclosure would give a competitor an advantage, and the information is kept confidential within your company.

Quite a bit of information can be protected as a trade secret

In order to be protected, trade secrets and confidential information must be unavailable to the general public and not able to be discovered by, for example, just looking through the phone book or publicly available information. It also must be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." In other words, as long as the company makes "reasonable efforts," even if the secret gets out in some way, you may protect it under the UTSA.

The UTSA states that not every person must receive express notice of the trade secret status of every piece of information. However, you should try to give such notice to anyone who might receive it. The standard is that you must undertake "reasonable efforts" to maintain secrecy. Though this seems to be an objective standard, what efforts are "reasonable" may differ in the minds of judges and juries. So more, rather than fewer, efforts, is better.

Companies who are concerned about keeping the competitive advantage that comes from keeping their trade secrets, well, secret, should take some steps now to protect them. Doing so is a good idea for two reasons. First, if you take the proper protective actions now, it will be more difficult for someone to steal your trade secrets or confidential information. Second, taking proper steps will make it easier for you to get relief from a court under the Uniform Trade Secrets Act and other relevant laws if someone steals them.

Steps You Can Take To Protect Your Trade Secrets Now

• Decide what information you want to protect as a trade secret or confidential information. But be reasonable in doing so. If you define everything as a trade secret, it will weaken your position when arguing that a particular piece of information is, in fact, confidential and that its secrecy is essential to your company's success.

• Limit access to the information only to persons who need to know it as a part of their job duties.

• Have all employees who will be exposed to trade secrets or confidential information sign a confidentiality agreement that contains a statement that they recognize that it is a trade secret, that it is distributed on a "need to know only" basis, a promise not to use the information in the future to compete with your company, and an agreement to advise any subsequent employer of the restrictions. Make sure those agreements are reasonable in scope and nature and that they contain adequate consideration to make the agreement enforceable. Keep the signed agreement as part of each employee's file.

• Include a similar confidentiality provision in all contracts with temporary workers, outside entities, vendors who will have access to the information, distributors, partners and customers. Keep the signed agreement as part

of files for those workers and entities, as well.

• If a document contains trade secrets, label it as confidential, and treat it as such. Prevent widescale copying of such documents and, if appropriate and manageable, number each copy (in the middle of the page, so that the source of any unauthorized copies can be identified), register the document numbers and require that the documents be returned for destruction either when the task is completed or on demand.

Limit access to information to persons who need to know it as a part of their job

• Create a formal confidentiality policy for all trade secrets and confidential information, follow it, and instruct all employees who work with any company information that certain such information is considered a trade secret, to be treated confidentially.

• Act appropriately to correct and discipline all persons who violate these policies.

• Conduct exit audits with all departing employees and, as a part of these audits, have them return all secret information and advise them of their duties under any non-compete, non-disclosure, or other agreements. Have these spelled out in a document which they acknowledge reviewing by signing it.

• Make sure that confidential information in a computerized file is available only with a password, and that the password is given only to necessary personnel and is changed regularly. Keep a record of the measures taken by, for example, logging the dates that the passwords are changed. Create firewalls to any internet-connected computers and maintain necessary security to prevent computer espionage and theft.

• Be careful of emails, and adopt a formal policy of not exchanging trade secrets or confidential information via email. Emails are stored on every computer on the internet through which they pass on the way to their destination, and it is not secure. If email is the only way to exchange information, use an encryption program, such as PGP, to protect it.

• Conduct periodic trade secret audits to check for leaks.

• Be aware that trade secrets laws in the U.S. are different from laws in other countries. Outside the U.S., trade secret protection may be nonexistent. In some countries, industrial espionage is considered legal, acceptable and is often used.

If you follow the recommendations above, you are well on your way to protecting your company's trade secrets and ensuring that your company has a legitimate advantage in using its confidential information in a profitable way. After taking the above steps, anyone who attempts to steal your trade secrets or confidential information does so at his or her own peril; as you have greatly increased your chances of prevailing in judicial proceedings to protect them.

If you have any questions, or if we can assist in your legal needs, please call us at (714) 907-0697, or email:
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