

### ***Trade Secret Basics***

It is protected by an advanced high-tech security system. No one person knows the entire formula. It is the most famous trade secret in the world - the formula for Coca-Cola. The Coke recipe is well over 100 years old and has yet to be replicated or stolen. Your trade secrets may not require armed guards, barbed wire fences or retina scans, but you should follow common-sense procedures and protect the valuable components of your business.

Every business, regardless of size, has some information that they would prefer to keep confidential. It might be client lists, business plans, an electrical process, source code, or just about any type of financial, business, scientific, technical, economic or engineering information - all these are potential trade secrets of the business and may be protected by State and Federal laws.

There is no originality requirement for the trade secret status, and no required filings or costly applications. New Hampshire has adopted the standards set out by the Uniform Trade Secrets Act and they are incorporated in N.H. Rev. Stat. Ann. 350-B, which is available at the state website [<http://www.state.nh.us>].

Under the U.S. Economic Espionage Act of 1996, trade secret misappropriation is a federal offense with criminal liability and damages. In one case, an engineer employed as a sub-contractor by Gillette to develop production equipment for a new shaving design allegedly downloaded secret data and drawings onto his laptop computer. He then distributed the information to Gillette competitors by fax and electronic mail. He was charged with copying and attempting to steal, copy, or possess trade secrets in violation of the Espionage Act.

There are only two basic requirements to establish a trade secret. First, the information, including any formula, pattern, compilation, program, device, method, technique, or process, must have some commercial business value. Secondly, the secret is....Well it's a secret, and it's treated like a secret.

The first prong, commercial value, focuses on the importance of the information. The business owner can demonstrate a dollar value associated with obtaining the

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information or show the money spent by the competition is taking the information. Most importantly, information is NOT a trade secret if it is "readily ascertainable by proper means." If the information is generally known, it cannot have commercial value and is therefore not a trade secret.

The second prong of the statute requires the holder of the alleged trade secret to maintain reasonable efforts to secure the secrecy status. How many people know the trade secret? Did the employees/contractors sign confidentiality agreements? To what extent were computer passwords, cabinet locks and door locks used? Follow the military adage - Need to know - the material must be carefully tracked, restricted, and of limited distribution.

Not only should you protect you or your company's trade secrets, but you should be careful not to inadvertently misappropriate the trade secrets of others. Just what information is an ex-employee allowed to use? As one court eloquently expressed in *Fleming Sales Co. v. Bailey*, 611 F. Supp. 507, 514-15 (N.D. Ill. 1985);

Such information comprises general skills and knowledge acquired in the course of employment. Those are things an employee is free to take and to use in later pursuits, especially if they do not take the form of written records, compilations or analyses. Any other rule would force a departing employee to perform a prefrontal lobotomy on him or herself. It would disserve the free market goal of maximizing available resources to foster competition.... [I]t would not strike a proper balance between the purposes of trade secret laws and the strong policy in favor of fair and vigorous business competition.

No frontal lobotomy required - (although in some cases it probably wouldn't make a difference!)

Some of the trade secret cases involving spying and bribery are easy to peg. But, many of the cases are not as clear, especially when an ex-employee is involved. A new employee may want to impress his superiors by using materials and confidential information obtained from the previous employer, not realizing the potential risks.

Protect yourself and your business. Have counsel draft the appropriate company agreements and policies and make sure these guidelines are followed. A comprehensive company policy not only helps protect your business trade secrets, but also aids in eliminating inadvertent misappropriation of the trade secrets of others.

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