

Trade Secrets and Confidential Information

Law of Trade Secrets: DTSA and CUTSA

CUTSA: Provides civil action for misappropriation of trade secrets in violation of California's Uniform Trade Secrets Act. CUTSA has three core elements (*Cytodyn, Inc. v. Amerimmune Pharm., Inc.*, 160 Cal. App. 4th 288, 72 Cal. Rptr. 3d 600 (2008)): (1) The defendant acquired, disclosed, or used the plaintiff's trade secret through improper means; (2) The defendant's actions damaged the plaintiff; (3) The plaintiff owned a trade secret

Remedies: Compensatory damages, reasonable royalty, restitution, exemplary damages, reasonable attorney's fees, injunction

DTSA: Provides federal cause of action for trade secret misappropriation (does not preempt CUTSA)

Remedies: Compensatory, reasonable royalties, exemplary damages, reasonable attorney's fees, injunction, ex parte seizure order (under extraordinary circumstances)





What is a Trade Secret?

- Consists of Information
- Derives actual or potential independent economic value from not being generally known to:
 - The public; or
 - Other persons who can obtain economic value from its disclosure or use

Subject to reasonable efforts to maintain its secrecy

Law of Trade Secrets: Business Torts

- **Unfair Competition**

Remedies: restitution, injunction

- **Intentional Interference with contract**

Remedies: Compensatory, exemplary damages, injunction

- **Intentional Interference with Prospective Economic Advantage**

Remedies: Compensatory, exemplary damages, injunction



Recommended Practices

- Take reasonable steps to maintain the secrecy of trade secrets
 - Designate information as a trade secret (i.e. customer list, process, financials and marketing strategy)
 - Place employees on notice that such information is a trade secret
 - Confidentiality agreement/Non-Disclosure agreement
 - Restrictive covenants limited to release of trade secret information
 - Restrict access to and public display of trade secrets to protect their status
 - Avoid overly broad policies or banning activity that interferes with Section 7 rights under the NLRA



Non-Disclosure/Confidentiality Agreement

General purpose: To prevent unauthorized disclosures of information

Key Provisions

- ✓ Persons/entities subject to agreement
- ✓ Business purpose
- ✓ Definition of confidential information
- ✓ Exclusions from definition
- ✓ All nondisclosure obligations
- ✓ Use and access restrictions
- ✓ Safekeeping and security requirements
- ✓ Term/survival of nondisclosure obligations
- ✓ Return or destruction of confidential information



Drafting a non-compete agreement that does not violate California Law

- Section 16600 of the Business and Professions Code provides that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void"
- "This section invalidates provisions in employment contracts that prohibit "an employee from working for a competitor after completion of his employment or imposing a penalty if he does so [citation] *unless* they are necessary to protect the employer's trade secrets." *Muggill v. Reuben H. Donnelley Corp.*, 62 Cal. 2d 239, 242 (Cal. 1965)

Agreement May:

- ✓ Preclude employee from using or disclosing trade secret information in subsequent employment
- ✓ Require employee to refuse offers of employment requiring disclosure of company's trade secret information
- ✓ Preclude employee from using customer list, (provided that reasonable efforts to establish trade secret status are made) to solicit business from those customers.

Trade Secret Misappropriation Litigation

Scenario: Mike and his brother Jasper were hired by Countertops Co. as sales persons. Over time, Jake and Jasper learn about the countertop manufacturing business in detail (machinery used, manufacturing process, raw supplies, profit margin, marketing methods and contacts in the industry). One day, they decide to resign from Countertops Co and start their own countertop manufacturing business in the area. They contact all the customers that they have serviced during their employment at Countertops Co. They have been in business for six months now, and 60 percent of their customers are former Countertops Co. customers. Countertops Co. has noted a significant drop in revenue in the last six months.

Can Countertops Co. Sue Mike and Jasper for lost business?

Other Employment and Labor Law Updates

New Restroom Sign Requirement

AB 1732. Starting March 1, 2017, all single-occupancy restroom facilities in any business establishment, place of public accommodation or government agency must be identified as “all-gender” toilet facilities. The law authorizes inspectors or other building or local officials responsible for code enforcement to inspect for compliance (Health and Safety Code sec. 118600).

Questions???



