

Protecting the Trade Secrets of a Small Business

Perhaps the two best-kept trade secrets in corporate history are the formulas for Coca-Cola and the recipe for Kentucky Fried Chicken. These are important trade secrets for these billion-dollar companies, but to a small business, your trade secrets are just as valuable.

A trade secret is generally defined as: 1) some type of information 2) that has economic value because it is secret (proprietary), and 3) that your business is making a reasonable effort to keep secret. Examples include formulas, patterns, programs and apps, devices, methods, and processes. A trade secret is not known outside of the company, and a company needs to do everything necessary to keep the secret internally. Failure to adequately protect your company's trade secrets may give the impression that they are not so secret, and a business may be unable to claim that leaked, valuable information is a trade secret.

Federal laws addressing trade secrets can be found in the Economic Espionage Act of 1996. This act protects secrets that, if stolen, can be used to benefit a foreign country, while also addressing the theft of trade secrets that can benefit anyone.

A second federal statute, the Uniform Trade Secrets Act enacted in 1975, provides uniformity of trade secret protection across all states that have adopted the Act. Such protection is increasingly important as interstate commerce is commonplace with so many transactions conducted via the Internet by companies both large and small. Forty-eight states have adopted it, including Georgia, which modified it somewhat as part of the Georgia Uniform Trade Secrets Act of 1990 (GUTSA).

Almost every company will have information it considers a trade secret, whether a process or even a customer list. In order to protect that trade secret several steps must be followed:

- A company should identify all information considered a trade secret;
- Mark them as confidential or proprietary, password protect and encrypt them as necessary and appropriate. If your trade secrets are in a tangible form, physical security measures, including securing papers, formulas, etc. in vaults, should be used;
- Make a list of key positions within your company and the types of secrets individuals in these positions have knowledge of;
- Control access to these secrets, prohibit or restrict downloading of trade secrets, and prohibit the storage of any trade secrets on personal devices;
- Get agreements from key people with access to trade secrets (confidentiality agreements or non-disclosure agreements) – these agreements should extend beyond the time an individual is employed by the company;
- Train all employees on how to keep the company's trade secrets safe. All employees need to know the steps to take should data be compromised or if an employee is approached by someone seeking knowledge about your company's data, information, or processes;
- Make sure your IT professionals know how to secure data, and make sure IT security rules are followed within the company. Digital security measures such as firewalls, strong passwords, and restricted access to networks and websites are critical;
- Know what to do when something is stolen.

Unfortunately, there may be a time when trade secrets are unintentionally or purposefully turned over to competitors or agents seeking to gain an advantage by using your secrets. If that happens, what are your remedies? The two primary remedies under GUTSA are:

- *Injunctive relief:* A company that has had a trade secret misappropriated may obtain a court order prohibiting a party from using that secret. The injunction may terminate when the trade secret no longer exists, or for a period of time after which the commercial advantage of using the ill-gotten trade secret no longer exists. In the event there is an exceptional circumstance, and a court finds it unreasonable to prohibit future use, a reasonable royalty may be required for a period of time for which the use could have been prohibited. It is important that a company that has a trade secret misappropriated file action as soon as possible to limit the opportunity for a misappropriated trade secret to benefit the entity that has taken it. In most instances, a period of five years is allowed during which a company may seek an injunction or damages.
- *Damages:* In addition to injunctive relief, a person or company may be entitled to damages resulting from the misappropriated trade secret, including actual damages to the company and unjust enrichment that is not calculated with the actual loss. If the misappropriation of the trade secret is found to be willful and malicious, a court may award exemplary damages up to two times any award made for actual damages and/or unjust enrichment.

For start-ups and young companies hoping to find success based on their proprietary methods or unique formulations of products, it is critical that these trade secrets are protected. Contact the Law Firm of Robert D. Schmitter, LLC for assistance in keeping your trade secrets secret. <https://schmitterlaw.com>