

## Guardians at the Gate – Trade Secret Protection

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Information can be extremely valuable. And the theft of valuable information can be devastating to a company. Take the recent revelation that a secretary at Coca-Cola allegedly pilfered files in the Coke executive offices with plans to sell secret documents to executives at PepsiCo. The plot involved selling PepsiCo recipes for some Coca-Cola products, details of future promotions, a sample of a new product not yet on the market, and other secrets for more than \$1.5 million.

News stories like these are troubling indeed to executives who realize the importance of keeping critical business information secret and confidential. That information can include customer lists, pricing and cost information, marketing strategy, and technology.

Employees have a duty under the law not to use or disclose their employer's confidential information in a way to harm the employer. Violation of this duty may lead to a lawsuit for damages and/or an injunction to prevent further damage.

Many executives, though, are not keen on pursuing a lawsuit against a disloyal employee. It may be too late to stop the damage. The former employee may not have enough money to pay any damage award. Litigation is expensive, a drain on company resources, and a distraction from smooth operation of the business. The better course of action is to prevent the theft of the secret information in the first instance.

In fact, the notion of taking reasonable efforts to maintain secrecy is so important that it is part of the definition of trade secrets. If certain fundamental steps have not been taken, and there is a theft of confidential information, courts will find that the information wasn't really confidential, or the company would have taken those steps to protect the information.

There is not a hard and fast list of rules that will guarantee either that a theft cannot occur, or that if one occurs, the Court will find that the steps taken by the company were reasonable. This is in part because each situation must be analyzed on its own. However, some security measures have been found to be successful, and have also satisfied courts that they represent reasonable efforts. These include:

- Requiring employees to sign nondisclosure agreements.
- Formalized screenings of visitors.
- "Confidential" markings on documents.
- Keeping key documents under lock and key.
- Marking key documents "confidential."
- Using a shredder to destroy copies and old documents.
- Advising and training employees concerning the confidential nature of trade secret information.
- Limiting access to business information on a need-to-know basis.

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- Requiring departing employees to return confidential information contained in items such as computers, computer disks, manuals and reports.

Despite best efforts to maintain secrecy, there may be dishonest, disloyal employees who steal confidential information. They may do it as part of an effort to begin a competing venture. They may do it to leverage a position with a competing company. Or they may do it for spite.

Once a theft of trade secret information is discovered, quick action is imperative. Ordinarily, that means an immediate trip to the courthouse to seek a temporary restraining order from a judge. This is followed by a deposition of the former employee, and possibly the new employer who may be exploiting the purloined information. In some circumstances, it is appropriate to bring the new employer into the litigation as a party defendant.

The next step in the process is a preliminary injunction hearing, with its goal being to enjoin the former employee from using or disclosing the confidential information.

A combination of common sense security measures coupled with immediate resort to the courts upon discovery of a security breach provides the best protection for trade secrets.

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