

# CLIENT ALERTS

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## Now May Be the Time to Run a Trade Secrets Audit: Take advantage of any downtime now to protect your trade secrets later

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While many parts of the economy and the country are beginning to reopen for business, many companies still find themselves shutdown, working at partial capacity, working from home, or otherwise not working at full throttle. Given that state, this could be a good time to catch up on some of those tasks that routinely get put on the back burner. One of those tasks may be to audit your trade secret portfolio, to make sure your intellectual property is being properly protected.

Under trade secret law, a company must take reasonable measures to protect its confidential information in order for that confidential information to be protected as a trade secret. Obtaining trade secret status can provide you with additional tools to stop others from misappropriating your information and permit you to recover additional damages if someone does improperly use it. Not all company information can be qualified as a trade secret. And not all measures to protect your confidential information are as “reasonable” as others. Here are some steps you can take now to audit the strength of your trade secrets.

The first step is to determine what trade secrets your company has. Some smaller companies may think they do not have trade secrets, or that only cutting edge tech companies have such protectable rights. But that is not the case. In reality, almost every company in existence likely has at least *some* trade secrets that they should protect.

First, what information might you have that could be classified as a trade secret? Trade secrets are information that companies keep highly confidential, and such information therefore has independent economic value *because* it is kept confidential. Some obvious information likely comes to mind, such as non-patented technical inventions, designs, formulas, innovations, software, etc. But other types of information can

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also be a trade secret, such as customer information (particularly when it contains the customer's preferences, problems, and unique characteristics), customer lists, financial information, pricing and margin information, and business plans. Even trial and error information about what your company tried that *didn't* work can be protected, because if disclosed such information has value in that your competitors would know what *not* to spend their time and resources on.

Once you've identified what your potential trade secrets are, you should determine whether you are properly protecting them. Do you have confidentiality agreements with those who might come into contact with the information? If they are enforceable in your state, do you have non-compete agreements? Do you have non-solicit agreements, stating that people who leave your company cannot solicit your other employees or your customers? Is information only shared on a need-to-know basis? Do you have end user licensing agreements or confidentiality agreements with your customers, prohibiting them from sharing your information with others?

You will also want to make sure your own company is not inadvertently disclosing your own trade secrets. Sometimes marketing or salespeople may be too loose with what they share with customers, company websites may list more detail than they should, or marketing brochures accidentally disclose what would otherwise be confidential information. Remember, to be a trade secret the information must be kept *secret*.

Lastly, how does your company protect its trade secrets when there is a potential improper disclosure? Does your company pursue former employees suspected of misappropriating trade secrets? Does your company enforce its confidentiality agreements and other restrictive covenants? These are all ways of enforcing and protecting your trade secrets.

These steps and questions above are only the tip of the iceberg when it comes to making sure your company is properly protecting its information. The Butzel Long Non-Compete/Trade Secrets Group recommends that our clients periodically run a "Trade Secret Audit" every year or so (or more often, as circumstances require). We can assist your company with identifying what information should be kept confidential, what reasonable steps to take to best keep that information secret, and how to protect and defend your trade secret rights if they are ever infringed.

So perhaps your company is still idled or at half-speed for the next couple of weeks until the entire economy is back up and running. Use this time now to protect yourself in the future. Your trade secrets are the lifeline for your company. Don't get caught sleeping when you could be getting your house in order to protect your information.

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