

CLIENT ALERTS

To Enforce Your Trade Secret Rights, Your House Must be in Order

8.29.2019

For many companies, trade secrets are the lifeblood of the organization and vital to their revenue, competitive standing, and reputation. Not surprisingly, most states have adopted some form of the Uniform Trade Secrets Act. More recently, the U.S. federal government enacted the Defend Trade Secrets Act, which, in appropriate circumstances, provides for a federal civil cause of action in the event of trade secret misappropriation. Common to each statute is the requirement that a trade secret owner take *reasonable steps under the circumstances* to protect its trade secrets if it wishes to preserve them and enforce its trade secret rights in court. The statutes themselves, however, offer little guidance on what constitutes reasonable steps for the purpose of trade secret protection, so it is left to the courts to make that determination on a fact-specific basis—case by case—in light of the prevailing circumstances.

As it happens, a recent trend shows courts focusing hard on whether trade secret claimants have taken the reasonable steps necessary to support and prevail on their claims. Accordingly, this article perhaps serves as a timely reminder of some of the big-ticket items that companies should attend to in the interest of trade secret protection.

First, be sure to implement and enforce effective internal policies, procedures, and record-keeping practices aimed at safeguarding your trade secrets. Make employees sign non-disclosure agreements (NDAs) at the outset of their employment and perhaps at reasonable regular intervals thereafter. Properly mark confidential documents. Employ password protection and encryption to limit valuable information to certain employees. Conduct exit interviews in which you identify categories of sensitive materials in the exiting employee's possession, and require him or her to return the materials before departing. Those are but a few examples of sound internal policies and procedures to adopt and follow.

Related People

Phillip C. Korovesis
Of Counsel

Ivonne M. Soler
Senior Attorney

Related Services

Non-Compete & Trade Secret

Trade Secret & Non-Compete
Specialty Team

CLIENT ALERTS

Second, effectively manage your physical and electronic security. If necessary, limit access to rooms or areas where there is sensitive information. Screen visitors to your facilities and have them sign NDAs, as appropriate. Maintain IT firewalls. Monitor employee use of the internet and block access to websites the access of which might compromise your IT systems. Don't leave trade secret information adrift in the office. If your visitors or your janitor can see it, it may no longer be a trade secret. Overall, what you do by way of physical and electronic security should be tailored to the location of your trade secrets, the environment in which you operate, and the systems you use.

Third, make trade secret protection a focus of your risk assessment/risk management regimen. It is good practice to maintain a registry or something else that enumerates all of your trade secrets. Know which of your employees have access to which trade secrets, and be sure that your employees who have access to your trade secrets know that the company considers such information to be trade secret. Moreover, develop a procedure for routinely reviewing potential cyber, physical, and other threats to your trade secrets, and implement effective measures to minimize corresponding risk. Continually monitor your approach to trade secret protection, making necessary improvements along the way. Put an executive or a qualified committee in charge of all of this.

Fourth, manage your suppliers, customers, and other third parties who have access to your trade secrets. Just by way of example, a manufacturing supply chain can be a fertile breeding ground for trade secret misappropriation. Minimize that risk through well-crafted NDAs with your customers and third-party vendors. Make sure it is clear to them which of the company's trade secrets you are sharing with them. Mark your shared documents and other trade secret materials appropriately. Make sure that nothing in the overall contract documents with a particular customer or supplier eliminates or compromises the protections you think you have under a separate NDA.

Fifth, zealously defend your trade secrets. Send a cease-and-desist letter to address any risk of misappropriation of your trade secrets. In the event of perceived or actual misappropriation, seek injunctive relief. If you sit on your rights, you just might lose them.

As a practical matter, there is no one-size-fits-all for trade secret protection. What constitutes reasonable protective steps in the eyes of the law depends on the case-specific circumstances, which include (but are not limited to) the size, sophistication, and operations of the company seeking to enforce its rights. If you have questions or concerns regarding the protection of your trade secrets, or on whether you are taking appropriate steps to enforce your trade secret rights, any of Butzel Long's experienced trade secret attorneys would be glad to assist.

Donald V. Orlandoni

313.225.5314

orlandoni@butzel.com