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Qualifying Information as a Trade Secret

Generally, a "trade secret" is any confidential information held by a business which gives the business an advantage over competitors in the marketplace. Trade secrets are a form of intellectual property. However, they are not offered the same types of protection as patents, copyrights or trademarks. Obligations to refrain from disclosing trade secrets to others arise through contractual or fiduciary relationships.

Trade secrets are defined and regulated by state law. Only information which is held to be a trade secret under state requirements will be protected from infringement under the applicable trade secret laws. Once qualified as a trade secret, the information may not be stolen, copied, misappropriated or disclosed without the consent of the owner.

Trade Secrets in General

Trade secrets are treated as valuable property and the holder of the information is considered the owner. As with other forms of property, trade secrets may be lost, stolen or sold by one business to another. However, unlike other forms of intellectual property, trade secrets may not be registered with the government and are generally only protected if they actually qualify as trade secrets and if affirmative acts are taken by the owner to keep the information confidential.

If the aforementioned requirements are met, the trade secret is protected indefinitely as long as it remains confidential. Should the trade secret ever become available to the public, protection is lost and the information is free for anyone to use.

Information Which Qualifies as a Trade Secret

Whether information qualifies as a trade secret is dependent upon state law. However, a trade secret generally includes any oral or written secret information held by a business that offers the business a commercial advantage. Different courts might consider different factors when determining whether certain information amounts to a trade secret.

Typical factors may include:

- The extent to which the information is known outside of the particular business entity;

- The extent to which the information is known by employees and others involved in the business;
- The extent to which measure have been taken to guard the secrecy of the information;
- The value of the information to the business; and
- The difficulty with which the information could be property acquired or independently duplicated by others.

Examples of trade secrets may include business plans, sales strategies, customer lists, source code listings, methodologies, formulas, patterns, physical devises and/or ideas.

Actions to Protect Trade Secrets

Simply because the information is of a "type" which qualifies as a trade secret under state law does not result in automatic protection. The business or owner of the secret must take action indicating their desire to keep the information from competitors and out of the public domain. If reasonable precautions are not taken to protect the information, a court may find that the information is not a trade secret.

Depending upon state law requirements, the owner may take the following measure to ensure trade secrecy:

- Entering into non-disclosure agreements or contracts;
- Restricting access to information to certain individuals;
- Protecting secrecy through physical security;
- Marking trade secret documents with "Confidential"; and
- Adopting reasonable password policies and other computer security.

An example of an extreme case is the protection measures taken by the Coca-Cola Company. The formula to the Coca-Cola soft drink is one of the best kept trade secrets in the world. The soda's formula is only known by two employees at any given time, whose identities are unknown to the public and who may not fly on the same plane. Further, the written formula is locked in a vault which may only be opened by a resolution of the Coca-Cola board of directors.

However, even Coca-Cola is not immune from trade secret theft. In February of 2007, a former secretary at Coca-Cola was found guilty of conspiring with two men to steal confidential documents and samples of a new product, which they offered to sell to rival PepsiCo for at least \$1.5 million.

Rights of Trade Secret Owners

Trade secrets are intellectual property. Owners of information qualifying as a trade secret are thus entitled to certain property rights. Trade secret may prevent the use, disclosure or copying of the information by certain individuals without permission.

For example, employees of a business are typically considered to be automatically bound by a duty of confidentiality when they come into contact with a trade secret as part of their employment. Also, any individual who breaches a nondisclosure agreement, misuses the information or uses illegal means to obtain it may be liable for trade secret infringement. If infringement exists, the owner of the trade secret may be able to obtain a court order to prevent further disclosure, monetary damages for any loss resulting from the disclosure, and/or punitive damages.

However, if the information was discovered legally and does not otherwise violate any agreement, such as through reverse engineering, the secret is lost and the information is no longer protected.

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