The Rise of Trade Secret Litigation: Are You Prepared to Stop Your Trade Secrets from Walking Out the Door? (Part One)

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This is part one of a two-part series by our intellectual property and labor and employment groups designed to cover best practices related to trade secrets and your business.

trade secret (noun): any information that provides economic advantage to its owner by virtue of its not being generally known to the public

Recent reports show that trade secret litigation hit a historic high in 2025 with more than 1,550 cases filed in federal courts across the United States. Experts may attempt to sift through this data and explain the what and the why behind the increase in case filings. But that is not the purpose of this series.

Rather, the purpose is to provide information and best practices that can help protect your business from becoming a statistic. The fact is that confidential, proprietary, and trade secret information (these are not the same under the law) all have a nasty habit of walking out or walking in the door of your business without you knowing. When that happens, regardless of the reason, intention, or level of malfeasance, it is not an HR, compliance, legal, or IT problem—it is a business problem impacting the enterprise's bottom line and putting unsuspecting customers and clients in the middle of litigation they did not sign up for.

Proper trade secret governance is an effective tool to mitigate this enterprise risk. Boilerplate non-disclosure or non-compete agreement drafted during the Bush administration—HW or W, it does not matter which—is simply not enough protection. At their best, proper trade secret governance plans are wholistic, comprehensive, interdivisional policies and procedures that create multiple levels of proactive protection against loss or inadvertent use of another business' information. Hallmarks of proper trade secret governance include methods which:

- Define the secret(s)
- Guard their secrecy
- Limit or revokes access
- Properly screen and investigate employment decisions
- Respect the secrecy of other's information
- Routinely verify compliance with policies and procedures

Each of these hallmarks will look very different from company to company, or even division to division within a single company. However, each of these principles is designed to work together to help avoid:

- Your trade secrets walking out the door and down the street to your competitor placing you at an immediate commercial disadvantage; or
- Your competitor's trade secrets walking in your door, without your knowledge, placing you at risk of misappropriation, lengthy litigation, and potential disgorgement of your profits.

There are a variety of steps to setting up a proper trade secret governance plan or auditing your current plan. But the first and possibly most important question you should ask is: "*Can I prove—today—that our trade secrets are actually protected?*"

This is a loaded question that should prompt a flurry of additional questions in your mind, which should reinforce the overarching point: protecting trade secrets requires a layered and comprehensive approach.

A good starting point is asking yourself "what are our trade secrets?" Knowing the answer requires you to have taken the time to define them—one of the more important steps you can take in defining or evaluating your trade secret governance plan. This ensures that you:

- Know what your trade secrets are
- Know what you need to protect
- Can identify the best and most efficient way to protect the information
- Know who should and should not have access to the information
- Can monitor or limit access to the information
- Explicitly identify such information as belonging to the company
- Contract to protect such information
- Recover or revoke access to the information before employees leave the company

Although there is no one-size-fits-all approach to defining trade secrets, the Federal Circuit recently issued two decisions that provide guidance regarding how you should go about defining your trade secret to prove its existence and your protection of it. In both cases, the Federal Circuit emphasized that trade secrets must be defined with sufficient particularity to allow a court to understand how the asserted trade secret is different than the information that is readily available to the public.

The recipe for Coca-Cola®—one of the more culturally relevant trade secrets—is a perfect example of this principle. The ingredient list for Coca-Cola® is readily available to the public on every can and bottle sold and is nearly identical to every other cola product on the market. If the ingredients are publicly available and widely used in the market to manufacture cola, then how is the recipe for Coca-Cola® entitled to trade secret protection? First, Coca-Cola® has not claimed trade secret protection over all colas, which is a mistake we see clients make every day—overbreadth. Second, the secret is the specific recipe—the measurements, ratios, branded ingredients, and process steps—Coca-Cola® uses to produce its unique and iconic taste. The specificity of that recipe would allow, in a hypothetical situation, for a court to compare the Coca-Cola® recipe to what is generally known and determine whether they were the same or different.

When you are seeking to define and understand what your trade secrets are, be like Coca-Cola®. Ask yourself:

- What information do we have or have we created?
- Is it different than what is generally known to the public?
- If so, how?
- What is the best way to capture or articulate that difference?

Once you have gone through that process, then you can determine the policies and procedures that are necessary to protect that information, as well as prove that you (1) have a trade secret; and (2) have adequately protected it.

In Part Two, we will cover the issues presented by the actions of departing and incoming employees, focusing on the strategies your business can implement to protect itself from—and best position itself in—costly litigation.