
LABOR AND EMPLOYMENT LAW UPDATE



ELECTRONIC PRODUCTIVITY AND MOBILITY TOOLS: HAVE YOU LOST CONTROL OF YOUR TRADE SECRETS?

Today, employees have a variety of electronic tools at their disposal to enhance their productivity and mobility. Mobile devices such as laptop computers, tablet PCs and smart phones have the capacity to create and store large quantities of electronic data. A virtual private network (VPN) program provides direct access to an office computer from a home computer. An e-mail with attached data can generally be accessed from any computer, netbook or smart phone with internet access.

The internet provides additional tools which can be accessed from any computer, netbook or smart phone. Social networking sites, such as LinkedIn, often double as databases for existing and potential clients. Online databases maintained through host websites, such as Google Apps, are an alternative to computer databases maintained by the employer.

The same tools which enable employees to be more productive and mobile, however, present legal challenges for employers who seek to retrieve from departing or former employees confidential data or trade secrets created or stored by such tools. For an employer whose trade secret protocols or agreements have not kept pace with the growing number of electronic tools available to employees, such legal challenges can be quite formidable.

TRADE SECRET PROTECTION

SOURCES OF PROTECTION: Trade secret protection is afforded by federal and state penal laws as well as the common law tort of misappropriation of trade secrets. Broader protection can be afforded by a confidentiality agreement, which bars the use or disclosure of an employer's trade secrets by a departing or former employee, or a covenant not to compete, which prevents a former employee from being in a position to disclose or use the trade secrets.

LIMITS OF PROTECTION: To obtain legal protection for information imparted to an employee, an employer must generally do more than claim the information to be a trade secret; it must prove the information was actually a trade secret. To this end, the employer must show that measures were taken to safeguard the secrecy of the data. This burden can be daunting when there are so many tools which provide an employee access to trade secrets.

ILLUSTRATIVE CASES

THE PALM PILOT: While working for an Illinois medical systems dealer, an employee created and maintained a customer list on the address book of his Palm Pilot. The employee purchased the Palm Pilot without reimbursement from the employer. When the employee resigned to work for a competitor, the employer sued under the Illinois Trade Secrets Act for return of the customer list. In denying the claim, the court noted that the company had taken no affirmative measures during the employment relationship to protect the list.

THE LAPTOP COMPUTER: A former sales employee of an Illinois manufacturer and seller of baking pans was allowed to keep a company-provided laptop computer upon her separation. Upon hearing the former employee had gone to work for a competitor, the company sued under the Illinois Trade Secrets Act for misappropriation of customer data on the laptop computer. The court rejected the claim because the company (1) had no written policy or procedure requiring the return of customer data upon separation, and (2) failed to ensure the laptop computer was stripped of customer information.

THE HOME COMPUTER I: It was common practice for employees of a Massachusetts' insurance company to not only work from home, but to also send data home in e-mails. When two employees resigned to work for a competitor, the company alleged the retention of data on their home computers was a breach of confidentiality agreements and a misappropriation of trade secrets under Massachusetts law. The court denied the claim because the company had never instructed the former employees not to send or bring confidential information home.

THE HOME COMPUTER II: In a similar case, a director of operations for a Connecticut medical device development company often worked from home with the knowledge and approval of his employer. The employer also knew that the employee kept files on his home computer. After the termination of the employee, the employer filed suit alleging that the employee had misappropriated trade secrets in violation of Connecticut law by retaining files on his home computer. In rejecting the claim, the court said that the employer had requested neither the deletion of its files from the employee's home computer nor the return of its documents or data.

LESSONS FOR EMPLOYERS

Employers need to be proactive rather than reactive about protecting trade secrets stored away from their premises. Proactive measures can include the following:

- * Electronic and productivity tools used by an employee should be owned by the employer. An employer can simply demand the return of its property upon separation.
- * Security rules and protocols which enable an employer to know, control and restrict the storage locations of its trade secrets should be implemented and consistently enforced.
- * E-mails should be avoided as a means of transmitting trade secrets. E-mails are also stored by e-mail service providers.
- * Confidentiality agreements which provide for the return and/or deletion of electronic data and copies of such data should be required of all employees.

- * Confidentiality agreements which prohibit the unauthorized use or disclosure of trade secrets during or after the employment relationship should be required of all employees.

QUESTIONS

Questions regarding trade secret protection or any other labor and employment issues can be directed to Robert G. Chadwick, Jr. at Campbell & Chadwick, P.C.

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