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The Rising Importance of Trade Secret Protection in the Coming Era of Non-Compete Ban: Two Steps Your Business Needs to Take Now

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To become and remain competitive in virtually any industry, businesses develop, execute, and hone strategies to win over and keep customers. These strategies become critical operational and business information. To keep this information from falling into competitors' hands, businesses rely on several tools. Depending on the state where the business operates, the employee non-compete agreement is among those tools—at least for now. Recently proposed regulation from the Federal Trade Commission and proposed legislation from Congress threaten to remove this tool altogether.

On January 5, 2023, the Federal Trade Commission proposed a nationwide ban on most employment non-compete agreements. Less than a month later, on February 1, 2023, a bipartisan group of U.S. Senators reintroduced the "Workforce Mobility Act of 2023," which would ban the use and enforcement of post-employment non-compete agreements. As efforts to enact a nationwide ban on non-compete agreements gain momentum, a business's ability to use state or federal trade secret laws to protect the proprietary information that keeps it competitive is more critical than ever.

In this blog, I will discuss the growing importance of trade secret protection and how it can help safeguard your business without non-compete agreements.

The Changing Landscape of Non-Compete Agreements

With few notable exceptions, state law currently governs non-compete agreements. The laws of the state where the business hires workers usually apply and are often a consideration for those businesses looking to expand into new states. For example, a business with Texas employees can use narrowly tailored non-compete agreements to protect its competitive proprietary information by preventing former employees from joining or starting rival companies nearby. On the other hand, Maryland and Oregon prohibit non-compete agreements among lower-paid workers, and California and Oklahoma have already banned such contracts.

Recent federal proposals banning the use of most non-compete agreements across the United States raise serious questions about their future. As a result, businesses should proactively adapt their strategies and take measures to secure other legal protections for their trade secrets. The most obvious among the available measures is a comprehensive strategy to maximize the use and protections offered to trade secret owners via state and federal trade secret laws. The federal Defense of Trade Secrets Act and the Uniform Trade Secrets Act, adopted in one form or another by most states, are among the practical tools businesses can use for trade secret protection.

Establishing and Encouraging a Culture of Trade Secret Protection in Two Steps

Federal and state trade secret laws provide trade secret owners with legal remedies to protect their trade secrets. The first step, however, is determining the information that qualifies as a trade secret. Not all of a business's confidential data is a legally protected trade secret. For confidential information to be considered a trade secret, it must have economic value from not being generally known or easily discoverable. It must also be subject to reasonable efforts to maintain its secrecy.

Developing a culture of trade secret protection is the best way to ensure that you meet these requirements. It requires a comprehensive approach. Through written agreements, policies, procedures, and training, employers can educate employees on the type of information the business considers a trade secret, the value of trade secrets, and the consequences of misappropriation. Using passwords and other electronic and physical barriers to control and limit access to the business's trade secrets, you can reinforce and further foster an environment wherein employees are more vigilant about protecting your business's valuable information.

Step 1: Strengthening Confidentiality and Nondisclosure Agreements

The first step to developing this culture of protection is to re-examine and revise the written agreements between your business and the individuals and entities that create, use, and receive your trade secrets. The two most common categories of these written agreements are confidentiality and nondisclosure.

A confidentiality agreement is most commonly between an employer and its employees or independent contractors. It is the foundation for establishing a culture of trade secrecy. Businesses that have employee non-compete agreements most likely already have confidentiality agreements. Faced with the possibility of a non-compete ban, however, businesses should reexamine their confidentiality agreements to ensure they maximize the protections afforded by federal and state trade secret laws. These agreements should limit the disclosure of confidential, proprietary, or sensitive business information. They should also clearly define the scope of confidential information and the obligations of employees and business partners to maintain secrecy.

Nondisclosure agreements ("NDAs") are another crucial tool in trade secret protection. While NDAs share the same general purpose as confidentiality agreements, NDAs are more frequently used to retain the trade secret status of information a business discloses to another business for a specific and limited purpose. There are three basic approaches to defining the information covered by an NDA: providing a general description, usually a list of categories of covered information, providing a specific description, and marking or designating each item covered. The most effective NDAs are comprehensive and tailored to your business's needs.

Step 2: Implementing Comprehensive Trade Secret Protection Policies and Procedures

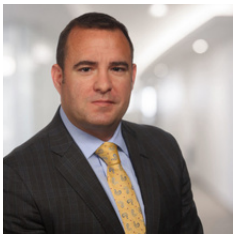
The second step to developing this culture of protection is to create or otherwise re-examine your business's policies and procedures for handling confidential, proprietary, or sensitive business information. Businesses should tailor their trade secret policies and procedures to the type of business and to the technology used to access, create, utilize, and internally share trade secrets.

These policies should address issues such as employee training on trade secret protection, access controls to sensitive information, and procedures for reporting potential trade secret breaches. Policies and training should ensure physical and electronic protections are in place. These policies should also identify permissible and impermissible access, use, and sharing of both the media and the information contained therein. Specifically, policies concerning access to company-issued email, physical or cloud-based servers, and documents should clearly outline ownership of the media and any messages transmitted or accessed. Policies relating to trade secret protection should also limit the content of statements made by or on behalf of the business on its web page, social media, or elsewhere. In that same vein, be sure to shape these policies to include instructions and protection for whistle-blowers as well as guidance from recent opinions by the National Labor Relations Board ("NLRB").

Finally, the business's policies should limit access to its confidential, proprietary, or sensitive business information through passwords, double authentication, and tiered access to those types of trade secrets that are particularly sensitive. Training on how to protect and avoid inadvertent disclosure of passwords or other methods of improper electronic access should occur as part of onboarding and any regularly scheduled review or training update. Policies and training should also include closing and opening procedures, the use of security systems, and physical limits for customer and guest access to areas wherein confidential, proprietary, or sensitive business information is kept or used in open view.

Conclusion: Now is the Time to Act

With the future of non-compete agreements uncertain, trade secret protection is becoming increasingly vital for businesses interested in protecting their innovations. Businesses that can best foster a culture of trade secret protection can confidently rely on federal and state trade secret laws when they need to protect them from trade secret misappropriation. The two-step approach of first strengthening confidentiality and nondisclosure agreements, then implementing a tailored, comprehensive, industry-specific set of policies and training to ensure compliance with applicable federal and state laws helps foster the desired culture. In today's ever-evolving legal and competitive landscape, such a methodical approach is necessary to allow businesses to safeguard their proprietary information and maintain their competitive edge.



About the Author

For more than twenty years, Richard L. Hathaway has litigated non-competition, non-solicitation, trade secrets, and other matters protecting business innovation. He has successfully enforced his business clients' agreements and rights in Texas state or federal court, and in arbitration. In fact, he has recently obtained a multi-million dollar arbitration award for a business against a former employee for misappropriating trade secrets. He and his team are available to assist your business in protecting its trade secrets via a policy and training review or aggressively pursuing available legal avenues. He is available via email at: rhathaway@krcl.com and phone at: 214-777-4270.