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Protecting Confidential Company Information

By **Jamie L. Lopez**

In the competitive world of retail sporting goods, it seems like the gloves are off. In a lawsuit filed by Dick's Sporting Goods this past February, Dick's alleges that Mitchell Modell, the CEO of a competitor, disguised himself as a Dick's executive and went undercover in a Dick's retail store to gain access into restricted areas and uncover non-public information. In 2012, Mr. Modell appeared on the reality TV show "Undercover Boss," in which he shaved his head and wore a mustache in order to go undercover as a sales associate and truck driver within his own company. Dick's alleges that Mr. Modell used a similar disguise to pose as a Dick's executive and convinced Dick's personnel to let him into the store's private areas and give him confidential information about store operations.

Although corporate espionage is usually not as extreme as that alleged scenario, almost all companies have confidential information worth safeguarding from competitors and/or the public. Some of a company's most important assets are its non-public information. In many cases, it is what lends the company its competitive edge. Keeping that information confidential is vital to the success of the business. Companies should be aware of the appropriate legal solutions in the event that such information is misappropriated.

Confidential information can take many forms, such as client lists or pricing information, sales and marketing methods, or a unique process by which something is done. All of this information is considered confidential, and some of this confidential information

may qualify for trade secret protection.

Trade Secrets

Trade secrets are a specific and legally defined type of confidential information that is subject to certain protections under case law and certain statutory law. The Uniform Trade Secret Act ("UTSA"), which has been adopted in almost every state, defines a "trade secret" as "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

Both elements are equally important in defining a trade secret. For confidential information to derive "independent economic value... from not being generally known to the public," it must provide a substantial business advantage as a result of its secrecy. For example, a confidential customer list has value because it allows a competitor to be more selective and to more effectively solicit customers versus another company that does not have access to that same cultivated information. Second, a company must take reasonable steps to maintain the confidentiality of trade secret information in order for it to maintain trade secret status. A company is only required to take "reasonable steps," not turn itself into an impenetrable fort. However, it is important to note that confidential information may qualify for trade secret status at first, but can lose that status if the owner of the information fails to take steps to maintain the secrecy of the information. Courts will not enforce protection of a trade secret if you cannot demonstrate that the information meets both elements.

Protecting Your Confidential Information

Confidential information is only valuable when its secrecy is maintained. Companies must enact policies and treat confidential information in such a manner as to maintain the secrecy of the information, whether trade secret or not. Companies should also ensure that their employees are abiding by these policies and practices as well. For example:

- Develop a written policy that informs employees of the confidential nature of certain data, machinery, processes, or entire projects, and that describes the steps employees can and should take to protect such information.
- Obligate employees to protect confidential information by requiring employees to sign non-competition, non-solicitation, or non-disclosure agreements.

- Restrict or condition access to the information by only distributing the information on a "need to know" basis to certain employees, restricting access to sensitive areas, and requiring non-disclosure and confidentiality agreements.
- Mark or secure all forms of media in which the information is stored - with regard to documents, use terms such as "CONFIDENTIAL" and "PROPRIETARY INFORMATION," and take care in the distribution and storage of these documents. For electronic media, restrict access by the use of passwords or by physically locking up hardware.
- Require clients or prospective business partners to execute non-disclosure agreements prior to disclosing confidential information.

A word of caution, however: restrictive covenants such as non-competes and confidentiality agreements must comply with state law. Some states, such as California, have found non-compete and non-solicitation agreements to be unenforceable, but companies operating there may still use confidentiality clauses to protect confidential information, including trade secrets. Other states require confidentiality agreements to have temporal or geographic limitations. You should consult an attorney to ensure that any such agreements are enforceable under the laws of the states in which they are used.

Enforcing Trade Secrets

In the instance that a company discovers its trade secret information may have been taken or misappropriated, it has legal remedies. Companies should consult legal counsel in any case in which it suspects that its trade secrets may have been taken or misused. Usually, the first step after such a discovery would be to send a cease-and-desist letter to the misappropriator to inform the misappropriator of the company's position and legal rights. If that proves to be unsuccessful, the company can bring suit in civil court. The UTSA provides various remedies for the misappropriation of trade secrets, including injunctive relief where a court is empowered to order the misappropriator to cease use of any trade secrets through a temporary restraining order or a permanent injunction. A company can also seek damages, in the form of lost profits, restitution, and/or punitive damages. Finally, in the case of "willful and malicious" misappropriation, the company may be entitled to reimbursement of its attorney's fees.

Protecting Confidential Information

Confidential information that does not qualify as a trade secret can still be protected through other means. In either case, a cease-and-desist letter can still be effective in informing a potential defendant of its violations and the company's desire to enforce its

legal rights. If such a letter is ineffective, companies can initiate litigation in civil court, under different causes of action. Where a company uses confidentiality agreements to protect its information, the company may have a claim for breach of contract where a person is in violation of the terms of the agreement. The company may also seek damages under unjust enrichment where a competitor is profiting from the misuse of confidential information.

Conclusion

All confidential information will lose its value if not properly protected. Companies are well-advised to consult an attorney to help identify confidential information and develop a protection plan.

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