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Reasonable Measures Under the DTSA

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Enacted in 2016, the Defend Trade Secrets Act, 18 U.S.C. § 1839(3), provides a federal cause of action for misappropriation of trade secrets. As with state law trade secret statutes, the DTSA defines a "trade secret" broadly, as:

> [A]ll forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if–
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> (A) the owner thereof has taken reasonable measures to keep such information secret; and
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> (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

However, as with the similar state law causes of action, included in that definition is the requirement that the owner of a trade secret have taken "reasonable measures to keep such information secret." When the owner of information has failed to take reasonable measures to keep it secret, the information is not a trade secret and cannot form the basis of a claim for misappropriation, no matter how egregious the alleged misappropriation may be.

This article examines the factors courts consider in evaluating sufficient reasonable measures to protect the secrecy of information and provides practical guidance on steps trade secret owners should take in light of the case law.

Reasonable measures to maintain secrecy, as the words suggest, require reasonableness under the circumstances. They require neither extravagance nor absolute secrecy. *See, e.g.*, *AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corp.*, 663 F.3d 966, 974 (8th Cir. 2011). The question of whether a party took reasonable measures in protecting information–and the ultimate question of the existence of a trade secret–is an issue of fact ordinarily best resolved by a jury. *See, e.g.*, *Matrix Health Grp. v. Sowersby*, No. 18-61310-CIV, 2019 BL 383940 (S.D. Fla. Oct. 7, 2019). Nonetheless, some common themes emerge from the case law to provide guidance regarding which considerations are most critical.

Demonstrating Reasonable Measures

The most critical considerations in determining whether particular information has been subject to reasonable measures to keep it secret are the existence of confidentiality or non-disclosure agreements; the existence of employee handbooks, policies, or other efforts to inform employees of the existence of trade secrets; and the restriction of access to the information. Courts are not likely to find any one of these facts alone to be sufficient; however, courts do not necessarily require a showing of all three. Generally, a combination of any two of these factors forms a foundation sufficient to create an issue of fact for a jury.

Confidentiality and Non-Disclosure Agreements

The existence or lack of confidentiality and non-disclosure agreements often presents the most compelling evidence supporting or negating whether a trade secret owner took reasonable steps to keep information secret. However, confidentiality agreements are not dispositive either way. Courts routinely hold that the existence of a confidentiality agreement alone is not sufficient to establish reasonable measures to protect trade secrets. *Elsevier Inc. v. Doctor Evidence, LLC*, No. 17-cv-5540 (KBF), 2018 BL 21786 (S.D.N.Y Jan. 23, 2018).

Conversely, the absence of a confidentiality agreement alone does not negate the existence of a trade secret where other facts demonstrate that the party took reasonable measures to protect alleged trade secrets. *See, e.g.*, *Burlington Medical, LLC*, No. 2:18-cv-656, 2019 BL 290678 (E.D. Va. Aug. 5, 2019). However, strong confidentiality and non-disclosure agreements, when coupled with other measures, are usually sufficient to constitute reasonable measures as required by the DTSA. *See, e.g.*, *Medidata Sols, Inc. v. Veeva Sys., Inc.*, No. 17 CIV. 589 (LGS), 2018 BL 433931 (S.D.N.Y. Nov. 26, 2018).

Timing of confidentiality and non-disclosure agreements is critical. Companies should ensure employees or third parties sign such agreements before receiving access to the alleged trade secrets and as a prerequisite to such access. *See, e.g.*, *Art & Cook, Inc. v. Haber*, No. 17CV1634LDHCLP, 2017 BL 355022 (E.D.N.Y. Oct. 3, 2017).

Employment Handbooks and Policies

A second critical fact is whether companies put employees on notice of the existence of trade secrets. While confidentiality and non-disclosure agreements may accomplish this, employers can also put employees on notice through employee handbooks or policies. Courts routinely find that such policies, coupled with access controls, constitute reasonable measures to protect trade secret information. *See, e.g.*, *ATS Grp., LLC v. Legacy Tank & Indus. Servs. LLC*, No. CIV-18-944-R, 2019 BL 306055 (W.D. Okla. Aug. 16, 2019) (citing *Deluxe Fin. Servs., LLC v. Shaw*, No. 16-3065 (JRT/HB), 2017 BL 272053 (D. Minn. Aug. 3, 2017)).

However, such policies need to be specific regarding the types of information protected. General admonitions regarding all business information do not provide employees with notice of what constitutes a trade secret and are not sufficient to constitute reasonable measures to protect alleged trade secrets. *See, e.g.*, *Abrasic 90 Inc. v. Weldcote Metals, Inc.*, 364 F. Supp. 3d 888, 900 (N.D. Ill. 2019). Where employees are required to sign such handbooks or policies, they should be treated the same as confidentiality agreements—signed prior to and as a condition of access to the alleged trade secrets. *See, e.g.*, *Art & Cook*, 2017 BL 355022.

Restricted Access and Passwords

Finally, restricting access on a need-to-know basis and implementing password controls constitutes compelling evidence of reasonable measures to protect trade secrets. *See, e.g.*, *Seattle Sperm Bank, LLC v. Cryobank Am., LLC*, No. C17-1487 RAJ, 2018 BL 285182 (W.D. Wash. Aug. 9, 2018) (citing *Buffets, Inc. v. Klinke*, 73 F.3d 965, 969 (9th Cir. 1996)).

Companies should document such restricted access to demonstrate that access is limited to employees with an actual need to know and require passwords that are unique for each employee. *See, e.g.*, *Abrasic 90*, 364 F. Supp. 3d at 901. Measures such as multilevel passwords, encryption, multifactor authentication, and other robust electronic security measures make an even stronger case of appropriate reasonable measures.

Other Factors

Although less often dispositive, courts consider a number of other facts in determining whether a party took reasonable measures to protect alleged trade secrets. These factors, in combination with one or more of the critical factors discussed above, can demonstrate reasonable measures.

Marking Trade Secrets

Courts frequently consider whether documents alleged to be trade secrets were marked as confidential or proprietary. *See, e.g.*, *S. Field Maint. & Fabrication LLC v. Killough*, No. 2:18-CV-581-GMB, 2018 BL 360019 (M.D. Ala. Oct. 1, 2018). When coupled with factors such as the existence of confidentiality agreements, the marking of documents demonstrates reasonable measures to keep information secret. While not dispositive, this factor becomes more critical when the information owner shares the information at issue with third parties. *See, e.g.*, *M.C. Dean, Inc. v. City of Miami Beach, Fla.*, 199 F. Supp. 3d 1349, 1355 (S.D. Fla. 2016).

Employee Exit Procedures

Another question is how the information owner treats departing employees who had access to the information. Relevant factors include reminding departing employees to return company property, *Chamberlain Grp. v. Techtronic Indus. N. Am., Inc.*, No. 16 CV 06113, 2017 BL 340261 (N.D. Ill. Sept. 26, 2017), and following up with departed employees to remind them not to misappropriate trade secrets, *Nelson Bros. Prof'l Real Estate LLC v. Jaussi*, No. SACV170158DOCJCGX, 2017 BL 480437 (C.D. Cal. Mar. 23, 2017).

However, companies may negate such efforts by failing to pursue the return of alleged trade secret information. In addition to reminding employees of their obligations, companies should fully question employees regarding the information in their possession at the time of their departure and use available resources, including litigation, in recovering that information.

Physical Security

Although courts focus less on physical security as electronic security has become increasingly critical, securing physical access to company facilities and specific rooms containing trade secret information or servers remains an important consideration. *See, e.g.*, *Vendavo, Inc. v. Long*, 397 F. Supp. 3d 1115, 1136 (N.D. Ill. 2019).

Mistakes Negating Reasonable Measures

Notwithstanding other efforts that a party may have made to protect alleged trade secret information, some actions will almost certainly result in a decision that a party cannot prove that it took reasonable measures to protect its alleged trade secrets.

Public Disclosure

Public disclosure of information alleged to be a trade secret will almost certainly result in a finding that a party did not take reasonable measures to protect its trade secrets. That is true whether the disclosure is in court filings, *Gov't Employees Ins. Co. v. Nealey*, 262 F. Supp. 3d 153, 170–71 (E.D. Pa. 2017); in delivery to a state agency, *M.C. Dean*, 199 F. Supp. 3d at 1356–57; in marketing efforts, *Medicrea USA, Inc. v. K2M Spine, Inc.*, No. 17 CIV. 8677 (AT), 2018 BL 235614 (S.D.N.Y. Feb. 7, 2018); or in disclosures to third parties without a confidentiality agreement, *Bay Fasteners & Components, Inc. v. Factory Direct Logistics, LLC*, No. 17-CV-03995, 2018 BL 95669 (N.D. Ill. Mar. 20, 2018). It is axiomatic that publicly disclosing information is inconsistent with an argument that the information constitutes a trade secret.

Failure to Plead

Failure to plead any steps taken to protect the secrecy of alleged trade secret information will result in a finding that the plaintiff cannot establish reasonable measures. *See, e.g.*, *Dichard v. Morgan*, No. 17-CV-00338-AJ, 2017 BL 419945 (D.N.H. Nov. 22, 2017). Simply alleging the existence of reasonable measures, without explaining those measures factually, is likely to result in a dismissal for failure to state a plausible claim.

Treating All Information the Same

Some courts look to see differentiated treatment of alleged trade secret information. For those courts, protective measures that treat all company information the same will not be sufficient to demonstrate reasonable measures to protect the secrecy of alleged trade secret information. *See, e.g.*, *Abrasic 90*, 364 F. Supp. 3d at 902–03; *Elsevier*, 2018 BL 21786 (finding a confidentiality agreement alone does not prove the existence of trade secrets because trade secrets represent a subset of confidential information). A company cannot define its trade secrets as all company information, and policies that seek to broadly protect all company information risk a court finding them unreasonable to protect alleged trade secrets.