Texas Flood: Protecting Against the Rising Tide of Trade Secret Litigation

The upheaval following the COVID-19 crisis should spur companies to reexamine old playbooks, and to get ready for a "new normal" in which employees remain scattered and diffused.

By **Chris Patton** | August 27, 2020

Chris Patton, a partner with Lynn Pinker Hurst & Schwegmann/courtesy photo

COVID-19 continues to change America's economic and legal landscape, with a tidal wave of economic instability and employee turnover that is higher today than at any period since the Great Depression. In the resulting job-search melee, corporations are rightfully concerned about ex-employees sharing trade secrets and other confidential information with their new or prospective employers. As work-from-home spaces become the new normal, it's no exaggeration to say the COVID-19 crisis could also spawn a generational trade secret crisis.

Trade secret litigation is already booming in federal courts. And Texas leads the pack, with such cases increasing threefold. Stout's Trends in Trade Secret Litigation Report 2020 shows that Texas alone now accounts for 20% of America's entire trade secret docket. The U.S. District Court for the Eastern District of

Texas and the Northern District of Illinois are neck-and-neck on total court decisions (7.8% each); however, Stout's reports that, as of 2019, 22% of all trade secret cases now arise in the industrial sector. Texas is poised to outpace every other state in 2020, given the state's massive workforce and fourth-in-the nation ranking for manufacturing alone.

Almost every state has adopted some version of the 1985 Uniform Trade Secrets Act. The UTSA defines trade secrets by, among other things, listing business practices and information which derive commercial value from the fact that they aren't generally known or easily obtained, and for which their holders have made "reasonable efforts," under the circumstances, to protect their secrecy (Uniform Trade Secrets Act §1 (amended 1985), 14 U.L.A. 538 (2005)).

Congress passed the Defend Trade Secrets Act in 2016. Although relatively new, this federal cause of action mostly tracks the UTSA's definition of a trade secret (18 U.S.C. §1836, et seq.). Despite its similarity with state-law analogues, the DTSA appears to have opened new doors to trade secrets plaintiffs. One recent study noted that since 2016, trade secret litigation in federal court has increased by nearly 25%, while other types of intellectual property cases either remain constant (patent) or slightly decline (copyright/trademark) over that same period.

While some high-profile corporate espionage capers make for good reading, such as the recent Uber/Waymo self-driving car trade secret theft, which ended in prison time for the former Uber engineer, more often the misappropriated trade secret is something created in the ordinary course of business. Recent Texas cases have clarified specific types of information, most of them fairly mundane, which qualify as trade secrets:

- Distributor and network lists created by a multilevel marketing company;
- National account information, including the volume of product in stores revenue, projected revenue, and sales trends of a national retail product company;
- Records showing the type of contracts which the defendant typically underwrites with a client, as well as the defendant's pricing, terms, and services;
- A DNA test developed by a skincare company to inform customers about personalized products; and
- A database containing 1.7 million job applicant resumes.

The surge in employee turnover set off by the COVID pandemic creates a special security risk for companies, many already fighting to stay afloat in the wake of evolving stay-at-home orders. The now-familiar "virtual office" threatens to become a virtual sieve, as businesses are forced to entrust trade secrets to employees working remotely. This information diaspora becomes even more problematic when companies have to lay off or furlough their staff. Insider knowledge can create a tempting advantage for laid-off employees seeking work, or for recent hires eager to gain a leg up with their new bosses.

Reasonable efforts to keep information confidential is a key element in any trade secret case. As workplaces face disruption unseen in nearly a century, employers must enforce security measures that meet the standard for reasonableness under the DTSA. Perhaps the first—and easiest—step is to simply remind employees bound by confidentiality agreements that even when working from home they must still keep company information confidential. Recent court decisions in Texas have also held that different combinations of the following measures pass the "reasonable" test for establishing a trade secret under Texas law:

- internal disclosure of trade secrets to only those employees who need access to carry out their job responsibilities;
- maintaining the information in a password-protected database;
- locating plants or facilities in inaccessible or remote places;
- posting security guards at entrances and exits of locations where trade secrets are accessible;

- requiring an access card or security clearance to enter locations where trade secrets are accessible;
- checking material going in and out of a location where trade secrets are accessible;
- immediately blocking access to trade secret information on termination of an employee; and
- regularly training employees regarding their confidentiality obligations.

Of course, what constitutes "reasonable" protection depends on the specific circumstances. But regardless of the situation, the upheaval following the COVID-19 crisis should spur companies to reexamine old playbooks, and to get ready for a "new normal" in which employees remain scattered and diffused. For corporations hoping to ride out the COVID flood—and the wave of trade secret litigation which COVID is likely to unleash—such a reassessment isn't just prudent. It's necessary.

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