

Insights

Protect Your Company's Trade Secrets with a Trade Secret Audit

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Many businesses believe their company information is "trade secret" information deserving of special protection. But is it really? How can you protect and show it really is trade secret information? One way is to conduct an internal trade secret audit.

What is Trade Secret Information?

Generally speaking, the three (3) basic elements to be a trade secret are: 1) the information is not known by others, 2) the information has value, and 3) the information is the subject of reasonable efforts to maintain its secret. See Ind. Code § 24-2-3-2. Matters of general knowledge known within an industry are not a trade secret.

Reasonable Efforts to Maintain the Information Confidential and Secret

This is where the trade secret audit comes into play. Indiana courts recognize the following efforts support a conclusion that the information truly is a trade secret and that reasonable steps to keep the information confidential have been taken:

- requiring employees to sign confidentiality agreements;
- posting warning signs;
- requiring visitors to sign in, and/or execute confidentiality agreements;
- having an employee handbook provision or written policy discussing confidential information;
- shielding the trade secret process (or information) from view by third parties;
- segregating the trade information;
- using unnamed or code named ingredients or information;
- keeping the confidential documents under lock and key;
- keeping the documents computer password protected to only certain individuals;
- providing the confidential trade secret information to only certain limited company individuals;
- marking trade secret information with a legend stating it is confidential; and
- using exit interviews to remind employees of the confidential status of certain information they have learned while employed.

This list is illustrative only. It is not exhaustive of all measures that can be employed to protect confidential information as trade secret information.

How to Perform the Trade Secret Audit

For a relatively inexpensive charge counsel can perform a trade secret audit to investigate and discuss whether the above steps are being taken, and the reasonable likelihood that the information at issue will be considered a trade secret. And, the fact that a trade secret audit has even been conducted is evidence that the information is

maintained and considered confidential trade secret information. The audit is designed to identify the specific information that the company wants to be kept confidential, an analysis of whether it truly is confidential, and whether the information is being maintained confidential, providing advice how to better keep it confidential. The trade secret audit helps ensure that the information is in fact kept confidential and out of the hands of third parties. It also supports the likelihood that a court would find that the information is "trade secret" information should any litigation be required due to theft of the information.

The level of effort and analysis will depend on the nature of the business and the number and type of alleged trade secrets. At a very minimum the audit must identify each specific piece of information that is considered by the company to be confidential and to require protection. This could include company formulas, designs, manufacturing processes, financial information, marketing plans, supplier information, customer lists, and customer information. In performing the audit the company may learn that the information is not confidential and that efforts to maintain it as confidential are a waste of company resources and efforts.

Why is it Important the Information be Considered a Trade Secret?

First, the whole purpose that certain key information be treated as confidential is so that third parties and competitors do not learn this information to help compete against the company. Second, if information is truly "trade secret" information, taken or used by a former employee or somehow obtained by a competitor, then claims can be pursued under various trade secrets acts and statutes that allow for a multitude of types of damages and recovery, including injunctions, damages, exemplary damages, and attorney's fees. A trade secret audit will help the company achieve all of these goals and protection, to assist the company to succeed.

If you have questions about information found in this alert, please contact **Scott S. Morrisson** or any other member of Krieg DeVault's **Labor and Employment Law team**.

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