

Trade Secrets

THE SECRECY REQUIREMENT

Secrecy Requirement

- To receive trademark protection, the owner must prove that he or she took reasonable efforts to keep the information a secret.
- This requirement is often a point that is debated when applied in different factual circumstances.
- No specific formula exists to measure this requirement. To determine whether this requirement was met, courts will engage in a highly factual determination.

The Trade Secret Protection Plan

To maintain secrecy, companies should develop:

- A Trade Secret Protection Plan which should be memorialized in writing. Plan should include notifying employees of which information is secret and be reminded of their confidentiality obligations.
- The plan should provide that employees sign confidentiality agreements and agree not to disclose confidential information.
- When employees leave the company, exit interviews should be conducted to remind employees of the confidentiality requirement.

Physical Security Measures

- Access to trade secrets should be physically restricted.
- Locks should be placed on items containing the secret information. For example, cabinets with secret documents should be locked.

Labeling Trade Secret Materials

- Documents containing secret information should be marked properly and in accordance with the trade secret protection plan.
- Any such documents should also be destroyed in accordance with the trade secret protection plan so that secret information is not leaked.
- Access to computers should also be restricted to protect confidential data.

Passive v. Active Disclosure

- Passive Disclosure: Negligently leaving confidential documents in open view.
- Active Disclosure: Can occur on the premises or outside of the facility where secrets are kept. For example, on a tour of the facility, the tour guide can reveal a confidential process that the company has perfected.

Dealing with Outsiders

- May curtail the exposure of confidential information by requiring that all publications, articles, speeches and other materials be approved by a “filter” committee prior to being distributed.
- Consider requiring that outside third parties sign confidentiality agreements.