

TRADE SECRETS: HOW TO PROTECT YOURS? WHAT SHOULD YOU DO IF A NEW HIRE BRINGS SECRETS WITH THEM?

By Robert S. Halagan

You have a key employee who knows all the business secrets of your organization; how do you make sure he doesn't take them to your competitors and potentially cripple your company? A key employee from a competitor is looking for a job and you'd like to hire her; what do you need to be concerned about?

Protecting business secrets, and avoiding getting sued if you gain access to someone else's secrets, is an area for which every business needs to have a plan. Many businesses fail to adequately protect the information that is key to their competitive edge. If your business has confidential information that you wouldn't want competitors to access (and what business doesn't?), you need to keep several key points in mind.

Minnesota law provides a framework for protecting your information. The Minnesota Trade Secrets Act gives businesses the tools necessary to ensure that you can protect your trade secrets provided you take the appropriate steps. The first step is to ensure that you have a confidentiality policy that covers your business and has been distributed to anyone who has access to your information. This policy should spell out the types of information that you consider to be protected and the steps the company expects employees to take to ensure that the information does not get improperly disclosed. It should make sure that any information is returned to the company once an employee leaves for new employment. It should also include enforcement language that allows for an injunction against an employee who tries to take the information and for collection of your attorney's fees if you need to start a legal action to protect your secrets. Employees should individually sign off on the agreement, preferably at the time they begin their employment.

A key to an effective policy is to identify what you believe to be your confidential information. Keep in mind that not all of your business information is subject to protection under Minnesota law or under a confidentiality policy. Information that is readily available from other sources can't be made secret just because you adopt a policy. Is a customer list confidential? In some circumstances it can be, but only if it is developed through proprietary efforts your company pays for and only if you take steps to ensure it is not publicly disseminated. Is your pricing information confidential? Internal information can clearly be protected, retail pricing cannot. Pricing to individual customers may be protected depending on whether you make it clear that it is considered confidential.

If a new hire has the potential to bring with them key information, you need to find out if their prior employer has adopted a confidentiality policy and, if so, what it looks to protect. If a new employee gets sued for violating a confidentiality agreement or a non-compete, you can be sure your company will get brought into the suit. Every new hire should receive a letter that states you have asked them whether they were subject to any such agreements and that you expect them to comply with their obligations under those agreements. The letter should make clear that you

do not want them to utilize or bring to your company any information or documents that are protected by their former employer.

If the prior employer had no policy and took no steps to protect their trade secrets you can be more aggressive about mining information from a new employee, but there are still lines you should not cross. If they have in their possession documents that are clearly proprietary (financial statements from the former employer, contracts or bidding documents that are not publicly available) do not let them into your business. One approach that is worth considering is conducting a detailed debriefing of the new employee on the business practices of their former company. Looking at how your competitors hire and compensate, understanding their selling practices and approaches, identifying key contacts in their business and other key players in their company may lead to interesting insights in how they do business and maybe even some valuable tips on how you can improve yours.

Protecting your trade secrets does not require a lot of effort but failing to take any steps can leave you vulnerable to a key employee leaving and taking with them important and valuable information. If you would like to adopt a policy to help protect your business information please contact me at rhalagan@halaganlaw.com to take advantage of this edition's special offer.