



DYKEMA GOSSETT PLLC

## Employment Law Developments

### Keeping Trade Secrets Secret in the Workplace

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In today's workplace, where employees come and go at a faster pace than ever before, it is not surprising that most trade secret disputes arise in the context of the employee-employer relationship. This article will discuss means by which an employer can protect its valuable trade secrets from disclosure.

Trade secrets are among the most important assets of any company and are often the only thing keeping a company one step ahead of its competition. In 1998, Michigan became the 43rd state to adopt the Uniform Trade Secrets Act ("UTSA") which prohibits an employee from using or disclosing trade secrets contrary to the employer's interests. Remedies for violation of the UTSA include payment of monetary damages, and actual or threatened misappropriation may result in a Court entering an injunction preventing an employee from utilizing and/or disclosing the trade secrets at issue.

#### **Identifying Trade Secrets**

All businesses have trade secrets. However, what may be a trade secret for one employer may not constitute a trade secret for another. The UTSA defines a trade secret as information including a formula, pattern, compilation, program, device, method, technique, or process, that both:

- 1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

- 2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Some information, such as a secret formula, is easily identifiable as a trade secret. Things as simple as a customer list or even the knowledge that certain processes will **not** work may constitute trade secrets, however. Many different types of information have been afforded trade secret status, among them: manufacturing processes, customer lists, product margins, marketing plans, business strategies, blueprints, financial information and customer specific information. A good rule of thumb is that if your competitors would be willing to pay for the information, that information could be protected under the UTSA.

#### **Developing a Trade Secret Protection Plan**

To be afforded protection under the UTSA, an employer must prove that it took reasonable efforts under the circumstances to protect the trade secret. As stated by one federal appeals court, "the more the owner of a trade secret spends on preventing the secret from leaking out, the more he demonstrates that the secret has real value deserving of legal protection, that he was really hurt as a result of the misappropriation of it, and that there really was a misappropriation." Steps taken by an employer to protect confidential information will not only allow it to make a case for misappropriation under the UTSA but will also increase the likelihood that current or former

employees will maintain the confidentiality of the sensitive information.

Once trade secrets have been identified, employers should take the following measures to maintain their secrecy:

- **Disclose Trade Secrets Only On A “Need to Know Basis.”** Confidential information should be disclosed only to those employees who need the information to perform their respective duties. One means of accomplishing this is to limit access to confidential computer databases by use of passwords or other computer security devices. Keeping documents containing trade secrets in a physically secure place, only accessible to employees on a need to know basis, can provide similar protection for non-electronic records. Access can be controlled by key cards or a strictly enforced sign in and sign out procedure.
- **Educate Your Employees On The Importance Of Maintaining Confidentiality.** The Company Employee Manual should clearly communicate the importance that the Company puts on confidentiality and that inappropriate disclosure of trade secrets may result in termination. Employee meetings also present an opportunity for an employer to periodically discuss its confidentiality policies and concerns. Resigning or terminated employees should be reminded of their confidentiality obligations during exit interviews or as part of a severance agreement.
- **Confidentiality Agreements.** Employees with access to trade secrets should be required to sign a confidentiality agreement. Nondisclosure agreements are also appropriate where one company is working with another on a joint project, thus exposing its trade secrets. Canned language should be avoided; the employer should try to briefly define what it considers to be confidential and proprietary. What may be appropriate language for a salesman will not be appropriate for an engineer.
- **Covenants Not To Compete.** A covenant not to compete can be an effective tool to protect disclosure of trade secrets. In Michigan, such agreements are enforceable when they are entered into to protect a legitimate business interest (i.e. trade secrets) and are reasonable as to duration, geography and scope. Again, canned language should be avoided. What is reasonable will vary depending on the particular employee and industry at issue.

- **Handling Sensitive Documents.** Stamp key documents confidential. It may also be helpful to print all confidential documents on a certain color of paper so as to make them readily identifiable. Documents that may contain trade secrets should be shredded instead of thrown away with non-confidential documents in trash receptacles. Documents kept on computer databases should be encrypted. Resigning and terminating employees should be asked to return all company documents in their possession.
- **Security Measures for Visitors.** Have all visitors sign in before coming onto the employer’s facility. The sign in log may contain a statement that all visitors agree to refrain from disclosing any confidential information that they may be exposed to during their visit. Visitor badges and security guards are also helpful in assuring that visitors are not improperly exposed to restricted areas containing an employer’s trade secrets.

The aforementioned measures can help ensure that trade secrets remain secure. A trade secret can continue indefinitely, or at least as long as the information remains a secret. For example, the formula for Coca-Cola is a trade secret that has existed for many years due to the company’s diligent efforts to protect its disclosure. Many employers only become aware of their trade secrets and their importance once an employee leaves and utilizes the employer’s trade secrets to call on their customers or to set up a competing business. The costs of identifying trade secrets and taking measures to protect them are relatively small when compared to the potentially high cost of losing that information to competitors. Once these measures have been taken it is important to monitor competitors’ activities for signs that the trade secrets have been misappropriated. If a trade secret is released into the public domain, a court is without power to restore it.

Conversely, an employer hiring a competitor’s former employee should proceed with great care to avoid liability for misappropriating trade secrets or for interfering with existing covenants not to compete. When hiring a former employee of a competitor, it is advisable to have the prospective employee sign a statement agreeing that trade secrets will not be revealed and that it is understood that the new job’s duties will not require the disclosure of the former employer’s trade secrets. Absent a noncompete agreement, the law does not prevent an employee from using her general experience and knowledge gained from working within a particular industry.

## Tips For Minimizing Unemployment Insurance Costs

The Michigan Employment Security Act (“MESA”) safeguards the general welfare by dispensing benefits to ameliorate the effects of involuntary unemployment. Unemployment insurance is financed, for the most part, by taxes on employers in proportion to the number of its former employees that have collected unemployment benefits. Therefore, it is in the employer’s best interests to reduce the number of former employees collecting benefits. There are several ways in which an employer can minimize its unemployment costs.

### ***Challenging An Employee’s Right To Unemployment Benefits***

Given the MESA’s purpose, the state construes the act’s provisions to provide former employees benefits whenever possible. However, an employer can still successfully challenge benefits under certain circumstances.

*Voluntary Leaving:* An individual who leaves work “voluntarily without good cause attributable to the employer” is disqualified from receiving benefits. The burden of challenging the voluntariness of leaving rests on the employee. Good cause for leaving has been defined as where an employer’s actions would cause a reasonable, average, and otherwise qualified worker to give up his or her employment.

*Misconduct:* An employee may be disqualified from receiving benefits if he or she is discharged or suspended for “misconduct connected with...work.” Misconduct has been defined as the willful or wanton disregard of an employer’s interests. Mere inefficiency, poor performance, ordinary negligence and good faith errors in judgment or discretion are usually insufficient to substantiate a finding of misconduct. However, where an employee disregards important well known employer policies, is violent, or engages in theft from or harassment of other employees, a finding of misconduct is likely.

An employer’s chances of successfully contesting a request for unemployment benefits can be enhanced

in a number of ways. First, accurately and completely documenting the reason for an employee’s termination can be the key to convincing the Commission that unemployment benefits are not warranted in a particular situation. Second, the Commission has set numerous deadlines within which benefit decisions must be contested. Adhering to those deadlines is imperative if the employer wishes to successfully challenge a claim for benefits. Third, should a hearing be held, the employer must make witnesses available that can testify from personal knowledge, as such testimony is considerably more credible than testimony regarding what others have said.

### ***Utilizing Severance Pay To Offset Unemployment Benefits***

Michigan’s Employment Security Act was amended in 2002 to allow severance pay to offset unemployment benefits. An employee receiving severance pay may face denials or reduction of unemployment benefits.

Specifically, Michigan law was amended to state that severance pay offsets benefits “for the period designated by the contract or agreement providing for the payment, or if there is no contractual specification of the period for which payments shall be allotted, then for the period designated by the employing unit or former employing unit.” Under the amended statute, severance pay allocated or designated to a particular week of unemployment is deemed payable with respect to that week, leaving the former employee ineligible for benefits for the time period designated. Absent such an allocation, the severance payment will be attributed to the week in which it was paid only, or weeks if the severance payments were made on a monthly basis.

To ensure an offset, the employer should designate the time for which the severance pay is allotted. For example, an employer could include in the severance agreement a clause indicating that severance pay is to be paid “weekly for 10 weeks following separation.” It would also be advisable for an employer to notify the BWUC of the payment amount and the weeks to which it wishes to allocate those payments.

# Employment Law Developments

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## Employment Seminar 2003

### Employment Law Developments— Issues Affecting Employers

*Thursday, October 30, 2003*

This complimentary program is presented by the Employment Group of Dykema Gossett PLLC in a new half-day format.

**Thursday, October 30, 2003**

8:00am – 8:45am Registration & Complimentary Breakfast

8:45am – 12:30pm Seminar Sessions

Lunch will be served immediately following Session 4



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