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Can You Keep a Secret? What Every Business Should Know About Trade Secrets

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William Penn said, "To keep your secret is wisdom; but to expect others to keep it is folly." Walter Winchell put it more bluntly: "I usually get my stuff from people who promised somebody else that they would keep it a secret." Winchell may have been referring to news sources, but he might just as well have been describing the competitive market. The bottom line is that if you have any competitive advantage in the market, you likely have something worth keeping secret. This is where trade secret law comes into play.

The Georgia Trade Secrets Act of 1990 (GTSA) protects a company's trade secrets from misappropriation. Remedies for misappropriation under the GTSA can include an injunction prohibiting others from using a trade secret or conditioning its use on payment of a reasonable royalty; actual damages or payment of a reasonable royalty where damages cannot be proven; and reasonable attorney's fees and punitive damages if the misappropriation is willful and malicious.

Trade secret information can include proprietary formulas, special processes, marketing plans, pricing information, and research and development data. Information in any form with actual or potential economic value is protected if it is not generally known or readily ascertainable to others, and reasonable efforts are taken to maintain its secrecy.

Most companies consider their customer information off-limits to others, and customer lists can be trade secrets. But, there is a distinction between a tangible list and someone's knowledge of information on the list. While the list may qualify as a trade secret, the information on the list is generally not protected under the GTSA.

Information that is "readily ascertainable" to others is fair game under the GTSA. This includes information in trade journals, reference materials and other publications. Even if individual components of a trade secret are publicly known, however, a secret and unique compilation, arrangement or integration of the components can be a trade secret. Coca-Cola's formula is a classic example.

Processes and formulas that someone else can independently develop or reverse engineer are also fair game. Yet, theoretical ability to develop or reverse engineer a trade secret will not make it "readily ascertainable" if it will be difficult, costly or time-consuming. Further, a trade secret is protected until someone else acquires it or can readily acquire it by proper means.

So how can you protect your trade secrets? The GTSA requires "reasonable efforts," so the amount of effort required will vary based upon the circumstances. There are many options to consider.

- Secure nondisclosure agreements from employees in contact with trade secrets.
- Secure nondisclosure agreements from manufacturers, suppliers and other third parties in contact with trade secrets.
- Limit access to only those who need to know or use trade secrets in their jobs.
- Use password-protected computers.

- Identify trade secrets for employees and give specific instruction on maintaining their confidentiality.
- Prevent unauthorized entry into facilities where trade secrets are located.
- Mark trade secrets and tangible evidence of trade secrets with a proprietary legend restricting their use and disclosure.

Nondisclosure agreements are very common and are useful because the GTSA prohibits acquisition of a trade secret through the breach of a confidential relationship or other duty. Nondisclosure agreements can create or clarify a company's confidential relationship with key employees and their duties with regard to the company's trade secrets.

They can also clarify the company's trade secrets, so there is no misunderstanding as to what the company is trying to protect. Nondisclosure agreements can also offer more limited protection for confidential information that doesn't qualify as a trade secret but is nonetheless valuable to the company.

Now ask yourself, can you keep a secret?