Protecting Trade Secrets

Tips for keeping your company's information safe

by: Robert C. Goldberg, BTA General Counsel

Several recent Courts & Capitols columns have discussed the trend of federal and state regulators curtailing or prohibiting the use of noncompetition, nondisclosure, nonsolicitation and confidentiality agreements. Dealers have a significant investment in their customer bases and must protect them from departing employees. Fortunately, every state (except New York) has enacted the Uniform Trade Secrets Act (UTSA) that may become more important in protecting confidential business information. There is also a federal statute for the protection of trade secrets, the Defend Trade Secrets Act (DTSA) of 2016. Establishing a trade secret requires specific practices.

Prohibiting the use of noncompete clauses will have no negative impact on trade secrets law. A dealer can protect against the actual or threatened misappropriation of trade secrets under the UTSA, the DTSA or both. Trade secrets protect any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others. The courts apply a six-factor test to determine whether information qualifies as a statutory trade secret:

(1) The extent to which the information is known outside the company. (The more extensively the information is known outside the company, the less likely it is that it is a protectable trade secret.)

(2) The extent to which the information is known by employees and others involved in the company. (The greater the number of employees who know the information, the less likely it is that it is a protectable trade secret.)

(3) The extent of measures taken by the company to guard the secrecy of the information. (The greater the security measures, the more likely it is that it is a protectable trade secret.)

(4) The value of the information to the company and competitors. (The greater the value of the information to the company and its competitors, the more likely it is that it is a protectable trade secret.)

(5) The amount of time, effort and money expended by the company in developing the information. (The more time, effort and money expended in developing the information, the more likely it is that it is a protectable trade secret.)

(6) The ease of difficulty with which the information could be properly acquired or duplicated by others. (The easier it is to duplicate the information, the less likely it is that it is a protectable trade secret.)

There are no shortcuts in trade secrets law. Dealers should:

- Implement policies and procedures to protect valuable company information.
- Limit computer access to certain information such as financial results, customer information, lease terminations, maintenance agreements, vendor terms and related software programs.
- Do not have hard copies of confidential information lying around the office. Place copies of potential trade secrets under lock and key, or make them password protected.
- Limit access to their premises.
- Mark information "Confidential."
- Be careful when disclosing any information to a third party, such as a supplier or leasing company. Prior to disclosure, have a nondisclosure agreement (NDA) in place. Specifically establish that the information will only be shared with an employee who has a "need to know," and the information will not be used for sales or marketing purposes. If the third party is reluctant to enter into an NDA, do not share the information.
- Restrict employees from downloading company information to their personal devices.
- Secure the return of all company property at the time of an employee's termination.
- Meet with an employee at his (or her) termination to review company policies regarding trade secrets and confirm the individual does not have any company information in his possession.

As the landscape for noncompete agreements changes, dealers must adjust their business practices in anticipation. ■

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