

Five Things To Know About Trade Secrets

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This week's letter T is for trade secrets, and five things every employer should know about them.

1. Nearly everybody has them. As [I wrote here](#), if there is information you would not want your competitor to have, you should at least be talking to your lawyer about whether they may be trade secrets and, if so, what do you need to do to protect them.
2. The key point of trade secret law is that, in order to have the legal protections of a trade secret, it has to be, well, *secret*. To put it another way, not everybody has as many trade secrets as they think. The extent to which you can protect information bears a strong correlation to how protected the information is in the course of your business. For example, if you hand information to prospective customers not subject to a confidentiality and nondisclosure agreement, or it is accessible to all employers regardless of whether they know the information to perform their duties, it may be hard to protect that information as a "trade secret."
3. It is not a substitute for noncompete, as [Hans Murphy wrote here](#). An employer may choose for various good reasons not to have noncompetes – you may determine that you cannot attract good talent if others in your industry do not use them, or you may just not like them as a matter of company culture. But noncompetes can be powerful if done right and, while a strong trade secrets program can be powerful as well, as described in Hans' post: it's not the same.
4. The last two points relate to current developments in the area of trade secrets law you should be aware of. First, as [I touched on here](#), there is a good deal of discussion in Washington about instituting a federal trade secrets law. If that comes to pass, I am not sure that will have momentous consequences for employers, but certainly stay aware of that.
5. Finally, we have not posted yet about an interesting decision from the [Arizona Supreme Court](#) that found that its state trade secrets law does not pre-empt other tort claims against the wrongdoer. Right now trade secrets is almost entirely a matter of a series of very similar state laws, and as the Arizona court noted, most states' courts have found that trade secrets statutes are the exclusive remedies for violations. The Arizona decision seemingly exposes trade secret wrongdoers there to

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broader penalties, and it is a development employers should keep an eye on in the event that issue is raised in other states as well.

Your organization's valuable information is its life blood, and being aware of these key points and consulting with your counsel about them is critical to protecting it.