

Protecting trade secrets in a world of technological and international risks

By Diane Cafferata

An organization's trade secrets are among its most valuable assets, often representing the innovative methods and mechanisms that fuel its business. Measures to protect those trade secrets have historically included a variety of physical (e.g., keycard access), electronic (e.g., firewalls), and/or legal measures (e.g., NDAs).

Organizations today find themselves facing new trade secret protection challenges from new technologies and globalization. For example, the remote work arrangements that have become so common since the Covid era can involve the transfer of confidential data that may be intercepted. Similarly, the use of AI technology can result in the inadvertent disclosure of confidential and proprietary company information. The international partnerships and extended supply chains common in today's world also increase the risk of trade secret disclosure and may expose an organization's confidential and proprietary information to actors in jurisdictions without a solid trade secret protection regime.

Depending on the nature of the business, in-house counsel may want to consider alterations to its policies to keep its protection measures fresh in light of these evolving challenges. This exercise would involve anticipating risks presented by these challenges, and considering how they might apply to the organization's efforts to protect its own trade secrets



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from misappropriation and to prevent new hires from exposing it to misappropriated third-party information. Outside litigation counsel familiar with the ways such disputes arise and play out in this changing landscape can become useful allies in foreseeing and devising protections against possible risks.

As always, what specific features organizations might find helpful to their protection efforts, and what collection of measures they ultimately put in place, will depend heavily on the nature of their business. But I offer the following ideas just for illustration purposes: Litigation counsel can update an organization's confidentiality agreements and pol-

icies, identifying new issues that may arise from technological and foreign sources and drafting provisions that establish legal protections against them. Once such issues are identified, they might help in drafting changes to policies and contracts to address those issues. Some common technological issues to address would include proper data containment and encryption procedures, limits on the use of AI, safe remote work practices, data breach reporting, and the supervision of employees' activities while complying with privacy regulations. In appropriate situations, litigation counsel could proactively gather information doc-

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umenting the internal product development history of their intellectual property, or set up procedures for doing so on a going-forward basis. In agreements with international partners and suppliers, litigation counsel might be called upon to tailor protections that take into account the complexities of enforcement in the relevant foreign jurisdictions. These policies and agreements can be audited on a schedule to ensure the organization is keeping up with developments.

If policies and agreements are updated, and depending on the needs of the organization, internal education may be helpful to ensure em-

ployees understand and abide by them. An organization's litigation counsel could be tapped to present lively training sessions for employees on how they can take steps to protect the organization's proprietary information.

Involving litigation counsel in these proactive trade secret protection activities gives them a strong background when they are called on to initiate or address a misappropriation accusation on behalf of the organization. Litigation counsel will already be familiar with the organization's measures to protect its trade secrets and with the role of the trade secrets in providing

value to the organization. With this background, litigation counsel can easily develop a plan to document the acts of misappropriation and prepare claims for injunctive relief and damages. On the defense side, litigation counsel will have a head start in gathering evidence demonstrating independent development and the organization's record of compliance with confidentiality obligations. In disputes that involve the organization's international partners or vendors, litigation counsel may already be familiar with these relationships and can begin, for example, assembling facts supporting the extraterritorial use of the Defend

Trade Secrets Act (DTSA) to enforce trade secret misappropriation claims against those partners or vendors.

In conclusion, trade secret protection in today's environment can benefit from a proactive partnership between in-house and litigation counsel because they can use their unique perspectives to identify possible vulnerabilities and jointly develop plans to mitigate them. By treating litigation counsel as strategic advisors and giving them a role in decision-making, the organization better aligns its business practices with potential risks and simultaneously strengthens its legal defenses.