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PROTECTING YOUR COMPETITIVE ADVANTAGE IN THE MARKETPLACE

By Jeremy S. Johnson

IF YOU OWN A SMALL BUSINESS, it is likely that your success has been the result of a significant amount of hard work and expense undertaken by you over the years. You may have developed certain techniques or may have acquired certain information that has made your business a unique one in the marketplace. Undoubtedly, no matter what you are in the business of, you have probably developed certain strategies and techniques that you believe give you the edge over the competition and have been an important part of your success. The secret to your success may be in the form of a secret recipe, a detailed listing of your customers or a manufacturing process you have developed. Whatever it is you consider the secret to your success, you probably would not want your competition to have the information you consider to be the competitive advantage you have in the marketplace. With this in mind, it is surprising how many small business owners do very little to protect the information they consider to give them an advantage over their competition.

In California, certain laws exist that afford protection to a business owner who wishes to keep from disclosure or misuse, the information he or she considers to be a trade secret. California has enacted the Uniform Trade Secrets Act (California Civil Code §§ 3426, et seq.) to protect business owners who develop or possess certain items of information that qualify as "trade secrets" under the Act. Generally speaking, a trade secret is something that is valuable because it is not generally known to the public or to other persons who can obtain economic value from its disclosure or use. Under the legal definition of trade secret, not everything a business owner may consider to be confidential is deserving of protection. However, many things in fact do qualify for protection under the Act, assuming there are reasonable measures taken by the owner beforehand to maintain the confidential nature of the information. Although the reasonableness of the efforts taken by an owner to ensure the secrecy of the trade secret depend upon the situation at hand, there are certain measures or policies an owner may wish to employ in order to strengthen his or her ability to seek relief under the Act should the need arise.

THESE ARE A FEW WAYS IN WHICH AN OWNER OF A BUSINESS CAN PROTECT THEIR TRADE INFORMATION:

First, it is generally a good idea to have your employees sign confidentiality agreements upon their employment. In signing

a confidentiality agreement, each employee acknowledges the fact that he or she may gain access to certain confidential information belonging to the company during the course of their employment and in return, agree to maintain the secrecy of such information and to use the information solely for the company's benefit. Further, if your business function requires disclosure of the confidential information to outside parties or vendors, then you may want to insist that the vendor enter into a similar confidentiality agreement prior to disclosing the information. In seeking relief from misuse or misappropriation of the confidential information, having such agreements in place will assist you in demonstrating that reasonable measures to maintain the secrecy of the information were taken by you prior to disclosure.

In addition to having appropriate confidentiality agreements in place, the owner of the trade information may want to consider other measures to ensure reasonable protection of his or her trade secrets. For example, if the information is maintained on a computer network that is utilized by the entire staff at your office, you may want to limit the accessibility of the information by providing access passwords to the information to only those individuals who need to acquire the information to carry out their job duties. Additionally, depending how the confidential information is maintained, you may need to consider such things as labeling the items considered to constitute a trade secret as such or how documentation relating to the information is disposed of (i.e. printouts of sensitive information, which are later considered waste, should be disposed of by shredding first).

Even with the above in mind, there is no one way to ensure absolute protection of your trade secrets or other commercially sensitive information. However, knowing what it is you consider a trade secret and understanding a few ways in which you can attempt to protect your interest in the information is a great start and should help you in the future in keeping your competitive advantage in the marketplace. **GT**

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