

Protecting Your Trade Secrets and Goodwill

By Robert M. Kaitz

Any company's success relies in large part on the products, technologies, or processes it develops. For a smaller business, its "secret sauce" can be one of its most important competitive advantages and its most valuable asset. However, developing these coveted creations is only half the battle. The other half requires protecting a business's goodwill and proprietary information to maintain its competitive advantage in the market and ensure customer loyalty. This half requires careful planning, as small businesses and entrepreneurs must navigate employee confidentiality agreements and restrictive covenants to protect these valuable assets.

What is a Trade Secret?

Generally, a trade secret is any formula, pattern, device, or compilation of information used for business purposes and that provides a competitive advantage. It not only includes the end product, but can also include methods, packaging, presentations, lists, technical or nontechnical data, or anything else that provides a business with a competitive advantage.

As the term suggests, it is only subject to protection if it is treated as secretive. A business must take reasonable steps to ensure it retains the trade secret designation. The formula for Coca-Cola is not a trade secret merely because consumers prefer its taste to that of other colas, but rather because of the steps that Coca-Cola has taken, over decades, to guard its unique recipe.



What is Goodwill?

Goodwill is a business's reputation; it is what makes the business preferable to a consumer over industry competitors. The goodwill of any company is critical to developing and retaining customers, and while it may be an intangible asset, it is valuable and should be protected.

Protecting Trade Secrets and Goodwill

Confidentiality agreements and restrictive covenants go a long way in protecting a business's trade secrets and goodwill. Employers can require employees to sign these agreements as a condition of employment or continued employment. Agreements should be drafted to meet operational needs, relative to business size and scope, and each employee's unique responsibilities should be considered when crafting appropriate limitations.

The following are recommended terms to include in employee agreements:

- **Confidentiality and Trade Secret Protection.** An agreement's confidentiality provision should define the business's confidential information to include any trade secrets, formulas, recipes, techniques, methods, or other know-how that give the business a competitive advantage. A confidentiality provision should bar the employee from using or disclosing outside of the company any confidential information belonging to the business. Any restriction should extend after employment ends, regardless of the employee's separation circumstances.

The existence of a confidentiality agreement helps prove that a business has taken reasonable precautions to protect its trade secrets or confidential information and also provides a means to deter wayward employees (current or former) from improperly using trade secrets.

- **Non-Competition.** A non-competition agreement limits an employee's eligibility to seek alternative employment after leaving an employer. While it is useful in limiting the risk of a departing employee taking customers, businesses are constrained from restricting departing employees' rights to work, and the scope of a non-competition provision must always be readily justifiable to protect legitimate business interests.
- **Non-Solicitation.** A non-solicitation provision may be equally powerful in protecting customer goodwill. Absent a binding non-solicitation provision, a departing employee could work in concert with a competitor to poach other employees or clients, thereby disrupting customer and supplier relationships.

Including a non-solicitation provision to prevent a former employee from raiding a business is a common method to guard against this risk.

- **Right to Injunctive Relief.** Finally, language should be included stating that a violation of any of the above provisions will cause irreparable harm to the company and allow the company to seek injunctive relief. This places the employee on notice that a failure to abide by these terms will result in imminent court action.

Enforcement

If a current or former employee improperly uses company information, the business should react immediately and aggressively to ensure that the information misappropriated retains its trade secret protection. State and federal law claims may also exist against an employee beyond claims under an agreement.

The enforceability of non-competition and non-solicitation provisions largely depends on the jurisdiction where the employee works. Courts usually enforce them to the extent they are reasonable and justifiable based on legitimate business interests. Factors courts will weigh in include the breadth of the subject matter, the geographic scope, and the temporal scope of any restrictions to determine

whether the provision is reasonable. What is reasonable may vary widely depending on the jurisdiction.

Working with an attorney knowledgeable in your jurisdiction(s) of operation can help ensure that any agreement is drafted properly, calculated to protect trade secrets and/or goodwill, and an appropriate court enforces its restrictions. Your attorney can also update you regarding local developments in laws governing restrictive covenants, an area of law that frequently changes state-by-state.



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