Protecting Your Valuable Business Information and Relationships

~ Jennifer Fowler-Hermes

When survey after survey of America's workforce confirms that a large majority of employees admit to taking data from their current or former employers without permission, safeguards to protect proprietary and confidential information, including trade secrets, become a priority. We understand that the loss of corporate data can be devastating. We also know that when a former employee or former business owner solicits business contacts or employees, the results can be equally damaging. In today's highly competitive marketplace, it is essential for businesses to have a well-developed plan in place to protect corporate data and business relationships. Such plans should employ several tools, including, but not limited to, appropriate security safeguards, confidentiality policies, and agreements containing restrictive covenants.

Restrictive Covenants in Florida

In Florida, a business can use restrictive covenants to obtain a promise from an employee, independent contractor, officer, agent, or even a seller of an acquired business not to engage in any behavior contrary to its business interests. Certain restrictive covenants protect specific interests. For example, a covenant "not to compete" is generally a promise that the employee, independent contractor, officer, agent, or seller will not be involved, in any capacity, in a competitive business in a certain geographic area for a certain time period. Other restrictive covenants include covenants "not to solicit" the employer's customers, clients, donors, or current employees and covenants "not to disclose" the employer's confidential business information.

Enforcement of restrictive covenants in Florida is governed by statute. The current statute provides that the enforcement of contracts that restrict or bar competition is permitted as long as the restrictions are reasonable in time, area, and line of business. Additionally, the contracts must be in writing and signed by the persons agreeing to the restrictions. To enforce a restrictive covenant, a business must be able to demonstrate that the covenant it seeks to enforce was based on the need to protect a "legitimate business interest(s)" and that the contractual restraint is reasonably necessary to protect such interests. Florida courts deem restrictive covenants not supported by a legitimate business interest to be unenforceable. In determining whether a restrictive covenant is properly supported, Florida courts may not take into consideration the relative hardship the enforcement of a restrictive covenant would have on the person against whom enforcement of the agreement is sought.

A business may demonstrate a legitimate business interest in a variety of ways. It can point to its need to protect trade secrets; valuable, confidential business or professional information that does not otherwise qualify as trade secrets; the existence of substantial relationships with prospective or existing customers, patients, or clients; the need to preserve customer, patient, or client goodwill associated with an ongoing professional or business practice, a specific geographic area, or a specific marketing or trade area; or its provision to the former employee of extraordinary or specialized training.

For a restrictive covenant to be reasonably necessary to support an entity's interests, it must be reasonable with respect to both duration and geography. Florida law specifies particular time frames for different scenarios under which a restrictive covenant will be presumed reasonable. Those time frames are as follow: (1) For restrictive covenants sought to be enforced against a former employee, agent, or independent contractor, a court shall presume reasonable in time any restraint six months or less in duration and shall presume unreasonable any restraint more than two years in duration. (2) When an organization seeks to enforce a restrictive covenant against a seller of all or part of the assets of a business or professional practice, the shares of a corporation, a partnership interest, a limited liability company membership, or an equity interest of any other type in a business or a professional

practice, restraints three years or less in duration are presumed reasonable. Restraints exceeding seven years are deemed unreasonable. (3) When trade secrets are involved, courts presume restraints of five years or less as reasonable and restraints over 10 years as unreasonable.

With respect to the geographic parameters of any restraint, Florida does not prohibit or prevent enforcement of nationwide restrictive covenants, as long as the employer can demonstrate that such a restriction is reasonably necessary.

When a business or portion thereof is sold, and the seller had agreements with restrictive covenants in place, the language of restrictive covenants will control the ability of the purchaser to enforce those covenants. Where a restrictive covenant expressly authorizes enforcement by an assignee or successor, courts may not refuse to enforce that covenant on the grounds that the party seeking enforcement was not an original party. In contrast, an express statement that the restrictive covenant is enforceable by an assignee or successor is unnecessary in a stock purchase.

Although Florida accommodates the enforcement of non-compete agreements, in May 2016, the White House officially encouraged states to ban the unbridled use and enforcement of non-compete agreements against low-wage earners and those who do not have access to employer trade secrets. The White House opined that limiting the use of non-competes would make for a more competitive marketplace and increased wages. The White House statements impose no binding legal obligation on employers, and it remains to be seen whether the new administration will adhere to the same position.

Florida's Uniform Trade Secrets Act

An independent statutory provision that more specifically protects against the misappropriation of trade secrets is Florida's Uniform Trade Secrets Act (UTSA). Florida's UTSA does not require an agreement in order to obtain relief. Florida's UTSA defines a trade secret as information, including a formula, pattern, compilation, program, device, method, technique, or process, that (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. A key provision in this definition is whether the information is not "readily ascertainable" or, stated otherwise, whether the information is not available from public sources or may not otherwise be reconstructed without reference to the business's information. In addition, a business seeking to obtain relief under Florida's UTSA must be able to show that it took reasonable efforts to maintain the secrecy of its trade secrets. Clearly, if a business does not take appropriate precautions to protect its secrets, obtaining relief under UTSA will be unlikely.

UTSA prohibits misappropriation of trade secrets and defines misappropriation in terms of two distinct causes of action: either the acquisition of a trade secret by improper means or the disclosure or use of a trade secret without consent of the owner by someone who used improper means to acquire the trade secret or knew, or should have known, that it was improperly acquired. Unlawful misappropriation also occurs where, at the time of the disclosure or use of the trade secret, the individual knew or had reason to know that her or his knowledge of the trade secret was (1) derived from or through a person who had utilized improper means to acquire it, (2) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, (3) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use, or (4) before a material change of her or his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

Trade Secrets Under Federal Law

Until recently, Florida businesses and nonprofit organizations had to rely on state laws to seek legal recourse, including injunctive relief, when an employee or competitor misappropriated trade secrets. This changed in May 2016 when the Defend Trade Secrets Act of 2016 (DTSA) was signed into law. The DTSA creates a federal civil remedy for the misappropriation of trade secrets. This statute was enacted in response to the divergence of protections provided by the states' trade secret laws and to provide additional protection against international trade secret misappropriation. Aside from its whistleblower immunity protections, the DTSA does not preempt state trade secret laws. As a consequence, Florida businesses may now seek civil remedies under both state and federal statutes, and, if claims under state and federal law are brought in one suit, such claims may be brought in either state or federal court.

Similar to Florida's UTSA, the DTSA provides a civil legal remedy for businesses whose trade secrets have been misappropriated. But, while minor differences between the DTSA and Florida's UTSA do not foreshadow much divergence in the civil prosecution of such claims, there are several notable provisions in the DTSA for which there is no similar counterpart in Florida's UTSA. First, the DTSA includes a civil seizure provision, which allows injured trade secret owners to request a court order for the seizure of physical property in the possession of the alleged misappropriator, without notice. This civil seizure remedy is available only in extraordinary cases and is intended to prevent the dissemination or use of the trade secrets. Second, the DTSA's whistleblower provision provides immunity to whistleblowers who divulge a business's trade secrets to attorneys and government officials in the process of reporting illicit activity or in asserting a retaliation claim. Fortunately, this protection only extends to the disclosure of trade secrets that are relevant to the alleged illicit activity—and even then, to qualify for protection, the disclosure must be made under seal.

Finally, the DTSA requires businesses to notify their employees of the law's whistleblowing protections, including the immunity provisions. Failure to provide this notice will limit the statutory remedies available to businesses that successfully prove a misappropriation. Furthermore, businesses that violate the retaliation provision of the DTSA are not able to recover certain damages or attorney's fees, even when a willful and malicious misappropriation of a trade secret or a bad faith claim of misappropriation is established. Accordingly, if a business wants to ensure that it can use this statute as a tool to protect its trade secrets, it should consider updating its employee handbook and including cross-

references to the DTSA in any new or existing employment agreements. Businesses will have to balance concerns that providing specific, written exceptions to confidentiality may encourage misappropriation with the desire to use the DTSA's enforcement mechanisms.

Given the DTSA's recent passage, few courts have been presented with the opportunity to apply and interpret the statute. Therefore, the effect of the statute and, in particular, its extraordinary civil seizure provision, remain to be seen. Regardless, businesses should take the statute's provisions into account when drafting or revising their employee handbooks and employment agreements.

Best Practices for Protecting Information and Business Relationships

When appropriately implemented, carefully drafted, and narrowly tailored, restrictive covenants can effectively protect an employer's legitimate business interests, such as trade secrets, confidential and proprietary information, and substantial customer relationships. While the use of an employment agreement that includes restrictive covenants or a stand-alone non-compete or non-disclosure agreement may not be appropriate for every employee, it is one tool that is useful in mitigating the potential damage caused if an employee leaves your employment to work for a competing business or if a former business owner starts a competing business.

Businesses should also have controls in place to protect their trade secrets and to ensure that departing employees, agents, or independent contractors do not take trade secrets with them. Although written agreements are not required for the protection of trade secrets, they can be of great use in defining the rights of the parties and in providing notice of restrictive covenants to subsequent employers. Additionally, businesses should keep in mind that other businesses are also interested in protecting their information and business relationships, and should evaluate and appropriately adjust their hiring procedures (especially with respect to executive-level employees) to eliminate the risk that a new employee will expose the business to liability for trade secret misappropriation. The best way for a business to protect its valuable information and business relationships is to recognize potential risks and take affirmative steps to protect against those risks.

The assistance of Lindsey Dunn, Esq, in the preparation of this article is most gratefully acknowledged.

Jennifer is counsel at Williams Parker.

She is a labor and employment attorney who focuses on helping private, public, for-profit, and not-for-profit employers in a wide range of matters, including litigation and managing risks to avoid litigation. She earned her JD from the University of Florida College of Law and is certified by the Florida Bar as an expert in labor and employment law.