

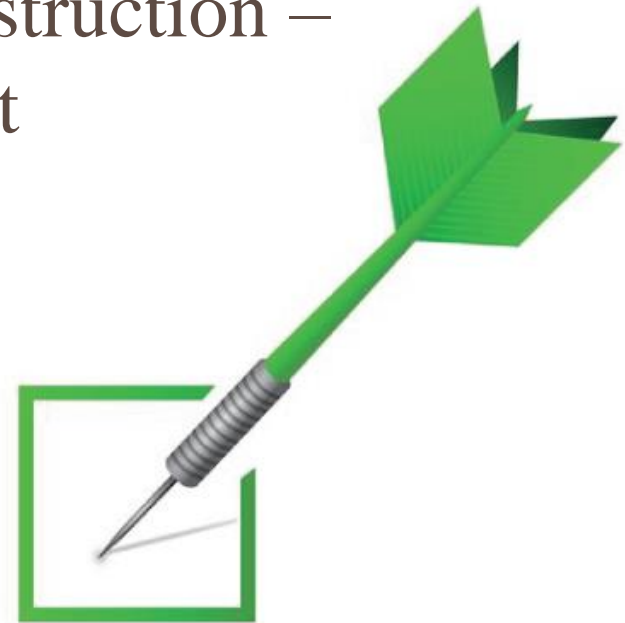


Employer Cybersecurity: Protect Your Company's Data and Trade Secrets

R.J. Cronkhite
Business Litigator

MY FOCUS TODAY

- Internal fraud, theft, and destruction – employees and management
- Issue spotting
- Spot checking
- Resources



WHAT I AM NOT COVERING

External Threats

- Phishing
- Malware / Spyware
- Ransomware
- Social engineering



WHY NOW – OUR FLUID ENVIRONMENT

- Employee mobility
- Electronic media and data
- Information sharing
- Business collaborations
- 25% of data loss incidents in 2013 happened, not because of hacking, but because of human error
- Another 14% were caused because of theft or loss of devices

BEST TECH PRACTICES TO PREVENT AND ADDRESS DATA THEFT AND DESTRUCTION

- Before we get into the nitty-gritty. . .
- Have a conversation with you IT department, leadership team
- Consider consulting with an IT security expert and digital forensics firm *before* something goes sideways

BEST TECH PRACTICES TO PREVENT AND ADDRESS DATA THEFT AND DESTRUCTION

- ISO 27001 Information Security Policy
- Annual audits and certifications
- Business Continuity Plan (BCP) incorporating data breach policies
- Archiving
- Keep software up to date with all recent patches.
- Ensure access to data is only given to those who need it to perform their job responsibilities
- Ethics and Security Hotline or dedicated email account

POLICIES TO REVIEW OR IMPLEMENT

- Confidentiality/Non-Disclosure Provisions
- Employee off-boarding procedures
- Theft vs. Destruction of electronic data
- Communication - Make clear in policies what constitutes “Employer Property”

SAMPLE PROVISION

“All files, records, proposals, specifications, or other documents, and all electronically stored information, computer software, software applications, EMAILS, files, data bases, and the like relating to the business of the employer or which contain Proprietary Information, whether prepared by me or otherwise coming into my possession, shall remain the exclusive property of the employer. Upon the termination of my employment, for any reason, I will promptly deliver to the employer all such material in my possession, custody, or control.”

DEALING WITH A BREACH

- **Cybersecurity Insurance**
 - What does it cover?
 - Beware exclusions and cookie-cutter policies
 - Premium costs
 - Insurance's proper role
- **Experts**

THE NEW DEFEND TRADE SECRETS ACT (the “DTSA”)

What?

Why?

So what?

What must I do to get reap the benefits?

WHAT IS THE DTSA?

Protects TRADE SECRETS—as
title might suggest—from
MISAPPROPRIATION

WHAT IS A “TRADE SECRET”?

Secret - Not generally known or readily ascertainable.

Valued - Derives independent economic value from not being generally known or readily ascertainable by others.

Safeguarded - Subject to reasonable efforts to maintain secrecy.

WHAT IS “MISAPPROPRIATION”

1. **Wrongful** *acquisition*
2. **Wrongful** *disclosure*
3. **Wrongful** *use*

WHY DID CONGRESS BOTHER?

- *Senate Judiciary Committee's Report* - American losses due to trade secret theft exceed \$300 billion and 2.1 million jobs annually. S. Rep. 114-220 (2016).
- The report concludes with the observation that “[a]s trade secret owners increasingly face threats from both at home and abroad, the [DTSA] equips them with the tools they need to effectively protect their intellectual property and ensures continued growth and innovation in the American economy.” *Id.*
- Before passing the DTSA, much of the discussion in Congress centered on protecting U.S. businesses from trade secret misappropriation abroad.

WHY YOU SHOULD CARE

- Actual Damages PLUS taking whatever money the employee (or competitor) made from the trade secret (“disgorgement”)
- Multiply the above by two - in essence, DOUBLE damages as a penalty (“exemplary damages”)
- PLUS Attorney Fees

WHAT YOU MUST DO TO BENEFIT

For your handbook or non-disclosure/confidentiality agreement:

The Defend Trade Secrets Act of 2016 (“DTSA”) provides that an individual shall not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that is made (i) in confidence to a federal, state, or local government official, either directly or indirectly, or to an attorney, and solely for the purpose of reporting or investigating a suspected violation of law; or (ii) in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal. In addition, the DTSA provides that an individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual (i) files any document containing the trade secret under seal; and (ii) does not disclose the trade secret, except pursuant to court order.

COMPUTER FRAUD AND ABUSE ACT

- Broader than DTSA as to what it covers
- Yet also more restrictive: “unauthorized access” and “exceeding authorized access”
- Michigan and Sixth Circuit law
- Improper Access vs. Improper use of info
- Policies, policies, policies

RECAP

R.J. Cronkhite



(248) 351-7017

rcronkhite@maddinhauser.com