

Protecting Your Trade Secrets from the Risks of Remote Working

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Remote working jumped significantly amid the Covid-19 pandemic, and many employers are now embracing a hybrid or fully remote work model for the long term. However, this new working environment invites a new set of risks for companies, including the increased possibility that valuable trade secrets may be exposed to the public or obtained by competitors.

Potentially making matters worse, President Joe Biden's recently issued Executive Order on Promoting Competition in the American Economy will likely reduce — or even eliminate — a company's ability to enforce non-compete agreements against its employees. Without the protection of non-compete agreements, Florida companies should reevaluate how they are guarding their trade secrets and take appropriate actions to ensure their future security.

Florida law enables companies to not only protect trade secrets under common law rights, but also under the Florida Uniform Trade Secrets Act (Chapter 688, Florida Statutes) (FUTSA). For the FUTSA protections to apply, the trade secret must generally meet two legal requirements: (1) the information 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) the information is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The fact that a company may consider, and even advise employees, that certain information is "proprietary" is not enough to ensure protection as a trade secret. Under FUTSA, the company must make reasonable efforts to keep the information a secret and prevent it from being disclosed to third parties.

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To ensure sufficient trade secret protection, Florida companies should conduct a periodic review of their trade secrets in light of the requirements under the FUTSA. As part of this review, companies should:

1. Identify all potential trade secrets.
2. Review all potential trade secrets to confirm that the information in fact constitutes a trade secret. To constitute a trade secret, the information must derive independent economic value 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.
3. Analyze the vulnerability associated with all identified trade secrets. Identify which secrets (i) would be most damaging to the business if made publicly available, (ii) are at the greatest risk of being appropriated/used by competitors or potential competitors.
4. Determine what structure(s) and systems may be implemented by the business to protect and manage trade secrets over time and implement same. In many instances, business utilize different levels of protective measures across the organization.
5. Consult with a knowledgeable attorney to ensure the structures and systems in place are sufficient, and to ensure the business is aware of the latest developments in this area of the law.

Due to the hectic nature of entrepreneurial and startup companies (as well as many established ones), it can be easy to neglect taking steps to protect valuable trade secrets until it is too late. However, by taking the proactive and ongoing measures described above, companies can greatly reduce the risk of a once protectable trade secret falling into the hands of, and being used by, a competitor.