

## **RISKING LIABILITY WHEN A NEW HIRE BRINGS TRADE SECRETS FROM A FORMER EMPLOYER**

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A recent decision by the Virginia Supreme Court highlights the exposure a company faces when a new employee discloses a former employer's trade secret information. The court ruled that a new employer can be liable for misappropriation of trade secrets even if it does not use the trade secrets to compete with the former employer. Under the Uniform Trade Secrets Act, there are two alternative definitions of "misappropriation". One requires "disclosure or use" of the trade secret by the defendant, but the other requires only that the defendant have "acquired" the trade secret with knowledge or reason to know that the trade secret had been acquired by improper means. So a company is liable for misappropriation if it receives information from a new employee which it knew or had reason to know that the employee was not entitled to disclose -- even if the company, itself, does not go on to use or disclose this information.

The Uniform Trade Secrets Act has been adopted by most states, including Maryland and the District of Columbia as well as Virginia. Thus, in all of those jurisdictions a company faces liability for trade secret misappropriation if it receives information from a new employee that it knew or had reason to know was the trade secret of a former employer. The company would be liable even if it did not use or disclose the trade secret although, as a practical matter, the amount of its liability usually would be minimal in those circumstances because it has not profited from the secret.

A related issue is whether the company is automatically liable, under the doctrine of "respondeat superior," for any use or disclosure that the new employee makes of the former employer's trade secret, regardless of whether company management knew about or approved his actions. Respondeat superior makes an employer liable for whatever the employee may have done in performing his work, even if his actions violated explicit policy or instructions. Federal courts in Virginia have ruled that respondeat superior applies to claims under the Virginia Uniform Trade Secrets Act. This issue has not yet been addressed in Maryland or D.C. Thus, in Virginia the company is liable whenever a new employee uses or discloses a former employer's trade secrets, even if management didn't know or approve and even if the employee's actions violated company policy.

At what point does the new employee "cross the line" and trigger liability for misappropriation of the former employer's trade secret? If all the new employee has done is merely to upload the alleged trade secrets onto his company computer, without disclosing the information to other employees or making any use of the information, the courts in Virginia have declined to find that any misappropriation has occurred. But if the employee has used the information in his work or has shared it with other employees, then the company faces liability for misappropriation.

Thus, once a new employee loads a former employer's trade secret information onto his company computer, his new employer is only one step away from liability. The employer will be liable if the new employee proceeds to share the information or make use of it in his own work. The risk of liability is even greater if the new employee uploads the information onto a company server

that is accessible to other employees who may find and use that information on their own. Even if there is no improper use or disclosure of the information, the fact that it resides on a company computer or server will create headaches if a question is ever raised about whether there has been any misappropriation by the new employee or his employer.

In order to minimize its risk of liability, a company should take steps to ensure that new employees do not bring into the workplace any trade secrets of their former employer(s). New hires should be cautioned not to load onto their company computers, cell phones, or other electronic devices any confidential information of a former employer. The new employee could inadvertently create a significant problem for himself and the company if he transfers his accumulated data wholesale without careful review.