

Don't Let Employee Trade Secret Thieves Turn the Table on You: Ten Tips for Minimizing Employment Liability

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When your company has uncovered evidence that an employee misappropriated trade secrets it has to act swiftly. The company may want to fire the employee to protect the company from the potentially devastating consequences. But how can you minimize the risk that the employee may sue the company claiming he did not misappropriate trade secrets?

Here are ten tips for minimizing the risks posed by an employee's claim:

1. **Inventory your trade secrets and have clear policies.** You should know what your trade secrets are and the protocols in-place to safe guard them. There should be policies about access to and use of trade secrets that are informed by the Uniform Trade Secrets Act and the Computer Fraud and Abuse Act. Your policies should be clear that the company owns the computing systems and data and that unauthorized use and misappropriation is strictly prohibited. Crafting a policy and protocol that passes muster with regulators is tricky, however, so you should consult an experienced attorney.
2. **Once you learn of possible misappropriation, involve HR.** Human resources professionals are experienced in handling employee discipline and terminations and can help you avoid potential pitfalls. They can provide objective oversight that will strengthen any decision adversely affecting the employee.
3. **Don't act hastily.** Never base the decision to terminate an employee on rumor or speculation. You could be held liable for wrongful termination if the decision is based upon misinformation supplied by a manager. You should thoroughly investigate suspected misappropriation, and consider placing the employee on paid leave (without access to company computer systems) to minimize liability in the event that misappropriation did not occur.
4. **Make sure it's actually a "trade secret."** Employers may think that any business-related information is a protected asset. However, state and federal regulators have taken the position that a lot of information related to employees' wages and working conditions is not protected as confidential, and therefore an employee cannot be fired for disclosing it. Similarly, courts look closely at what a company may cast as a trade secret. If the information has not been protected by the company or is available in the marketplace it may not be a trade secret.
5. **Check the contract.** When deciding whether to terminate the employee, review their employment contract, if there is one. A contract may spell out procedures you have to comply with, notice you need to provide, or create other obligations.
6. **Don't discriminate.** When considering whether to terminate an employee, make sure you treat him or her in the same way as you have treated other employees who have done the same thing. If you discipline the employee more harshly than another, they could claim it was based on a protected characteristic such as race, age, etc. Keep in mind too, that the way in which you punish the employee will set the standard for how you treat similar offenses in the future.
7. **Be civil.** Be mindful about the manner in which you convey the termination. Some jurisdictions recognize a cause of action for negligent infliction of emotional distress where an employee is treated unreasonably (i.e. too harshly) during the termination process. For example, don't fire the employee publicly or in a humiliating manner. Also, to limit the risk of a defamation claim, the termination details should be shared only on a need-to-know basis. You should ensure that the message is not delivered alone and that a witness is in the room.
8. **But don't sugarcoat.** Although you need to be civil, you should make sure that you are consistent in stating the reasons for the discipline; i.e., the misappropriation. Providing conflicting explanations can suggest an improper motive and invite a lawsuit. In particular, you should ensure that the explanation provided to the State for unemployment purposes matches the

true reason for termination.

9. **Don't forgo compliance.** If you believe an employee stole trade secrets, it may be tempting to hold up their final paycheck or otherwise retaliate against them. However, you need to ensure compliance with wage and hour law, COBRA requirements, etc. The fact that the employee stole trade secrets will not be a defense to a claim under these laws.
- . **Document everything.** Jumping through all of these hoops is worth little if you don't document your actions. Thorough documentation will give you the best chance if the employee decides to sue you. But, of course, take care to maintain the confidentiality of privileged communications with your attorneys and their work product.

Keeping these tips in mind will put you in a stronger position to defend any claim that a former employee brings.

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