

Noncompete News: Update on Tennessee Trade Secret and Non-Compete Law

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In 2000, the Tennessee legislature passed the Tennessee Uniform Trade Secrets Act ("TUTSA or the Act") to govern trade secret law and to extend an arm of protection to individuals and businesses with trade secrets. Tenn. Code Ann. § 47-25-1708(a). The Tennessee legislature adopted the definition of "trade secret," in part, from the Uniform Trade Secrets Act, but also included several other additions, making Tennessee's definition of "trade secret" even broader than that of most states. Recent Tennessee case law arguably provides greater protection to trade secrets by offering protection to categories of information that traditionally were not considered trade secrets.

In *Hamilton-Ryker v. Keymon*, 2010 Tenn. App. LEXIS 55 (Tenn. Ct. App. 2010), a temporarily laid off employee e-mailed documents related to a customer of her employer from her work e-mail address to her personal e-mail address. The customer subsequently ended the business relationship with the employer. The employer then sued the employee for breach of contract, misappropriation of confidential information, and violation of TUTSA. The trial court entered judgment for the employer and the Tennessee Court of Appeals affirmed an award of nearly \$1,000,000 to the employer, finding: 1) that the information e-mailed to the employee's personal e-mail was a trade secret, 2) that the covenant not to compete was enforceable despite the lack of any geographic limitation, and 3) that the evidence supported the award of damages, including punitive damages.

Misappropriation of a Trade Secret: Under TUTSA, a definition of "misappropriation" is "acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means." Keymon argued that the information she e-mailed to herself, including the client's mailing list, the year's production schedule, and financial documents, were **not** trade secrets because the information could have been readily obtained from the client directly. Notwithstanding the fact that Keymon may have been able to obtain the information independently, the Court held it was nonetheless trade secret information protected by the Act because **she, in fact, obtained the information from her former employer** instead of by other independent means. The Court also reasoned that Keymon misappropriated a trade secret because she received an economic benefit between the time she obtained the information and the time she began competing with her former employer by personally delivering services that were performed under the client's contract with the former employer.

Restrictive Covenant: As part of an employment agreement, Keymon had signed a restrictive covenant not to solicit the company's clients and stating that client confidential information would be used solely for the benefit of the employer and no

others. Keymon argued that she should not be bound by the "non-compete" covenant because it did not specify a geographic restriction as required under Tennessee law. The Court of Appeals noted that the "non-compete" was actually a non-solicitation agreement, which did not require a geographic limitation.

Damages: TUTSA provides for exemplary damages (a triple of actual damages) to be awarded in cases where there is "willful and malicious misappropriation," a different standard from the traditional standard for punitive damages. Tenn. Code Ann. § 47-25-1704(b). While Keymon argued that the traditional standard for punitive damages (a showing of hatred, ill will or spite) should be applied, the Court determined that in trade secret misappropriation cases, no such showing was necessary. Rather, Keymon acted maliciously as evidenced by her application for unemployment compensation, acceptance of a severance package upon her layoff, and her underhandedly accessing her former employer's trade secret information.

Employers' Bottom Line

The Keymon case provides the Court's latest rationale regarding trade secret misappropriation, applicable damages, and non-solicit agreements in Tennessee. Employers should be aware that Tennessee courts may now offer them more protection by re-categorizing information that traditionally has not been considered a trade secret. Instead of focusing solely on whether the information was readily ascertainable by appropriate public means, the Keymon court placed a great emphasis on the **means by which the individual obtained the information**. Last, under TUTSA, it may be easier to prove exemplary damages.

If you have any questions regarding trade secret misappropriation or non-compete or non-solicitation agreements, contact Victoria Holladay, vholladay@fordharrison.com, (901) 291-1531 or the Ford & Harrison attorney with whom you usually work.