

## Michigan

### 1. What is the statutory authority for trade secret protection in your state?

Many states have adopted the Uniform Trade Secrets Act, including Michigan. See 153 Am. Jur. Proof of Facts 3d 1 (Originally published in 2016). To establish a trade secret claim under the Michigan Uniform Trade Secrets Act (MUTSA), the plaintiff must show the existence of a trade secret and misappropriation. Mich. Comp. Laws § 445.1902(b), (d); Mich. Comp. Laws § 445.1902(b), (d); see *RGIS, LLC v. Gerdes*, 817 F. App'x 158, 162 (6th Cir. 2020) (finding that DTSA “defines ‘misappropriation’ and ‘trade secret’ in similar ways” and “assum[ing] (without deciding) that the federal law follows the same standards as the state law”).

### 2. What are the elements of a trade secret claim in your state, and are any unique?

“[T]he elements of a misappropriation claim under MUTSA and the DTSA are largely identical.” *FCA US LLC v. Bullock*, 446 F. Supp. 3d 201, 212 (E.D. Mich., Mar. 13, 2020). It is the plaintiff’s burden to plead facts to show, “(1) the existence of a trade secret; (2) the Defendant’s acquisition of the trade secret in confidence; and (3) the Defendant’s unauthorized use of it.” *Dice Corp. v. Bold Technologies*, 913 F. Supp. 2d 389, 406 (E.D. Mich. 2012) (quoting *Stromback v. New Line Cinema*, 384 F. 3d 283, 302 (6th Cir. 2004)).

Under the Michigan Uniform Trade Secrets Act (MUTSA) a “trade secret” is “information, including a formula, pattern, compilation, program, device, method, technique, or process, that is both of the following”: (i) 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(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

In Michigan, courts review a number of factors to determine whether information constitutes a trade secret under the act, including: (i) the extent to which the information is known outside the owner's business; (ii) the extent to which the information is known by employees and others involved in the business; (iii) the extent of the measures taken to guard secrecy of the information; (iv) the value of the information to owners and competitors; (v) the amount of effort and money expended in developing the information; and (vi) the ease or difficulty with which the information could be properly acquired or duplicated by others. See *Hayes-Albion v Kuberski*, 421 Mich 170, 182 (1984). While *Hayes-Albion* was decided before enactment of the Uniform Trade Secrets Act, Michigan courts continue to rely on these early trade secret cases for guidance. See *McKesson Medical-Surgical v Micro Bio-Medics*, 266 F Supp 2d 590, 595-96 (ED Mich 2003).

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### 3. How specific do your courts require the plaintiff to be in defining its “trade secrets?” (This could include discussing discovery case law requiring particularity.)

Under Michigan case law, “[a] party alleging trade secret misappropriation must particularize and identify the purported misappropriated trade secrets with specificity.” See *Jasper v. Bloomfield Vill. Inv. Holding, LLC*, No. 337098, 2018 WL 1611461, at \*5 (Mich. Ct. App. Apr. 3, 2018) (quoting *Dura Global Technologies, Inc. v. Magna Donnelly Corp.*, 662 F.Supp.2d 855, 859 (ED Mich, 2009)).

A party claiming trade secret protection under MUTSA must establish, at a minimum, that the information constitutes a “trade secret” and that the alleged violator had neither express nor implied consent to use the information. See *Mike’s Train House, Inc v Lionel, LLC*, 472 F3d 398 (6th Cir 2006); *Sherman & Co v Salton Maxim Housewares, Inc.*, 94 F Supp 2d 817, 821–822 (ED Mich 2000).

In Michigan, trade secrets depend on the secrecy of the protected information. In other words, “there must be evidence presented that sufficient measures have been taken to guard the secrecy of the information and to preserve its confidentiality.” *Kubik v Hull*, 56 Mich App 335, 347 (1974) and *Dice Corp v Bold Technologies*, 913 F Supp 2d 389, 406 (ED Mich 2012).

To be protected, the guarded information must provide the owner a competitive advantage in the marketplace. *Giasson Aerospace Sci, Inc v RCO Engineering, Inc.*, 680 F Supp 2d 830, 843-844 (ED Mich, 2010).

The courts have recognized customer lists and information, costs, internal weaknesses, marketing and strategic plans, diagrams, survey data, prices and similar information as satisfying the definition of a “trade secret” under MUTSA. See, e.g., *Merrill Lynch Pierce Fenner and Smith v Ran*, 67 F Supp 2d 764 (ED Mich 1999).

### 4. What is required in your state for a plaintiff to show it has taken reasonable measures to protect its trade secrets? (Preferably answer with practical, factual requirements from decisions.)

In showing that a plaintiff has taken reasonable measures to protect its trade secrets, courts consider several confidentiality (secrecy) factors, including: (i) “the actual extent of measures taken by the employer to guard the secrecy of the information, (ii) the extent to which the information is known by others in the same business, and (iii) the ease or difficulty with which the information can be properly duplicated or acquired by others.” Carey DeWitt, *Trade Secret Law for the Employment Lawyer Handling A Misappropriation Case*, Mich. B.J., January 2005, at 20, 21–22.

Additionally, facts that a plaintiff might show to demonstrate that it has taken reasonable measures to protect its trade secrets may include the following: (i) “[S]torage of information with locked, limited access, (ii) need-to-know information access, (iii) electronic key access to rooms/information, (iv) clear marking of confidential information, (v) limited access of computer-stored information, (vi) visitor restrictions, and other means of avoiding unnecessary disclosures, such as scrutiny of brochures and websites to prevent release of secrets, (vi) employee policies on confidential information, or confidentiality, non-solicitation, (employee) anti-raiding, or non-compete agreements, (vii) routine verification of confidentiality procedures, (viii) routine employee reminders of confidentiality policy, (ix) pursuit of departing employees with access to confidential information, (x) prohibiting removal of confidential information from company premises, (xi) restricting copying of confidential information (numbering copies, etc.), and (xii) conducting exit interviews.” *Id.* at 22.

**5. Does your state apply the inevitable disclosure doctrine? If so, how is it applied?**

Michigan has not yet adopted the “inevitable disclosure” doctrine, where a plaintiff may prove a claim of trade secret misappropriation by demonstrating that the defendant's new employment will inevitably lead him to rely on the plaintiff's trade secrets. See *CMI Int'l, Inc. v. Internet Int'l Corp.*, 251 Mich. App. 125; 649 N.W.2d 808 (2002).

**6. How have courts in your state addressed the defense that an alleged trade secret is “reasonably ascertainable?” What needs to be shown to prevail on that theory?**

As stated in *Giasson Aerospace Sci., Inc. v. RCO Eng'g, Inc.*, “there can be no trade secret where the ‘secret’ is readily ascertainable from the public domain.” 680 F. Supp. 2d 830, 841–42 (E.D. Mich. 2010). However, “Plaintiffs need not show that each component of their trade secrets are secret, or even nonobvious over what exists in the public domain.” *Id.*

“A trade secret cannot consist of 'information which is readily ascertainable, i.e., capable of being acquired by competitors or the general public without undue difficulty or hardship.’” *Wysong Corp. v MI Indus.*, 412 F Supp 2d 612, 627 (ED Mich 2005) quoting *Kubik, Inc v Hull*, 56 Mich App 335,348; 224 NW2d 80 (1974).

Moreover, information is considered “readily ascertainable” if it is available in trade journals, reference books, or published materials. However, the exact item or information claimed to be a trade secret must be disclosed therein. See *Uniroyal Goodrich Tire Co. v. Hudson*, 873 F. Supp. 1037, 1046 (E.D. Mich. 1994), judgment aff'd, 97 F.3d 1452 (6th Cir. 1996) (applying Michigan law) (the court reviewed the articles presented by the defendant attempting to show that the plaintiff's specific tire information was not a trade secret and concluded the articles only contained general tire information rather than information regarding the plaintiff's product or claimed trade secrets).

**7. What are the most recent “hot button” issues addressed by courts in your state regarding trade secret claims?**

In the recent case of *LinTech Global, Inc. v. CAN Softtech, Inc.*, the Eastern District of Michigan had the opportunity to examine MUTSA’s preemption provision. See 2021 WL 1026908, at \*1 (E.D. Mich. Mar. 17, 2021).

Specifically, in a Partial Motion to Dismiss, Defendants in that matter claimed that “[Plaintiff’s] tortious interference claims are based on the allegation that Defendants acted in violation of MUTSA and, because MUTSA preempts other tort claims, the tortious interference claim must fail.” *Id.* at 5. In other words, Defendants took the position that Plaintiff’s tortious interference claim was based entirely on trade secret misappropriation.

In denying Defendants’ Motion to Dismiss, however, the Court for the Eastern District of Michigan reasoned that Plaintiff’s tortious interference claim survived based upon its well-pled allegations regarding “other wrongful conduct independent of the misappropriation of trade secrets.” *Id.* at 6. Thus, the court denied Defendants’ Motion, and allowed the case to proceed to discovery.

**8. How does your state’s Trade Secret law differ from the DTSA, as the latter is applied in your Circuit?**

A few years ago, on May 11, 2016, the Defend Trade Secrets Act (DTSA) was signed into law, providing litigants a private right of action in federal court for trade secret misappropriation claims. See *Defend Trade Secrets Act of 2016*, Pub. L. No. 114-153, § 2, 130 Stat. 376, 376–82 (codified at 18 U.S.C. § 1836 (2012)). While the availability of a federal cause of action was likely a net positive for owners of trade secrets, there remained questions: how would parties litigate trade secret disputes given the availability of a

federal claim, and how would courts interpret and implement the new law, particularly given the existing inconsistencies in the various state trade secrets laws modeled after the Uniform Trade Secrets Act (UTSA). *See id.*

The DTSA's relatively recent effective date means little has been seen through the courts yet, with most issued decisions dealing with injunctions or motions on the pleadings. However, two consequences of the enactment of the DTSA are becoming clear: (1) the uniformity Congress desired will be lacking and (2) costs associated with trade secret litigation will increase. *See id.*

Key definitions (e.g., "trade secret," "misappropriation," and "improper means") in the DTSA and UTSA are substantively similar. Compare 18 U.S.C. §§ 1836, 1839, with Unif. Trade Secrets Act § 1 (Unif. Law Comm'n, amended 1985). Although some courts have determined that "existing state law on trade secrets informs [their] application of the DTSA" based on the statutory similarities and legislative history, courts have provided additional reasons for relying on state law when analyzing a DTSA claim. Some courts have turned to state law because of "the absence of contrary authority." *See id.* Others have relied on state law merely because courts in their district have previously done the same. Still, others have taken this approach where the parties simply agreed the court may look to state law. Regardless of the reason for the approach, because courts are relying on existing state law, many differences in the "patchwork" of state trade secrets laws that the DTSA was intended to fix will eventually be imported into each jurisdiction's interpretation of the DTSA.