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New Hampshire

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

New Hampshire Uniform Trade Secrets Act, N.H. Rev. Stat. § 350-B:1, *et seq.*

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

The plaintiff must plead facts sufficient to establish that:

1. it had a trade secret,
2. defendants used it, and
3. defendants knew or had reason to know that they obtained knowledge of the trade secret through a breach of confidence

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.)

The courts have explained that a plaintiff must disclose their trade secrets with "reasonable particularity" prior to onset of discovery. However, there has been some argument regarding whether the determination such a standard of "reasonable particularity" is to be determined as a question of law before discovery, or a matter that is a discovery issue and in the sound discretion of the trial court. In *Vention Medical Advanced Components, Inc. v. Pappas*, the court agreed with the trial court that the issue of trade secret disclosure is fact dependent and an issue of discovery. 171 N.H. 13, 26, 188 A.3d 261, 273 (2018), *as amended* (Oct. 23, 2018). In addition, they further described the standard of "reasonable particularity" to mean "a description of trade secrets that is sufficient to put the defendant on notice of the claims against him, and that allows the defendant to discern the relevancy of any requested discovery." *Id.* at 26, 188 A.3d at 273. Ultimately the court agreed with trial court in the conclusion that Vention had sufficiently described their trade secrets with "reasonable particularity" by identifying the process and equipment that it used to make their product in a step-by-step detail including component process parameters, which were enough to meet its standard of specificity because the claimed trade secrets were the processes and technology it used to make their product, not a single product, material or tube size. *Id.* at 26, 188 A.3d 274.

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.)

New Hampshire state courts have not discussed which efforts to maintain secrecy are reasonable or sufficient for trade secret protection. However, there are many cases that analyze what the courts have determined to be sufficient in that case. In *Wilcox v. Industries Corp. v. Hansen*, 870 F. Supp. 2d 296, 310 (D.N.H. 2012), the court determined these factors to be sufficient to show that the plaintiff took sufficient actions to protect their trade secret:

1. Required employees to sign confidentiality agreements as a condition of employment, and
2. Placed security systems in facilities containing confidential information, providing access only to specific employees.

The courts have also analyzed cases where they have determined that information in question was not a trade secret due to lack of protection. In *Mortgage Specialists, Inc. v. Davey*, 153 N.H. 764, 769, 904 A.2d 652, 658 (2006), the court determined that the plaintiff did not take reasonable efforts under the circumstances to maintain secrecy of their information. In support of that conclusion, the court listed these shortcomings:

1. Not labeling the information as confidential or trade secret,
2. Storing the documents in an attic with no monitorization,
3. Lack of consistent instruction to employees and independent contractors as to nature of the confidential information, and
4. The allowance of any loan originator to request paper copy for confidential information, even though electronic access was restricted.

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

New Hampshire courts have most consistently not applied the inevitable disclosure doctrine. *In Allot Communications, Ltd v. Cullen*, 020710 NHSUP, 10-E-0016 (Feb. 7, 2010), the court stated that the public policy of New Hampshire "discourages covenants not to compete," and therefore have moved away from applying the inevitable disclosure doctrine.

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?

The courts in New Hampshire have not deeply addressed an available defense of "reasonably ascertainable" trade secrets. In *ACAS Acquisitions (Precitech) Inc. v. Hobert*, 155 N.H. 381, 397, 923 A.2d 1076, 1091 (2007), the Supreme Court of New Hampshire decided on a case where the defendant made the argument that he had not violated his non-compete agreement because the information he disclosed was information available from public sources and therefore, "readily ascertainable." The court accepted that argument in part and rejected in part by stating that, "the mere identity of the customers may be reasonably ascertainable," but the disclosed information was compromised of other principals not in the public domain. *Id.*

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

There have been certain themes in trade secret claims that are being addressed by courts all around the country. Some of these include: (1) cases discussing a "generally known and readily ascertainable" defense to trade secret misappropriation, most notably in Texas; (2) evaluating the reasonable secrecy efforts of confidentiality, most notably in California and Pennsylvania; (3) addressing the standard of "sufficient trade secret identification," and (4) navigating the protectable trade secrets in customer identification in a rising tech world, most notably in Oregon and California. There have not been any "hot button" issues in New

Hampshire as of the date of this publication.

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

There are some unique features in the DTSA that is not present in NHUTSA. Some of these include, Ex Parte Seizures, Whistleblower Immunity and employer notification requirements of it, and the lack of a trade secret identification requirement on trade secret holders. In addition, the DTSA also provides for federal criminal charges for trade secret theft, while the NHUTSA is solely a civil action. Lastly, the definitions of misappropriation between the two acts are similar, yet different. The NHUTSA details a variety of ways in which "improper means" could be understood, where the DTSA is rather vague and open-ended. In terms of damages, the DTSA allows for recover of actual damages, restitution damages and allows for injunctions on threatened misappropriation, whereas the NHUTSA has been silent on whether injunctive relief is appropriate where the harm is rudimentary.