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Pennsylvania

McNees Wallace & Nurick, LLC
100 Pine Street
Harrisburg, PA 17101
www.McNeesLaw.com

Kandice K. Hull, Esq.
khull@mcneeslaw.com

Lauren Anthony, Esq.
lanthony@mcneeslaw.com

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

In Pennsylvania, the statutory protections for trade secrets are set forth at 12 P.a. C.S. § 5301 *et seq.*, the Uniform Trade Secrets Act, or PUTSA. The Act's subparts are set forth at Sections 5301 through 5308, and the substantive provisions include: Section 5302 (Definitions); Section 5303 (Injunctive Relief); Section 5404 (Damages); Section 5305 (Attorney Fees); Section 5306 (Preservation of Secrecy); Section 5307 (Statute of Limitations); and Section 5308 (Effect on Other Law).

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

As an initial matter, there must be a "trade secret" as defined by 12 Pa. C.S. § 5302, which provides that a "trade secret" is "[i]nformation, including a formula, drawing, pattern, compilation including a customer list, program, device, method, technique or process that":

> (1) 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.
>
> (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
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> 12 Pa. C.S. § 5302.

As to misappropriation of trade secrets, there must also be a showing of misappropriation, which is defined as follows:

> (1) 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; or
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> (2) disclosure or use of a trade secret of another without express or implied consent by a person who:
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> > (i) used improper means to acquire knowledge of the trade secret;
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> > (ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:
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> > > (A) derived from or through a person who had utilized improper means to acquire it;
> > >
> > > (B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
> > >
> > > (C) derived from or through a person who owed a duty to the person

seeking relief to maintain its secrecy or limit its use; or

(iii) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

12 Pa. C.A. § 5302.

As stated by the Superior Court in *Pestco, Inc. v Associated Products, Inc.*, "Pennsylvania courts have generally accepted § 757 of the Restatement (2nd) of Torts as the basic outline for our trade secrets law[,]" and Section 757 states, in pertinent part, that :

One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if

(a) he discovered the secret by improper means, or

(b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him.

Pestco, Inc. v. Associated Prod., Inc., 880 A.2d 700, 705–06 (Pa. Super. Ct. 2005) (internal citation omitted) (citing Rest.2d Torts § 757, *Liability For Disclosure Or Use Of Another's Trade Secret—General Principle*, (a), (b)).

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.)

As stated *supra*, Section 5302 defines a "trade secret" as "[i]nformation, including a formula, drawing, pattern, compilation including a customer list, program, device, method, technique or process that":

(1) 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.

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

12 Pa. C.S. § 5302.

Further, as the Pennsylvania Superior Court stated in *Crum v. Bridgestone/Firestone North American Tire, LLC*:

The following factors are to be considered in determining whether given information is afforded trade secret status: 1) the extent to which the information is known outside of his business; 2) the extent to which it is known by employees and others involved in his business; 3) the extent of measures taken by him to guard the secrecy of the information; 4) the value of the information to him and to his competitors; 5) the amount of effort or money expended by him in developing the information; and 6) the ease or difficulty with which the information could be properly acquired or duplicated by others. . . . The crucial *indicia* for determining whether certain information constitutes a trade secret are 'substantial secrecy and competitive value to the owner.

Crum v. Bridgestone/Firestone N. Am. Tire, LLC, 907 A.2d 578, 585 (Pa. Super. Ct. 2006) (quotation marks and internal citations omitted).

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.)

"For one, 'what is required to maintain a trade secret action is not absolute secrecy'—but for the breach of which, one supposes, as a matter of logic, the circumstances would never give rise to actionable misappropriation of trade secrets—'but rather substantial secrecy.'" *Alpha Pro Tech, Inc. v. VWR Int'l LLC*, 984 F. Supp. 2d 425, 437 (E.D. Pa. 2013) (citing *EXL Labs., LLC v. Egolf,* No. 10–6282, 2010 WL 5000835, at *5 (E.D.Pa. Dec. 7, 2010)). "And ascertaining 'whether a plaintiff took sufficient steps to maintain substantial secrecy of its proprietary information' requires consideration of, but not entire reliance on, confidentiality agreements, which are but one factor of the analysis." *Id.* at 437-38 (citations omitted).

"Whether given security measures are reasonable is a question of fact to be evaluated in light of the circumstances and facts of the case." *Bro-Tech Corp. v. Thermax, Inc.*, 651 F. Supp. 2d 378, 410 (E.D. Pa. 2009). Non-disclosure agreements, as well as restrictions on the production of certain information rendering it accessible only to certain individuals, have been deemed sufficient. *See id.* at 388 (finding expert report at summary judgment stage sufficient for purposes of showing measures to reasonably protect the information at issue for purposes of a Pennsylvania trade secrets claim, and noting that the expert report discussed "so-called 'batch sheets,' which record the production of IER batches and contain the specific formula and process employed in the same, are accessible only to the particular engineers, chemical operators and plant employees who need to see them").

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

Pennsylvania courts have acknowledged the concept of inevitable disclosure in certain instances. *See Air Prod. & Chemicals, Inc. v. Johnson*, No. 81-E-25, 1981 WL 48154, at *9 n.10 (Pa. Com. Pl. Aug. 7, 1981), *aff'd*, 442 A.2d 1114 (Pa. Super. Ct. 1982) (acknowledging authority "in which an ex-employee has been enjoined from working for plaintiff's competitor because of the inevitability of disclosure of protected information"); *Solar Innovations, Inc. v. Plevyak*, No. 1110 MDA 2012, 2013 WL 11272849, at *11 (Pa. Super. Ct. Mar. 20, 2013) (generally acknowledging the inevitable disclosure doctrine and describing it as a principle that "generally applies to enjoin an employee who is not bound by a non-disclosure or non-compete agreement from accepting employment with a competitor when new employment would likely result in the disclosure of trade secrets" (citing *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102 (3d Cir.2010)).

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 "readily ascertainable" language appears in connection with the definition of "trade secret." *See* 12 Pa. C.S. § 5302 (including, in pertinent part, the language "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" with respect to trade secret definition). In addressing this term, courts have looked to the level of access to the information at issue that the public has. *See Krafft v. Downey*, 68 A.3d 329, 338 (Pa. Super. Ct. 2013) ("Simply because the Kraffts took a great deal of

time to make what the trial court determined to be minor, non-proprietary changes to the existing process . . . does not mean it was not 'readily ascertainable by proper means' by the general public. To the contrary, that the process was available in books and other published materials is the definition of 'readily ascertainable.' 12 Pa.C.S.A. § 5302. In fact, the record reflects that the process of transferring images to flagstone was ascertainable to anyone with access to the internet, a bookstore, or the library, which the Kraffts knew prior to including the Trade Secret Claims in the Amended Complaint.").

In addition, the Commonwealth Court in *Crouthamel v. Department of Transportation* has summarized relevant authority as follows:

> Generally, courts have held that where alleged secrets are commonly understood in an industry or readily available to the public, such as in public patent filings or trade publications, they do not receive trade secret protection. *See, e.g.*, *Ozburn-Hessey Logistics, LLC v. 721 Logistics, LLC*, 40 F.Supp.3d 437, 452 (E.D. Pa. 2014) (holding that alleged trade secret information that was generally known in the industry and available through trade publications was readily ascertainable and therefore not entitled to trade secret protections); *Midland-Ross Corporation v. Sunbeam Equipment Corporation*, 316 F.Supp. 171, 177-78 (W.D. Pa.), *aff'd*, 435 F.2d 159 (3d Cir. 1970) (finding that "[t]he very act of publishing a trade secret in a patent destroys the secretive nature of that which is disclosed therein" and "[m]ethods of manufacture or design and details of construction which are matters of general scientific knowledge in the industry do not constitute trade secrets").

Crouthamel v. Dep't of Transportation, 207 A.3d 432, 439 (Pa. Commw. Ct. 2019).

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

More recently, in *McKelvey v. Pennsylvania Department of Health*, the Supreme Court of Pennsylvania addressed an exemption for trade secrets under Pennsylvania's Right to Know Law in connection with records of applicants fin the medical marijuana industry, concluding that the exemption should be applied individually, and not on an industry-wide basis:

> [W]ith respect to the trade secret exemption, the court determined that the OOR properly applied the trade secret exemption only to Terrapin, and correctly found the confidential proprietary information exemption inapplicable to every applicant. Rather than rejecting outright any exemption by those applicants who offered no evidence to substantiate their exemptions, the court reviewed the evidence as to each applicant when considering whether they satisfied the exemptions. With respect to the trade secret exemption, the court, finding Terrapin's presentation to be exemplary, determined that its affidavits sufficiently established that the processes described therein were trade secrets, and extended that record evidence to similar processes described by the other applications. Thus, the court concluded that the affidavits submitted by Terrapin satisfied the first prong of the trade secret exemption for every applicant. Nevertheless, the court concluded that only Terrapin could avail itself of the exemption because it was the only party that submitted evidence of its reasonable efforts to maintain the secrecy of its processes, a necessary second component in establishing trade secret status — and requiring individualized assessment.
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> Similarly, as to Applicants' alleged exemption for confidential proprietary information, the court concluded that none of the Applicants established the exemption, emphasizing that "[t]he measures

> undertaken to maintain secrecy of the information are important indicators of its confidential nature." This assessment, consistent with court's trade secret analysis, required individualized evidence of each applicant's efforts in this regard. As no applicant other than Terrapin submitted evidence regarding these steps to maintain secrecy, the applicants other than Terrapin failed to establish the confidential nature of the information.
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> In light of the above, we hold that the Commonwealth Court properly analyzed the exemptions to disclosure under the RTKL, and did not abuse its discretion in finding certain information to be industry-wide in nature, and, thus, applicable to all applicants, and other information to be applicant-specific, necessitating individualized assessment. *This is especially true with respect to efforts to maintain the secrecy of information, which would necessarily differ by applicant. These are individualized determinations, which the Commonwealth Court properly recognized required individualized evidence to support.*

McKelvey v. Pennsylvania Dep't of Health, 255 A.3d 385, 408 (Pa. 2021) (internal citations omitted) (emphasis added). *McKelvey* is thus significant in that it represents the intersection of trade secret law, open records law, and cannabis law in Pennsylvania.

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

"Although the DTSA and the PUTSA use different wording to define a trade secret, they essentially protect the same type of information. Both define a trade secret as information that: (a) the owner has taken reasonable means to keep secret; (b) derives independent economic value, actual or potential, from being kept secret; (c) is not readily ascertainable by proper means; and (d) others who cannot readily access it would obtain economic value from its disclosure or use." *Teva Pharms. USA, Inc. v. Sandhu*, 291 F. Supp. 3d 659, 675 (E.D. Pa. 2018) (citing 18 U.S.C. § 1839(3); 12 Pa. Stat. § 5302).