FOR MORE INFORMATION

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Washington

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

Washington's Uniform Trade Secrets Act (UTSA) is codified at Chapter 19.108 of the Revised Code of Washington (RCW).

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

The Washington UTSA provides remedies for the misappropriation of trade secrets. A Plaintiff seeking redress under the Washington UTSA must prove: (1) that they had a trade secret; (2) that the defendant misappropriated the plaintiff's trade secret; (3) that the defendant's misappropriation was a proximate cause of damages to the Plaintiff; and (4) as a result of the misappropriation, the defendant received money or benefits that in justice and fairness belong to the plaintiff. 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 351.01 (7th ed.).

Misappropriation is defined as: acquisition of a trade secret of another without express or implied consent by a person who (1) used improper means to acquire knowledge of the trade secret; or (2) the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was (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 (3) before a material change of his or her position, knew or had a reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake. RCW 19.108.010(2)(a)-(b).

"Trade secret" is defined as "information, including a formula, pattern, compilation, 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; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. RCW 19.108.010(4)(a)-(b).

The definitions and general application of the Washington UTSA are very similar to the federal Defense of Trade Secrets Act of 2016, the UTSA 1985 version, and other states' trade secret acts.

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 plaintiff's "declarations and affidavits must provide specific, concrete examples illustrating that the information meets the requirements for a trade secret." *Belo Mgmt. Servis. Inc. v. Click! Network*, 184 Wn.App 649, 657 (2014). Trade secret information must be novel and cannot be readily ascertainable by proper means from another source or from the product itself. *See Spokane*

Research & Defense Fund v. City of Spokane, 96 Wn.App. 568, 578 (Div. 3 1999); *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 49–50 (1987). If the information is in the public domain and the end product is not original, information is not a trade secret. *Woo v. Fireman's Fund Ins. Co.*, 137 Wn.App. 480, 488-89 (Div. 1 2007). The information does not stop becoming a trade secret by a plaintiff's submission of the information for certification, through confidential disclosure to employees or suppliers, or through publication of exhibits at trial. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 52 (1987).

The plaintiff must also prove that the information has independent economic value. Washington courts will look to the effort and expense required to develop the information. It can even be "lengthy and expensive research that proves a certain process will not work." *Ed Nowogroski Ins., Inc. v. Rucker*, 137 Wn.2d 427, 438 (1999).

Often, the question arises whether customer lists are considered trade secrets. Washington courts use a three-part test which requires the plaintiff to show: (1) whether the list is a compilation of information; (2) whether it is valuable because unknown to others; and (3) whether the owner has made reasonable attempts to keep the information secret. *Ed Nowogroski Ins.*, 137 Wn.2d at 442.

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.)

RCW 19.108.010(4)(a)-(b) requires a subject to exert reasonable efforts to maintain the information a secret.

Juries may consider the following factors when evaluating whether the plaintiff demonstrated reasonable measures to maintain secrecy: (1) the extent to which the information is known outside the plaintiff's business; (2) the extent to which employees and others in the plaintiff's business know the information; (3) the nature and extent of the measures the plaintiff took to guard the secrecy of the information; (4) the existence or absence of an express agreement restricting disclosure; and (5) the extent to which the information was disclosed to others indicate that further disclosure without the plaintiff's consent was prohibited. 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 351.08 (7th ed.).

Reverse engineering has been found as a proper means of acquiring trade secret information. *Boeing Co.*, 108 Wn. 2d at 53-54. A jury may consider evidence of whether the plaintiff's claimed trade secret could be reverse engineered when determining if the claimed information met the requirement of a trade secret. WPI 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 351.04 (7th ed.). Allowing private information to become public, even through carelessness, will preclude protection as a trade secret for improper safeguarding. *Woo*, 137 Wn.App. at 490. Reasonable efforts to maintain secrecy "have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on a 'need to know basis,' and controlling plant access." *Machen, Inc. v. Aircraft Design, Inc.*, 65 Wn.App. 319, 327 (Div. 3 1992), *overruled on other grounds, Waterjet Tech., Inc. v. Flow Int'l Corp.*, 140 Wash. 2d 313, 315 (2000). Public disclosure of information through display, trade journal publications, advertising, or other carelessness can preclude protection. *Id*.

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

Washington courts have never expressly adopted the inevitable disclosure doctrine. In fact, the court in *Moore v. Commercial Aircraft Interiors, LLC* stated that the doctrine is neither adopted nor rejected and refused to decide whether to adopt it. *Moore v. Commercial Aircraft Interiors, LLC*, 168 Wn.App. 502, 512-13 (Div. 1 2012).

However, there seems to be an implied understanding of the validity of the doctrine. First, RCW 19.108.020 allows a plaintiff to seek an injunction for actual or threatened misappropriation. The injunction may be continued for an "additional reasonable period of time in order to eliminate commercial advantage

that otherwise would be derived from the misappropriation." *Id*. Second, the Court of Appeals (Division 3) affirmed an order that enjoined former employees from manufacturing a certain product for a period of six years based on product formulations found to be trade secrets of their former employer. *Solutec Corp., Inc. v. Agnew*, 88 Wn.App. 1067, 1997 WL 794496, at *10 (Div. 3 1997) (unpublished opinion). The *Solutec Corp.* Court found that not only did a trade secret exist for the manufacturing and formulation of the product but also that the broad injunction against the defendants from producing *any kind* of similar product was proper. *Id.* at *9. The Court reasoned that policing defendants to confirm that they were specifically using the specialized knowledge they gained of the formulations would be unduly burdensome, expensive, and would not provide the plaintiffs with relief. *Id*.

Generally, appellate courts in Washington have upheld either preliminary, permanent, or time specific injunctive relief so long as a plaintiff has met the criteria for an injunction. *See Boeing Co. v. Sierracin Corp.*, 108 Wn. at 684 (permanent injunction against the defendant upheld); *Solutec Corp., Inc., v. Agnew*, 88 Wn.App. 1067 at *9-10 (six-year injunction upheld by court on appeal) (unpublished opinion); *Gaddis Events, Inc. v. Wu*, 199 Wn.App. 1011, 2017 WL 2335854, at *5 (Div. 1 2017) (preliminary injunction possible but denied) (unpublished opinion).

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?

Under RCW 19.108.010(4)(a), information will not qualify as a trade secret if it is readily ascertainable. The plaintiff has the burden of proving that the information is not readily ascertainable when seeking relief under the Washington UTSA. *Precision Moulding & Frame, Inc.*, 77 Wn.App 20, 25 (Div. 1 1995) ("While a defendant does not need to go so far as to establish that the information is known to or readily ascertainable to the general public to defeat a trade secret claim, a plaintiff cannot establish that a trade secret exists if the information is generally known to or readily ascertainable by other persons . . . .").

Readily ascertainable can be described by its opposite, independent economic value. Juries are allowed to consider the following factors when determining independent economic value: (1) the value of the information to the plaintiff and to the plaintiff's competitors; (2) the amount of effort or money that the plaintiff took to guard the secrecy of the information; (3) the ease or difficult of acquiring or duplicating the information by proper means; and (5) the degree to which third parties have placed the information in the public domain or rendered the information readily ascertainable. 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 351.05 (7th ed.)

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

One of the most recent substantive cases, *Ada Motors, Inc. v. Butler*, the Court of Appeals (Division 1) remanded to the trial court on the issue of jury instructions on damages for a trade secret claim. The court stated: "The plaintiff has the initial burden of proving sales attributable to the trade secret. Then the burden shifts to the defendant to establish any portion of the sales not attributable to the trade secret and any expenses to be deducted in determining net profits." *Ada Motors, Inc. v. Butler*, 7 Wn.App.2d 53, 63, (Div. 1 2018).

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

The DTSA is very similar in substance to the Washington UTSA specifically with their definitions of "misappropriation," "trade secrets," and their allowances for damages and injunctions. Washington courts have also recognized this. *See generally, Bombardier Inc. v. Mitsubishi Aircraft Corporation*, 383 F.Supp.3d 1169 (W.D. Wash. 2019).