Virginia
Regulatory Hot Tip 2016 – 7

Professional Insurance Agents Association of Virginia and DC, Inc.

CAN I PROTECT MY CUSTOMER LISTS?

When insurance agents come to me about hiring a new producer or finding a way to retain a high results producer and I ask them what their major fear is for finding the right person, they all say the same thing:

> *"I want to encourage them to work hard and I will give them the tools to assist them in the trade. After all, I have been doing this work for a long time and I have amassed a really good business weapon, my client and client prospect list which I will share with them."*

Then, before drawing a breath, they all say, *"but if this doesn't work out, I want some protections so that they will not take this list with them."*

Over time, the Virginia courts have wrestled with balancing the business owner's need for protection of such trade secrets as its customer lists with avoiding a restraint of

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trade that will keep the departing employee from being able to secure a meaningful job. After all, the departing employee has just spent several years perhaps, with you, and they want something for their efforts. This is all that they know how to do to make a living. You see the problem…..

You must remember that whatever trade secret that you are sharing with the employee must be protected, to the extent possible by you. Moreover, it must be clear to the departing employee that this information was shared with them with protections already in place to secure it from becoming publicly known information. What are some protections that you as the business owner could consider as regards your customer lists? Well, anytime they are going to be reproduced, there should be a watermark, or other marking indicating that this is proprietary, confidential information, not to be shared with others. Likewise, you might avail yourself of passcodes for trade secrets maintained on your system. You also should not make proprietary information available to everyone in your agency. For example, the receptionist may have no need to see the agency's customer list. Or, she might, but if she does, then you need to take the precautionary methods that you would for your producer and make sure that she understands this information is proprietary, not to be shared with others nor removed from your office computer or premises (wherever it is maintained). Failure of the agency owner to take such precautions may cause the court to say that this is not proprietary information that should be called a trade secret, allowing a departing employee to take the list with them.

Likewise, recently courts have said that you may not just say that the customer list is a trade secret, particularly if the producer or person with whom you are sharing this proprietary information will never really use it. Let's say, for example, you have a producer, producer #1, who focuses on automobile business in the territory from Richmond to Virginia Beach, whereas another producer, producer #2, focuses on automobile business in the territory from Richmond to Roanoke. But, you share your entire client list with both, even though producer #1 has no interest or need to see your customers from Richmond to Roanoke, and indeed, will never write business for any new prospects in this territory. When producer #1 leaves, you may not be able to hold his feet to the fire relative to the customer list outside of his day-to-day territory. The court has indicated that you must draw these restraints as narrowly as possible in order to not become a restraint on trade. So, perhaps you, as the agency owner, need to separate customer lists and provide information on a need-to-know basis, thus limiting what you are sharing with others. Likewise, how do you keep abreast of where your producer might keep your proprietary information? For example, can you say for sure that none of it resides on a personal iphone or ipad? Do you require that anyone keep a list of where this information goes?

Obviously in this brief article we cannot explore all of the parameters that you should consider when you share your agency's proprietary information with others. You should consult your legal advisor on what type of agreement would best serve your needs to protect your agency's trade secrets and proprietary information. Oftentimes, these include entering into restrictive covenant agreements with the employee or including restrictive covenants in an employment agreement, if you plan to enter into an employment agreement with your employee. But, remember, the burden is on you to preserve, mark and protect your trade secrets in whatever manner you deem best for your agency.

Because trade secrets are the topic, this article is a perfect place to introduce the *Defend Trade Secrets Act of 2016 ("DTSA")*, a new piece of federal legislation which could help you in your quest to protect your trade secrets. With the DTSA, employers who historically relied exclusively on state courts when trade secrets were misappropriated now have a federal remedy in qualifying circumstances. The DTSA, which actually amends the Economic Espionage Act of 1996[1], was signed into effect by President Obama on May 11, of 2016.[2] That is a date you should remember because it triggers certain whistleblower immunity disclosures that employers must make to employees and independent contractors in order to avail themselves of this new federal civil remedy. Just keep in mind that the DTSA only applies to qualifying misappropriations which occur on or after that date, May 11, 2016.[3] For misappropriations prior to May 11, 2016 Virginia insurance agents can look to the Uniform Trade Secrets Act, VA Code §§ 59.1-336 through 59.1-343 for a potential remedy.

In a later hot tip we will address the DTSA in further detail and review the state statute in Virginia. Until then, do what you can to protect your client lists and other

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[1] 18. U.S.C. § 1831 et seq.

[2] S. 1890 impacting various provisions is Chapter 90 of Title 18 of the United State Code, specifically provisions of: 18 U.S. C. §§ 1831, 1832, 1833, 1835, 1836 and 1839.
See: Kenneth Kuwayti, Bryan Wilson and Christian Andreau-von Euw, *The Defend Trade Secrets Act: Some Practical Considerations* (May 11, 2016), http://www.mofo.com/~/media/Files/ClientAlert/2016/05/160511 DefendTradeSecretsAct.pdf; Michael S. Melbinger, *Time to Review Employment & Other Agreements in Light of the Defend Trade Secrets Act,* Wintson & Strawn LLP: Executive Compensation Blog (June 6, 2016) http://www.winston.com/en/executive-compensation-blog/time-to-review-employment-other-agreements-in-light-of-the.html; Ann G. Fort, Matt Gatewood, Peter G. Pappa, Gail L. Westover, *Implementing the Whistleblower Immunity Notice Provisions under the Recently-Enacted Federal Defend Trade Secrets Act,* (May 20, 2016) http://www.sutherland.com/NewsCommentary/Legal-Alerts/188752/Legal-Alert-Implementing-the-Whistleblower-Immunity-Notice-Provision-under-the-Recently-Enacted-Federal-Defend-Trade-Secrets-Act; Susan Gross Sholinksy, Peter Steinmeyer *Strategies for Complying with the Notice Provisions of the Defend Trade Secrets Act of 2016,* Epstien Becker Green (May 27, 2016) http://www.ebglaw.com/news/strategies-for-complying-with-the-notice-provisions-of-the-defend-trade-secrets-act-of-2016.

trade secrets in the manner that best suits your agency, and be aware of the protections available to you.