

## BLOGS

Archives;Hiring & Firing;Privacy & Information Security

# Willful Blindness on Trade Secrets: Employers Could Pay a Heavy Price

A recent trial experience provided an extraordinary lesson on the significant legal exposure employers face when hiring away employees from a competitor. I recently completed a jury trial in which my client obtained a \$22.7 million verdict against a competing company that had hired away two of my clients employees who had secretly taken numerous computer files belonging to my client and then used them for the benefit of their new employer. Although there ended up being many actions of the new employer to criticize, I believe that the most egregious one was the new employers failure to actively manage this risk at the hiring stage. The new employer appeared to at best utilize a conscious strategy of turning a blind eye toward the unlawful activity of its newly hired employees, while at the same time profiting significantly from the use of the purloined computer files.

Although the new employer at trial argued that the employees were essentially rogue employees who had acted without any direction or knowledge of their new employer, the trial evidence demonstrated a tremendous failure by the new employer to manage the situation in order to limit its legal exposure. No effort was made to ensure that the new employees did not possess and bring with them any trade secret or confidential information of their former employer. Nor were any efforts undertaken to meaningfully search the new employers computer system to ensure that such information was not being used by the new employees nor uploaded to the new employers computer system.

Minnesota and more than 40 states protect trade secret misappropriation through the Uniform Trade Secrets Act. Employers need to be aware that it is an unlawful misappropriation under that statute if a party (such as a new employer) benignly comes into possession of trade secrets even unknowingly and does not, upon discovery that the trade secrets are in the company's possession, take action to cease using the information and to return that information to its owner. It is, therefore, not an effective defense to trade secret misappropriation claims for a new employer to merely claim that they did not direct new employees to bring trade secret or other confidential information along with them.

To effectively manage legal exposure for misappropriation of trade secrets and confidential information, all employers should consider consistently taking the following steps when hiring new employees who were previously working for a competitor:

Ask job offerees if they have signed a confidentiality agreement and/or noncompete agreement with their existing employer and, if so, review that agreement.

Inform job offerees (and new employees) that they are expected to comply with the terms of any confidentiality and/or noncompete agreement with their prior employer and to not bring with them or use any confidential or trade secret information of their former employer. For maximum protection, this direction should be made in writing (such as including it within any employment offer letter).



Promptly and seriously investigate any concerns that may arise about the improper possession or use of trade secret and confidential information by your employees.

Implement serious discipline (including possible termination) of offending employees.