A Q&A guide to state law on trade secrets and confidentiality for private employers in New Jersey. This Q&A addresses the state-specific definitions of trade secrets and the legal requirements relating to protecting them. Federal, local or municipal law may impose additional or different requirements.

**OVERVIEW OF STATE TRADE SECRET LAW**

1. List the laws (statutes and regulations) by name and code number, both criminal and civil, that your state has adopted governing trade secrets.

New Jersey has not adopted a version of the model Uniform Trade Secrets Act. Instead, New Jersey relies on common law trade secret protection.

New Jersey’s Computer Related Offenses Act (CROA), provides civil remedies for wrongful actions that may affect trade secrets contained in:

- Data.
- A database.

Under the CROA, some of the wrongful actions include unauthorized:

- Altering.
- Damaging.
- Taking.
- Accessing.
- Attempting to access.
- Destruction.


Trade secrets may also be protected by New Jersey’s criminal statute, which addresses both theft and computer-related criminal activity (N.J. Stat. Ann. §§ 2C:20-1(i) (2011); 2C:20-3 (2011); 2C:20-23 to 2C:20-34 (2011)).
New Jersey has not adopted the Uniform Trade Secrets Act (UTSA). New Jersey instead relies on common law trade secret protection (Ahlert v. Hasbro, Inc., 325 F. Supp. 2d 509 (D.N.J. 2004)). A bill with a modified version of the UTSA has received favorable committee reports and even passed the New Jersey General Assembly in November 2010. However, the bill has never reached a floor vote in the New Jersey Senate.

New Jersey courts analyze trade secret misappropriation under the Third Restatement of Unfair Competition's confidentiality principles (Expediters Int'l of Wash., Inc. v. Direct Line Cargo Mgmt. Servs., Inc., 995 F. Supp. 468 (D.N.J. 1998)). New Jersey courts have also referenced the Restatement of Torts's trade secret definition and its six-factor trade secret analysis (Hammock ex rel. Hammock v. Hoffman LaRoche, Inc., 662 A.2d 546 (N.J. 1995)). The Restatement of Torts's six factors include:

1. The extent to which the information is known outside of the business.
2. The extent to which it is known by employees and others in the business.
3. The extent of the owner's measures to guard the information's secrecy.
4. The information's value to the owner and to his competitors.
5. The amount of effort or money used to develop the information.
6. How easy or difficult it would be for others to properly acquire or duplicate the information.

(Restatement of Torts § 757 cmt. b (1939)).

Under the common law duty of confidence a person cannot disclose a trade secret when:

1. The person knew or had reason to know that the discourse was intended to be in confidence.
2. The other party to the disclosure reasonably inferred that the person consented to an obligation of confidentiality.

(Restatement (Third) of Unfair Competition § 41(b) (1995)).

Confidential and proprietary business information may also be protectable even without an express agreement. In Lamorte Burns & Co. v. Walters, two employees breached their duty of loyalty by stealing protected information that they intended to use to compete with their former employer after resigning.

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Competitors owe no duty of loyalty or confidence to a trade secret owner. However, a competitor may be liable for trade secret misappropriation if he acquires it with knowledge of a former employee’s breach of confidence. (Rohm & Haas Co. v. Adco Chem. Co., 689 F.2d 424 (3d Cir. 1982)).

New Jersey law permits employers to use restrictive covenants to guard against misappropriation of company information by current and former employees. New Jersey courts require these agreements to be reasonable. (Ingersoll-Rand Co. v. Ciavatta, 542 A.2d 879 (N.J. 1988)).

Employers may also use restrictive covenants to guard against misappropriation of company information that does not meet the definition of a trade secret (Lamorte Burns & Co. v. Walters, 770 A.2d 1158 (N.J. 2001)).

New Jersey courts use the 1939 Restatement of Torts’s trade secret definition, under which a trade secret is any:

1. Formula.
2. Pattern.
3. Device.

(Restatement of Torts § 757 cmt. b (1939); Ahlert v. Hasbro, Inc., 325 F. Supp. 2d 509 (D.N.J. 2004)).

To be protected as a trade secret, information must:

1. Be used in business.
2. Give the owner an opportunity to obtain an advantage over competitors who do not know or use it.

(Restatement of Torts § 757 cmt. b (1939); Ahlert v. Hasbro, Inc., 325 F. Supp. 2d 509 (D.N.J. 2004)).

The New Jersey Criminal Code requires trade secret information to be both secret and valuable. The Code defines a trade secret as...
TRADE SECRETS

The following types of information may be protected as trade secrets:

- Scientific data, such as:
  - chemical processes and manufacturing methods (Sun Dial Corp. v. Rideout, 108 A.2d 442 (N.J. 1954));
  - a manufacturing process (Rohm & Haas Co. v. Adco Chem. Co., 689 F.2d 424 (3d Cir. 1982)).

- Business information, such as:
  - a code for determining discounts, rebates or other concessions in a price list or catalogue, and bookkeeping methods if the business continuously uses the information (Boost Co. v. Faunce, 80 A.2d 246 (N.J. Super. Ct. Ch. Div. 1951));
  - customer or client lists and information (AYR Composition, Inc. v. Rosenberg, 619 A.2d 592 (N.J. Super. Ct. App. Div. 1993)) (see Question 7);

NOT TRADE SECRETS

The following information has been found not to be a trade secret:

- Skills, expertise and general knowledge of an employee (Ingersoll-Rand Co. v. Ciavatta, 542 A.2d 879 (N.J. 1988)).
- General knowledge of a firm’s inner workings (Laidlaw, Inc. v. Student Transp. of Am., Inc, 20 F. Supp. 2d 727 (D.N.J. 1998)).

NOT TRADE SECRETS AS A MATTER OF LAW

The following have been found not to be trade secrets as a matter of law:

- Idea submissions, where the plaintiff cannot show “use in business” of the product (Ahlert v. Hasbro, Inc. 325 F. Supp. 2d 509 (D.N.J. 2004)).
REASONABLE EFFORTS TO MAINTAIN SECURITY

8. What efforts to maintain secrecy have been deemed reasonable or sufficient for trade secret protection:
   - By courts in your state?
   - By statutes or regulations in your state?

CUSTOMER LISTS CAN BE PROTECTED AS TRADE SECRETS

New Jersey courts have held that confidential customer lists may be protected from use or disclosure by current or former employees (AYR Composition, Inc. v. Rosenberg, 619 A.2d 592 (N.J. Super. Ct. App. Div. 1993)).

However, when employees take personal contacts from job to job, employers do not have a protectable interest in those relationships (Coskey’s TV & Radio Sales & Serv., Inc. v. Foti, 602 A.2d 789 (N.J. Super. Ct. App. Div. 1992)). Similarly, if customers are known in an industry or are easily discernable, employers do not have a protectable interest (Nat’l Tile Bd. Corp. v. Panelboard Mfg. Co., 99 A.2d 440 (N.J. Super. Ct. Ch. Div. 1953)).

SCOPE OF INJUNCTION ENJOINING USE OF FORMER EMPLOYER’S CUSTOMER LIST

In Coskey’s TV & Radio Sales & Serv., Inc. v. Foti, an employer sued its former employee for breach of a restrictive covenant. The preliminary injunction restricted the former employee from contacting any of the customers he had worked with during his employment, including those he had known before being hired.

On appeal, the Coskey’s TV & Radio Sales & Serv., Inc. v. Foti court balanced the employer’s protectable interest against the former employee’s hardship. Given the former employee’s extreme financial hardship and the limited benefit for the employer, the court substantially vacated the injunction.

The decision held that the former employee should be allowed to pursue:
   - Successful contracts he had negotiated for the employer.
   - Outstanding bids he participated in.
   - The employer’s relationships with particular customers where the employer helped provide the contact.

A court does not automatically terminate an employer’s pre-existing cause of action against a former employee, even if some of the employer’s trade secrets are disclosed in patents that are issued after the defendant employee misappropriated the information (Adolph Gottscho, Inc. v. Am. Marking Corp., 114 A.2d 438 (N.J. 1955)).
STATUTES OR REGULATIONS
There are no statutes or regulations addressing what are considered reasonable steps to maintain secrecy of a trade secret.

TRADE SECRET MISAPPROPRIATION CLAIMS

9. For any law identified in Question 1 (statutes or regulations) or Question 3 (common law), what must a plaintiff show to prove trade secret misappropriation?

COMMON LAW
Under New Jersey common law, to prove trade secret misappropriation a plaintiff must show each of the following:

- A trade secret exists (see Question 4).
- The information was communicated in confidence by the plaintiff to the employee.
- The secret information was disclosed by the employee and in breach of that confidence.
- The secret information was acquired by a competitor with knowledge of the employee’s breach of confidence.
- The secret information was used by the competitor to the plaintiff’s detriment.
- The plaintiff took precautions to maintain the secrecy of the trade secret (see Question 8).


Under Rycoline Prods., Inc. v. Walsh, a trade secret owner is not required to show that a competitor used the secret information to make a product that is identical to the trade secret product.

10. Can corporations, corporate officers and employees of a competing company in possession of the trade secrets of others be held liable for misappropriation in your state? If so, under what circumstances?

A plaintiff may allege trade secret misappropriation claims against corporations, corporate officers and employees of a competing company (Rycoline Prods., Inc. v. Walsh, 756 A.2d 1047 (N.J. Super. Ct. App. Div. 2000); Rohm & Haas Co. v. Adco Chem. Co., 689 F.2d 424 (3d Cir. 1982)).

Under Rycoline Prods., Inc. v. Walsh, to prove trade secret misappropriation against these parties a plaintiff must show each of the following:

- A trade secret exists (see Question 4).
- The information was communicated in confidence by the plaintiff to the employee.

DEFENSES

11. For any law identified in Question 1 (statutes and regulations) or Question 3 (common law), what defenses are available to defend against claims under the statute or common law?

COMMON LAW
Defenses to a misappropriation of trade secrets claim include:

- The information is not a trade secret or otherwise protectable.
- There was no misappropriation.
- The statute of limitations has expired.
- The trade secret owner failed to take action to protect its trade secrets.
- Lack of standing to sue.
- Equitable defenses, such as:
  - estoppel;
  - waiver; and
  - unclean hands.

CRIMINAL STATUTE
In New Jersey, a criminal defendant has an affirmative defense to a trade secret theft prosecution if he either:

- Was unaware that the property belonged to another.
- Acted under an honest claim of right to the property or that he had a right to acquire or dispose of it as he did.

Trade Secret Laws: New Jersey

STATUTE OF LIMITATIONS

12. For any law identified in Question 1 (statutes and regulations) or Question 3 (common law), please identify the relevant statute of limitations for bringing a claim.

COMMON LAW


In New Jersey, a trade secrets misappropriation claim accrues when the plaintiff knew or should have known of the injury giving rise to his claim (Blystra v. Fiber Tech Group, Inc., 407 F. Supp. 2d 636 (D.N.J. 2005)).

CRIMINAL STATUTE

New Jersey imposes a five-year statute of limitations on prosecutions for a trade secret misappropriation (N.J. Stat. Ann. § 2C:1-6 (2011)).

OTHER RELATED CLAIMS

13. What other claims, statutory or common law, can a plaintiff bring in your state against a defendant in the event of wrongful acquisition, misuse or disclosure of a trade secret?

Under New Jersey common law for wrongful acquisition, misuse or disclosure of a trade secret, a plaintiff may bring the following claims:

- Breach of duty of loyalty.
- Tortious interference.
- Unfair competition.
(Lamorte Burns & Co. v. Walters, 770 A.2d 1158 (N.J. 2001)).

Plaintiffs may allege both common law trade secret misappropriation and a claim under New Jersey's Computer Related Offenses Act (CROA) (N.J. Stat. Ann. § 2A:38A-3(a) (2011)). The CROA protects computer related sources, which may contain trade secrets. A computer database containing financial, merchandise, customer and vendor information was a trade secret when it was:

- Compiled through and for use in the plaintiffs' business.
- Stored for the plaintiffs' exclusive use.
- Protected from dissemination to the general public.

REMEDIES

14. For any law identified in Question 1 (statutes and regulations) and Question 3 (common law), please describe the potential relief available to plaintiffs.

COMMON LAW

In New Jersey, for common law trade secret misappropriation a plaintiff may be entitled to:

- Punitive damages (Lamorte Burns & Co. v. Walters, 770 A.2d 1158 (N.J. 2001)).

The damages for misappropriation of trade secrets may be measured by either:

- The plaintiff's losses.
- The profits unjustly received by the defendant.
(Shamrock Techs., Inc. v. Med. Sterilization, Inc., 6 F.3d 788 (Fed. Cir. 1993)).

STATUTES AND REGULATIONS

In New Jersey, recovery of punitive damages in a trade secret case is governed by the Punitive Damages Act (PDA) (N.J. Stat. Ann. §§ 2A:15-5.9 to 2A:15-5.17 (2011)).

To recover punitive damages under the PDA, a plaintiff must prove that the harm was caused by the defendant's acts or omissions and the acts or omissions were either:

- Motivated by actual malice.
- Accompanied by a wanton and willful disregard of persons who might foreseeably be harmed.

In determining whether punitive damages are appropriate under the PDA, a court should consider all relevant evidence, including but not limited to:

- The likelihood, at the relevant time, that serious harm would arise from the defendant's conduct.
- The defendant's awareness or reckless disregard of the likelihood that such serious harm would arise from his conduct.
- The defendant's conduct on learning that his initial conduct would likely cause harm.
- The duration of the defendant's conduct or whether there was any concealment of that conduct.
For violations of New Jersey's civil Computer Related Offenses Act, a plaintiff may obtain:

- Compensatory damages.
- Punitive damages.
- Attorneys’ fees.
- An injunction.
- Investigation and litigation costs.


### CONTRACTUAL PROTECTIONS

15. What factors do courts in your state consider when assessing the enforceability of a non-disclosure or confidentiality agreement?


Community Hospital Group, Inc. v. More explains that courts use a three-part test to determine whether a non-compete agreement is reasonable and therefore enforceable. The court must determine whether the restrictive covenant:

- **Is necessary to protect the employer’s legitimate interests in enforcement.** An employer’s legitimate interests include protecting:
  - customer relationships;
  - trade secrets; and
  - confidential business information.


In restrictive covenants for physicians, an employer’s legitimate interests may include protecting patient lists, patient referral bases and investment in a physician’s training. However, legitimate business interests do not include restricting competition (Cmty. Hosp. Group, Inc. v. More, 869 A.2d 884 (N.J. 2005)).

- **Would cause undue hardship to the employee.** The court must determine:
  - the likelihood the employee can find other work in his field; and
  - the burden the restriction places on the employee.

(Pathfinder, L.L.C. v. Luck, 2005 WL 1206848 (D.N.J. May 20, 2005)).

However, Pathfinder, L.L.C. v. Luck notes if an employee resigns, courts are less likely to find undue hardship because the employee triggered the restriction.

- **Would injure the public.** Coskey’s Television & Radio Sales & Service, Inc. v. Foti shows that New Jersey courts balance the public's right to access the advice of professionals licensed by the state, against the employer’s legitimate patient or client relationships.

Sufficient consideration to support a non-compete covenant may include:

- An offer of employment.
- A promise of continued employment.
- A change in the terms or conditions of employment.


New Jersey courts may modify or blue-pencil an overbroad non-compete covenant, permitting total or partial enforcement to the extent reasonable under the circumstances (Solari Indus., Inc. v. Malady, 264 A.2d 53 (N.J. 1970)).

Community Hospital Group, Inc. v. More also states that depending on the court's analysis, a restrictive covenant may be disregarded, partially enforced or completely enforced to the extent reasonable under the circumstances.

For more information on restrictive covenants in New Jersey, see State Q&A, Non-compete Laws: New Jersey (www.practicallaw.com/1-505-9155).

### MISCELLANEOUS

16. What common law duties are recognized in your state that prohibit employees from disclosing employer information even absent an independent contractual obligation?

17. Does your state recognize the doctrine of inevitable disclosure?

New Jersey courts have applied the doctrine of inevitable disclosure. A court may grant injunctive relief to prevent disclosure if both:

- An employee with access to his former employer’s trade secrets takes a new job similar to his previous one.
- There is sufficient likelihood of inevitable disclosure. 


For general information on the inevitable disclosure doctrine, see Practice Note, Non-compete Agreements with Employees: Protection in the Absence of Non-competes: Inevitable Disclosure (www.practicallaw.com/7-501-3409).

18. What, if anything, have courts held regarding trade secret misappropriation claims involving memorizing trade secrets rather than the taking of tangible representations of information?

For trade secret misappropriation purposes, New Jersey courts have not addressed whether information memorization is treated differently than taking tangible representations of information.

19. Do any of the laws identified in Question 1 (statutes and regulations) or Question 3 (common law) preempt other causes of action a plaintiff could assert related to trade secret misappropriation (for example, conversion, breach of fiduciary duty, unfair competition or tortious interference)?

As New Jersey has not adopted the model Uniform Trade Secrets Act, the common law controls and civil claim preemption by statute is not an issue (see Question 13).

Under New Jersey’s criminal theft statute (N.J. Stat. Ann. § 2C:20-1(i) (2011)), wrongdoers may be criminally prosecuted and sued civilly for trade secret misappropriation or related claims under the common law (see Question 1).