

# Trade Secret Laws: Illinois

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A Q&A guide to state law on trade secrets and confidentiality for private employers in Illinois. This Q&A addresses the state-specific definition 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.

Illinois has adopted the Illinois Trade Secrets Act (765 Ill. Comp. Stat. Ann. 1065/1-9 (2010)), often referred to as the ITSA to distinguish it from the model Uniform Trade Secrets Act.

Illinois does not have a criminal statute specifically regarding trade secrets.

2. Has your state adopted the model Uniform Trade Secrets Act (UTSA)? If so, please:

- Identify which among the statutes listed in response to *Question 1* is your state's adopted version of the UTSA.
- Describe any significant differences between your state's adopted version and the model UTSA.

### ADOPTED VERSION OF MODEL UTSA

Illinois has adopted the model Uniform Trade Secrets Act (UTSA), with slight modification. It is referred to as the Illinois Trade Secrets Act (ITSA) (765 Ill. Comp. Stat. Ann. 1065/1-9 (2010)). For an overview of the UTSA, see *Practice Note, Protection of Employers' Trade Secrets and Confidential Information: Trade Secrets* ([www.practicallaw.com/5-501-1473](http://www.practicallaw.com/5-501-1473)).

### SIGNIFICANT DIFFERENCES BETWEEN ADOPTED VERSION AND MODEL UTSA

#### ITSA Provides Broader Protection

The ITSA differs from the UTSA because it expands the UTSA's definition of a trade secret to include:

- Drawings.
- Financial data.
- Lists of actual or potential customers or suppliers. (765 Ill. Comp. Stat. Ann. 1065/2(d) (2010); UTSA § 1(4).)

Under the ITSA, acquisition of trade secrets by improper means does not include:

- Reverse engineering.
- Independent development. (765 Ill. Comp. Stat. Ann. 1065/2(a) (2010).)

The ITSA does not affect the definition of a trade secret contained in any other Illinois statute (765 Ill. Comp. Stat. Ann. 1065/8(4)).

### Enforceability of Nondisclosure Agreements

The ITSA does not affect contractual remedies. The ITSA further provides that a contractual or other duty to maintain secrecy is not void or unenforceable solely for lack of durational or geographical limitation (765 Ill. Comp. Stat. Ann. 1065/8(b)(1) (2010)).

### Statute of Limitations

The ITSA has a five-year statute of limitations, while the UTSA is limited to a three-year statute of limitations (765 Ill. Comp. Stat. Ann. 1065/7 (2010); UTSA § 6).

The ITSA does not contain the following UTSA provisions:

- Uniformity of Application and Construction (UTSA § 8).
- Severability (UTSA § 10).
- Repeal (UTSA § 12).

3. List any common law protections afforded to trade secrets. If common law protections are afforded to trade secrets, are they preempted by available state statutes?

The Illinois Trade Secrets Act preempts the former common law protecting trade secrets, though many of the common law standards and analyses still remain relevant (765 Ill. Comp. Stat. Ann. 1065/8(a) (2010)) (see Question 4).

## DEFINITION OF TRADE SECRET

4. How does your state define a trade secret under each law identified in Question 1 (statute or regulation) and Question 3 (common law)?

The Illinois Trade Secrets Act defines a trade secret as information that both:

- Includes the following:
  - technical or non-technical data;
  - a formula;
  - a pattern;
  - a compilation;
  - a program;
  - a device;
  - a method;

- a technique;
- a drawing;
- a process;
- financial data; or
- a list of actual or potential customers or suppliers.
- Is sufficiently secret to derive actual or potential economic value from:
  - not being generally known to those who can obtain economic value from its disclosure or use; and
  - is the subject of reasonable efforts to maintain its secrecy or confidentiality.

(765 Ill. Comp. Stat. Ann. 1065/2(d) (2010).)

To determine whether information is a trade secret, Illinois courts continue to evaluate the following common law factors:

- The extent to which the information is known outside of the business.
- The extent to which it is known by employees and others involved in the business.
- The measures taken by the business to guard the secrecy of the information.
- The value of the information to the business and its competitors.
- The amount of effort or money expended by the business in developing the information.
- The ease or difficulty for others to properly acquire or duplicate the information.

(*Delta Med. Systems, Inc. v. Mid-America Med. Systems, Inc.*, 772 N.E.2d 768 (Ill. App. Ct. 2002).)

5. Describe any significant cases in your state creating, modifying or clarifying the definition of a trade secret.

To determine whether information is a trade secret, Illinois courts focus on whether the information is secret and whether the information has economic value because of its secrecy. Economic value is required to prevent protection for information not generally known to the public but clearly understood in a particular industry. (*George S. May Int'l Co. v. Intl Profit Associates*, 628 N.E.2d 647 (Ill. App. Ct. 1993).) For more information, see Questions 6 and 7.

6. What are examples of information that courts in your state:

- Have found to be trade secrets?
- Have found not to be trade secrets?
- Have found not to be trade secrets as a matter of law?

## TRADE SECRETS

These types of information have been found to be trade secrets:

- Computer software source codes (*Computer Associates Int'l v. Quest Software, Inc.*, 333 F. Supp. 2d 688 (N.D. Ill. 2004)).
- Financial data on profits (*Brostron v. Warmann*, 546 N.E.2d 3 (Ill. App. Ct. 1989)).
- Circuitry schematics (*Televation Telecommunication Systems, Inc. v. Saindon*, 522 N.E.2d 1359 (Ill. App. Ct. 1988)).
- Research, design and marketing plans; product formulations; production methods; and not publicly available customer and supplier identities (*Lucini Italia Co. v. Grappolini*, 2003 WL 1989605 (N.D. Ill. Apr. 28, 2003)).

## NOT TRADE SECRETS

These types of information have been found **not** to be trade secrets:

- Customer identities and lists readily obtainable through:
  - phone books;
  - trade publications; or
  - association memberships and directories (*System Dev. Servs., Inc. v. Haarmann*, 907 N.E.2d 63 (Ill. App. Ct. 2009); *Curtis 1000, Inc. v. Suess*, 843 F. Supp. 441 (C.D. Ill. 1994), *aff'd* 24 F.3d 941 (7th Cir. 1994)).
- Pricing information freely disclosed to customers, as opposed to unique undisclosed formulas used to calculate price information (*Unisource Worldwide, Inc. v. Carrara*, 244 F. Supp. 2d 977 (C.D. Ill. 2003)).

## NOT TRADE SECRETS AS A MATTER OF LAW

These types of information have been found not to be trade secrets as a matter of law:

- Information or processes commonly known within the industry (*Chemetall GmbH v. ZR Energy, Inc.*, 138 F. Supp. 2d 1079 (N.D. Ill. 2001); *Composite Marine Propellers v. Van Der Woude*, 962 F.2d 1263 (7th Cir. 1992)).
- Information developed with little time, money and effort (*Web Commc'ns Group, Inc. v. Gateway 2000, Inc.*, 889 F. Supp. 316 (N.D. Ill. 1995)).
- Information so outdated that it lacks current economic value (*Applied Indus Materials Corp. v. Brantjes*, 891 F. Supp. 432 (N.D. Ill. 1994)).

7. To what extent have:

- Customer, client or subscriber lists been given trade secret protection?
- Former employees been enjoined from using former employer's customer information?

## CUSTOMER LISTS CAN BE PROTECTED AS TRADE SECRETS

Customer lists and pricing information have been recognized as trade secrets, though these determinations have hinged on the case's facts (*Multiut Corp. v. Draiman*, 834 N.E.2d 43 (Ill. App. Ct. 2005)).

To be a trade secret, a customer list must meet two requirements:

- The information must be sufficiently secret to derive economic value from not being generally known to others who can obtain economic value from its disclosure or use.
- The information must be the subject of reasonable efforts to maintain its secrecy or confidentiality.

(765 Ill. Comp. Stat. Ann. 1065/2(d) (2010).)

For a customer list or other customer information to be protected as a trade secret:

- The list must have been developed by the employer over a substantial period of time.
- The employer must have developed the list at great expense.
- The information must not be available to other employees, the general public or competitors.

(*Elmer Miller, Inc. v. Landis*, 625 N.E.2d 338 (Ill. App. Ct. 1993).)

Customer lists have been held not to be trade secrets where:

- The information was not treated as confidential and secret by the employer.
- The information was available to other employees.
- The business failed to take steps to restrict employee access to the list.
- The business did not inform employees the information was confidential.
- The business did not require employees to sign confidentiality agreements.
- The information was known to competitors.
- The information could be easily duplicated by reference to telephone directories or professional publications.
- Customer identities were known to competitors.

(*Liebert Corp. v. Mazur*, 827 N.E.2d 909 (Ill. App. Ct. 2005); *Office Mates 5, North Shore, Inc. v. Hazen*, 599 N.E.2d 1072 (Ill. App. Ct. 1992).)

## SCOPE OF INJUNCTION ENJOINING USE OF FORMER EMPLOYER'S CUSTOMER LIST

In *Stampede Tool Warehouse, Inc. v. May*, the appellate court both:

- Reversed the permanent injunction restraining the former employees from contacting any of their former employer's customers.
- Modified the injunction to last four years from the date the original temporary restraining order was entered.

(651 N.E.2d 209 (Ill. App. Ct. 1995).)

In *Burt Dickens & Co. v. Bodi*, the court upheld a one-year injunction preventing a former operations manager from soliciting his former employer's customers. The former manager misappropriated customer account information before setting up his own competing business (494 N.E.2d 817 (Ill. App. Ct. 1986)).

## REASONABLE EFFORTS TO MAINTAIN SECRECY

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?

## COURTS

In *Burt Dickens & Co. v. Bodi*, the court upheld an injunction preventing a former employee from soliciting the former employer's customers. The court cited several reasonable steps that the employer had used to protect its customer information, including:

- Severely restricting employee access to customer expiration lists.
- Disclosing only relevant account information to each salesman.
- Use of a secret code to access information.
- Restricting computer printouts of customer information.
- Shredding and disposing of computer printouts after use.
- Informing all employees that customer expiration lists were confidential property that could not be disclosed or removed from the office.

(494 N.E.2d 817 (Ill. App. Ct. 1986).)

Another employer was held to have taken reasonable steps to protect information as a trade secret where:

- Employee manuals contained confidentiality policies to prevent outsiders from gaining access to the information and to limit access within the company.
- Employees were reminded of their confidentiality obligations when leaving the company.

- Only employees with security key cards could access the company's premises.
- The information was never released to the general public. (*Computer Assocs. Int'l v. Quest Software, Inc.*, 333 F. Supp. 2d 688 (N.D. Ill. 2004).)

Additional reasonable steps to protect customer information might include:

- Keeping the trade secret in computerized form with restricted access (*Burt Dickens & Co. v. Bodi*, 494 N.E.2d 817 (Ill. App. Ct. 1986)).
- Keeping secret documents locked up (*Strata Mktg., Inc. v. Murphy*, 740 N.E.2d 1166 (Ill. App. Ct. 2000)).
- Limiting access to the information on a need-to-know basis (*Televation Telecommunication Systems, Inc. v. Saindon*, 522 N.E.2d 1359 (Ill. App. Ct. 1988)).
- Asking employees to sign confidentiality agreements (*Stampede Tool Warehouse, Inc. v. May*, 651 N.E.2d 209 (Ill. App. Ct. 1995)).

Reasonable security efforts may vary with business size.

Reasonable efforts to maintain secrecy for a two or three person shop may differ from reasonable steps for a larger company (*Elmer Miller, Inc. v. Landis*, 625 N.E.2d 338 (Ill. App. Ct. 1993)).

## STATUTES OR REGULATIONS

There are no statutes or regulations addressing what are considered to be 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?

The Illinois Trade Secrets Act (ITSA) defines misappropriation as either:

- Acquisition.
- Disclosure.

(765 Ill. Comp. Stat. Ann. 1065/2(b) (2010).)

## ACQUISITION AS MISUSE

A trade secret can be misappropriated where the acquirer knew or had reason to know that the trade secret was acquired by improper means (see *Definition of Improper Means*) (765 Ill. Comp. Stat. Ann. 1065/2(b)(1) (2010)).

## DISCLOSURE OR USE OF TRADE SECRET AS MISUSE

Disclosure or use of another's trade secret without express or implied consent can constitute misappropriation where the acquirer:

- Used improper means to acquire knowledge of the trade secret.
- At the time of disclosure or use, knew or had reason to know, that the trade secret was:
  - derived from a person who used improper means to acquire it;
  - acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
  - derived from a person who owed a duty to maintain its secrecy or limit its use.
- Before a material change of position, the acquirer knew or had reason to know:
  - the information was a trade secret; and
  - that knowledge of the information had been acquired by accident or mistake.

(765 Ill. Comp. Stat. Ann. 1065/2(b)(2) (2010).)

## DEFINITION OF IMPROPER MEANS

Improper means under the ITSA includes:

- Theft.
- Bribery.
- Misrepresentation.
- Breach or inducement of a breach of a duty to maintain secrecy.
- Espionage through electronic or other means.

(765 Ill. Comp. Stat. Ann. 1065/2(a) (2010).)

Improper means does not include:

- Reverse engineering.
- Independent development.

(765 Ill. Comp. Stat. Ann. 1065/2(a) (2010).)

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?

Under the Illinois Trade Secrets Act (ITSA), two businesses successfully stated a trade secrets misappropriation claim against a restaurant chief executive in his individual capacity where he both:

- Acted as chief executive of a competitor.
- Misappropriated trade secrets regarding suppliers, sales, employee histories, gross profits, revenues, expenses,

financing agreements, investor lists, marketing plans and special customer relationships.

(*MJ & Partners Rest Ltd. P'ship v. Zadikoff*, 10 F. Supp. 2d 922 (N.D. Ill. 1998).)

In *Mangren Research & Dev. Corp. v. Nat'l Chem. Co.*, a chemical manufacturer successfully sued a competing corporation under the ITSA for trade secret misappropriation where the competitor:

- Hired one of the manufacturer's former employees who disclosed his former employer's trade secret formula.
- Developed and sold a product using a similar formula.
- Ignored the former employee's warning that using a similar formula would likely cause a misappropriation lawsuit.

(87 F.3d 937 (7th Cir. 1996).)

## 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?

Defenses to a misappropriation of trade secrets claim include:

- The information is not a trade secret.
- There was no misappropriation.
- The statute of limitations has expired.
- The trade secret has not been described with the requisite specificity in the pleading.
- Lack of standing to sue.
- The trade secret owner failed to use reasonable efforts to protect its trade secret (*Jackson v. Hammer*, 653 N.E.2d 809 (Ill. App. Ct. 1995)).
- Equitable defenses, such as:
  - laches;
  - estoppel;
  - waiver; and
  - unclean hands.

## 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.

The Illinois Trade Secrets Act has a five-year statute of limitations. The five-year period begins to run from when either:

- The misappropriation is discovered.

- The misappropriation should have been discovered by exercising reasonable diligence.

(765 Ill. Comp. Stat. Ann. 1065/7 (2010).)

A continuing misappropriation constitutes a single claim (765 Ill. Comp. Stat. Ann. 1065/7 (2010)).

## 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?

The Illinois Trade Secrets Act (ITSA) displaces conflicting tort, restitutionary, unfair competition and other Illinois laws providing civil remedies for trade secret misappropriation (765 Ill. Comp. Stat. Ann. 1065/8(a) (2010)).

However, a plaintiff may allege:

- Contractual remedies, whether or not based on misappropriation of a trade secret.
- Criminal remedies, whether or not based on misappropriation of a trade secret.
- Other civil remedies that are **not** based on misappropriation of a trade secret.

(765 Ill. Comp. Stat. Ann. 1065/8(b) (2010).)

For more information on claims preempted by ITSA, see *Question 19*.

## 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.

Potential relief for trade secret misappropriation includes:

- Monetary damages.
- Exemplary damages.
- Injunction.
- Attorneys' fees.
- Costs.
- A reasonable royalty.
- Court order compelling affirmative acts to protect a trade secret.

(765 Ill. Comp. Stat. Ann. 1065/3-5 (2010).)

## CONTRACTUAL PROTECTIONS

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

A postemployment restrictive covenant is enforced if its terms are reasonable (*Coady v. Harpo, Inc.*, 719 N.E.2d 244 (Ill. App. Ct. 1999)).

*Coady v. Harpo, Inc.* explains that to determine whether a restrictive covenant is reasonable a court considers whether:

- Enforcement of the covenant will injure the public.
- Enforcement of the covenant is an undue hardship for the promisor.
- The restraint imposed by the covenant is greater than necessary to protect the employer's interests.

Before conducting its reasonableness analysis, a court must determine whether the restrictive covenant is both:

- Ancillary to a valid employment relationship.
- Supported by adequate consideration.

(*Applied Micro, Inc. v. SJI Fulfillment, Inc.*, 941 F. Supp. 750 (N.D. Ill. 1996).)

Employment that has continued for a substantial period may be sufficient consideration to support a confidentiality or nondisclosure agreement (*Applied Micro, Inc. v. SJI Fulfillment, Inc.*, 941 F. Supp. at 753)). Seven months of continued employment has been held insufficient consideration to support a restrictive covenant, while two or more years would have been sufficient (*Brown & Brown, Inc. v. Mudron*, 887 N.E.2d 437 (Ill. App. Ct. 2008)).

Illinois courts may blue-pencil an overbroad restrictive covenant, including a confidentiality or nondisclosure agreement, particularly when the agreement provides that its terms are severable and the unreasonable provisions are not essential (*Gillespie v. Carbondale & Marion Eye Centers, Ltd.*, 622 N.E.2d 1267 (Ill. App. Ct. 1993)).

For more information on restrictive covenants in Illinois, see *State Q&A, Non-compete Laws: Illinois* ([www.practicallaw.com/7-505-8898](http://www.practicallaw.com/7-505-8898)).

## MISCELLANEOUS

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

Two common law duties prohibit employees from disclosing employer information:

- Duty of loyalty.
- Fiduciary duty.



Employees owe their employers a fiduciary duty of loyalty. An agent is a fiduciary for all matters within the scope of his agency. An employee must exercise the utmost good faith and loyalty toward his employer. The relationship implies that the principal has put some trust or confidence in the agent. (*Regal-Beloit Corp. v. Drecoll*, 955 F. Supp. 849 (N.D. Ill. 1996).)

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

Illinois courts have applied the doctrine 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](http://www.practicallaw.com/7-501-3409)).

For more information on inevitable disclosure in Illinois, see *State Q&A, Non-compete Laws: Illinois: Question 17* ([www.practicallaw.com/7-505-8898](http://www.practicallaw.com/7-505-8898)).

**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?**

An employee can breach his confidential relationship with his employer by surreptitiously copying or memorizing secret information to solicit his employer's customers after his termination (*TIE Systems, Inc. v. Telcom Midwest, Inc.*, 560 N.E.2d 1080 (Ill. App. Ct. 1990)).

Illinois courts have enjoined the use of memorized trade secrets. An appellate court enforced a three-year injunction, rejecting a former employee's argument that he had inadvertently memorized his former employer's electronic circuitry schematics following constant exposure to the information (*Televation Telecomm Sys., Inc. v. Saindon*, 522 N.E.2d 1359 (Ill. App. Ct. 1988)).

**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)?**

The Illinois Trade Secrets Act displaces conflicting tort, restitutionary, unfair competition and other Illinois laws providing civil remedies for trade secret misappropriation (765 Ill. Comp. Stat. Ann. 1065/8(a) (2010)).

However, a plaintiff may allege:

- Contractual remedies, whether or not based on misappropriation of a trade secret.
- Criminal remedies, whether or not based on misappropriation of a trade secret.
- Other civil remedies that are **not** based on misappropriation of a trade secret.

(765 Ill. Comp. Stat. Ann. 1065/8(b) (2010).)

Section 8(a) has been interpreted to abolish claims arising from trade secret misappropriation, other than contract claims, replacing them with ITSA claims (*Hecny Transp., Inc. v. Chu*, 430 F.3d 402 (7th Cir. 2005)).

In essence, claims are preempted only when they rest on the conduct that is alleged to misappropriate trade secrets. In analyzing preemption issues, a court must determine whether the claim rests on trade secret misappropriation or whether it stems from other conduct. (*EBI Holdings, Inc. v. Butler*, 2009 WL 400634 (C.D. Ill. Feb. 17, 2009).)

This is a fact-intensive inquiry that depends on the particular circumstances of each case. In *EBI Holdings, Inc.*, the plaintiffs' claims stemmed from conduct other than trade secret misappropriation. The court stated that the ITSA did not preempt the plaintiffs' various claims and denied the motion to dismiss the following claims:

- Inducement of breaches of fiduciary duty and duty of loyalty.
- Tortious interference with contract.
- Unjust enrichment, because the claim could concern information other than trade secrets.
- Civil conspiracy.
- Tortious interference with prospective economic advantage.

By contrast, a plaintiff's tortious interference with contract claim was preempted because the claim was based on the same conduct that the plaintiff alleged gave rise to its claim under the ITSA (*Aspen Mktg. Servs., Inc. v. Russell*, 2009 WL 4674061 (N.D. Ill. Dec. 3, 2009)).

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