



Trade Secret Laws: Virginia

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A Q&A guide to state law on trade secrets and confidentiality for private employers in Virginia. 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.

Virginia has adopted the Virginia Uniform Trade Secrets Act (*Va. Code Ann. §§ 59.1-336 to 59.1-343 (2011)*), often referred to as VUTSA to distinguish it from the model Uniform Trade Secrets Act (UTSA).

The Virginia Labor and Employment Law requires the Department of Labor and Industry to maintain the confidentiality of trade secret information it receives. However, the Commissioner of Labor and Industry may disclose trade secrets:

- To staff.
- In a proceeding before the Commissioner.

(*Va. Code Ann. §§ 40.1-6(10), 40.1-51.4:1, 40.1-51.33 (2011)*.)

Under the Virginia Freedom of Information Act, trade secret information may be disclosed, except for:

- Engineering and construction drawings and plans submitted for Building Code compliance during building construction.
- Records of the Virginia Military Advisory Council, Virginia National Defense Industrial Authority or other commissions related to military affairs.

(*Va. Code Ann. § 2.2-3705.2 (2011)*.)

Virginia has adopted the Virginia Uniform Computer Information Transactions Act (VUCITA) (*Va. Code Ann. §§ 59.1-501.1 to 59.1-509.2 (2011)*), which is based on the Uniform Computer Information Transactions Act (UCITA). VUCITA provides default rules and remedies to commercial transactions related to computer information transactions. Computer information transactions under VUCITA can include the digital transfer of informational rights, which include trade secrets. Specifically, VUCITA defines informational rights to include all rights in information created under laws governing:

- Trade secrets.
- Patents.
- Copyrights.
- Mask works.
- Trademarks.
- Publicity rights.
- A person's right to control the use of or access to information.

(*Va. Code Ann. § 59.1-501.2(38) (2011)*.)

For a brief summary on UCITA, see *Legislation Governing Liability for Website Content Checklist: Contract* (<http://us.practicallaw.com/3-500-4360>).

Virginia does not have a criminal statute directly regulating trade secrets. However, see *Question 13: Other Related Claims* for potential claims under the Virginia Computer Crimes Act (*Va. Code Ann. §§ 18.2-152.1 to 18.2-152.15 (2011)*).

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

Virginia has adopted the model Uniform Trade Secrets Act (UTSA), with slight modification. It is referred to as the Virginia Uniform Trade Secrets Act (VUTSA) (*Va. Code Ann. §§ 59.1-336 to 59.1-343 (2011)*). The US Court of Appeals for the Fourth Circuit has noted the similarity between VUTSA and UTSA (*Avtec Sys., Inc. v. Peiffer, 21 F.3d 568 (4th Cir. 1994)*).

For an overview of the model UTSA, see *Practice Note, Protection of Employers' Trade Secrets and Confidential Information: Trade Secrets* (<http://us.practicallaw.com/5-501-1473>).

SIGNIFICANT DIFFERENCES BETWEEN ADOPTED VERSION AND MODEL UTSA

VUTSA differs from the model UTSA because it:

- Expands the definition of improper means to also include the unauthorized use of a computer or computer network (*Va. Code Ann. § 59.1-336 (2011)*).
- Restricts a punitive damages award to either of the following, whichever is less:
 - two times the monetary damages; or
 - \$350,000.(*Va. Code Ann. § 59.1-338(B) (2011)*).
- Excludes a motion to terminate an injunction made or resisted in bad faith as a basis for an award of attorneys' fees (*Va. Code Ann. § 59.1-338.1 (2011)*).
- Excludes a severability provision.

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?

VIRGINIA COMMON LAW PROTECTIONS OF TRADE SECRETS

Common law protections afforded to trade secrets include:

- Breach of contract (*Stone Castle Fin., Inc. v. Friedman, Billings, Ramsey & Co., 191 F. Supp. 2d 652 (E.D. Va. 2002)*).

- Breach of fiduciary duty where the employee uses trade secret information to the disadvantage of the employer and to the benefit of a competitor (*Tryco, Inc. v. U.S. Med. Source, LLC, 80 Va. Cir. 619 (Va. Cir. Ct. 2010)*).

For more information on other common law claims available to trade secret owners, see *Question 13: Other Related Claims*.

VUTSA PREEMPTION

The Virginia Uniform Trade Secrets Act (VUTSA) preempts conflicting tort, restitutionary and other state law providing civil remedies for trade secret misappropriation. However, VUTSA does not affect certain remedies, such as:

- Contractual remedies (whether or not based on trade secret misappropriation).
- Other civil remedies not based on trade secret misappropriation.
- Criminal remedies (whether or not based on trade secret misappropriation).

(*Va. Code Ann. § 59.1-341 (2011)*).

See *Question 19* for more information on preemption of misappropriation claims.

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 Virginia Uniform Trade Secrets Act (VUTSA) defines a trade secret as information that meets all of the following criteria:

- Includes at least one of the following:
 - formula;
 - pattern;
 - compilation;
 - program;
 - device;
 - method;
 - technique; or
 - process.
- Derives actual or potential independent economic value because it is:
 - generally unknown; and
 - not readily ascertainable by proper means and by another person who can obtain economic value from its disclosure or use.
- Is the subject of reasonable efforts under the circumstances to maintain its secrecy.

(*Va. Code Ann. § 59.1-336 (2011)*).

The Virginia Labor and Employment Law and the Virginia Freedom of Information Act do not provide a separate definition for trade secret.

The Virginia Uniform Computer Information Transactions Act does not define trade secrets, but does include trade secrets in the definition of informational rights (*Va. Code Ann. § 59.1-501.2(a) (38) (2011)*).

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

To be protected as a trade secret, courts require that:

- The information is secret.
- The economic value is derived from its secrecy.
- The information is not readily ascertainable by proper means by competitors who could obtain economic value from its disclosure.
- The owner uses reasonable efforts to safeguard the information (see *Question 8: Reasonable Efforts to Maintain Secrecy*).

(*MicroStrategy Inc. v. Li*, 601 S.E.2d 580 (Va. 2004).)

The Virginia Supreme Court has noted that the most important characteristic of a trade secret is its secrecy, not its novelty (*Dionne v. Se. Foam Converting & Packaging, Inc.*, 397 S.E.2d 110 (Va. 1990)).

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

Virginia courts have found the following types of information to be trade secrets:

- Customer lists, pricing information, marketing and sales techniques and product information (*MicroStrategy, Inc. v. Bus. Objects, S.A.*, 331 F. Supp. 2d 396 (E.D. Va. 2004)). For more information on trade secret protection of customer lists, see *Question 7: Customer Lists Can Be Protected As Trade Secrets*.
- Source code or object code where copyright ownership is not at issue (*Avtec Sys., Inc. v. Peiffer*, 21 F.3d 568 (4th Cir. 1994)).
- Software components (*MicroStrategy Inc. v. Li*, 601 S.E.2d 580 (Va. 2004)).
- A document containing a competitive strategy against the defendant that was only provided to the employer's field sales staff (*MicroStrategy, Inc. v. Bus. Objects, S.A.*, 331 F. Supp. 2d 396 (E.D. Va. 2004)).

- A computer database of customer and product information (*One Stop Deli, Inc. v. Franco's, Inc.*, No. 93-090-H, 1993 WL 513298 (W.D. Va. Dec. 7, 1993)).
- Manufacturing process for compressed foam for use in the inner packaging industry (*Dionne v. Se. Foam Converting & Packaging, Inc.*, 397 S.E.2d 110 (Va. 1990)).
- Schedule of customer discounts (*MicroStrategy, Inc. v. Bus. Objects, S.A.*, 331 F. Supp. 2d 396 (E.D. Va. 2004)).
- Compilation of public facts where the compilation itself is confidential (*Comprehensive Techs. Int'l, Inc. v. Software Artisans, Inc.*, 3 F.3d 730 (4th Cir. 1993)).

NOT TRADE SECRETS

The following types of information have been found not to be trade secrets:

- Patented subject matter (*MicroStrategy, Inc. v. Bus. Objects, S.A.*, 331 F. Supp. 2d 396 (E.D. Va. 2004)).
- Passwords that were not based on a special formula or algorithm (*State Analysis, Inc. v. Am. Fin. Servs. Ass'n*, 621 F. Supp. 2d 309 (E.D. Va. 2009)).
- Church documents contained in an open court file and posted on the internet (*Religious Tech. Ctr. v. Lerma*, 897 F. Supp. 260 (E.D. Va. 1995)).
- An outdated contacts list that was readily ascertained through proper means, such as a phone directory or phone operator (*Tryco, Inc. v. U.S. Med. Source, LLC*, 80 Va. Cir. 619 (Va. Cir. Ct. 2010)).
- Employment negotiations (*Rohrbaugh v. Kreidler*, 71 Va. Cir. 298 (Va. Cir. Ct. 2006)).

NOT TRADE SECRETS AS A MATTER OF LAW

Whether information is a trade secret is a question of fact (*MicroStrategy Inc. v. Li*, 601 S.E.2d 580 (Va. 2004)).

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

Determining whether customer lists can be protected as trade secrets is a highly fact-based inquiry. Customer lists may be protected as trade secrets if the information meets the statutory requirements under the Virginia Uniform Trade Secrets Act (VUTSA) (see *Question 4: Definition of Trade Secret*).

For example, a computer database of customer and product information was found to be a trade secret. The database was used for tracking sales history of customers on a service route

(*One Stop Deli, Inc. v. Franco's, Inc.*, No. 93-090-H, 1993 WL 513298 (W.D. Va. Dec. 7, 1993)).

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

Courts balance four factors to determine whether to issue a preliminary injunction, including:

- The plaintiff's likelihood of success on the merits.
- Whether greater injury would occur to the defendant from either granting or not granting the injunction.
- Whether the plaintiff will suffer irreparable injury without an injunction.
- The public interest.

(*Religious Tech. Ctr. v. Lerma*, 897 F. Supp. 260 (E.D. Va. 1995).)

An injunction enjoining use of a former employer's customer list may restrict the defendant from soliciting or communicating with clients included on the customer list (*Nat'l Legal Research Grp. v. Lathan*, No. 92-0031-C, 1993 WL 169789 (W.D. Va. May 17, 1993)).

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

A trade secret owner is not required to maintain absolute secrecy of the trade secret. Information is only required to be kept secret by reasonable efforts under the circumstances (*MicroStrategy Inc. v. Bus. Objects, S.A.* 331 F. Supp. 2d 396 (E.D. Va. 2004)). For example, a trade secret owner may disclose his trade secret to a licensee, employee or third party in express or implied confidence, and still maintain its secrecy (*Dionne v. Se. Foam Converting & Packaging, Inc.*, 397 S.E.2d 110 (Va. 1990)).

Reasonable efforts to maintain secrecy include:

- Restricting access to information.
- Using confidentiality agreements.
- Using physical or software-related barriers to restrict access to the information.
- Disclosing sealed information during a trial.
- Disclosing unsealed information during a trial that has no evidence of further publication.

(*MicroStrategy, Inc. v. Bus. Objects, S.A.*, 331 F. Supp. 2d 396 (E.D. Va. 2004).)

STATUTES OR REGULATIONS

To qualify as a trade secret, the Virginia Uniform Trade Secrets Act requires reasonable efforts under the circumstances to keep information secret (*Va. Code Ann. § 59.1-336 (2011)*). However, there are no Virginia statutes or regulations explaining what are 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?

Misappropriation is defined in three different ways:

- Acquisition.
- Disclosure.
- Use.

(*Va. Code Ann. § 59.1-336 (2011)*.)

The plaintiff must show the following elements to assert trade secret misappropriation:

- Existence of a trade secret (see *Questions 4 and 5: Definition of Trade Secret*).
- Misappropriation by the defendant, which can include:
 - acquisition of the trade secret as a result of a confidential relationship (see *Acquisition as Misuse*); or
 - unauthorized use or disclosure of the secret resulting in loss or damages (see *Disclosure or Use of Trade Secret as Misuse*).

(*Va. Code Ann. § 59.1-336 (2011)* and *MicroStrategy Inc. v. Li*, 601 S.E.2d 580 (Va. 2004).)

ACQUISITION AS MISUSE

A trade secret can be misappropriated if the acquirer knew or had reason to know that the trade secret was acquired by improper means (see *Definition of Improper Means*) (*Va. Code Ann. § 59.1-336 (2011)*).

DISCLOSURE OR USE OF TRADE SECRET AS MISUSE

Disclosure or use of a trade secret of another without express or implied consent can constitute misappropriation where the person does either of the following:

- Uses improper means to acquire knowledge of the trade secret (see *Definition of Improper Means*).
- At the time of disclosure or use, knew or had reason to know that the trade secret was:
 - derived from another who used improper means to acquire it;



- acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use;
- derived from or through another who owed a duty to maintain its secrecy or limit its use; or
- acquired by accident or mistake.

(Va. Code Ann. § 59.1-336 (2011).)

DEFINITION OF IMPROPER MEANS

Improper means includes:

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

(Va. Code Ann. § 59.1-336 (2011).)

Espionage is the use of a spy to obtain confidential information about a competing company (*MicroStrategy, Inc. v. Bus. Objects, S.A.*, 331 F. Supp. 2d 396 (E.D. Va. 2004)).

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 Virginia Uniform Trade Secrets Act, persons who may be liable for trade secret misappropriation include:

- Individuals.
- Corporations.
- Business trusts.
- Estates.
- Trusts.
- Partnerships.
- Associations.
- Joint ventures.
- Governments.
- Governmental subdivisions or agencies.
- Legal or commercial entities.

(Va. Code Ann. § 59.1-336 (2011).)

A corporation, corporate officers and employers of a competing company can be held liable for misappropriation when both:

- The existence of a trade secret is proven (see *Questions 4 and 5: Definition of Trade Secret*).
- The competing corporation improperly used the trade secret or acquired it through improper means (see *Question 9: Trade Secret Misappropriation Claims*).

(See Va. Code Ann. § 59.1-336 (2011) and *Physicians Interactive v. Lathian Sys. Inc.*, No. CA 03-1193-A, 2003 WL 23018270 (E.D. Va. Dec. 5, 2003).)

An employer can be held vicariously liable for an employee's trade secret misappropriation as long as the employee intended to further the employer's interest. An employer may be held liable even when it has no knowledge of the employee's intention to misappropriate the trade secret (*Newport News Indus. v. Dynamic Testing, Inc.*, 130 F. Supp. 2d 745 (E.D. Va. 2001)).

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 trade secret misappropriation claim include:

- The information is not a trade secret (see *Question 4: Definition of Trade Secret*).
- The information is readily ascertainable from a public source.
- There were no reasonable efforts to keep the information secret (see *Question 8: Reasonable Efforts to Maintain Secrecy*).
- There was no misappropriation (see *Question 9: Trade Secret Misappropriation Claims*).
- The statute of limitations expired (see *Question 12: Statute of Limitations*).
- The elements of Section 59.1-336 of the Virginia Code have not been pled with required particularity (see *MicroStrategy, Inc. v. Bus. Objects, S.A.*, 331 F. Supp. 2d 396 (E.D. Va. 2004)).
- The plaintiff lacks standing to sue.
- The claims are preempted (see *Question 19*).
- 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 Virginia Uniform Trade Secrets Act (VUTSA) imposes a three-year statute of limitations. Specifically, the three-year period begins to run when either:

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

(*Va. Code Ann. § 59.1-340 (2011)*.)

A continuing misappropriation constitutes a single claim (*Va. Code Ann. § 59.1-340 (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?

Unless preempted by the Virginia Uniform Trade Secrets Act (VUTSA) (see *Question 19*), a plaintiff can allege:

- Contractual remedies (whether or not based on trade secret misappropriation).
- Other civil remedies not based on trade secret misappropriation.
- Criminal remedies (whether or not based on trade secret misappropriation).

(*Va. Code Ann. § 59.1-341 (2011)*.)

Other related common law claims can include:

- **Tortious interference with contractual relations or a business expectancy.** The plaintiff must show:
 - the existence of a business relationship or expectancy and the probability that the plaintiff will receive future economic benefit;
 - the defendant's knowledge of the business relationship or expectancy;
 - a reasonable certainty that without the defendant's intentional misconduct, the plaintiff would have continued the business relationship or realized the expectancy; and
 - damage.

(*Smithfield Ham & Prods. Co. v. Portion Pac, Inc.*, 905 F. Supp. 346 (E.D. Va. 1995).)

- **Breach of fiduciary duty.** The success of a breach of fiduciary duty claim depends on the underlying facts of the case. For an example of a case where VUTSA preempted the breach of fiduciary duty claim, see *Question 19*.
- **Breach of contract.** For a plaintiff to successfully allege both breach of fiduciary duty and breach of contract claims, the fiduciary and contractual duties must exist independently (*Stone Castle Fin., Inc. v. Friedman, Billings, Ramsey & Co.*, 191 F. Supp. 2d 652 (E.D. Va. 2002)).
- **Fraud.** The plaintiff must show that the fraud involved a false representation of a material fact that:
 - was made intentionally and knowingly;
 - was made with the intent to mislead;
 - was relied on by the plaintiff;
 - misled the plaintiff; and
 - resulted in damages.
 (*Stone Castle Fin., Inc. v. Friedman, Billings, Ramsey & Co.*, 191 F. Supp. 2d 652 (E.D. Va. 2002).)
- **Conspiracy to injure business.** Conspiracy involves two or more persons who mutually combine, associate or agree to willfully and maliciously:
 - injure another in his reputation, trade, business or profession by any means; or
 - compel, prevent or hinder another to do an act against his will.
 (*Stone Castle Fin., Inc. v. Friedman, Billings, Ramsey & Co.*, 191 F. Supp. 2d 652 (E.D. Va. 2002).)

If a common law claim is entirely based on the trade secret misappropriation claim, VUTSA preempts the common law claim. For more information on preemption, see *Question 19*.

Statutory claims can include claims under the Virginia Computer Crimes Act, which places civil and criminal liability on a person who commits computer trespass that may also affect trade secrets (*Va. Code Ann. §§ 18.2-152.1 to 18.2-152.15 (2011)*).

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.

A plaintiff may recover damages for misappropriation, unless monetary recovery is inequitable because the acquirer made a material and prejudicial change of position before acquiring knowledge of the misappropriation (*Va. Code Ann. § 59.1-338(A) (2011)*).

Under the Virginia Uniform Trade Secrets Act (VUTSA) relief may include:

- **Monetary damages.** Monetary damages can include actual loss and unjust enrichment caused by the misappropriation (*Va. Code Ann. § 59.1-338(A) (2011)*).
- **A reasonable royalty.** Instead of awarding monetary damages, courts may award a reasonable royalty for the unauthorized disclosure or use of a trade secret. Courts may use the actual market value of the trade secret to determine the royalty amount (*Am. Sales Corp. v. Adventure Travel, Inc.*, 867 F. Supp. 378 (E.D. Va. 1994)).
- **Punitive damages.** Courts may award punitive damages if willful and malicious misappropriation exists. The damage amount may equal either of the following, whichever is less:
 - two times the monetary damages or reasonable royalty; or
 - \$350,000.

(*Va. Code Ann. § 59.1-338(A) (2011)*.)

Virginia courts do not favor punitive damages, but will award punitive damages for egregious conduct (*Am. Sales Corp. v. Adventure Travel, Inc.*, 867 F. Supp. 378 (E.D. Va. 1994)). For example, punitive damages have been awarded where former employees conspired to misappropriate the employer's trade secret, violating their duty of loyalty (*Sperry Rand Corp. v. A-T-O, Inc.*, 447 F.2d 1387 (4th Cir. 1971)).

- **Reasonable attorneys' fees.** Courts may award reasonable attorneys' fees if:
 - the misappropriation claims was made in bad faith; or
 - willful and malicious misappropriation exists.

(*Va. Code Ann. § 59.1-338.1 (2011)* and *MicroStrategy, Inc. v. Bus. Objects, S.A.*, 331 F. Supp. 2d 396 (E.D. Va. 2004).)

For claims made in bad faith, Virginia courts apply an objective reasonableness standard. The prevailing party may be entitled to attorneys' fees if the losing party made the misappropriation claim without any objective basis for any chance of success (*Tryco, Inc. v. U.S. Med. Source, LLC*, 80 Va. Cir. 619 (Va. Cir. Ct. 2010)).

To determine whether willful and malicious misappropriation exists, it is not enough for the plaintiff to merely show that trade secret misappropriation was willful. VUTSA requires both evidence of willful and malicious misappropriation. Malice requires a showing of:

- ill will;
- malevolence;
- grudge;
- spite;
- wicked intention; or
- a conscious disregard of the rights of another.

(*MicroStrategy, Inc. v. Bus. Objects, S.A.*, 331 F. Supp. 2d 396 (E.D. Va. 2004).)

- **Affirmative acts.** A court may issue an order compelling affirmative acts to protect the trade secret (*Va. Code Ann. § 59.1-337(C) (2011)*).
- **Injunctive relief.** A court may issue an injunction for actual or threatened misappropriation to prevent future misappropriation (*Va. Code Ann. § 59.1-337(A) (2011)*).

Courts balance four factors to determine whether to issue a preliminary injunction, including:

- The plaintiff's likelihood of success on the merits.
- Whether greater injury would occur to the defendant from either granting or not granting the injunction.
- Whether the plaintiff will suffer irreparable injury without an injunction.
- The public interest.

(*Religious Tech. Ctr. v. Lerma*, 897 F. Supp. 260 (E.D. Va. 1995).)

Courts will limit the scope of an injunction to the information identified as trade secrets. Courts may also:

- Dissolve an injunction when the trade secret no longer exists.
- Extend an injunction for a reasonable period of time.

(*Va. Code Ann. § 59.1-337 (2011)* and *MicroStrategy, Inc. v. Bus. Objects, S.A.*, 331 F. Supp. 2d 396 (E.D. Va. 2004).)

In one case the court issued an injunction that:

- Prohibited the defendant from possession, use or disclosure of the trade secrets.
- Required the defendant to return all paper copies of documents containing trade secret information.
- Required the defendant to delete all electronic copies of documents containing trade secret information.
- Required the injunction to last at least six months.

(*Va. Code Ann. § 59.1-337 (2011)* and *MicroStrategy, Inc. v. Bus. Objects, S.A.*, 331 F. Supp. 2d 396 (E.D. Va. 2004).)

CONTRACTUAL PROTECTIONS

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

Virginia courts apply a three-part reasonableness test to determine whether to enforce non-disclosure agreements. Non-disclosure agreements will be enforced if the restraint is:

- No broader than necessary to protect the owner's legitimate business interests.
- Not unduly harsh and oppressive to the employee's legitimate efforts to earn a living.
- Not in violation of public policy.

(*Nortec Commc'ns, Inc. v. Lee-Llacer*, 548 F. Supp. 2d 226 (E.D. Va. 2008).)

Virginia courts generally do not blue pencil agreements (*Roto-Die Co. v. Lesser*, 899 F. Supp. 1515 (W.D. Va. 1995)).

For general information on non-disclosure and confidentiality agreements, see *Practice Note, Confidentiality and Nondisclosure Agreements* (www.practicallaw.com/7-501-7068).

MISCELLANEOUS

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

Virginia courts apply common law principles regarding the employee's fiduciary duty to the employer. Employees have a duty of good faith, loyalty and honesty to their employers. Under the duty of loyalty, an employee or former employee has a duty not to disclose the employer's confidential information. Even absent an independent contractual obligation, Virginia courts impose a duty of loyalty on the employee (*Bull v. Logetronics, Inc.*, 323 F. Supp. 115 (E.D. Va. 1971)).

The Virginia Supreme Court has provided a non-exhaustive list of what kinds of actions constitute an employee's breach of the duty of loyalty:

- Misappropriating trade secrets.
- Misusing confidential information.
- Soliciting the employer's clients or other employees before their termination of employment.

(*Williams v. Dominion Tech. Partners, L.L.C.*, 576 S.E.2d 752 (Va. 2003).)

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

Virginia does not recognize the doctrine of inevitable disclosure (*Gov't Tech. Servs., Inc. v. Intellisys Tech. Corp.*, 51 Va. Cir. 55 (Va. Cir. Ct. 1999)).

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?

Virginia courts have not addressed any distinction between memorizing and physically taking trade secrets.

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 Virginia Uniform Trade Secrets Act (VUTSA) preempts conflicting tort, restitutionary and other Virginia law providing civil remedies for trade secret misappropriation. However, VUTSA does not preempt the following claims:

- Contractual remedies (whether or not based on trade secret misappropriation).
- Other civil remedies not based on trade secret misappropriation.
- Criminal remedies (whether or not based on trade secret misappropriation).

(*Va. Code Ann. § 59.1-341* (2011).)

The preemption provision in VUTSA is only intended to preempt claims that are entirely based on a claim for trade secret misappropriation (*Smithfield Ham & Prods. Co. v. Portion Pac, Inc.*, 905 F. Supp. 346 (E.D. Va. 1995)). Therefore, if a claim requires the plaintiff to prove elements beyond those required for misappropriation, then VUTSA will not preempt the claim. For more information on what a plaintiff must allege for a misappropriation claim, see *Question 9: Trade Secret Misappropriation Claims*.

At the summary judgment stage, a court will not likely find preemption for alternative claims, unless the information is clearly a trade secret (*Stone Castle Fin., Inc. v. Friedman, Billings, Ramsey & Co.*, 191 F. Supp. 2d 652 (E.D. Va. 2002)). Until the court can make a fact-based determination on whether information is a trade secret, the court will not likely find preemption, especially in the early stages in litigation.

The following claims were found to be preempted by VUTSA because the claims were entirely based on a trade secret misappropriation claim:

- Breach of fiduciary duty (*S&S Computers & Design, Inc. v. Paycom Billing Servs., Inc.*, No. CIV. A. 500CV00058, 2001 WL 515260 (W.D. Va. Apr. 5, 2001)).
- A conspiracy claim under Section 499 of Title 18.2 of the Virginia Code (prohibiting conspiracies to injure another's reputation, trade, business or profession) (*MicroStrategy Inc. v. Bus. Objects, S.A.*, 429 F.3d 1344 (Fed. Cir. 2005)).

VUTSA does not preempt civil remedies under the Virginia Computer Crimes Act (*Va. Code Ann. § 18.2-152.12(E)* (2011)). For more information on the Virginia Computer Crimes Act, see *Question 13: Other Related Claims*.



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