

# IN Brief

SPRING 2000

## IDENTIFYING AND PROTECTING YOUR TRADE SECRETS

by John P. Pavia and Jeffrey J. Mirman

**T**hroughout most of the last century, businesses customarily invested millions of dollars to develop and to safeguard trade secrets such as formulas, customer lists, and blueprints. Access to these precious and classified assets has often been limited to only those senior executives with a "need to know." Our courts have acknowledged that certain confidential business information is worthy of trade secret protection in order to encourage invention and innovation and to promote fair and ethical courses of business dealing.

The trade secrets of a company do not give that company a monopoly with respect to the use of the secret; rather, the law protects the company against the unauthorized use or unfair acquisition of the secret by a competitor.

### Trade Secrets Defined

It is important to know that not all information that a company uses in its daily business is a trade secret which the courts will protect. What, then, is a trade secret worthy of court protection?

In Connecticut, as in most states, a trade secret is information which (1) is secret and which the company has taken steps to keep secret; (2) is not known outside the business; (3) is of value to the company in its trade or business; (4) is the subject of considerable time and money in development; and (5) would be difficult for a competitor to properly acquire or duplicate. Examples of trade secrets include formulas, patterns, compilation, programs, devices, methods, techniques, processes, drawings, cost data, and customer lists. With respect

to customer lists, if the list could be easily obtained by going through the yellow pages or some other directory, then the customer list is not likely to be afforded trade secret status. Rather, if the list contains particular individuals who are contacts and who have been dealing with the company, then those names are more likely to be considered trade secrets.

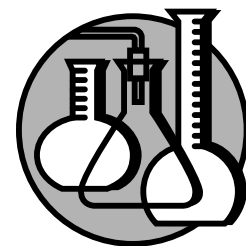
### Protecting Your Trade Secrets

The first and foremost action you must take to protect your trade secrets is to keep them a secret. Limit the number of individuals to whom access is given. Label those documents which you consider to be trade secrets with the tag "**CONFIDENTIAL INFORMATION.**" Keep the secrets in a special area, under lock and key if necessary. And if you are giving out the information to potential customers or clients, make those individuals acknowledge that the information is a trade secret, its use will be limited, and the information will be returned when the need to use the information is concluded.

### Agreements with Employees

Although Connecticut common law and statutory law prevent your employees from improperly using your trade secrets, to drive the point home and to identify what secrets you have which you wish to protect, you should require your employees to execute a Confidentiality, or Trade Secret, Agreement. These agreements typically identify what specific trade secrets, or classes of trade secrets, employees will

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**CONFIDENTIALITY AGREEMENTS AND COVENANTS NOT TO COMPETE CAN HELP SAFEGUARD TRADE SECRETS.**

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# EMPLOYER LIABILITY FOR EMPLOYEE DRIVING ACCIDENTS

by Jeffrey J. Mirman

Two recent Connecticut Court decisions have dealt with the vicarious liability of employers whose employees get into accidents while driving automobiles. There is both good news and bad news.

First the bad news. A Superior Court judge has determined that a Company which sends an employee to a training seminar may be held responsible for an accident caused by the employee when driving home while intoxicated after the employee had a few drinks in the bar with other employees following the seminar. The Court concluded that a jury could find that the employee was acting within the scope of his employment when the accident occurred, even though he was driving home at the time of the accident, and even though he had engaged in excessive drinking **after** the seminar was over.

The general rule is that when an employee is on his way to work or on his way home from work he is on his own time, and cannot be said to be acting within the scope of his employment if he gets into an accident during one of these trips. However, courts throughout the country, including Connecticut, are carving out exceptions to this rule when an employee negligently consumes too much alcohol at a Company-sponsored event or party and then causes an accident after leaving the event or party. Under these circumstances, Courts have concluded that the Company should be held responsible for the negligent acts of its employees while driving under the influence. The Courts have reasoned that the party or event was of benefit to the Company, because the attendance of the employees was either impliedly or expressly required, or because these events boost morale and foster communications between coworkers. A Company which provides alcohol at such events is presumed to believe that the alcohol in some way contributes to the success of the event or the purpose for which the Company brought the employees together. Accordingly, the Courts are imposing liability upon companies on the theory that the Company is

in a position to control employees' consumption of alcohol, or to control the activities of its employees, and to give greater assurance of compensation to victims, and to impose the risk of such accidents upon those, including the Company, who derive benefit from the event which gave rise to the injury.

A purely social function, such as where a group of employees decides to meet after hours or on the weekend, is likely to be treated differently from a Company-sponsored event, such as a Christmas party, or summer outing, or an event where employees are expected to mingle with customers. In short, it appears that an employer may be held responsible for accidents caused by employees driving under the influence following any event where alcohol is served, and where the Company knows or has reason to expect that alcohol will be served.

In the example which opened our discussion, the training seminar was given at a hotel which commonly hosts such seminars. After the seminar was over, a group of employees decided to have some drinks in the bar. Because the Company knew, or should have known, that employees might drink following

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# OSHA AND HOME WORKERS

by Lisa A. Zaccardelli

On November 15, 1999 the Occupational Safety and Health Administration, better known as “OSHA,” announced that OSHA’s policies and regulations applied to workers not only at the workplace but to employees while working at home. A firestorm of criticism from businesses across the country has caused OSHA to rescind the statements and retreat from its position until such time as it conducts a public forum on the issue and further investigates the reasonableness of such a policy. We caution you not to be fooled into a false sense of security by what may be OSHA’s temporary retreat. As more and more employers allow workers to work out of their homes, the impact on employees and their families who are trying to balance competing interests of job and home are significant. It is likely, therefore, that OSHA will apply some or all of its regulations to those employees who work from their homes, opening a Pandora’s Box for an employer attempting to comply with OSHA’s requirements. Accordingly, we recommend that companies who permit employees to work at home act now to guard against potential in-home injuries, and to work with their stay-at-home employees to minimize the risk of injury.

In 1971, Congress passed the Occupational Safety and Health Act, requiring employers to provide safe and healthful working conditions, and today OSHA regulates hundreds of industries. The recent controversy came about when a Texas employer wrote OSHA seeking information and guidance on whether OSHA standards and regulations applied to individuals working at home. OSHA responded that the regulations applied to work performed by an employee in any workplace within the United States, “including a workplace located in the employees home,” and that employers who allow workers to work at home are responsible for complying with the Act and its safety and health standards. Specifically, OSHA concluded that, even when the workplace is in an employee’s home, the employer retains some degree of control over the conditions of the “work at home arrangement.” This means that, to the extent foreseeable, OSHA required the

employer to ensure that employees are not exposed to hazards created by their “at home” employment. Taken to its logical conclusion, OSHA applied its regulations to require that an appropriate desk or computer terminal is being used. Under OSHA’s view, an employer may have to conduct an onsite inspection of the work premises to make sure there are no hazards or other conditions that create a safety or health risk.

OSHA stressed that the employer is not responsible for ensuring a “safe home,” only a safe workplace. Therefore, if a home office exists in the basement space of a residence and stairs leading to the basement are unsafe, the employer could be liable for those conditions.

OSHA also addressed whether periodic safety inspections would be required. While stating there is no general requirement for routine safety inspections, certain kinds of equipment, such as ladders, electrical protective equipment, and other electrical sources, if being used by the home worker, require periodic inspections. The agency cited specific examples of what employers would be required to do, including pursuing all feasible steps to protect the employee, correcting hazards such as unsafe office equipment and ensuring the installation does not overload the home electrical circuits.

OSHA’s interpretation has raised a myriad of issues ranging from an employer’s liability to workers’ rights to privacy in their homes. Because this issue is unlikely to disappear, employers who allow workers to work out of their homes will be faced with the challenges of ensuring a safe work environment and compliance with those standards, while allowing workers the flexibility and freedom of home office arrangements. Even if a company has only a handful of at-home workers, this controversy should prompt employers to think about these arrangements. Until OSHA definitively acts, employers are still exposed to potential worker’s compensation claims. Employers are best advised to carefully analyze the home office arrangement. **L&D**



**IT IS LIKELY THAT OSHA WILL APPLY SOME OR ALL OF ITS REGULATIONS TO EMPLOYEES WHO WORK FROM THEIR HOMES, OPENING A PANDORA’S BOX FOR EMPLOYERS ATTEMPTING TO COMPLY WITH OSHA’S REQUIREMENTS.**

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## **TRADE SECRETS** (cont'd from p.1)

be given access to and remind employees, not only that the secrets should be confidential during the course of their employment, but also that, should they leave the company, they must continue to maintain the secrecy after they leave and not use the secret information for their own or anyone else's benefit. The agreement should remind employees not only of their obligation but also of the fact that they face a claim for damages and injunctive relief should they fail to honor their obligations.

## **Covenants Not To Compete**

The Trade Secret, or Confidentiality, Agreement should not be confused with a covenant not to compete and should not be tied to such a covenant. A covenant not to compete is used to protect an employer from an

employee competing for business, customers, or employees after that employee has left the company for a specified period of time in a specified geographic area. Thus, while the covenant not to compete is limited in both time and geography, the trade secret agreement, and obligation, lasts so long as the company maintains the trade secret — in the case of Coca-Cola, for example, perhaps forever with its formula. Moreover, while the covenant not to compete must be supported by consideration, or a promise of a benefit from the company to the employee, the trade secret does not. We recommend, therefore, that you have both a trade secret agreement and a covenant not to compete. That way, there will be no confusion as to the obligations of an employee who leaves the company. We also recommend that you remind your employees of their obligations before they actually leave. **L&D**

## **EMPLOYER LIABILITY** (cont'd from p.2)

the seminar, and because the Company derived some benefit from this activity, in terms of an increase in morale, and because the Company did not prohibit this activity, the Court concluded that the Company, and not the innocent victim, should assume the risk.

A Company may, of course, establish a rule which prohibits employees from consuming alcohol at Company-sponsored events or after such training seminars. If you do permit the consumption of alcohol, know that there are risks involved.

Now the good news for employers. If the employee who had a few drinks after the training seminar caused a

motor vehicle accident to a fellow employee, the fellow employee could **not** sue the Company. A recent decision of the Appellate Court of Connecticut has upheld the motion that an employee hurt by the negligent operation of a motor vehicle by a fellow employee while on the job may not sue his employer for the fellow employee's negligence. The employee may collect worker's compensation benefits, but he may not bring a separate claim for negligence. In this case, the legislature has determined to restrict the employee's right to recover. Unlike the situation described above, where an employee hurts a non-employee, when an employee is injured the Company does not have any vicarious liability. **L&D**

## **FIRM HAPPENINGS**

Attorney **GEORGE A. BAKER** joined the firm February 14, 2000. Attorney Baker was the Probate Judge for the District of Tolland from 1995-1998. He will practice in the areas of Estate and Business Planning and Probate and Trust Administration.

**ROBIN MESSIER PEARSON** was appointed by the Governor to serve as a member of the Blue Ribbon Commission to study Affordable Housing in the State of Connecticut. She also chaired the Commission's Affordability and Enforcement subcommittee.

**MARVIN H. LAPUK** was presented with an award by the Hartford County Bar Association in honor of his 25 years of service as its Budget Committee Chairman.

**JOHN P. PAVIA III** has been promoted to a Principal of the firm effective January 2000. John practices in our Litigation Department.

**ROSS FINGOLD** is on the Committee for the Arthritis Foundation's Black Tie Dinner Dance and Auction honoring Geno Auriemma on Saturday, April 29, 2000 at Aetna's Bulkeley Memorial hall.

**JOEL MANDELL** was elected to his 4th term on the Town of Simsbury Board of Selectmen and is currently serving as the Deputy First Selectmen... Attorney Mandell was the Moderator for the January Public Forum of The Real Estate Exchange entitled "Rx for Real Estate: Development Opportunities in Health Care"... He is also the author of an article entitled "To Survey or Not To Survey, That Is The Question," which will be published in the March 6, 2000 edition of *The Connecticut Law Tribune's* Real Estate Magazine.

**COLEMAN B. LEVY** was the guest auctioneer at the YWCA of New Britain Holiday Treasures Auction held on November 12, 1999. **L&D**