THE CURRENT STATE OF PROTECTING INFORMATION

– NATIONAL CONCRETE BURIAL VAULT ASSOCIATION –

Loose Lips Sink Ships

Written by **Poul Lemasters, NCBVA Legal Counsel** | January 2024

If you don't know, although I'm sure you do, during WWII there was a huge need to protect information from potential enemies. The message was simple – be careful when you speak; you never know who is a spy.

Is there a lesson here for businesses today? Do businesses have anything to fear when it comes to information that it has? The following article is a brief overview on not only what type of information businesses may have to protect; of course, how to protect it; and also how this information can be leaked.

What Information Does a Business Need to Protect?

In the grand scheme of protecting information, step one is determining what information to protect. Typically, it boils down to confidential information that can create some risk of liability if the information is obtained by someone. Most businesses would break this down into employee information, customer information, and business information. For purposes of this article, the focus will be the last 2 categories.

Under the general category of customer and business information is one of the most valuable pieces of protectable business information – trade secrets. Notice that trade secrets are protectable, not protected. That's because as a business, you must try to protect them to be able to get protection. But, we are getting ahead of ourselves. First – what are trade secrets?

If you want to define a trade secret, then consider the definition provided by the **Federal Trade Secret Act** which defines a trade secret as, "information that: (1) derives independent economic value from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Ok, that's a lot of info, but stated differently, it means that to be a trade secret, the information must:

1. Be commercially valuable because it is secret
2. Be known only to a limited group of persons
3. Be subject to reasonable steps taken by the rightful holder of the information to keep it secret (this is why trade secrets are protectable – but you as a business must take efforts to qualify)

Based on this, what trade secrets do you as a business have? It will depend, but it may be a process or procedure you use, or it could be a customer list. In fact, a customer list is the most common – yet also most difficult – to classify as a trade secret.

How Does Your Business Protect Confidential Information?

How you protect your confidential information will be dependent on what exactly you are protecting. For example, if it is employee confidential information, then it may be locked in a secure file with limited access. If it's confidential data on your computer, then it may be protected by passwords and a log of who has access to those files. Some other general ways of protecting confidential information include:

- Surveillance measures
- Marking documents to prevent copying (this is for print and digital)
- A cybersecurity plan for digital information
- Most importantly, an inventory of exactly what confidential material you do have

There are also contractual ways to protect your confidential information. This includes non-disclosure agreements, non-solicitation agreements, non-compete agreements, and even company policies and procedures. The agreements listed are considered restrictive covenants, meaning that they restrict some part of an employee's ability to work.

Non-Compete Agreements

As a brief review, a non-compete (also known as a covenant not to compete or simply a CNC) is the most restrictive covenant because it restricts a person's ability to work for any competing business. This means that if I work for Company A, and they fire me or I quit, then I may be restricted from working for any other business that competes with Company A. Typically, there are

limits to a non-compete that include the length of time, the geographical area, and the exact element that determines what is protected – which helps define competition. All of these must be reasonable for the non-compete to be enforceable. The non-compete protects your information because your employee has no way to work with a competing business to be able to share any of your information.

Non-Solicitation Agreement

In contrast to the non-compete that restricts all work, the non-solicitation only restricts your interactions – but allows you to work anywhere. How does it restrict your interactions? Typically, a non-solicitation will state that as an employee, if you leave, you are prohibited from soliciting: any employees from where you worked (i.e. trying to get fellow employees to quit and come work at your new place); any vendors that were vendors at your work (i.e. trying to get the same deals or use specific products from your former employer to your new employer); and, most common, any clients or customers (i.e. people that are current, former, and potentially future customers or clients that are associated with your former company.) The non-solicitation agreement, because it does not restrict where you work, is not limited by a geographic area and can also work easily on independent contractors (an area where a non-compete has less enforceability, at least currently). Your information is protected because the non-solicitation limits what information you can share with your new employer.

Non-Disclosure Agreement

Lastly, the non-disclosure agreement (or NDA or Confidentiality Agreement) is a contract between two or more parties, such as an employer and employee or a business and a contractor, that protects specific information. The NDA is typically very limited in what is protected, but of all the restrictive agreements, is the easiest to enforce. Most NDAs will identify exactly what information is protected (it is important to be as specific as possible because simply stating trade secrets can be too broad); how long the protection lasts (typically this is a period of years or until some other event occurs); list any information that is excluded (this is typically anything public); and also the remedies for breach (this could include restraining orders, automatic injunction, as well as monetary damages).

What About a Confidentiality Policy?

Besides contracts between you and your employee, you can also create policies and procedures that set out exactly what is confidential information as well as how you expect employees to protect this information. As an example of a confidentiality policy, consider the following:

CONFIDENTIAL INFORMATION

A Sample Policy

Our clients entrust the Company with important information relating to their personal lives and businesses. In addition to clients' information, our Business also maintains confidential information, including certain trade secrets. The nature of the relationship of employee and employer requires maintenance of confidentiality. In safeguarding the information received, we earn the respect and further trust of our clients, as well as protect our business. Your employment with the Company assumes an obligation to maintain confidentiality, even after you leave our employ.

Any violation of confidentiality seriously injures the Company's reputation and effectiveness. Therefore, please do not discuss our business with anyone who does not work for us, and never discuss business transactions with anyone who does not have a direct association with the transaction. Even casual remarks can be misinterpreted and repeated, so develop the personal discipline necessary to maintain confidentiality. If you hear, see, or become aware of anyone else breaking this trust, consider what they might do with information they get from you.

If you are questioned by someone outside the company and you are concerned about the appropriateness of giving them certain information, remember that you are not required to answer, and that we do not wish you to do so. Instead, as politely as possible, refer the request to the owner or manager.

While performing duties and services at the Business, employees will have access to information relating to the clients served that is sensitive and confidential. Employees are to have access to client information on a need-to-know basis only. Employees are not to give out any non-public information. Non-public information is any information that someone could not get from sources like a general search on the internet. Even information that is public should not be given out indiscriminately. The best practice is to only verify information and not to disclose any information, and when in doubt, refer to the owner / manager.

No one is permitted to remove or make copies of any of the company's records, reports, or documents without prior approval of the owner / manager. Because of its seriousness, disclosure of confidential information could lead to dismissal.

Let's Get Back to Trade Secrets

Besides contractual and company policies, there is one last area of protection for your business specific to trade secrets. There is a **Federal Uniform Trade Secrets Act**, as well as 45 states that have some version of this federal law. These laws provide special protection to trade secrets, even if your company has no policy or contractual agreement in place. However, as stated above, trade secrets are protectable and not just protected. This means to qualify for protection under a state law, you must have done some preliminary steps on your end.

For example, to protect a customer list as a trade secret, you would need to take some actions on your part to show that it is a trade secret and needs the protection. Typically, you would need to show it is an actual written document, not simply some people you know and have verbally shared. You would also need to have some minimal protections in place, such as keeping it locked up, or some restrictions in place to limit who can see the document. Your list must contain information that is more than public information – this means more than a name and phone number. Perhaps your list would include notes about the customers, private cell numbers, or private email or other addresses. Lastly, your list should always be current. This means that you track all your versions (remember the inventory list we mentioned earlier in this article).

How Does Confidential Information Get Out There?

Enter the world of gossip and rumors. Whether we like to admit it or not, gossip and rumors are part of society. People hear a story, and they want to share the information. Sometimes good – but as we know it's mostly bad. No one ever wants to be the topic of gossip or a rumor. And if it's bad enough, these little conversations can not only create a bad working environment – they can even lead to HR issues, and even legal issues. In the world of keeping secrets and protecting confidential information, you need to know what you can and can't do when it comes to gossip and rumors.

What exactly are gossip and rumors?
In its simplest form, gossip and rumors are any act of sharing information about others. Historically, this was the classic water cooler conversation, where people gathered for a break and shared the stories they heard – about others. However, in today's world, gossip and rumors travel far more quickly and broadly thanks to technology – like emails and text messages.

While gossip and rumors are very similar, most agree that there is a difference. Gossip is when we talk about others and their personal life. Typically, these are true facts, but not made public – well, until you share them through your gossip. Rumors are also stories and information about other's lives, but the facts are typically unverified. In other words, gossip tends to be true, while rumors are unverified. The unverified may later be proven true, but rumors tend to push false statements (more about that later).

What issues can be caused from gossip and rumors?
There are a few potential issues that can arise when gossip and rumors are part of the workplace.

1. First, and the easiest to see, is a **bad work environment.** Almost everyone has seen or even been part of a workplace where there is a negative energy. This almost palpable feeling of uneasiness and distrust. This can be rooted in gossip and rumors among the workplace. When employees fear being a part of rumors or gossip, it tends to have a negative effect. Employees can withdraw from work both physically and mentally. Once one employee starts to remove themselves from the workplace, it easily can lead to others doing less as well.

2. Second, gossip and rumors can lead to **violations of your work policy.** Depending on what is being said about others, the statements could actually violate several business policies including: harassment, anti-harassment, anti-discrimination, non-retaliation, and confidentiality policies. For example, imagine an employee complaining about overtime and then the manager has a conversation with that employee – explaining the overtime policy, why it is required, and potentially saying if you don't like it, you can leave. Now, the rumors and gossip start, and people are talking about how you almost fired someone because they wouldn't work overtime. Now you want to have a talk with the person spreading rumors! Well, be careful – because this singling out one person could be retaliation due to the employee's right to talk about working conditions. It is also easy to see how rumors about a person's life could violate confidentiality, and if the person is threatened, then harassment; and if the rumors discuss any protected class, then you have discrimination.

3. Lastly, there is the issue of **privacy.** Not only do employees have a right to privacy, but your

business does as well. Rumors and gossip can interfere and violate privacy concerns quickly. Imagine employees spreading rumors that your business is failing. Imagine that these rumors are being shared to other businesses that you work for – such as vendors. Ultimately this information could breach privacy and confidentiality provisions of your company. See how this all ties back to those loose lips and sinking ships?

How do I handle gossip and rumors?
If you are wondering what you can do to handle gossip and rumors, wonder no more. There are a few thoughts on how to confront and handle gossip and rumors. First, if there is an issue in the workplace, confront the issue. However, try not to single any one person as this can create more issues. Instead, discuss the issue with all employees. Remind them of your policies and that gossip and rumors could violate these policies.

Should you create an anti-gossip or anti-rumor policy? Most professionals do not suggest this – mostly because the National Labor Relations Board has said that it is allowable and encourages workers to be able to talk and communicate in the workplace. In fact, many of the things most employers don't want discussed (wages, benefits, working conditions, overtime) are all protected and these are always allowed to be discussed. In the example above, the fact that the boss was potentially going to talk to a gossiper to stop talking about overtime issues is a direct violation under the NLRB.

The better move is to make sure that your harassment, anti-harassment, anti-discrimination, non-retaliation, and confidentiality policies are written in such a way as to include language that these policies also include communication by gossip or rumors.

Defamation Lawsuits

Leave it to a lawyer to give you the worst-case scenario on how bad it can get. Gossip and rumors are typically not actionable, and simple violations of polices in the workplace. Depending on the severity, this could lead to disciplinary actions or even termination. But it can get worse.

If the rumors or gossip are false statements, then this could lead to defamation. **Defamation is the act of making false statements that harm an individual or business's reputation.** Defamation can either be written (libel) or spoken (slander) statements. If someone – or your business – believes they are being defamed, then they can proceed with legal actions in the form of a defamation lawsuit. A defamation lawsuit is where the plaintiff must prove:

1. Someone made a false statement about them or your business.
2. The statement was shared or made public to a third party. This is actually an easy step and can be proven by showing it was shared with just one other person.
3. The statement caused harm to the person's reputation, or in the case of your business – the employer's reputation.

Keep in mind that truthful statements are an absolute defense against any defamation claim. But, once you are at the point of a defamation lawsuit, while the truth may set you free, it probably won't solve all the damage caused. While you may always want to talk to an attorney once you get involved in potential defamation claims – ***please talk to an attorney.***

Final Remarks

Overall, protecting confidential information begins with knowing what information you have that is confidential. You can't protect what you don't know you have. Then, once you know, start a program that will encompass all your confidential information. **Most importantly, train your people.** All employees, managers, and owners should know what is protected and how to protect it. If you're not taking action to protect what needs protected, then you're simply allowing someone to take it from you.

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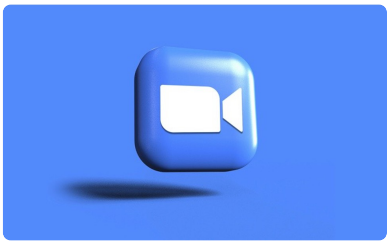
Wednesday, February 21, at 2:00pm ET

Zoom Conference Call and Q&A Session with NCBVA Legal Counsel



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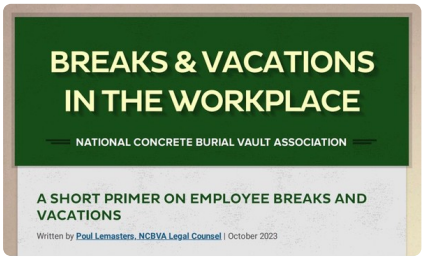

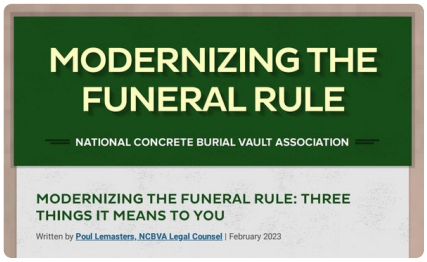

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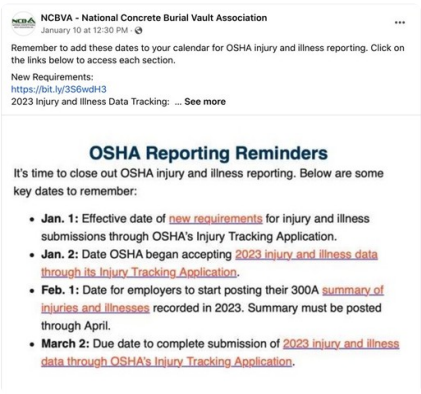

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