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When Trade Secrets Theft is a Crime: Input from Federal Law Enforcement on Investigating and Addressing Criminal Trade Secrets Theft

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Today's Speakers



Bradford Newman
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Brad regularly serves as lead trial counsel in cases with potential eight and nine-figure liability, and has successfully litigated a broad spectrum of trade secrets cases in state and federal courts throughout the country. He is the author of the treatise *Protecting IP in the Age of Employee Mobility: Forms and Analysis* (ALM 2014). Brad has been recognized by the *Daily Journal* as one of the top 20 Artificial Intelligence lawyers in California, and is the Chair of the ABA's AI Subcommittee. In 2018, he proposed The AI Data Protection Act - federal AI IP and workplace legislation that has been turned into a Discussion Draft House of Representatives Bill.



Jessica Nall
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Jessica has extensive experience in conducting internal corporate investigations for companies in the technology, financial services, energy, and health care industries, with a focus on technology companies headquartered in Silicon Valley. Jessica has helped a number of well-known public and private companies navigate high-profile crisis situations involving cutting-edge government enforcement and compliance issues. Jessica brings to the table a wide range of experience in both traditional and emerging white collar issues, including in international antitrust enforcement, trade secrets theft, false claims act violations, cyber-crime, information security and privacy, crypto-currencies and tokens, ICOs, and block-chain technology.

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Overview

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12 Addressing Risk of Criminal Trade Secret Theft/Economic Espionage

Civil Theft of Trade Secrets

To succeed on a claim for trade secrets misappropriation, plaintiff must prove all of the following:

1. That plaintiff owned/was a licensee of a trade secret;
2. That this information was a trade secret at the time of the misappropriation;
3. That defendant improperly acquired/used/disclosed the trade secrets;
4. That plaintiff was harmed defendant was unjustly enriched; and
5. That defendant's acquisition/use/disclosure was a substantial factor in causing plaintiff's harm or defendant's unjust enrichment.

Uniform Trade Secrets Act (UTSA), Jury instr.

Criminal Theft of Trade Secrets

- (1) Whoever,
- (2) with intent to convert a trade secret,
- (3) that is related to a product or service used in or intended for use in interstate or foreign commerce,
- (4) to the economic benefit of anyone other than the owner thereof,
- (5) and intending or knowing that the offense will, injure any owner of that trade secret, knowingly
- (6) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains such information . . .

Shall be fined and/or imprisoned per 18 USC § 1832.

Economic Espionage

- (1) Whoever,
- (2) intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent, knowingly—
- (3) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains a trade secret . . .

Shall be fined under 18 USC § 1831.

The China Initiative



the launch

The China Initiative was launched by the DOJ in November 2018.



the mission

It dedicates government resources to investigating and prosecuting trade secret theft cases.



the numbers

In February 2020, the FBI director stated there are more than 1,000 pending investigations.

What Makes a Trade Secrets Theft Case Criminal?

- Evidence to Prove All Statutory Elements.
- Especially Egregious Conduct.
- Value of the Trade Secret.
- Victim Characteristics.
- Impact of parallel civil litigation.
- Impact of a Potential Prosecution/Anticipated deterrent impact.
- Nexus to a Foreign Actor.
- U.S. Attorneys' Office Enforcement Priorities.



What To Do Before Referring a Case?



- Preserve Evidence.
- Forensic Investigation.
- Establish the Compelling Narrative Supported by Key Evidence.
- Establish Law Enforcement Relationships in Advance.

How to Refer?

- In person meeting with outside counsel, executive level expert, FBI and AUSA.
- U.S. Attorneys' Office Point Person for Trade Secrets Referrals.
- Create Law Enforcement Relationships in Advance.



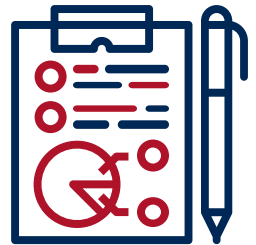
Things to Avoid?



- Technology Deep Dive.
- Choosing the Wrong Meeting Attendees.
- Permitting Spoliation Before Referral.
- Provision of Non-disclosable Information, Including Privileged Information.
- Interference in government processes.

Protection of Trade Secrets in Criminal Investigation/Prosecution

- Limits to Confidentiality Obligations on Government.
 - Brady Obligations.
 - 6th Amendment.
 - Criminal Discovery Obligations.
- Interim Stipulated Protective Order.



What to Expect As a Criminal Trade Secrets Theft Victim?



- Lengthy Time to Conclusion.
- Extensive Legal Process Required for Certain Investigative Powers.
 - Includes international cooperation.
- Risk of Disclosure of Confidential Company Information.
- Victims' Rights Limitations: No Control Over Outcome.
- Financial Impacts.

What to Expect As a Criminal Trade Secrets Theft Victim?

- Criminal Process:
 - Investigation.
 - Use of investigative process incl. search warrants.
 - Indictment.
 - Counsel Negotiations and Criminal Pre-trial Litigation.
 - Trial.
 - Sentencing.



How to Avoid Being Victimized?



- Effective Compliance Policy re: Trade Secrets.
- Safeguard Against Data Theft.
- Onboarding/Offboarding.
- Add Layers of Protection in Dealing with Foreign Partners.

Addressing Risk of Criminal Trade Secret Theft/Economic Espionage

International Business relationships that may trigger heightened scrutiny



Vendors

Investors

Employees

**Venture
Partners**

Researchers

**Government
Agencies**



Discussion



Questions

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