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"Readily Ascertainable" by Whom (or What)?

As artificial intelligence becomes ubiquitous, trade secret law is feeling the impact. As discussed in a prior issue of *Trade Secret Quarterly*, employers face new challenges in trying to protect their trade secrets from being input into AI where they become anything but secret. Beyond this familiar risk, AI has also made it easier to generate information that looks valuable – yet may not qualify as a trade secret. As AI increases access to and synthesis of public information, employers should monitor not only what employees feed into AI, but also what they use AI to produce, especially when the company intends to claim trade secret protection.

A vital characteristic of trade secrets is that they are *not* "readily ascertainable" by others who could use the information to their economic advantage. Traditionally, trade secret information reflects substantial time, expense, and effort to create or discover, and the law rewards those efforts when the information is kept secret. If information can be obtained with a click of a button, however, there is less justification for exclusive legal protection.

While information is not considered readily ascertainable if it would take substantial time, effort, and expense to obtain, that people-centric benchmark is under pressure as AI makes large-scale access and synthesis dramatically easier. Courts will increasingly be asked to reconsider what readily ascertainable means in the age where information that would take a team of employees weeks to create can be created by AI almost instantly.

Consider building a competitive pricing model for a new startup. Historically, teams might spend hours asking around and combing disparate sources for competitor pricing signals. An overlooked risk, however, is the downstream effect of using AI to create materials the company intends to protect as trade secrets. If one employee can generate a similar output with AI, so can others, including competitors. At that point, the information may be readily ascertainable, and thus not a trade secret because it can be reproduced without substantial time, expense, or effort. AI can save time, but it may erode protectability.

To preserve trade secret status, employers should set guardrails not only on inputs to AI, but also on AI-assisted outputs. Policies should explicitly address whether employees may use AI to aggregate or create financial analyses, marketing materials, customer lists, training manuals, and contracts templates. The goal should be to ensure that materials intended to be trade secrets are not composed primarily of information that AI can quickly source and replicate.

Watching the Clock: Understanding Statutes of Limitations Applicable to Trade Secret Disputes

Because trade secret misappropriation claims may arise under both federal and state law, it is not uncommon for them to be governed by multiple statutes of limitation. Even when the lengths of the applicable statutes of limitation are the same, however, jurisdictions may differ substantially in how they apply those statutes. To avoid a potential loss of rights, trade secret holders should understand not just the length of applicable statutes of limitation, but also how those statutes are likely to be applied in the jurisdictions where they conduct business.

Federal Versus State Law Claims

The federal Defend Trade Secrets Act (DTSA) is governed by a three-year statute of limitations. 18 U.S.C. § 1836(d). The Uniform Trade Secrets Act (UTSA) and many states that have adopted the UTSA, such as California and Minnesota, mirror this same limitations period for state law trade secret claims. However, state statutes can vary significantly, with some states imposing statutes of limitation as short as two years and others extending substantially longer. Compare AL Code § 8-27-5 (Alabama's two-year statute of limitations) with 13 Ohio Rev. Code Ann. § 1333.66 (Ohio's four-year statute of limitations) and 765 ILCS 1065/7 (Illinois' five-year statute of limitations).

What Starts the Clock Ticking – Inquiry Notice Versus Discovery Rule

The statute of limitations period for a claim under the DTSA begins to run when "misappropriation is discovered, or by the exercise of reasonable diligence should have been discovered," 18 U.S.C. § 1836(d), and many state trade secret statutes (including those that have adopted the UTSA) have similar accrual language. Courts have differed, however, in their assessment of whether that clock is triggered by inquiry notice (i.e., when a plaintiff is aware of a problem or has cause for concern) or the discovery rule (i.e., when a plaintiff actually discovers the facts constituting the violation or when a reasonably diligent plaintiff should have discovered those facts). The majority of courts have applied inquiry notice to claims under the DTSA. However, at least one court, in the District of Massachusetts, has applied the discovery rule instead. See *Insulet Corp. v. EOFlow Co.*, 755 F. Supp. 3d 70, 84–88 (D. Mass. 2024) ("As a matter of logic, it would seem to follow that this Court should reject the 'inquiry notice' standard here, on the ground that the adoption of such a standard conflicts with the language of the relevant statute of limitations."). Given these differences, prospective trade secret litigants should carefully consider how courts in the jurisdictions in which they operate address the accrual of trade secret claims.

Continuing Misappropriation Versus Separate Accrual

Statutes of limitations may also begin to run or accrue at different times for different trade secrets – or even for different acts of misappropriation of the same trade secret. But grouping or distinguishing trade secrets and acts of misappropriation is not necessarily an easy task. As the Colorado Supreme Court has observed, "virtually any two pieces of information can be conceived of as constituent elements of some greater whole," or, alternatively, as distinct from each other. *Gognat v. Ellsworth*, 259 P.3d 497, 502 (Colo. 2011). The Sixth Circuit has analyzed this issue through the lens of "whether the same relationship has been ruptured in the same way, looking, for example, at who made the disclosure, to whom the disclosure was made, and the nature, timing, and reasons for the disclosure." *B&P Littleford, LLC v. Prescott Mach., LLC*, 2021 WL 3732313, at *6 (6th Cir. Aug. 24, 2021). There, a later "acquisition and use" of alleged trade secrets gave rise to a new claim of misappropriation that did not accrue with an earlier misappropriation. *Id.* Ultimately, it is often a fact-specific inquiry to determine whether misappropriation is a "continuing act" subject to an earlier statute of limitations trigger or a new claim of misappropriation that arises and accrues later. *Id.*

Considering the Impact of the Relief Sought

The applicable time period for a statute of limitations might not be determined until a plaintiff files a complaint – at least under New York law. Unlike most states, New York trade secret claims are governed by common law, not statute. The applicable statute of limitations depends on the relief sought and the nature of the claims. See *IDT Corp. v. Morgan Stanley Dean Witter & Co*., 12 N.Y.3d 132, 139 (2009). Where a plaintiff primarily seeks monetary damages, the statute of limitations is three years. *Ferring B.V. v. Allergan, Inc.*, 932 F. Supp. 2d 493, 510 (S.D.N.Y. 2013). Where a plaintiff primarily seeks equitable relief, the statute of limitations is six years. *Universal Instruments Corp. v. Micro Sys. Eng'g, Inc*., 924 F.3d 32, 50 (2d Cir. 2019). But where an injunction is merely "incidental" to a "principally sought … monetary remedy," courts find that "the reality of the cause of action is that it is one for damages, not injunctive relief," and "the three-year statute of limitations [for claims seeking legal relief] applies." *Id.* Trade secret holders facing a potential statute of limitations issue should consider how the relief they choose to seek may bear on the viability of their claim.

Because applicable statutes of limitation may have dispositive impacts – barring a claim or otherwise leading to a loss of rights – trade secret holders should carefully and conservatively consider how relevant statutes of limitation may apply and act promptly to preserve their rights.

Status of Severance Agreements and the *McLaren Macomb* Decision

The National Labor Relations Board's (NLRB) stance on permissible language in employee severance agreements has been called into question by some recent actions. Earlier this year, the NLRB's Office of the General Counsel released Memorandum GC 25-05, which rescinded several Biden-era memoranda. Acting General Counsel William B. Cowen's justification for the rescission was that there was as an unsustainable backlog of cases related to those policies, and that resources would be better directed elsewhere.

Among the memoranda rescinded was Memorandum GC 23-05, which was created to help workers, employers, and labor organizations navigate the implications stemming from *McLaren Macomb* (372 NLRB No. 58 (2023)). *McLaren* held that it is unlawful for employers to offer severance agreements with overly broad confidentiality and non-disparagement clauses that result in the forfeiture of an employee's rights to organize and collectively bargain under Section 7 of the National Labor Relations Act. Following the rescission of GC 23-05, the NLRB's policy objectives have been called into question, leaving employers uncertain as to how to comply with NLRB regulations.

In *McLaren*, employees were offered a severance agreement that broadly prohibited statements that could harm the employer's image, as well as prohibited disclosure of the terms of the agreement. This resulted in a chilling effect on employees' ability to make statements or complaints about their workplace under Section 7. After examining the agreement's specific language, *McLaren* held that "a severance agreement is unlawful if its terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and that employers' proffer of such agreements to employees is unlawful."

McLaren overruled two earlier pro-employer NLRB cases from 2020: *Baylor University Medical Center* (369 NLRB No. 43) and *IGT d/b/a International Game Technology* (370 NLRB No. 50). *McLaren* condemned *Baylor* and *IGT*'s tactic of examining the *circumstances* under which the agreements were presented to the employees, rather than examining the *specific language* in the agreement. *McLaren* also criticized *Baylor* and *IGT's* determinations that the severance agreements in those cases were proper simply because they were voluntary, did not impact the terms and conditions of employment, and were not coercive.

The rescission of GC 23-05 signals a potential shift away from the NLRB's prior employee-friendly policies. While the NLRB might always try and revert to pro-employer holdings such as those in *Baylor* and *IGT*, it is unlikely to do so in the near term. Not only did the Sixth Circuit affirm the NLRB's ruling in *McLaren* in 2024, but cases decided by the NLRB after the rescission of GC 23-05 indicate that *McLaren's* ruling is still controlling.

This means that while the rescission of GC 23-05 may call into question the NLRB's policy objectives, employers should continue ensuring that confidentiality and non-disparagement provisions in severance agreements are narrowly tailored and not overbroad. They should also be aware of other federal and state requirements that may pose limitations on confidentiality or non-disparagement provisions in severance agreements.

FTC Drops Cases Regarding Its Final Rule Banning Noncompete Agreements

The Federal Trade Commission (FTC) has officially pulled the plug on its infamous noncompete rule, finalized in April 2024, which would have banned virtually all employment-related noncompete agreements. Following various legal challenges, the Biden-era FTC filed appeals in the Fifth and Eleventh Circuits in the hopes of defending the noncompete rule. Multiple motions to stay were filed throughout 2025, which gave the FTC the opportunity to determine if it would continue to pursue its appeals.

In a September 5 statement by Chairman Andrew Ferguson, the FTC announced that it had voted to withdraw its notices of appeal in cases in the Fifth Circuit (*Ryan, LLC v. FTC*) and the Eleventh Circuit (*Properties of the Villages v. FTC*). Ferguson maintained that the illegality of the rule was "patently obvious," warning from the outset that the "[r]ule would never survive judicial review" and would lead to a waste of resources spent defending it.

Commissioner Mark R. Meador, who also voted in favor of withdrawing the appeals, similarly believed the rule was an "ill-advised use of Commission resources" and was overbroad. Ferguson noted that when the FTC was faced with the decision to either "continue tilting at windmills by defending the Biden Administration's indefensible rule, or … get down to the hard business of promoting labor competition and protecting American workers," it chose the latter and highlighted that "the Trump-Vance Commission has already moved aggressively against unlawful noncompete agreements." He further stated that the FTC would continue to enforce antitrust laws against noncompete agreements and move against unlawful noncompete agreements on a case-by-case basis. Additionally, since many states already either individually restrict noncompete agreements or ban them outright, Ferguson noted that the FTC would "leave the legislating to the people's representatives in Congress and in the States."

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