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Sponsored by:

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District 17 (Middlesex and Somerset)

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SYNOPSIS

"New Jersey Trade Secrets Act."

CURRENT VERSION OF TEXT

As reported by the Senate Commerce Committee on September 19, 2011,
with amendments.



(Sponsorship Updated As Of: 9/27/2011)

1 AN ACT concerning the misappropriation of trade secrets and
2 supplementing Title 56 of the Revised Statutes.

3

4 **BE IT ENACTED** by the Senate and General Assembly of the State
5 of New Jersey:

6

7 1. This act shall be known and may be cited as the "New Jersey
8 Trade Secrets Act."

9

10 2. As used in this act:

11 "Improper means" means the theft, bribery, misrepresentation,
12 breach or inducement of a breach of an express or implied duty to
13 maintain the secrecy of, or to limit the use or disclosure of, a trade
14 secret, or espionage through electronic or other means, access that
15 is unauthorized or exceeds the scope of authorization, or other
16 means that violate a person's rights under the laws of this State;

17 "Misappropriation" means:

18 (1) Acquisition of a trade secret of another by a person who
19 knows or has reason to know that the trade secret was acquired by
20 improper means; or

21 (2) Disclosure or use of a trade secret of another without express
22 or implied consent of the trade secret owner by a person who:

23 (a) used improper means to acquire knowledge of the trade
24 secret; or

25 (b) at the time of disclosure or use, knew or had reason to know
26 that the knowledge of the trade secret was derived or acquired
27 through improper means; or

28 (c) before a material change of position, knew or had reason to
29 know that it was a trade secret and that knowledge of it had been
30 acquired through improper means.

31 "Person" means a natural person, corporation, business trust,
32 estate, trust, partnership, association, joint venture, government,
33 governmental subdivision or agency, or any other legal or
34 commercial entity.

35 "Proper means" means discovery by independent invention,
36 discovery by reverse engineering, discovery under a license from
37 the owner of the trade secret, observation of the information in
38 public use or on public display, obtaining the trade secret from
39 published literature, or discovery or observation by any other means
40 that is not improper.

41 "Reverse engineering" means the process of starting with the
42 known product and working backward to find the method by which
43 it was developed so long as the acquisition of the known product

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

¹Senate SCM committee amendments adopted September 19, 2011.

1 was lawful or from sources having the legal right to convey it, such
2 as the purchase of the item on the open market.

3 "Trade secret" means information, held by one or more people,
4 without regard to form, including a formula, pattern, business data
5 compilation, program, device, method, technique, design, diagram,
6 drawing, invention, plan, procedure, prototype or process, that:

7 (1) Derives independent economic value, actual or potential,
8 from not being generally known to, and not being readily
9 ascertainable by proper means by, other persons who can obtain
10 economic value from its disclosure or use; and

11 (2) Is the subject of efforts that are reasonable under the
12 circumstances to maintain its secrecy.

13

14 3. a. Actual or threatened misappropriation may be enjoined.
15 Upon application to the court, an injunction shall be terminated
16 when the trade secret has ceased to exist, but the injunction may be
17 continued for an additional reasonable period of time in order to
18 eliminate commercial advantage that otherwise would be derived
19 from the misappropriation.

20 b. In exceptional circumstances, an injunction may condition
21 future use upon payment of a reasonable royalty for no longer than
22 the period of time for which use could have been prohibited.
23 Exceptional circumstances include, but are not limited to, a material
24 and prejudicial change of position prior to acquiring knowledge or
25 reason to know of misappropriation that renders a prohibitive
26 injunction inequitable.

27 c. In appropriate circumstances, affirmative acts to protect a
28 trade secret may be compelled by court order.

29

30 4. a. Except to the extent that circumstances, including a
31 material and prejudicial change of position prior to acquiring
32 knowledge or reason to know of misappropriation renders a
33 monetary recovery inequitable, a complainant is entitled to recover
34 damages for misappropriation. Damages can include both the
35 actual loss caused by misappropriation and the unjust enrichment
36 caused by misappropriation that is not taken into account in
37 computing actual loss. In lieu of damages measured by any other
38 methods, the damages caused by misappropriation may be measured
39 by imposition of liability for a reasonable royalty for a
40 misappropriator's unauthorized disclosure or use of a trade secret.

41 b. If willful and malicious misappropriation exists, the court
42 may award punitive damages in an amount not exceeding twice any
43 award made under subsection a. of this section.

44

45 5. A person who misappropriates a trade secret shall not use as a
46 defense to the misappropriation that proper means to acquire the
47 trade secret existed at the time of the misappropriation.

1 6. The court may award to the prevailing party reasonable
2 attorney's fees and costs, including a reasonable sum to cover the
3 service of expert witnesses, if:

- 4 a. willful and malicious misappropriation exists;
5 b. a claim of misappropriation is made in bad faith; or
6 c. a motion to terminate an injunction is made or resisted in
7 bad faith.

8 For purposes of this section, "bad faith" is that which is
9 undertaken or continued solely to harass or maliciously injure
10 another, or to delay or prolong the resolution of the litigation, or
11 that which is without any reasonable basis in fact or law and not
12 capable of support by a good faith argument for an extension,
13 modification or reversal of existing law.
14

15 7. In an action under this act, a court shall preserve the secrecy
16 of an alleged trade secret by reasonable means ¹ [. There shall be a
17 presumption in favor of granting protective orders in connection
18 with discovery proceedings pursuant to section 4:10-3(g) of the
19 Rules of Court as adopted by the Supreme Court of New Jersey,
20 which may include provisions limiting access to confidential
21 information to only the attorneys for the parties and their experts,
22 holding in-camera hearings, sealing the records of the action, and
23 ordering any person involved in the litigation not to disclose an
24 alleged trade secret without prior court approval] consistent with
25 the Rules of Court as adopted by the Supreme Court of New
26 Jersey¹.
27

28 8. An action for misappropriation shall be brought within three
29 years after the misappropriation is discovered or by the exercise of
30 reasonable diligence should have been discovered. For the purposes
31 of this section, a continuing misappropriation constitutes a single
32 claim.
33

34 9. a. The rights, remedies and prohibitions provided under this
35 act are in addition to and cumulative of any other right, remedy or
36 prohibition provided under the common law or statutory law of this
37 State and nothing contained herein shall be construed to deny,
38 abrogate or impair any common law or statutory right, remedy or
39 prohibition except as expressly provided in subsection b. of this
40 section.

41 b. This act shall supersede conflicting tort, restitutionary, and
42 other law of this State providing civil remedies for misappropriation
43 of a trade secret.

44 c. In any action for misappropriation of a trade secret brought
45 against a public entity or public employee, the provisions of the
46 "New Jersey Tort Claims Act" (N.J.S.59:1-1 et seq.) shall supersede
47 any conflicting provisions of this act.

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1 10. This act shall take effect immediately, and does not apply to
2 misappropriation occurring prior to the effective date. With respect
3 to a continuing misappropriation that began prior to the effective
4 date, the act also does not apply to the continuing misappropriation
5 that occurs after the effective date.