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Title 39 - Trade and Commerce

CHAPTER 8.

TRADE SECRETS

SECTIONS 39-8-1 to 39-8-9. Repealed by 1997 Act No. 38, Section 1, eff May 21, 1997.

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SECTION 39-8-10. Short title.

This chapter may be cited as the "South Carolina Trade Secrets Act".

SECTION 39-8-11. Repealed by 1997 Act No. 38, Section 1, eff May 21, 1997.

SECTION 39-8-20. Definitions.

As used in this chapter, unless the context requires otherwise:

(1) "Improper means" include theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, duties imposed by the common law, statute, contract, license, protective order, or other court or administrative order, or espionage through electronic or other means.

(2) "Misappropriation" means:

(a) acquisition of a trade secret of another by a person by improper means;

(b) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(c) disclosure or use of a trade secret of another without express or implied consent by a person who:

(i) used improper means to acquire knowledge of the trade secret; or

(ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:

(A) derived from or through a person who had utilized improper means to acquire it;

(B) acquired by mistake or under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(iii) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(3) "Owner" means the person or entity in whom or in which rightful legal or equitable title to the trade secret is reposed.

(4) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(5) "Trade secret" means:

(a) information including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(b) A trade secret may consist of a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy. The collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.

SECTION 39-8-30. Trade secrets; employees' obligation to refrain from disclosing; civil actions and remedies.

(A) A trade secret endures and is protectable and enforceable until it is disclosed or discovered by proper means.

(B) Every employee who is informed of or should reasonably have known from the circumstances of the existence of any employer's trade secret has a duty to refrain from using or disclosing the trade secret without the

employer's permission independently of and in addition to any written contract of employment, secrecy agreement, noncompete agreement, nondisclosure agreement, or other agreement between the employer and the employee.

(C) A person aggrieved by a misappropriation, wrongful disclosure, or wrongful use of his trade secrets may bring a civil action to recover damages incurred as a result of the wrongful acts and to enjoin its appropriation, disclosure, use, or wrongful acts pertaining to the trade secrets.

(D) A contractual duty not to disclose or divulge a trade secret, to maintain the secrecy of a trade secret, or to limit the use of a trade secret must not be considered void or unenforceable or against public policy for lack of a durational or geographical limitation.

(E) This chapter applies to any and all civil remedies which are based upon misappropriation of a trade secret or upon protection of a trade secret except as provided in Section 39-8-110(B) and (C).

SECTION 39-8-40. Recovery of actual damages; exemplary damages.

(A) A complainant is entitled to recover actual damages for misappropriation of trade secrets. A material and prejudicial change of position before acquiring knowledge or reason to know of misappropriation may render full monetary recovery inequitable and may form the basis for reducing monetary recovery.

(B) Damages may include both the actual loss caused by misappropriation or the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

(C) Upon a finding of wilful, wanton, or reckless disregard of the plaintiff's rights, the court may award separate exemplary damages in an amount not exceeding twice any award made under subsection (A).

SECTION 39-8-50. Injunctions against actual or threatened misappropriations.

(A) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation. Such reasonable period of time shall take into account the average rate of business growth that would have been gained from nonmisappropriated use of the misappropriated trade secret.

(B) In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position before acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.

(C) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

SECTION 39-8-60. Preservation of secrecy during discovery proceedings of civil actions; substantial need defined.

(A) In an action under this chapter, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding hearings in-camera, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

(B) In any civil action where discovery is sought of information designated by its holder as a trade secret, before ordering discovery a court shall first determine whether there is a substantial need by the party seeking discovery for the information.

"Substantial need" as used in this section means:

(1) the allegations in the initial pleading setting forth the factual predicate for or against liability have been plead with particularity;

(2) the information sought is directly relevant to the allegations plead with particularity in the initial pleading;

(3) the information is such that the proponent of the discovery will be substantially prejudiced if not permitted access to the information; and

(4) a good faith basis exists for the belief that testimony based on or evidence deriving from the trade secret information will be admissible at trial.

(C) Direct access to computer databases containing trade secret information, so-called "real time" discovery, shall not be ordered by the court unless the court finds that the proponent of the discovery cannot obtain this information by any other means and provided that the information sought is not subject to any privilege.

(D) Upon motion of the holder of the trade secret information, a court may condition the production of trade secret information on the posting of an appropriate bond.

(E) Information produced pursuant to this section must be governed by an appropriate written protective order of the court.

(F) Information produced pursuant to this section may only be disclosed to persons identified in the written protective order of the court and may be used or disclosed only in the action in which it is produced. Litigation-sharing orders pertaining to trade secret information must not be entered by the court.

(G) A person receiving trade secret information pursuant to this section is subject to the jurisdiction of the courts of this State.

(H) When information produced pursuant to this section is discussed or otherwise disclosed at a trial or hearing, the owner of the produced trade secret information is allowed to obtain individually signed confidentiality agreements from all parties that are present in the courtroom or are party to any procedures where trade secret information is discussed, presented, or otherwise made known to any party not already under a confidentiality agreement with the trade secret owner.

(I) All trade secret information and any copies, duplicates, or other writings which reflect or contain the trade secret information, or excerpts therefrom, must be returned to the holder of the trade secrets at the conclusion of the litigation.

(J) This section applies to any civil action brought within or without this State where discovery is sought of trade secret information present in this State.

SECTION 39-8-70. Time limit for bringing action.

An action for misappropriation must be brought within three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.

SECTION 39-8-80. Bad faith; award of attorney's fees.

If (1) a claim of misappropriation is made in bad faith, (2) a motion to terminate an injunction is made or resisted in bad faith, or (3) wilful misappropriation exists, the court may award reasonable attorney's fees to the prevailing party.

SECTION 39-8-90. Persons guilty of stealing trade secrets; criminal penalties.

(A) A person, with intent to or reason to believe that it will injure an owner and benefit a person other than the owner, shall be fined not more than $100,000 or imprisoned not more than ten years, or both, if he:

(1) steals, wrongfully appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains trade secrets;

(2) wrongfully copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys trade secrets;

(3) receives, buys, or possesses trade secrets, knowing the trade secrets have been obtained by any means described in items (1) or (2);

(4) attempts to commit any offense described in items (1) through (3);

(5) wrongfully solicits another to commit any offense described in items (1) through (3); or

(6) conspires with one or more other persons to commit any offense described in items (1) through (3), and where one of the conspirators performs an act to further the conspiracy.

(B) In a prosecution for any violation of subsection (A) of this section the court must, pursuant to Section 39-8-100, preserve the secrecy of an alleged trade secret.

SECTION 39-8-100. Criminal proceedings; finding of disclosure of trade secrets; issuance of protective order.

(A) If the court finds that a trade secret may be disclosed during a criminal proceeding, the court must issue a protective order limiting the use and dissemination of the trade secret including, but not limited to, articles disclosing that secret, provided that the issuance of a protective order would not conceal fraud or work an injustice. The protective order may, in the court's discretion, include the following provisions:

(1) that the information produced pursuant to this section may be disclosed only to persons identified in the written protective order of the court and may be used or disclosed only in the action in which it is produced;

(2) that the defendant may view the secret only in the presence of his counsel or at counsel's office;

(3) that a party seeking to show the trade secret, or articles containing the trade secret, to a person not designated by the protective order must first obtain court approval to do so.

(a) The court must require that the person receiving the trade secret do so only in the presence of counsel for the party requesting protection.

(b) The court must require the person receiving the trade secret to sign a copy of the protective order and a confidentiality agreement with the trade secret owner and to agree to be bound by its terms. The order may include a provision recognizing the owner of the trade secret to be a third-party beneficiary of that agreement.

(c) The court shall require a party seeking disclosure to an expert to provide that expert's name, employment history, and any other relevant information to the court for examination. The court must evaluate the expert and determine whether the expert poses a significant risk of compromise.

(4) that no articles disclosing the trade secret may be filed or otherwise made a part of the court record available to the public without approval of the court and prior notice to the owner of the secret. The owner of the secret may give permission to accept the notice on the owner's behalf;

(5) other orders as the court considers necessary to protect the integrity of the trade secret.

(B) During proceedings where trade secrets may be disclosed, the court may, in its discretion, take other appropriate measures to protect against disclosure of trade secrets.

SECTION 39-8-110. Chapter's effect on conflicting tort, restitutionary and other laws; effect on other remedies.

(A) Except as provided in subsections (B) and (C), this chapter displaces conflicting tort, restitutionary, and other law of this State providing civil remedies for misappropriation of a trade secret.

(B) This chapter does not affect:

(1) contractual remedies, whether or not based upon misappropriation of a trade secret or protection of a trade secret;

(2) the provisions of the South Carolina Tort Claims Act.

(C) Any and all other civil remedies that are not based upon misappropriation of a trade secret or upon protection against misappropriation of a trade secret are governed by the rules of procedure, rules of evidence, regulations, and the common law applicable to the administrative law tribunal or court where the action is filed.

SECTION 39-8-120. Severability.

If any provision of this chapter or its application to any person or circumstances is held invalid, the invalidity

does not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of the chapter are severable.

SECTION 39-8-130. Retroactive application of chapter.

This chapter does not apply to a misappropriation occurring before July 1, 1997, or a continuing misappropriation that began before July 1, 1997.