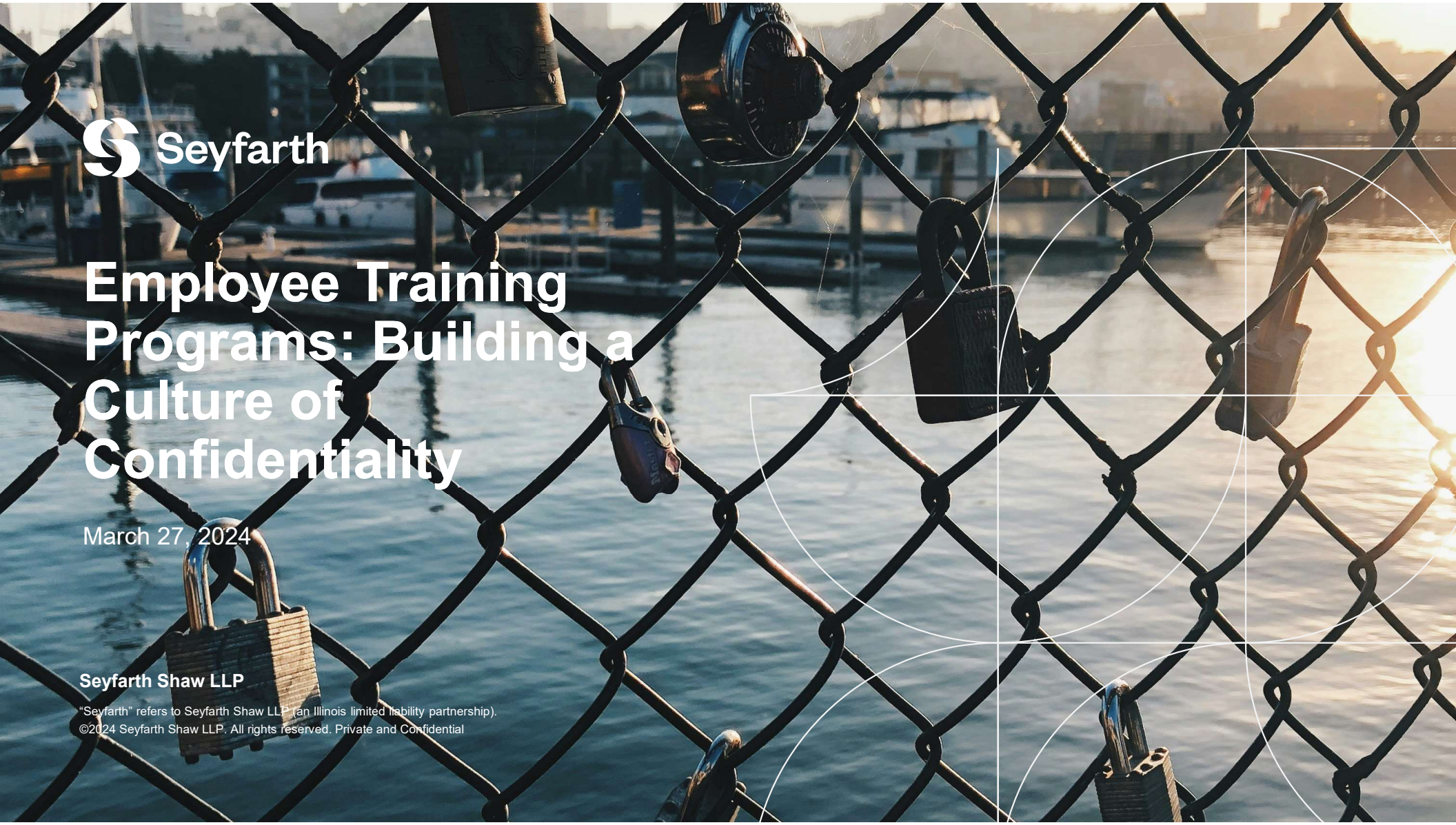

Seyfarth

Employee Training Programs: Building a Culture of Confidentiality

March 27, 2024

Seyfarth Shaw LLP

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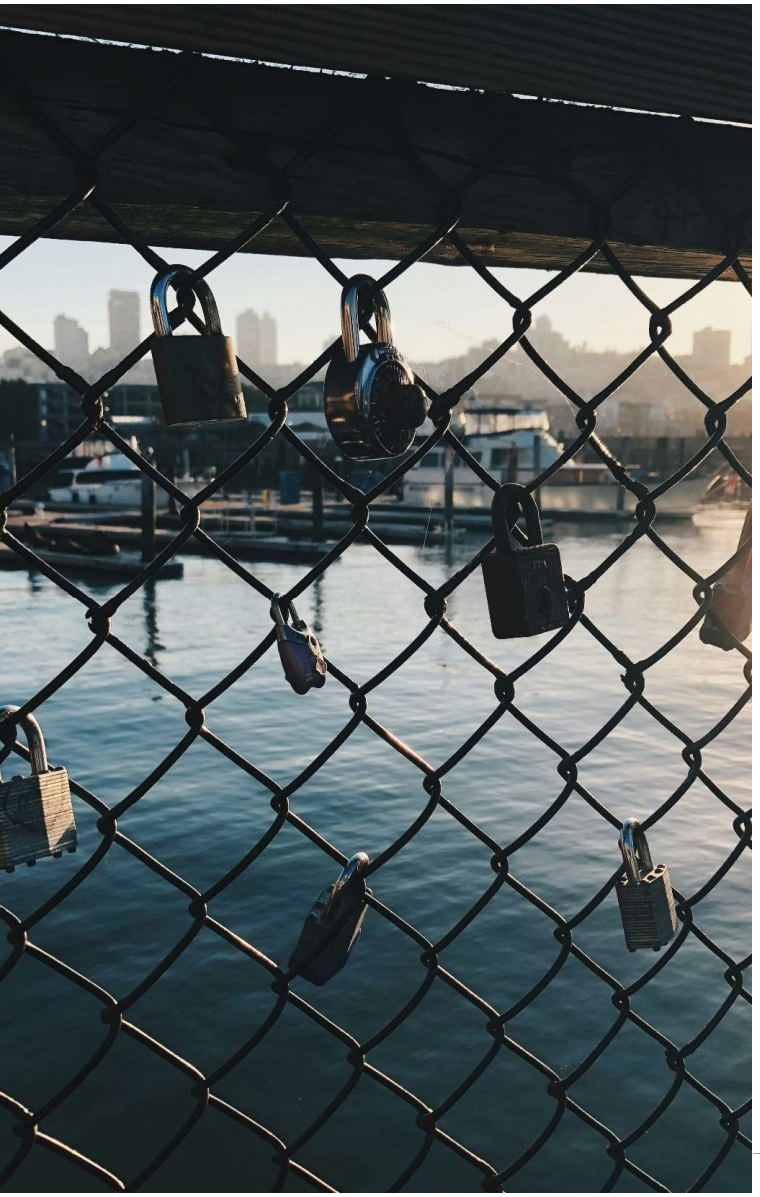


Agenda

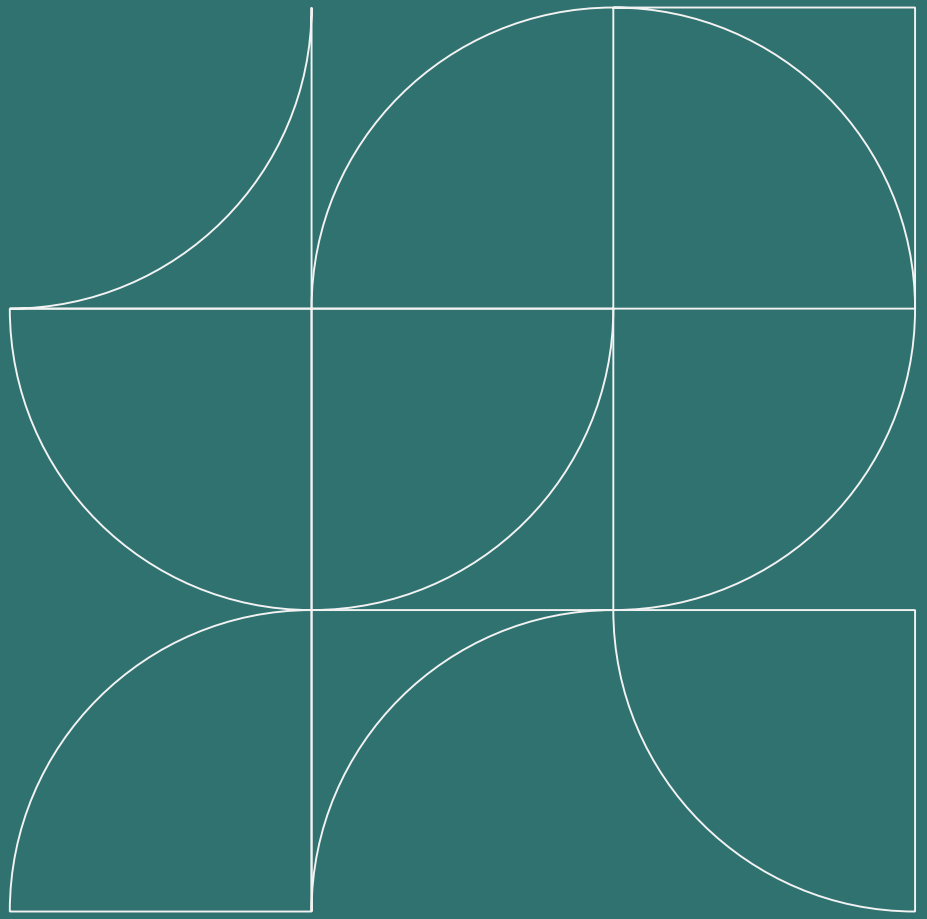
1 | Identifying & Maintaining Trade Secrets

2 | Restrictive Covenants

3 | On-Boarding and Off-Boarding Considerations

4 | Methods to Create a Culture of Confidentiality

Identifying and Maintaining the Secrecy of Trade Secrets and Confidential Information



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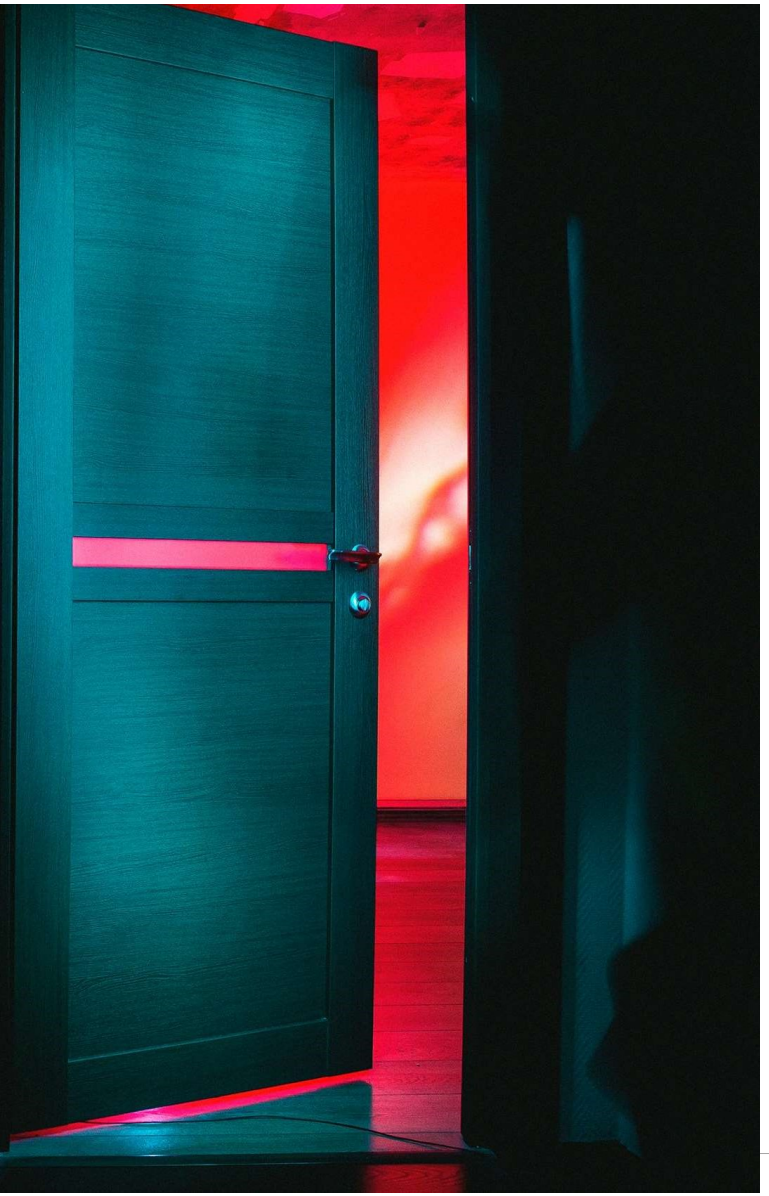

What is considered a “trade secret” or “confidential information”?

“A trade secret is one of the most elusive and difficult concepts in the law to define.”

Tewari De-Ox Sys., Inc. v. Mountain States/Rosen, L.L.C., 637 F.3d 604, 613 (5th Cir. 2011)

UTSA
Definition of "Trade Secret"

A "Trade Secret" is:

information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons 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."

The Defend Trade Secrets Act of 2016

Definition of Trade Secret

"Trade secret" includes all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if—

a) the owner thereof has taken **reasonable measures** to keep such information secret; and

b) the information derives **independent economic value**, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic

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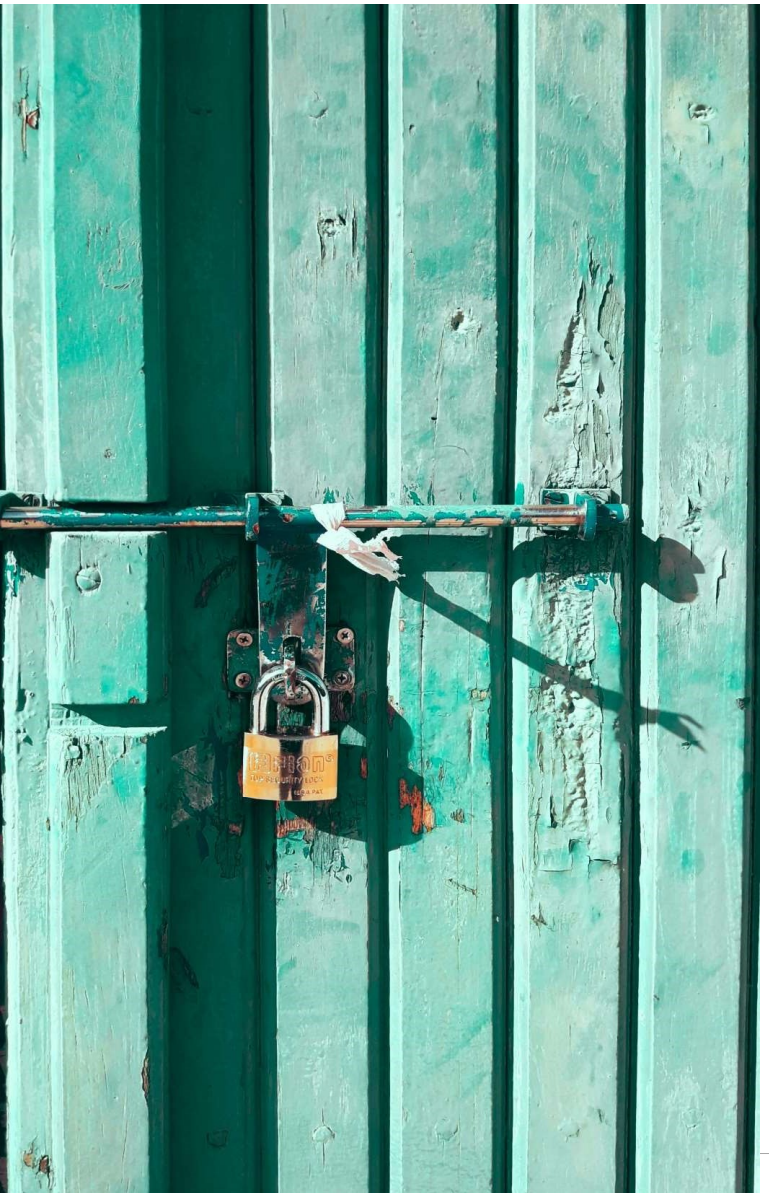

What Is a Trade Secret?

- Trade secrets = information
- Generally **not known** to others
- Economically valuable (actual or potential)
- **Reasonable efforts** to maintain secrecy

Identifying Trade Secrets

Factors That Help Determine Whether Information is a Trade Secret:

- Extent known outside the company
- Extent known by employees and others inside company
- Measures taken by company to protect secrecy
- Value of trade secret to company and competitors
- Time, effort, and money expended in development
- Ease with which it can be properly acquired or duplicated by others (reverse engineering/independent derivation)

Trade Secret Spectrum

- Outdated pricing information
- Publicly available customer contact information
- Generic sales strategies

- Customer lists
- Customer preferences
- Proprietary Sales Strategies

- The recipe for Coca-Cola
- Software code
- Medicine Chemistry

Examples of Information that May Be Trade Secrets

- **Internal Customer Lists**
  - High-trading or high-net-worth clients and their order histories;
  - Institutional fund clients, pension fund clients, and their portfolio allocations;
  - Angel / venture capital investors and their propensities;
- **Internal Modeling Documents**
  - Cash-flow forecast models;
  - Options / futures pricing models;
  - Underwriting models;
  - Analytics compilations and modeling;
- **Internal Opportunities and Trends**
  - SWOT analyses;
  - Future private-equity targets;
  - Emerging markets.

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Examples of Trade Secrets

- Product Formulas
- Manufacturing Processes
- Marketing Strategies
- Business Plans
- Sensitive Financial Information
- Pricing/Cost Information
- Unique Software & Source Code
- Knowledge About Customers (e.g., requirements, preferences, order history, purchasing trends)
- Negative Research Results
- Know How

Trade Secrets Must Be Kept Secret

- Public disclosure of a trade secret destroys the information's status as a trade secret. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984)

- "It is axiomatic that without secrecy, no trade secret can exist." *BDT Products, Inc. v. Lexmark, International, Inc.,* 274 F. Supp. 2d 880, 891 (E.D. Ky. 2003)

- Between 2009 and 2018, 15% of trade secret cases were dismissed because the plaintiff did not take reasonable measures to protect its trade secrets. And Defendants were successful in 54% of the cases that went to verdict between 2016 and 2018

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What Level of Security is Required?

- Absolute secrecy and heroic measures are not required – only measures that are "***reasonable under the circumstances***."
- Prevention protocols are key.
- However, if a trade secret is leaked and the company does not try to fix the leak and minimize damage, its value to the company may be severely compromised and lost forever.
- Courts will carefully scrutinize whether the company took appropriate steps to safeguard security.

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What is the **economic impact of trade secret theft** to U.S. companies?

Estimates of trade secret theft range from:

1 - 3%

of the Gross Domestic Product of the United States and other advanced industrial economies*

**CREATe and PwC: "Economic Impact of Trade Secret Theft: A framework for companies to safeguard trade secrets and mitigate potential threats (2014)*

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External Threats
to Corporate Confidential Information

Cyber threats can threaten the trade secret eligibility for company information:

– "Once a trade secret is posted on the Internet, it is effectively part of the public domain, impossible to retrieve. . . . [T]he party who merely downloads Internet information cannot be liable for misappropriation because there is no misconduct involved in interacting with the Internet." *Religious Tech. Ctr. v. Lerma* (E.D. Va. 1995).

– Potential Shift in Law – What used to constitute "reasonable measures" to maintain secrecy may no longer be reasonable as cyber threats become more universal and apparent.

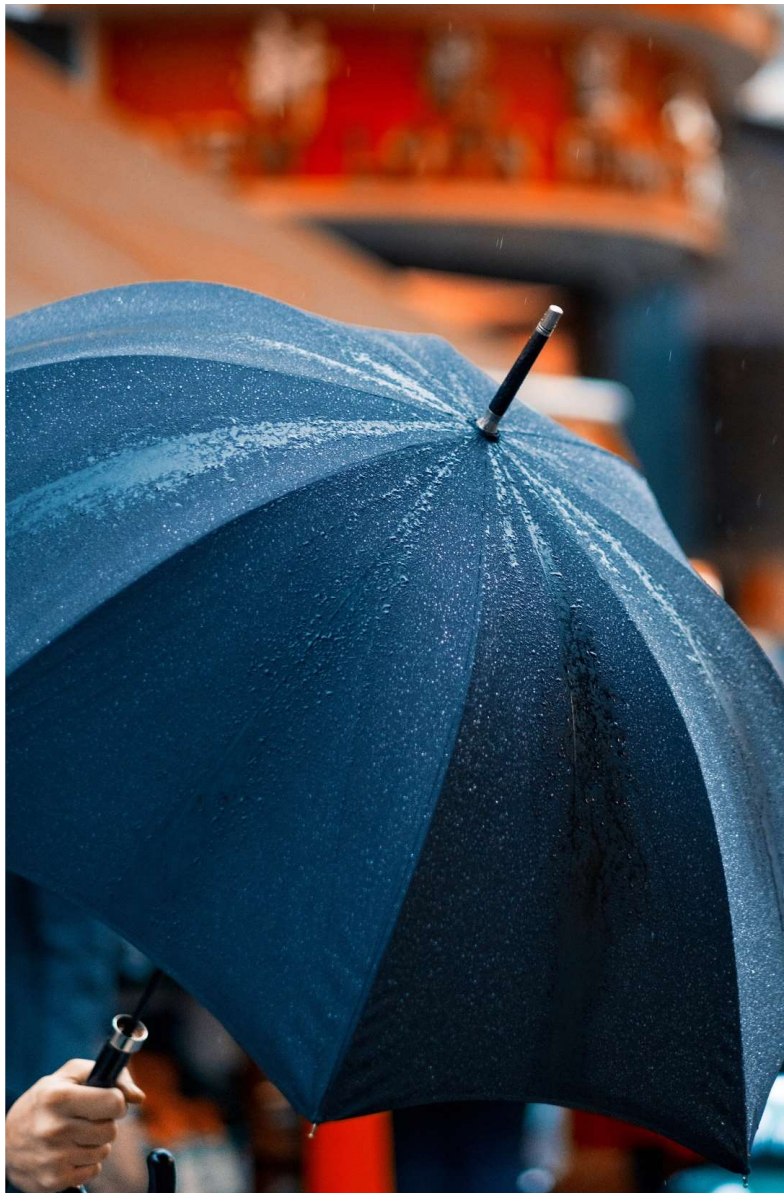
Employees Should Be Trained on What is Confidential

"One seeking to prevent the disclosure or use of trade secrets or information must demonstrate that he pursued an active course of conduct designed to inform his employees that such secrets and information were to remain confidential."

Jet Spray Cooler, Inc. v. Crampton, 361 Mass. 835, 841 (1972).

Typical Measures
to Protect Trade Secrecy Should Include:

- **Agreements with Employees**
  - Offer letters
  - NDAs, Return of Materials, Post-Employment Restrictive Covenants
- **Employee Policies and Handbooks – Written and Available**
  - Confidentiality, Privacy, BYOD
  - Include certifications of receipt/review
- **Confidentiality Agreements with Third Parties**
  - Clients, vendors, contractors, suppliers, JV partners
  - Due diligence parties – targets, acquirers, underwriters
- **Secure network and facility**
  - Password protection of hardware and software
  - Need-to-know distribution of materials
  - “Lock and Key”
  - Monitoring tools (real time and after-the-fact)



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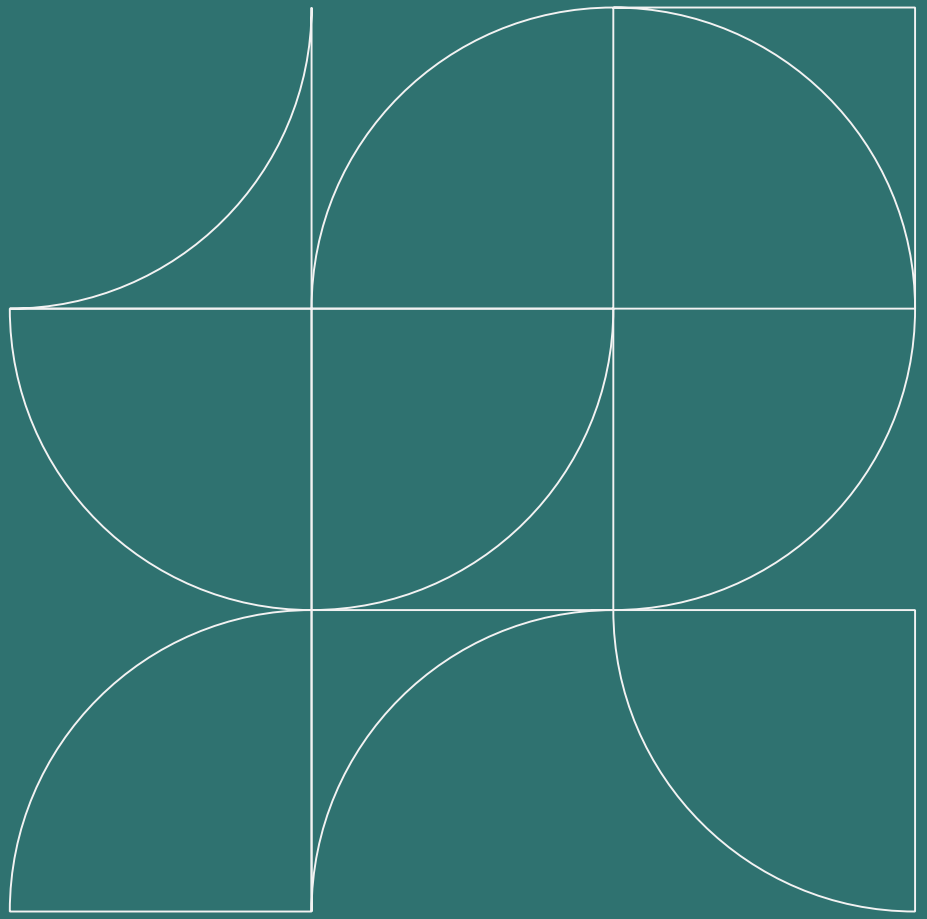
Restrictive Covenants



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Importance of Understanding State Laws for Restrictive Covenants

Top Calif. Antitrust Atty Says Criminal Cases On The Horizon

- California is preparing to prosecute criminal antitrust cases under the state's Cartwright Act.
- The Cartwright Act prohibits restricting commerce, preventing competition, or entering agreements to lessen competition.
- Criminal penalties for violations of the state's antitrust law include fines greater than $1 million for corporations and $250,000 for individuals, or two times the loss from the anti-competitive conduct.

https://www.law360.com/articles/1810754/top-calif-antitrust-atty-says-criminal-cases-on-the-horizon

Overview of Restrictive Covenants

- **Types**:
  - Non-competition
  - Non-solicitation of customers
  - Non-solicitation of employees
- **Restrictions can be based on**:
  - Scope
  - Geography/Territory
  - Duration
- **Used to Protect Valuable Corporate Assets**:
  - Confidential, proprietary, and/or trade secret information
  - Customer and other business relationships
  - Goodwill

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Enforceability of Restrictive Covenants

- **Question of State Law**
- **Enforceability Often Depends On:**
  - Scope of the restrictions
  - Nature of the employee's responsibilities and background
  - Relevant jurisdiction(s)
    - Choice of law
    - Questions regarding adequate consideration
    - Blue/red pencil
- **Potential Conflicts with Other Employment or Arbitration Agreements**
- **Context:**
  - Employees
  - Independent contractors
  - Vendors, suppliers, or other business partners
  - Sellers of a business

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Evolving Statutory Landscape

- Bans/Limits on Post-Termination Non-Competes
- Notice Requirements
- Income Thresholds
- Restrictions on Foreign Choice of Law/Forum Selection Provisions
- Protections for Certain Professions

Dynamic Nature of State Laws

- **Bans Regarding Non-Competes**
  - Minnesota
  - California
- **Increase in Salary Thresholds for Non-Competes**
  - Oregon
  - Washington
- **New Restrictions on Non-Competes for Healthcare/Medical Professions**
  - Connecticut
  - South Dakota
  - Montana
- **New Presumptions of Enforceability**
  - Missouri

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Legislation on the Horizon

- Washington
- New York
- Oklahoma
- Michigan
- Wisconsin
- Arkansas
- Texas
- Utah
- Nevada
- New Mexico
- Hawaii
- California

Staying Ahead of the Curve

- Regularly Review and Enhanced Protective Agreements, Policies, and Procedures
- Customize Restrictions for Maximum Protection
- Consider State-Specific Nuances and Workforce Location(s)
- Account for Technological Advances
  - BYOD
  - Social media
  - Cloud computing
  - Remote work
  - Generative AI

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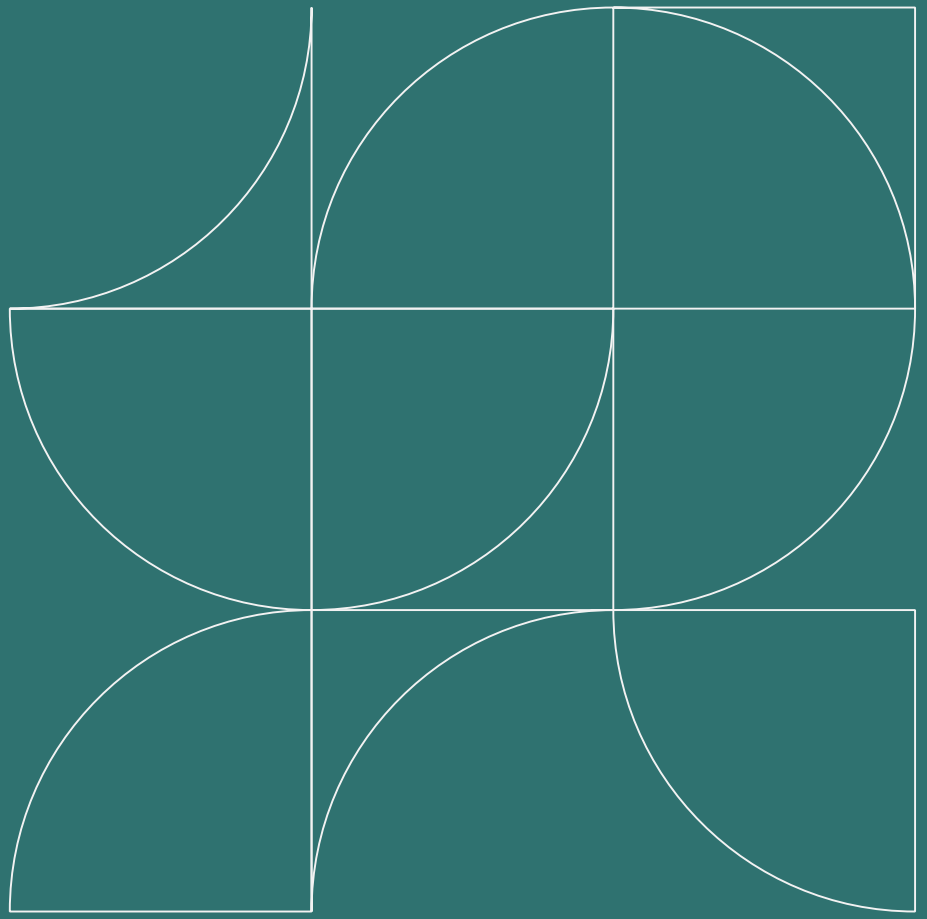
On-Boarding and Off-Boarding Considerations



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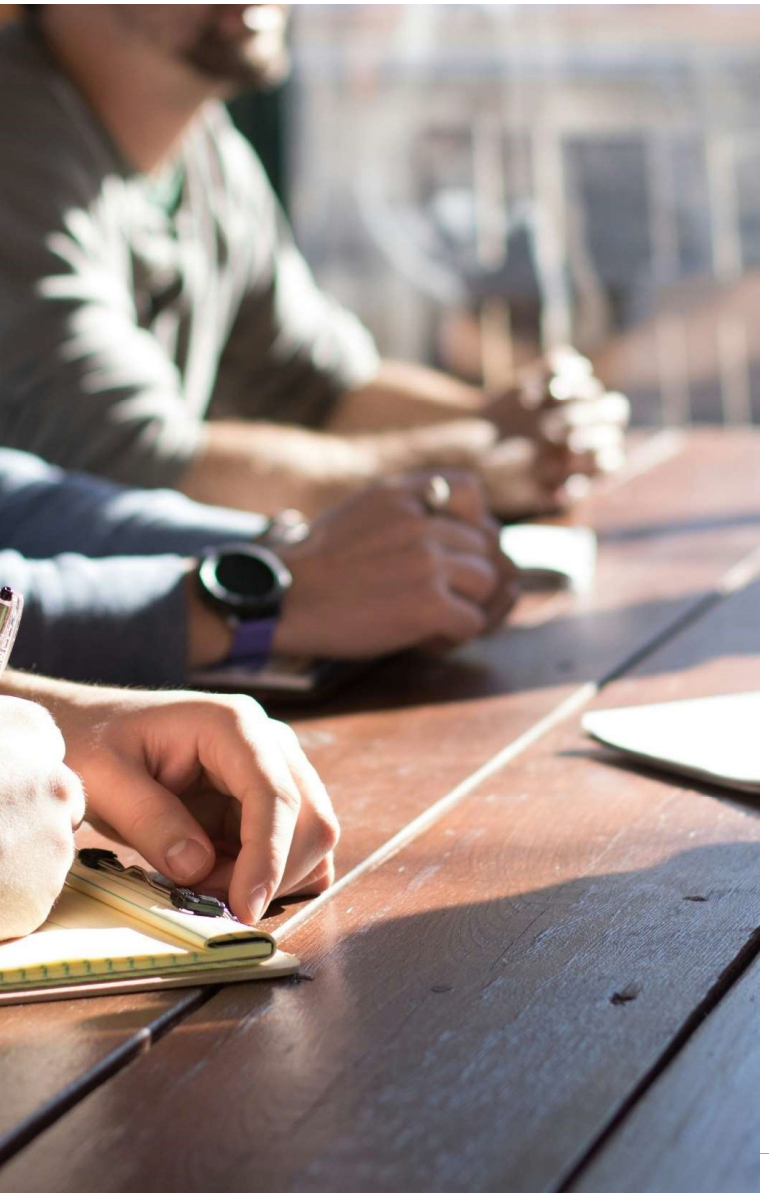


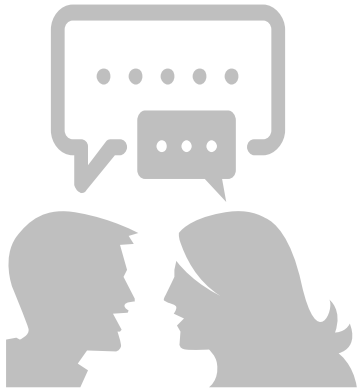
On-Boarding Procedures

What agreements should be in place for particular employees?

- Non-disclosure and trade secret protection covenants?
- Non-compete covenants?
- Invention assignment agreements?
- Acknowledgement that employee will not use prior employers' trade secrets and confidential/proprietary information and has returned all company property?
- Computer use and access agreements?
- Social media ownership and policies?

Exit Interviews & Processes

- Must adapt due to inability for in-person exit interview
- Prepare for the interview, identify the trade secret and confidential information the employee accessed/used, consider having in-house counsel or HR and employee's manager present as appropriate
- Question the departing employee in detail
  - Ask employee why s/he is leaving
  - Ask employee what new position will be
- Check employee's computer activities and work activities in advance of the meeting
- Ensure that all company property, hardware, and devices have been returned, including email and cloud data, and social media accounts; consider using an inventory list
- Offer to have materials picked up from house, if necessary



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Exit Interviews & Processes

- Ensure that arrangements are made to have all company data removed from any personal devices
- Disable access to company computer networks
- Make sure you obtain user names and passwords for all company social media accounts
- Inform the employee of continuing obligations under agreements with the company
- Consider letter to new employer and employee with reminder of continuing obligations
- Consider preserving departing employee's emails and/or forensically imaging electronic devices
- Consider using an exit interview certification

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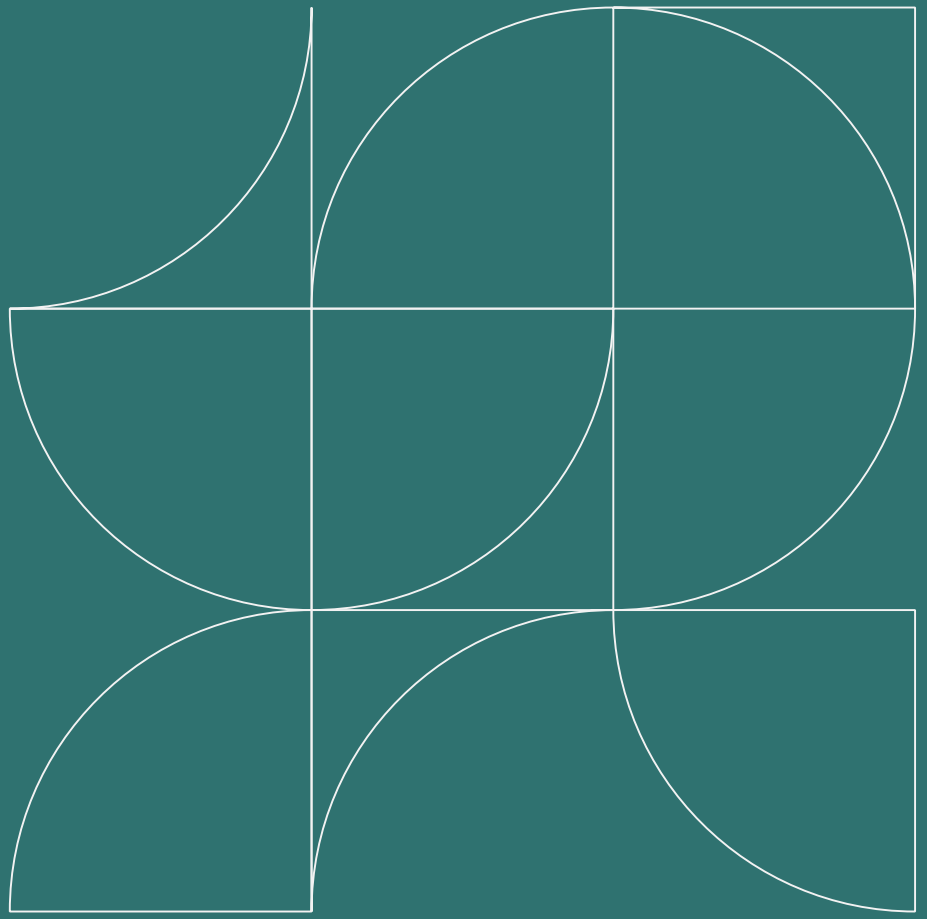
Methods to Create a Culture of Confidentiality



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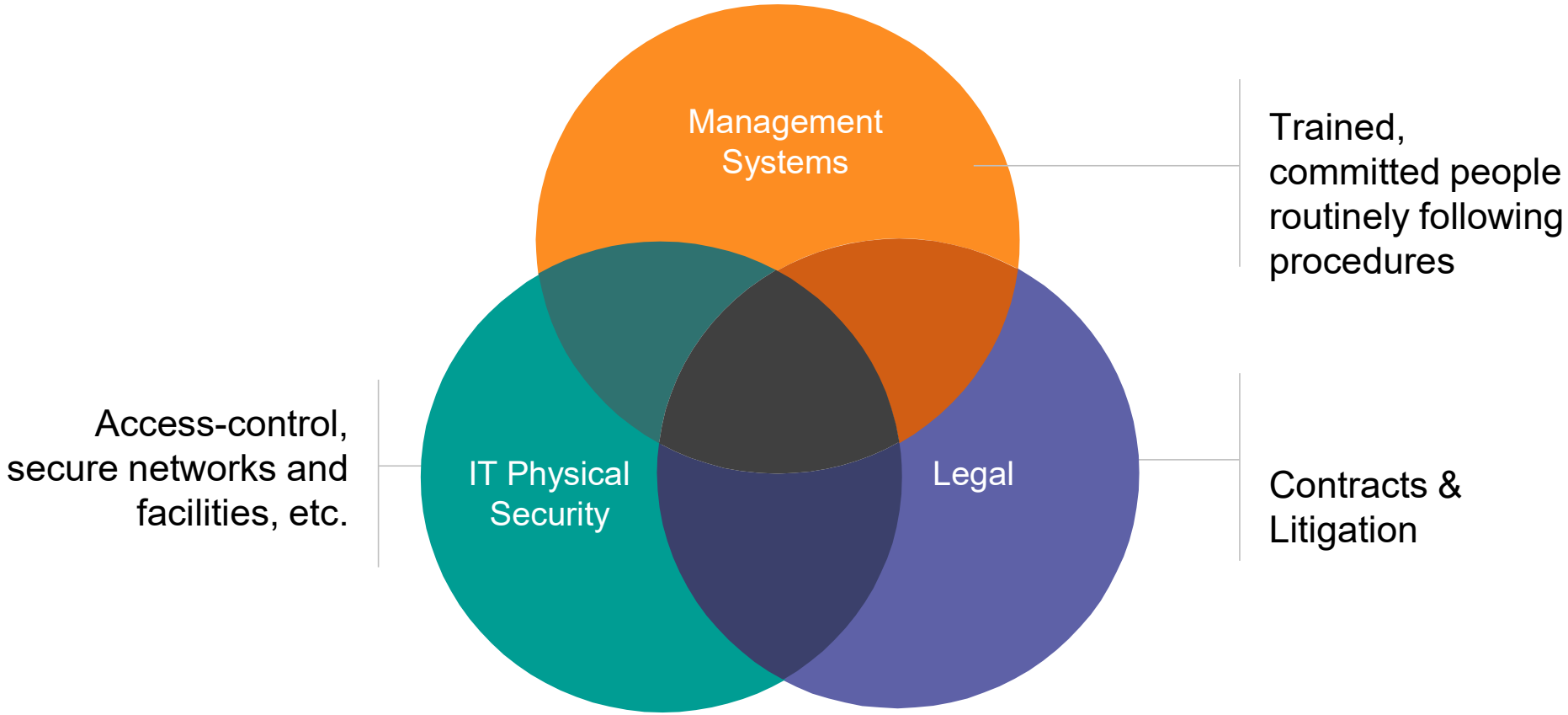
Create a Culture of **Confidentiality**

- Ensure employees understand what the company considers confidential, and why it is important to maintain confidentiality
  - Tie it in with client service
  - And make sure to get it back
- Treat others how you would like to be treated!
- Provide training modules with examples of “dos” and “don’ts”
  - Identify industry standards
- Mark things confidential/proprietary
- Make security protocols easy to understand, familiar, and uniform

Pillars of Effective Trade Secret Protection



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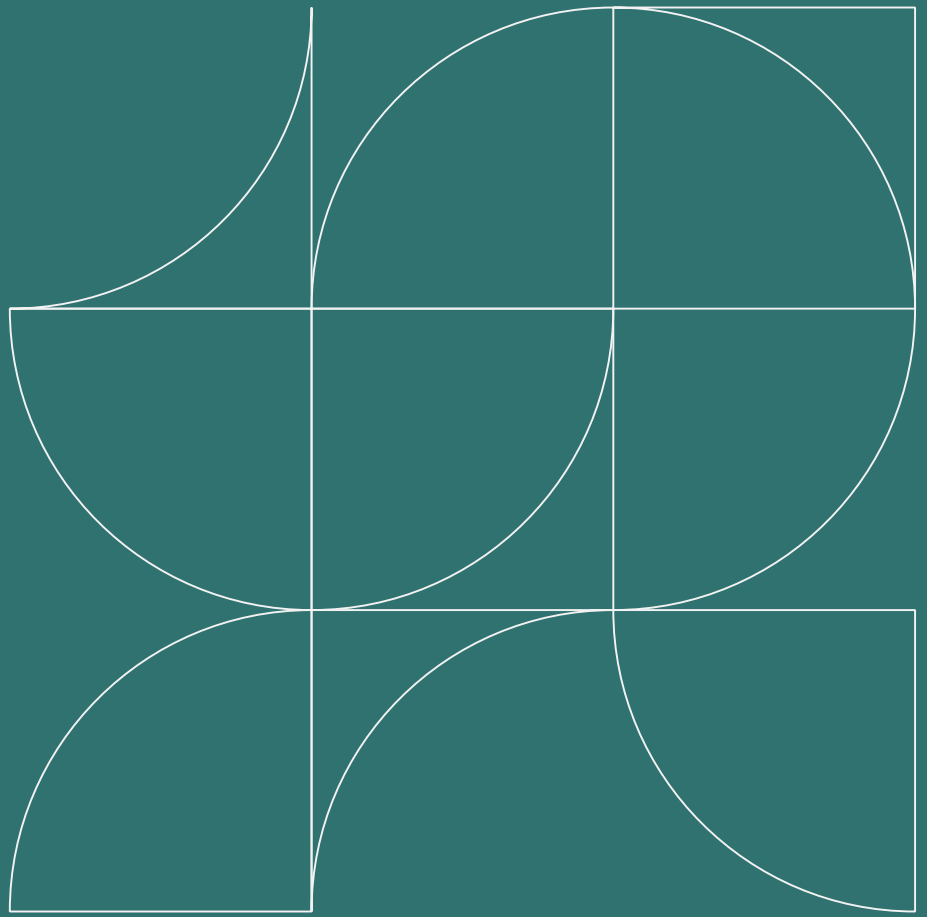
What do you Have in Place?



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Employee Agreements

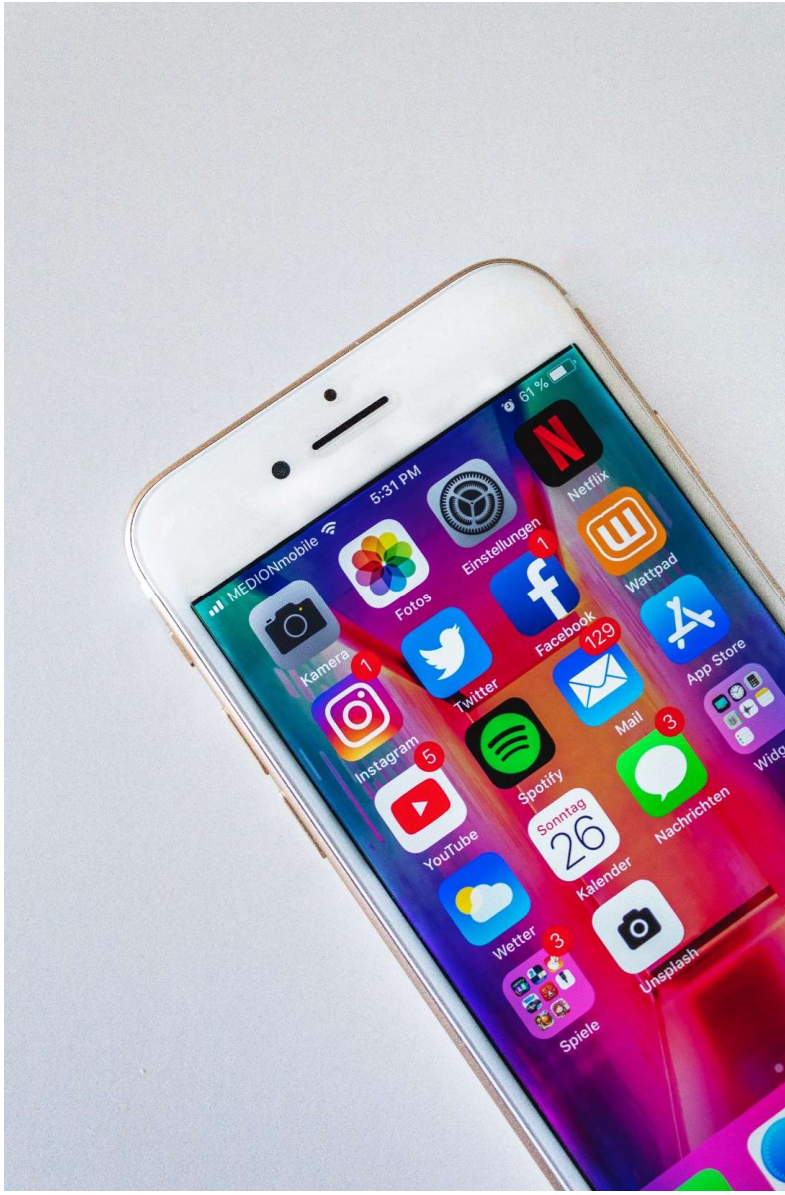
- Confidentiality Agreements
- Return of Materials Agreements
- Invention Assignment Agreements
- Restrictive Covenants Agreements
  - Non-compete
  - Forfeiture for competition
  - Customer non-solicit
  - Employee non-solicit
  - No-hire
  - Non-disclosure

Social Media Policies

- Do you have a social media policy that covers confidential information?
- Reasonable policies commensurate with threats
  - Ensure that policy is not overbroad
    - E.g., National Labor Relations Act §7 protects employee rights to engage in concerted activities
- Provide specific definition of confidential information and provide examples
  - Ensure that the policy is well-communicated and explained to employees
  - Have separate ownership of company social media account agreements

BYOD Policies

- Do you already have a BYOD policy?
- Different policies for different levels of employees?
- If you have a BYOD policy:
  - ✓ Specify which devices are permitted
  - ✓ Provide clear restrictions regarding use/transfer of company data
  - ✓ Explain when company gets access to device and data
  - ✓ Incorporate into exit interview process
  - ✓ Explain investigation, incident remote wiping procedures



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Employee Handbook

- Do you have one?
- How does it align with mass work-from-home needs?
- Does it need to be revamped?
- Do certain provisions need to be relaxed?
- Can certain provisions be highlighted to address employees unfamiliar with robust confidentiality protections?

Information Security Policy

- Do you have one?
- What information in this policy must be communicated to employees?
  - What steps have you taken to communicate policy?
  - Explain policy?
  - Ensure understanding by employees?
- Is there any provision inconsistent with new reality?
  - If so, has company decided how it should be relaxed/reconciled?

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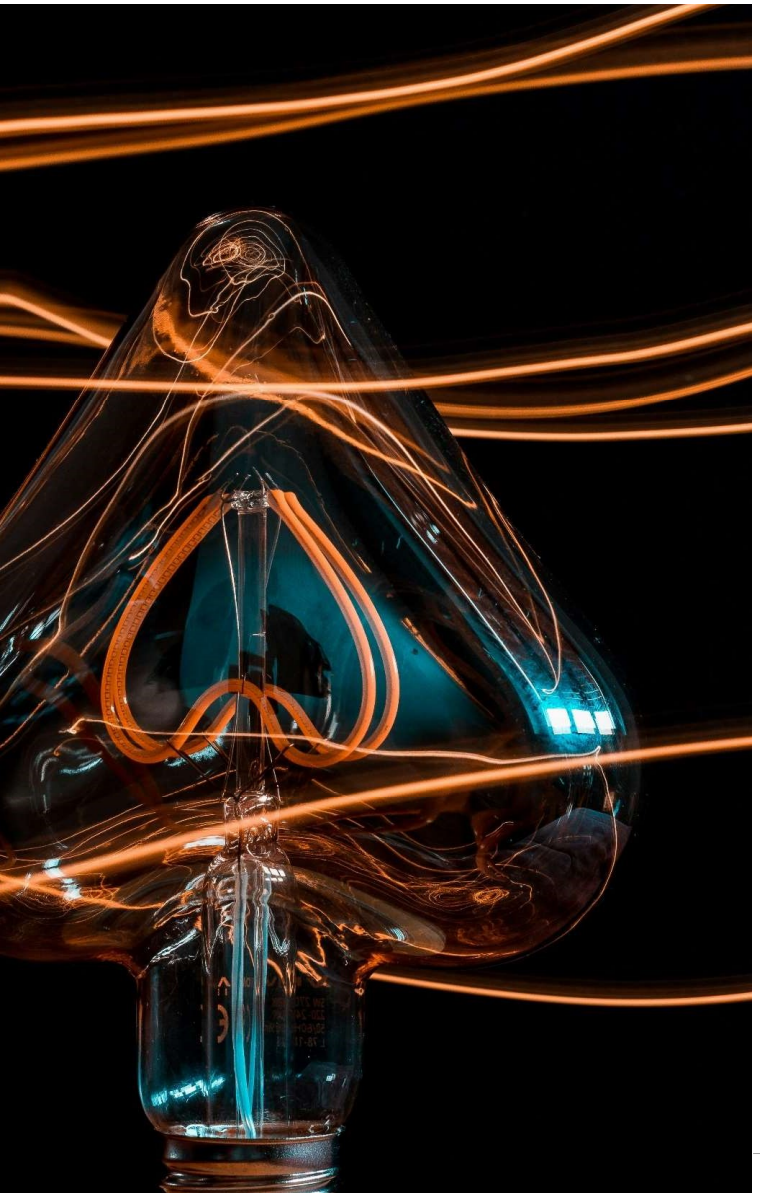


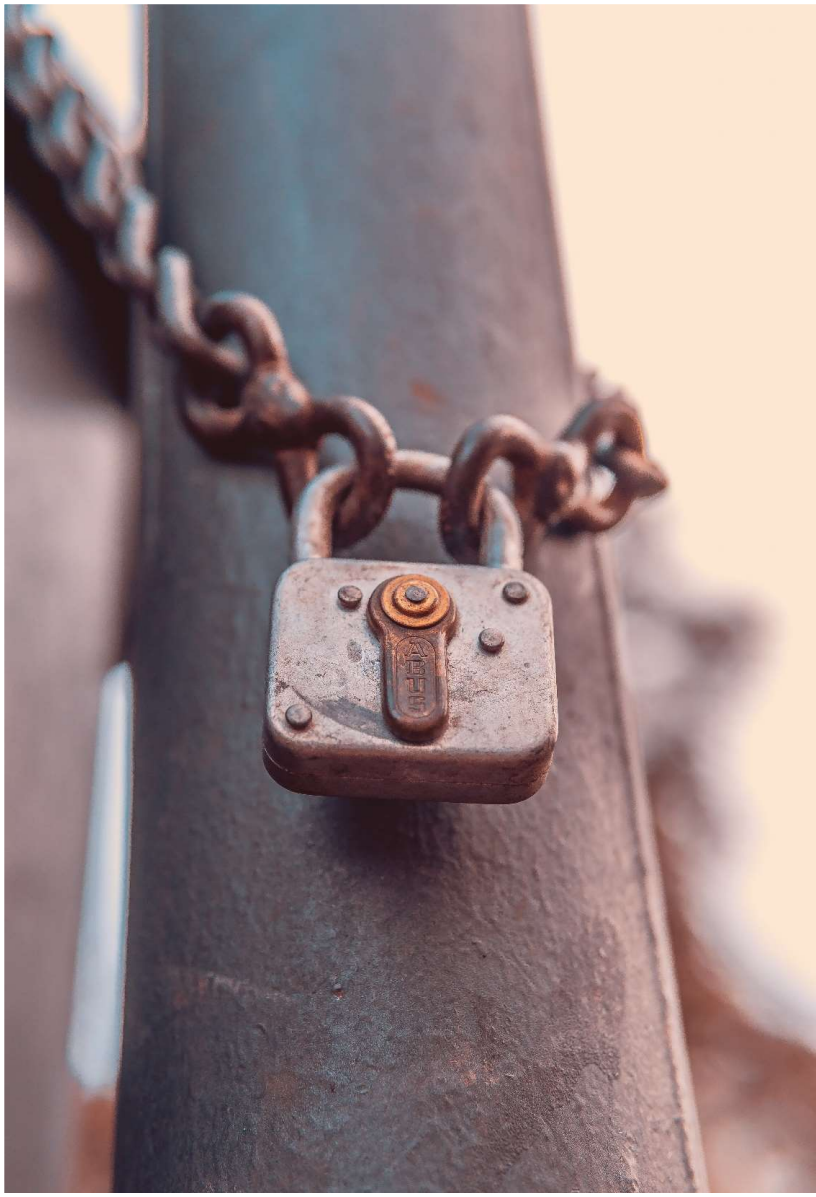
Generative AI Policy

- Generative AI takes information from host of sources to create new content
- Three primary concerns
  - company supporting AI platform may review, release, or sell data
  - application can potentially reuse confidential information by training responses to include
  - may be accessed through a security breach
- Potential Solutions
  - outright ban on use of AI
  - access controls limiting who and what can be accessed for use with AI
  - enterprise licenses with AI provider prohibiting release of information to 3rd parties
  - prohibiting use by 3rd parties or contractors
  - employee education

What To Do If With/Without These Policies

- Remind employees of these policies
  - Company wide distribution *in writing*
- Annually Remind Employees of Obligations
  - Hold dedicated meetings to address obligations (what is confidential, how to protect)
- Even if you lack policies, be proactive
- Communicate expectations about
  - device usage and best practices
  - where they hold video conference calls
  - best on-site/off-site work practices
  - how to protect information
- Formalize new policy and roll-out
- Send emails outlining company best practices (if no formal policy exists)
- **Don't let lack of formal policies erode/eliminate confidentiality efforts**

Policy v. Protection



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Electronic Security

- Knowledge of current technology (and accompanying risks) and computer forensics is essential.
- Risks:
  - Employees can use flash drives and personal e-mail accounts to electronically transmit documents containing trade secrets.
  - Employees can use personal devices such as cell phone cameras, iPhones, and portable music players to capture data.
  - Can leak information using social networking sites and other Internet forums.
  - Failure to install extra levels of security may be used by courts as an indication of a company's failure to take reasonable measures to maintain secrecy.

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Ownership of Data/Continuity of Access to Data

- Designate Ownership of Information
- Survival Provisions
- Diversification of Data Centers and Back-up Plan
- Avoid Withholding of Data for Failure to Pay
- Assistance for Transitioning and Moving Data to New Provider
- Restrict Use/Sale to Outside Third Parties
- Hold Provider and Subcontractors Liable for Breaches

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What You Need To Do Now, It's Not Too Late

- Determine if you have a policy, procedure in place.
  - If not, create one.
- Audit/Survey your employees, what are they doing?
- What devices or tools are employees using?
- Where are employees working?
- Use tools such as Survey Monkey to gather data.
- Deploy company owned devices and memory tools.
- Sign-In screens are critical.
- Issue reminder memorandum to all employees.
- Conduct training.
- Enforce policies.

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What You Need To Do Now, It's Not Too Late

- Monitor for issues.
- Track access to company data and files.
- Use proper software to prevent malware, phishing and viruses in email and attachments and training.
- Develop consistent return of information and device policies, for both in-person and remote workforce.

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Recommendations

on protecting trade secrets from cybersecurity threats

To guard against cybersecurity threats, employers should consider:

- Require all employee devices to be equipped with the employer-provided security software and the latest manufacturer software updates prior to permitting access to any remote systems;
- Require multifactor authentication upon each login to a company portal;
- Only allow remote access through a virtual private network (VPN) with strong end-to-end encryption;
- Prohibit working from public places, such as coffee shops or on public transportation, where third parties can view screens and printed documents;
- Prohibit use of public WiFi, and require the use of secure, password-protected home WiFi or hotspots; and
- Impose additional credentialing with respect to the ability to download certain sensitive data.

Questions

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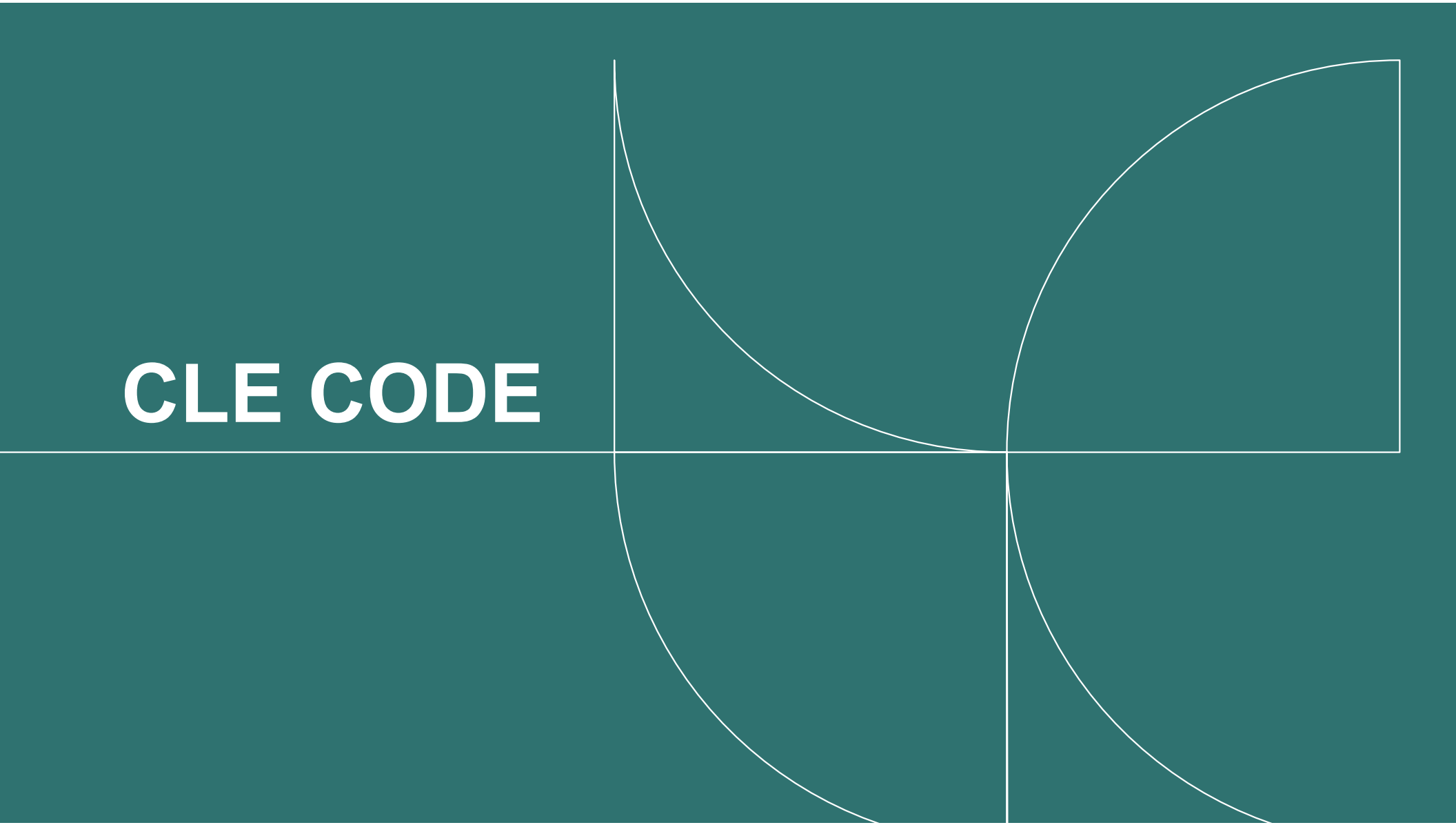
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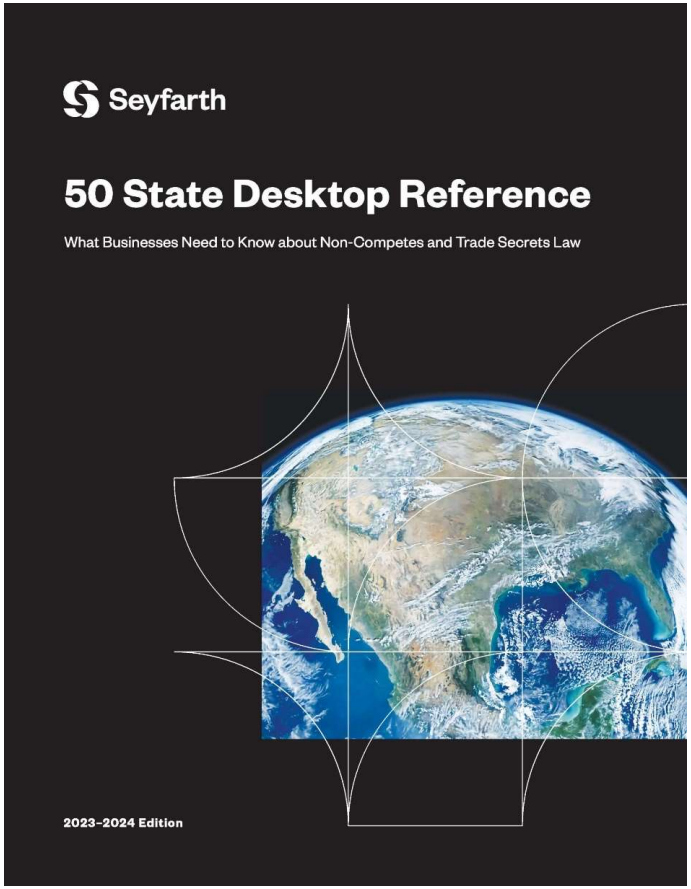
Stay Up to Date on Non-Compete Issues



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thank you

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