

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

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

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

2. As used in this act:

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

"Misappropriation" means:

(1) 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

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

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

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

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

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

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

"Reverse engineering" means the process of starting with the known product and working backward to find the method by which it was developed so long as the acquisition of the known product was lawful or from sources having the legal right to convey it, such as the purchase of the item on the open market.

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

(1) 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

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

3. 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.

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 prior to 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.

4. a. Except to the extent that circumstances, including a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss

caused by misappropriation and 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.

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

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

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

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

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

7. In an action under this act, a court shall preserve the secrecy of an alleged trade secret by reasonable means <sup>1</sup>[. There shall be a presumption in favor of granting protective orders in connection with discovery proceedings pursuant to section 4:10-3(g) of the Rules of Court as adopted by the Supreme Court of New Jersey, which may include provisions limiting access to confidential information to only the attorneys for the parties and their experts, holding in-camera hearings, 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] consistent with the Rules of Court as adopted by the Supreme Court of New Jersey<sup>1</sup>.

8. An action for misappropriation shall 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.

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

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

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

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