

**McGuireWoods**



# **TRADE SECRETS YEAR IN REVIEW 2023**

## MCGUIREWOODS' TRADE SECRETS YEAR IN REVIEW 2023

In 2023, McGuireWoods' multi-disciplinary trade secrets practice group published legal insights for companies seeking to manage the onboarding and offboarding of employees and protect their most prized trade secrets. This "Trade Secrets Year in Review 2023" summarizes key developments and practice points over the past year, from pivotal court decisions to proactive guidance for legal and HR departments.





### **1. Circuit Court Strikes Down Liquidated Damages Agreement in Trade Secret Case (January 2023):**

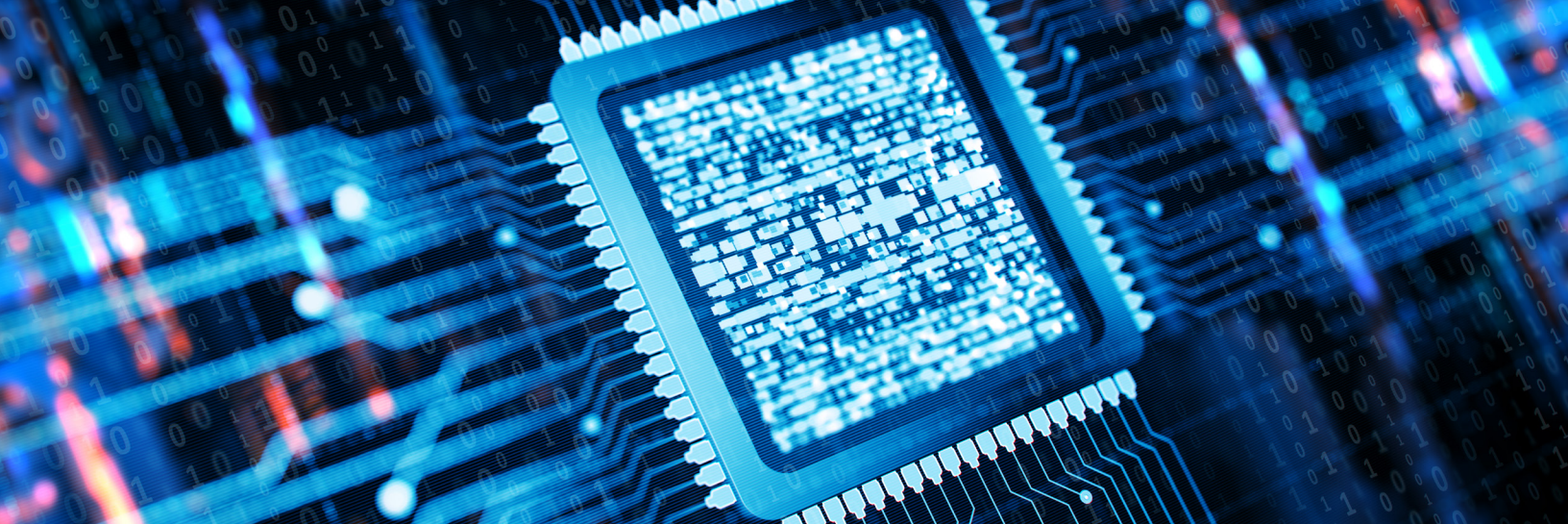
In January, a significant legal development unfolded as the 11th U.S. Circuit Court of Appeals struck down a liquidated damages agreement in a trade secret case. This article delves into the importance of crafting robust employment contracts and confidentiality agreements. Companies should ensure their agreements can withstand legal scrutiny and effectively deter departing employees from misappropriating valuable trade secrets.

### **2. Trade Secret Tidbits: February 2023 (February 2023):**

This article summarizes a mix of new trade secret cases involving the granting of temporary restraining orders to the adoption of pleading standards. It serves as a concise yet comprehensive resource, offering in-house counsel and HR professionals insights into emerging case law across the Southern District of New York, the 8th U.S. Circuit Court of Appeals and the Southern District of Texas.

### **3. It's No Longer a Secret — Parties Should Identify Their Trade Secrets Early in Litigation (April 2023):**

The article provides actionable steps for organizations to ensure they are well-prepared to protect their trade secrets in litigation. A common element in trade secret litigation is that plaintiffs must own and be able to reasonably identify their trade secrets. However, different courts require plaintiffs to define their trade secrets with different levels of specificity at different stages of litigation. Regardless of the court, trade secret plaintiffs are well advised to proactively identify their trade secrets as part of a prelitigation assessment and later in their pleadings — without, disclosing the actual secret. If they fail to identify their trade secrets in their pleadings, defendants may raise the deficiency early to stall discovery or even dismiss the litigation.



#### **4. Finding Irreparable Harm: 5th Circuit Vacates Refusal to Enter Preliminary Injunction (April 2023):**

Injunctions are a powerful deterrent against those who seek to misappropriate valuable trade secrets. And without preliminary injunctions — which typically last until the conclusion of a trial — trade secret owners can face irreparable and imminent losses and damage to their reputation throughout litigation. At the preliminary injunction hearing, the trial court typically evaluates the arguments of counsel, evidence presented, and the credibility of witnesses, often with much discretion.

But the trial court's discretion has limits. In April 2023, the 5th U.S. Circuit Court of Appeals vacated a district court's refusal to enter a preliminary injunction, remanding the case for further reconsideration.

#### **5. Ford Finds Key to Reversing \$105 Million Award in Trade Secret Case (June 2023):**

In May 2023, Ford achieved a monumental victory by successfully reversing a \$105 million award in a trade secret case. This article dissects the key legal strategies Ford employed, providing in-house counsel and HR professionals with insights into effective defenses against substantial trade secret claims. Understanding these strategies is paramount for organizations seeking to protect their intellectual property and mitigate risks associated with departing employees.

#### **6. Disruptive Technology Strike Force Initiates Federal Prosecutions Targeting Trade Secret Theft (June 2023):**

In June, McGuireWoods discussed the proactive stance by the U.S. Department of Justice and U.S. Department of Commerce's Disruptive Technology Strike Force, which initiated federal prosecutions targeting trade secret theft. This article explores the implications of this strike force and its goal to target illicit actors, strengthen supply chains and protect critical technology assets from theft by nation-state adversaries. Understanding these proactive measures is crucial for organizations navigating the risks of trade secret theft in an evolving technological landscape and across global markets.





## **7. For What It's Worth: Trade Secret Independent Economic Value (August 2023):**

In August, McGuireWoods delved into the concept of independent economic value in the context of trade secrets. Courts and litigants have long acknowledged that, to qualify as a “trade secret,” information must have “independent economic value” derived from its secrecy. Some commentators believe this requirement has been fairly toothless, expressing concern that “courts essentially read ‘independent economic value’ out of the statute by allowing plaintiffs to rely on weak inferences and assertions of hypothetical value rather than meaningful evidence.” Recent decisions show that this tide is changing, and trade secret plaintiffs should be ready to “show their work” to establish this key element.

## **8. Can Opposites Attract? Protecting Intellectual Property Through Patents and Trade Secrets (October 2023):**

In October, McGuireWoods’ trade secrets practice group explored the synergies between patents and trade secrets. While patents and trade secrets are viewed in part as opposites — patents require public disclosure, and trade secrets require confidentiality — seeking patent protection for aspects of a technology, while retaining trade secret status for others, may provide the best protection for a company’s intellectual property portfolio.

## **9. Sports and Trade Secrets — Are Analytics a Secret in the NBA? (December 2023):**

Closing the year, with the rise of trade secret litigation among sports teams, McGuireWoods explored the intersection of sports and trade secrets and whether analytics constitute a secret in the NBA. Based on these developments, sports teams — whether amateur, elite, college or professional — should take affirmative steps to protect their analytics materials. This article discusses how sports teams must be prepared to investigate key employee departures and conduct forensic investigations of their computers for potential leaks of confidential information.

## CONCLUSION

In-house counsel and HR professionals play a pivotal role in safeguarding an organization's intellectual property and trade secrets. In 2023, McGuireWoods reported on significant legal developments, emerging trends, and practical guidance for companies managing their employees and protecting their trade secret portfolios. McGuireWoods' trade secrets practice group looks forward to continuing this journey in 2024.

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