

## How Do I Protect My Trade Secrets, Including My Customer List

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All businesses have confidential information. Most consider their customer list confidential, and many go to great lengths to protect such lists. Confidential information, including customer lists, can be considered a "trade secret," which is a special type of confidential information. If information is considered a "trade secret," then the owner enjoys certain additional rights in protecting the information and obtaining damages if the information is improperly taken or used.

However, not all information and customer lists qualify as a trade secret and, unfortunately, businesses frequently learn this when it is too late to do anything about it. The time to address trade secrets is before a dispute arises, because trade secrets are defined in part by how a business treats the information over time.

More specifically, information must meet two general requirements to qualify as a trade secret. First, the information must be valuable because it is a secret that cannot be obtained by others through legitimate means, and it would be valuable to others if they could obtain it. Second, the information must be subject to reasonable efforts under the circumstances to maintain its secrecy.

The most common customer list problem arises from departing employees who take part or all of the list with them to a competitor or to start a competing business. In the absence of an employment agreement that imposes duties on an employee for all confidential information, regardless of whether it is a trade secret, a business must look to applicable state law (in Nebraska, the Nebraska Trade Secret Act) to try to protect

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its customer lists. But not all customer lists are treated the same under the Act. This is why both planning and action must start now.

To be a trade secret, customer lists must be more than publicly available information such as what is in a phone book or on the customer's website. Mere identity of the customer, the contact person, and the contact information is not enough to elevate the information to trade secret status. The following are several suggestions on how to improve the chances a customer list will be considered a trade secret:

- Tailor each client's listing to the particulars of each client. Include ordering/service information and history. Show the client's preferences and unique requirements. The more detailed the information is, the more useful the list may be and the more likely it is that it will qualify as a trade secret. The more unlikely it is that someone could duplicate your list on their own, the more likely it is to be considered a trade secret.
- Stamp the list as proprietary and confidential, and tell employees that the list is confidential.
- Restrict electronic access to the list by user name and password.
- Control distribution and access to hard copies of the list. Secure such copies in locked spaces.
- Restrict access to the list to need-to-know employees only.
- Do not sell or distribute the list to outsiders.
- If any disclosure of the list is necessary (such as in connection with the potential sale of the business), secure a confidentiality agreement first.
- Put identifiable time and effort into creating and maintaining the list, as well as in preserving its secrecy.
- Shred or destroy outdated copies of the list, whether electronic or in hard copy.
- Include confidentiality provisions in employment contracts and/or employee handbooks imposing obligations of secrecy and non-competitive use of all confidential information. Remind departing employees of such obligations. *Note:* Departing employees who attempt to take customer lists with them will usually copy or print a hard copy list or, more commonly, download an electronic version to a removable media device or email it from their work account to a personal account. Take steps in advance to prevent or at least track such activities.

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Although following these suggestions does not guaranty that a customer list will be a trade secret, they will increase the chances significantly. It is critical to implement new measures to safeguard your customer list, before a dispute ever arises. For assistance or other information, please call a member of our Intellectual Property Practice Group.

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