

Moneyball, Theo Epstein, and How to Protect Your Trade Secrets



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Picture Theo Epstein waving goodbye to Red Sox Nation as he climbs aboard his one-way express train to Chicago. Red Sox Nation may weep. John Henry and Larry Lucchino, on the other hand, whether they are to blame for Epstein's departure, as well as the fried-chicken debacle that was September in Boston, had better consider the future.

If Epstein was privy to any proprietary, secret, statistical method for analyzing baseball talent, that method may well be a Red Sox trade secret under Massachusetts law. Can Epstein now put it to use to benefit the Cubs? Lucchino, like any CEO – of a baseball team or a biotech company – would do well to consider how to protect Sox' trade secrets when senior talent departs.

Let's start in the first inning. Patents are sexy. Companies tout their patent portfolios; scientists love to track their patent statistics. Trade secrets, on the other hand, are the nuts and bolts of what makes a company run. If patents were ball players, they would be the

flashy, multi-million dollar, home-run-hitting center fielder. Trade secrets are the ever-steady, hard-working, loyal second basemen.

A trade secret is "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." A trade secret must be secret. Information that is generally known, easily replicated, or widely disseminated is not a trade secret.

The first step to protect trade secrets is identify them – with specificity. Then, you can put in place the safeguards necessary to keep that information secret. Those safeguards should include: limiting employees with access to the information; requiring employees to sign in and out of restricted areas; stamping documents and data "highly confidential" or "trade secret." Failure to take these steps may lead talent, a business affiliate, or a Court to conclude the information was not, in fact, kept secret.

Specifically identifying your company's key trade secrets serves another important purpose. It allows you to put your talent and your business affiliates contractually on notice that the company considers the information to be a highly competitive trade secret.

For example, inter-company scientific collaboration is growing. Just consider OEM suppliers and vendors. Often just reaching agreement about an OEM product requires intense collaboration between the customer and supplier involving shared trade secrets: the

testing and analysis of prototypes; scientist exchanges; and the disclosure of specific methods of production that may impact the customer's requirements. Trade secrets that are "shared" in these and other inter-company transactions or relationships risk losing their "secret" status. The best mechanism to protect those shared secrets is a confidentiality clause that clearly identifies what trade secrets may be disclosed and what the customer can and cannot do with them. Clarity is key, and specificity avoids a fight down the road about whether the information was or was not shared or was or was not, in fact, a trade secret.

The same with key talent. Every employment agreement should specify the types of trade secrets that executives will come in contact with in their employment. The Red Sox contract with Epstein should have carved out precisely what method of statistical analysis the Sox claim as a trade secret and provided that when he left the Sox, Epstein could not take, use, disclose or rely on that method of analysis for another team. If it didn't, Henry and Lucchino would have been well advised to include such language in any negotiations about Epstein's departure.

Debra Squires-Lee is a partner in the litigation department of Sherin and Lodgen LLP. She is a native Bostonian, and thus a certified member of Red Sox Nation. She is also an experienced trial lawyer who represents businesses in complex commercial litigation with significant experience defending companies against claims of trade secret misappropriation.