

## Trade Secret Laws: New Hampshire

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Status: Law stated as of 31 Mar 2022 | Jurisdiction: New Hampshire, United States

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A Q&A guide to state law on trade secrets and confidentiality for private employers in New Hampshire. This Q&A addresses the state-specific definitions of trade secrets and the legal requirements relating to protecting them. Federal, local, or municipal law may impose additional or different requirements. Answers to questions can be compared across a number of jurisdictions (see Trade Secret Laws: State Q&A Tool).

### Overview of State Trade Secret Law

#### 1. List the laws (statutes and regulations) by name and code number, both criminal and civil, that your state has adopted governing trade secrets.

New Hampshire adopted the New Hampshire Uniform Trade Secrets Act, often referred to as the NHUTSA to distinguish it from the model Uniform Trade Secrets Act (N.H. RSA §§ 350-B:1 to 350-B:9).

Other New Hampshire laws governing trade secrets include:

- **The New Hampshire Rules of Evidence.** The rules of evidence provide for a trade secret privilege. Under this privilege, the trade secret owner, agent, or employee can refuse to disclose, or prevent another from disclosing, trade secret information. However, the privilege is not enforced if it is used to conceal fraud or another injustice. (N.H. R. Evid. 507.)
- **The New Hampshire Right to Know Law.** This law grants access to all public records unless a statutory exemption applies (N.H. RSA § 91-A:4). Certain trade secret information may be exempted from disclosure under N.H. RSA §§ 91-A:4 and 91-A:5. However, there is no all-encompassing exemption for public records containing trade secrets. Exemption of trade secrets is determined using a balancing test that weighs the privacy interest against the public interest for disclosure on a case-by-case basis.

- **The New Hampshire Toxic Substances in the Workplace Act.** The act generally requires a manufacturer, producer, or formulator to provide safety data sheets for a product mixture containing two or more toxic substances. However, there is an exception for substances considered trade secrets. In that case, the company can register the substance with the commissioner of labor as a secret and the commissioner can only release information about the substance under specified conditions. (N.H. RSA § 277-A:4.)
- **The New Hampshire Criminal Code.** Under the criminal code, trade secrets are included within the definition of property for the crime of theft (N.H. RSA § 637:2(1)).

#### 2. Has your state adopted the model Uniform Trade Secrets Act (UTSA)? If so, please:

- Identify which among the statutes listed in response to Question 1 is your state's adopted version of the UTSA.
- Describe any significant differences between your state's adopted version and the model UTSA.

### Adopted Version of Model UTSA

New Hampshire has adopted a modified version of the model Uniform Trade Secrets Act (UTSA). It is referred to as the New Hampshire Uniform Trade Secrets Act (NHUTSA) (N.H. RSA §§ 350-B:1 to 350-B:9).



### Significant Differences Between Adopted Version and Model UTSA

#### No Severability Clause

Unlike the UTSA, the NHUTSA does not contain a severability clause.

#### No Effective Date Provision

The NHUTSA did not adopt the effective date provision of the UTSA.

### 3. List any common law protections afforded to trade secrets. If common law protections are afforded to trade secrets, are they preempted by available state statutes?

Trade secret misappropriation claims under New Hampshire common law are generally preempted by the New Hampshire Uniform Trade Secrets Act (NHUTSA). However, the NHUTSA does allow parties to protect their information by contract, **even if** that information does not rise to the level of a trade secret as defined by the NHUTSA. (N.H. RSA § 350-B:7(II); see *Micronics Filtration Holdings, Inc. v. Pure Filtration, LLC, et. al.*, 2018 WL 4845749, \*7 (D. N.H. Oct. 4, 2018) and *Mortg. Specialists, Inc. v. Davey*, 904 A.2d 652, 664 (N.H. 2006); see also *Beane v. Beane, et. al.*, 856 F. Supp. 2d 280 (D. N.H. 2012).)

### Definition of Trade Secret

### 4. How does your state define a trade secret under each law identified in Question 1 (statute or regulation) and Question 3 (common law)?

The New Hampshire Uniform Trade Secrets Act defines a trade secret as information:

- Including:
  - a formula;
  - a pattern;
  - a compilation;
  - a program;
  - a device;
  - a method;

- a technique; or
- a process.
- That derives actual or potential independent economic value from not being generally known to or readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use.
- That is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(N.H. RSA § 350-B:1(IV).)

A plaintiff must identify with reasonable specificity the trade secrets allegedly misappropriated. Reference to broad categories of business information is not enough to sustain a claim (*Vention Med. Adv. Comp. v. Pappas*, 188 A.3d 268, 272-76 (N.H. 2018); *Beane*, 856 F. Supp. 2d at 305; see also *TLS Mgmt. & Mktg. Servs., LLC v. Rodriguez-Toledo*, 966 F.3d 46, 52 (1st Cir. 2020) (applying Puerto Rico equivalent of the UTSA)).

The New Hampshire Toxic Substances in the Workplace Act defines trade secret as any confidential formula, pattern, device, or compilation of information which:

- Is used in the employer's business.
- Gives the employer the opportunity to obtain an advantage over competitors who do not know or use it.
- Is known only to the employer and to those employees to whom it is necessary to confide.

(N.H. RSA § 277-A:3(VI).)

The New Hampshire Criminal Code defines trade secret as all or any part of "any scientific or technical information, design, process, procedure, formula or invention" whose owner intends for it to be available only to persons the owner selects (N.H. RSA § 637:2(I)).

Neither the New Hampshire Rules of Evidence nor the New Hampshire Right to Know Law defines trade secret. There is also no case law interpreting the term under those laws.

### 5. Describe any significant cases in your state creating, modifying, or clarifying the definition of a trade secret.

The New Hampshire Uniform Trade Secrets Act (NHUTSA) displaces conflicting tort, restitutionary, and other laws of New Hampshire that provide civil remedies for misappropriation of trade secrets. Under the statute, information must be classified as either:

- A protected trade secret.
- Unprotected general knowledge.

NHTSA will **not** protect confidential information unless it meets the definition of a statutory trade secret. (*Beane*, 856 F. Supp. 2d at 303).

NHTSA considers information a trade secret if, among other things, the employer makes reasonable efforts to protect the secrecy of the information (*Mortg. Specialists*, 904 A.2d at 657-60). In *Mortgage Specialists, Inc. v. Davey*, the New Hampshire Supreme Court held that the following actions, even when considered together, were inadequate to protect the secrecy of the information:

- Providing customers with a privacy policy discussing the precautions the employer took to guard consumers' information.
- Placing shredders in its office.
- Restricting access to old loan applications by password.

(*Mortg. Specialists*, 904 A.2d at 660.)

### 6. What are examples of information that courts in your state:

- Have found to be trade secrets?
- Have found not to be trade secrets?
- Have found not to be trade secrets as a matter of law?

## Trade Secrets

New Hampshire has found the following types of information to be trade secrets:

- Customer information, including:
  - the ranking of customers by volume;
  - the identity of customers by market and particular products;
  - the identity of prospective customers for products manufactured or developed by the employer; and
  - the identity of customers who might partner with the company in the development of future products or markets.

(*ACAS Acquisitions (Precitech) Inc. v. Hobert*, 923 A.2d 1076, 1091 (N.H. 2007).)

- A list of customers and customer prospects (*OneSky Litig. Tr. v. Sullivan*, 2012 WL 124739 (D. N.H. Jan. 17, 2012)).

- A design idea to put a removable roller into company's ergonomic computer mouse series (*Contour Design, Inc. v. Chance Mold Steel Co., Ltd.*, 2010 WL 174315, \*5-6 (D. N.H. Jan. 14, 2010)).

- Information set forth in bid submissions and government contracts which:

- expressly identify certain information as proprietary and trade secret within the meaning of the Right-to-Know Law; and
- if disclosed, would have a chilling effect on the willingness of bidders to supply proposals.

(*CaremarkPCS v. N.H. Dep't of Admin. Servs.*, 116 A.3d 1054, 1056-59 (N.H. 2015).)

- Client email addresses and other things that might be contained in an employee's work computer, email, and phone (*HCC Specialty Underwriters, Inc. v. Woodbury*, 289 F. Supp. 3d 303, 319-20, 322 (D. N.H. 2018)).
- Step by step process, unique to the company, for the technology used to create heat shrink tubing (HST) to sell to a niche market (*Vention Med. Adv. Comp.*, 188 A.3d at 276).

## Not Trade Secrets

Publicly available material or material not protected by reasonable efforts to maintain secrecy will not be protected as a trade secret. This includes:

- Loan applications not subject to reasonable efforts to maintain secrecy (*Mortg. Specialists*, 904 A.2d at 657-60).
- A bank's internal procedures for communicating with borrowers absent any connection to:
  - substantive business strategies;
  - sensitive commercial information; or
  - trade secrets.

(*Farrin v. Nationstar Mortg., LLC*, 2018 WL 10812473 (D. N.H. Nov. 30, 2016)).

- Recollections of generalized business, sales, or marketing practices from training by previous employer (*Cabletron Sys., Inc. v. Allied Telesis, Inc.*, No. CV-92-544-M, slip op. at 5 (D. N.H. Mar. 29, 1996)).
- Publicly available tax planning information for the provision of tax advice and avoidable tax services (*TLS Mgmt. & Mktg. Servs.*, 966 F. 3d at 55-56 (applying the analogous UTSA adopted in Puerto Rico)).

### Not Trade Secrets as a Matter of Law

Whether information is a trade secret is generally a question of fact (*Anderson v. Century Prods. Co.*, 943 F. Supp. 137, 153 (D. N.H. 1996); see Question 4).

#### 7. To what extent have:

- Customer, client, or subscriber lists been given trade secret protection?
- Former employees been enjoined from using a former employer's customer information?

### Customer Lists Can Be Protected as Trade Secrets

In New Hampshire, whether customer lists are protected as trade secrets is a highly fact-intensive inquiry. For example:

- In *ACAS Acquisitions (Precitech) Inc. v. Hobert*, a New Hampshire trial court noted that the mere identification of a company's customers on a list is not a trade secret. However, the court held that this identification plus additional information about the customers (including the ranking of customers by sales volume) can make the list a trade secret. The New Hampshire Supreme Court upheld the trial court's ruling. (923 A.2d at 1091.)
- The US District Court for the District of New Hampshire held that common law claims arising out of a former employee's use of customer lists, particularly lists of customers who used private jets, were preempted by the New Hampshire Uniform Trade Secrets Act (NHUTSA) (*OneSky Litig. Tr.*, 2012 WL 124739, at \*3-7).
- The US District Court for the District of New Hampshire permitted plaintiff to pursue a theft of trade secrets claim under the NHUTSA against defendant who allegedly took a list of client email addresses among other things that may have been in defendant's computer, email, and phone (see *HCC Specialty Underwriters, Inc.*, 289 F. Supp. 3d at 303).
- In *Mortgage Specialists, Inc. v. Davey*, the New Hampshire Supreme Court upheld a jury decision that customers' mortgage loan applications were not trade secrets because of the lender's insufficient efforts to protect confidentiality. Although the electronic copies of old applications were password-protected, loan originators could easily obtain access to that information in other ways. (904 A.2d 660.)

### Scope of Injunction Enjoining Use of Former Employer's Customer List

The NHUTSA provides injunctive relief for actual or threatened misappropriation (N.H. RSA § 350-B:2(I)).

The federal court in New Hampshire has explained that courts will not accept without question a contractual provision purporting to acknowledge that irreparable harm would result in the event of breach of any terms of the contract. Courts must make an independent finding of irreparable harm prior to issuing injunctive relief (*Café Indigo, LLC v. Pearl River Pastry, LLC*, 2020 WL 5026745, at \*8 (D. N.H. Aug. 25, 2020)).

In *OneSky Litigation Trust v. Sullivan*, a company's vice president of sales violated a confidentiality agreement by disclosing customer identities to a competitor. The vice president's employment was terminated and he later went to work for a competitor. The former employer sought injunctive relief and asserted a violation of the NHUTSA. Under a settlement agreement, the vice president was required to:

- Return the company's customer lists and customer prospect lists.
- Delete the customer and prospect lists.
- Not retain any electronic or hard copies of the lists.

(*OneSky Litig. Tr.*, 2012 WL 124739, at \*1.)

When the vice president breached this agreement by retaining the lists, the former employer responded by alleging a variety of common law and statutory claims. The court, however, found that these claims were preempted by the NHUTSA. (*OneSky Litig. Tr.*, 2012 WL 124739, at \*3-7.)

The US District Court for the District of New Hampshire issued a preliminary injunction to enforce terms of a non-disclosure agreement to protect sensitive client data but refused to extend the order to cover information concerning "the particular demands and requirements of customers and insureds generally," as such phrase was unduly vague and could operate as a perpetual non-compete agreement (*HCC Specialty Underwriters*, 289 F. Supp. 3d at 327).

### Reasonable Efforts to Maintain Secrecy

#### 8. What efforts to maintain secrecy have been deemed reasonable or sufficient for trade secret protection by:

- Courts in your state?
- Statutes or regulations in your state?

### Courts

The US District Court for the District of New Hampshire held that an employer took enough actions to maintain the secrecy of trade secrets under the New Hampshire Uniform Trade Secrets Act (NHUTSA) where it:

- Required employees to sign confidentiality agreements as a condition of employment.
- Placed security systems in facilities containing confidential information, providing access only to specific employees.

(*Wilcox Indus. Corp. v. Hansen*, 870 F. Supp. 2d 296, 310 (D. N.H. 2012).)

The US District Court for the District of Maryland, analyzing a former employee's arguments under the NHUTSA, held that an employer had maintained secrecy of its trade secrets under the NHUTSA by taking the following actions, among others:

- Requiring all employees to read and reaffirm their understanding of the company's non-disclosure policies.
- Controlling access to the building using alarm systems, secure areas, and red warning lights to indicate the presence of visitors without security clearance.
- Prohibiting employees and visitors from bringing cell phones into secure areas.
- Labeling proprietary documents as "company confidential" and locking the documents away when they were not being accessed.
- Limiting employee access to certain parts of the company's computer network.
- Password-protecting all company computers.
- Randomly checking work areas to see if confidential information had been left out.

(*Glynn v. Impact Sci. & Tech., Inc.*, 807 F. Supp. 2d 391, 434 n.37 (D. Md. 2011).)

New Hampshire state courts have not discussed which efforts to maintain secrecy are reasonable or sufficient for trade secret protection, but they have discussed efforts that are not enough for trade secret protection. In *Mortgage Specialists, Inc. v. Davey*, the New Hampshire Supreme Court upheld a jury decision that the information in question was not a trade secret, partly because the company had not undertaken reasonable steps to maintain its secrecy. In particular, the company had:

- Not marked the information as confidential or as a trade secret.

- Left the information in the office's unlocked attic where it was easily accessible and unmonitored.
- Not given consistent and uniform instructions to its employees regarding the proper treatment of the information as confidential or proprietary.
- Restricted access to electronic copies of old loan applications with a password but allowed any loan originator to request a printed-out copy.

(904 A.2d at 660.)

Additionally, the New Hampshire Supreme Court held that certain information the company provided in a Request for Proposal (RFP) for services to the state of New Hampshire's health plan was exempted from disclosure under the Right-to-Know Law when:

- The vendor specifically marked the designated information as confidential and proprietary.
- The vendor did not expressly or impliedly consent to the disclosure and sought an injunction to prevent disclosure.
- The State Department knew or had reason to know that its knowledge of trade secrets was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use.

(*CaremarkPCS*, 116 A.3d at 1058-59.)

### Statutes or Regulations

The NHUTSA requires reasonable efforts to keep information secret for it to qualify as a trade secret (N.H. RSA § 350-B:1(IV)(b)). However, there are no additional statutes or regulations addressing what are considered reasonable steps to maintain the secrecy of a trade secret.

### Trade Secret Misappropriation Claims

**9. For any law identified in Question 1 (statutes or regulations) or Question 3 (common law), what must a plaintiff show to prove trade secret misappropriation?**

The New Hampshire Uniform Trade Secret Act (NHUTSA) defines misappropriation in three different ways:

- Acquisition.
- Disclosure.
- Use.

(N.H. RSA § 350-B:1(II).)

In addition, the federal court in New Hampshire includes the element that “defendants knew or had reason to know that they obtained knowledge of the trade secret through a breach of the confidence reposed in them” (*Pollack v. Goodwin & Associates Hosp. Serv., LLC*, 2021 WL 3773408, at \*5 (D. N.H. Aug. 25, 2021), citing *Wilcox Indus. Corp. v. Hansen*, 870 F. Supp. 2d 296, 309 (D. N.H. 2012)).

The two elements necessary to assert trade secret misappropriation are:

- The existence of a trade secret (see Question 4 and 5).
- Misappropriation of a trade secret (see Acquisition as Misuse and Disclosure or Use of Trade Secret as Misuse).

The plaintiff bears the burden of identifying and establishing the existence of a trade secret (*Fluent Holdings, Inc. v. Computational Dynamics N. Am., Ltd.*, 2000 WL 35933066 (N.H. Super. Ct. May 5, 2000); see also *TLS Mgmt. & Mktg. Servs., LLC*, 966 F. 3d at 53).

A plaintiff must identify with reasonable specificity the trade secrets allegedly misappropriated. Reference to broad categories of business information is not enough to sustain a claim as a matter of law. (*Vention Med. Adv. Comp. Serv.*, 188 A.3d at 272-74; *Beane*, 856 F. Supp. 2d at 305; see *TLS Mgmt. & Mktg. Servs., LLC*, 966 F. 3d at 52 (applying Puerto Rico equivalent of the UTSA).)

Misappropriation of confidential information has been found when a defendant-former employee voluntarily begins working for a competitor and uses:

- The identities of plaintiff’s customers and the association that defendant has established with the customers while employed by plaintiff to establish an instant customer base for the defendant.
- Past, present, or prospective customer lists, pricing policies and practices, marketing strategies, and market demand analyses in an improper manner.

(*Cabletron Sys., Inc.*, slip op. at 8)

### Acquisition as Misuse

A trade secret is misappropriated where it is acquired by a person who knew or had reason to know that the trade secret was acquired by improper means (N.H. RSA § 350-B:1(II)(a)).

### Disclosure or Use of Trade Secret as Misuse

Disclosing or using another’s trade secret without express or implied consent is also misappropriation where the person did any of the following:

- Used improper means to acquire knowledge of the trade secret.
- When disclosed or used, knew or had reason to know that the trade secret was:
  - derived from another who had used improper means to acquire it;
  - acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
  - derived from another who owed a duty to the person seeking relief to maintain its secrecy or limit its use.
- Before a material change of position knew or had reason to know that:
  - it was a trade secret; and
  - knowledge of the trade secret had been acquired by accident or mistake.

(N.H. RSA § 350-B:1(II)(b).)

### Definition of Improper Means

“Improper means” includes:

- Theft.
- Bribery.
- Misrepresentation.
- Breach or inducement of a breach of duty to maintain secrecy.
- Espionage using electronic or other means.

(N.H. RSA § 350-B:1(I).)

**10. Can corporations, corporate officers, and employees of a competing company in possession of the trade secrets of others be held liable for misappropriation in your state? If so, under what circumstances?**

Under the New Hampshire Uniform Trade Secrets Act (NHUTSA), persons who may be liable for trade secret misappropriation include:

- Natural persons.
- Corporations.
- Business trusts.
- Estates.
- Trusts.
- Partnerships.



- Associations.
- Joint ventures.
- Governments.
- Governmental subdivisions or agencies.
- Other legal or commercial entities.

(N.H. RSA § 350-B:1(III).)

The elements discussed in Question 9 are required to hold individuals and entities liable for trade secret misappropriation under the NHUTSA.

### Defenses

#### 11. For any law identified in Question 1 (statutes and regulations) or Question 3 (common law), what defenses are available to defend against claims under the statute or common law?

In New Hampshire, defenses to a misappropriation of trade secrets claim include:

- The information is not a trade secret (see Question 4 and 5).
- Failure to identify with reasonable specificity the trade secrets allegedly misappropriated (see Question 4).
- The trade secret owner failed to properly maintain the secrecy of the information (see Question 8).
- There was no misappropriation.
- The statute of limitations has expired (see Question 12).
- The plaintiff lacks standing to sue.
- The claims are preempted (see Question 19).
- Equitable defenses, for example:
  - laches;
  - estoppel;
  - waiver; and
  - unclean hands.

### Statute of Limitations

#### 12. For any law identified in Question 1 (statutes and regulations) or Question 3 (common law), please identify the relevant statute of limitations for bringing a claim.

The New Hampshire Uniform Trade Secrets Act imposes a three-year statute of limitations. Specifically, the three-year period begins to run from when the misappropriation either:

- Is discovered.
- Should have been discovered by the exercise of reasonable diligence.

(N.H. RSA § 350-B:6.)

A continuing misappropriation is a single claim (N.H. RSA § 350-B:6).

### Other Related Claims

#### 13. What other claims, statutory or common law, can a plaintiff bring in your state against a defendant in the event of wrongful acquisition, misuse, or disclosure of a trade secret?

Under the New Hampshire Uniform Trade Secret Act (NHUTSA), a plaintiff can still allege:

- Contractual remedies, whether or not based on misappropriation of a trade secret.
- Other civil remedies that are not based on misappropriation of a trade secret.
- Criminal remedies, whether or not based on misappropriation of a trade secret.

(N.H. RSA § 350-B:7(II).)

In *Mortgage Specialists, Inc. v. Davey*, the New Hampshire Supreme Court interpreted the NHUTSA to preempt common law claims broadly (see Questions 3 and 16). However, the court did explicitly allow claims arising under contract, even if the information in question does not meet the definition of a trade secret under the NHUTSA. (*Mortg. Specialists*, 904 A.2d at 664; see *Hansa Consult of N. Am., LLC v. Hansaconsult Ingenieurgesellschaft mbH*, 35 A.3d 587, 595 (N.H. 2011).)

While the NHUTSA preempts tort misappropriation claims, it does not preempt:

- Breach of fiduciary duty claims concerning an employee's conduct in competition with the current employer prior to termination (*Micronics Filtration Holdings, Inc.*, 2019 WL 9104171, at \*2 (citing *Solito v. Direct Capital Corp.*, 2018 WL 1789877, at \*5 (NH Super. Ct. April 11, 2018)).)

- Tortious interference with customer contracts (*Halifax-Am. Co., LLC, et. al. v. Provider Power, LLC, et. al.*, 180 A.3d 268, 276-77 (N.H. 2018)).

### Remedies

#### 14. For any law identified in Question 1 (statutes and regulations) and Question 3 (common law), please describe the potential relief available to plaintiffs.

Potential relief in New Hampshire includes:

- **Monetary damages.** Monetary damages can include actual loss or unjust enrichment not accounted for in the actual loss amount (N.H. RSA § 350-B:3(I)).
- **A reasonable royalty.** In lieu of damages measured by another means, the court may impose a reasonable royalty for unauthorized disclosure or use of a trade secret (N.H. RSA § 350-B:3(I)). In exceptional circumstances, courts may issue injunctions that condition future use on payment of a reasonable royalty. Exceptional circumstances include a material and prejudicial change of position before acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable. (N.H. RSA § 350-B:2(II).)
- **Reasonable attorneys' fees.** Reasonable attorneys' fees and costs may be awarded if:
  - the misappropriation claim was made in bad faith;
  - a motion to terminate an injunction is made or resisted in bad faith; or
  - willful or malicious misappropriation exists.

(N.H. RSA § 350-B:4.)

- **Stand-alone attorneys' fees.** Substantial attorneys' fees have been awarded under the statute even when no damages have been awarded for misappropriation of trade secrets (*Halifax-Am. Co., LLC, et. al. v. Provider Power, LLC*, 180 A.3d at 285-86). Such awards have been justified due to the proven "willful and malicious" misappropriation of trade secrets, even in the absence of damages stemming therefrom.
- **Exemplary damages.** Courts may award exemplary damages if willful and malicious misappropriation exists. Exemplary damages cannot be more than twice the amount of any monetary damages or reasonable royalty awarded. (N.H. RSA § 350-B:3(II).)

- **Affirmative Acts.** In appropriate circumstances, courts may order affirmative acts to protect a trade secret (N.H. RSA § 350-B:2(III)).
- **Injunction.** Courts may award injunctive relief for actual or threatened trade secret misappropriation. Generally, the injunction terminates when the trade secret no longer exists, but it may be continued for an additional reasonable period of time to eliminate commercial advantage resulting from the misappropriation. (N.H. RSA § 350-B:2(I).)

### Contractual Protections

#### 15. What factors do courts in your state consider when assessing the enforceability of a nondisclosure or confidentiality agreement?

The New Hampshire Supreme Court has applied a three-prong test to nondisclosure and confidentiality agreements to determine if they are enforceable. The test looks at whether the restriction:

- Is greater than necessary to protect the legitimate interests of the employer.
- Imposes an undue hardship on the employee.
- Is injurious to the public interest.

(*ACAS Acquisitions*, 923 A.2d at 1089-90.)

If the restriction does any of these things, it is unreasonable and unenforceable (*ACAS Acquisitions*, 923 A.2d at 1089-90).

Courts will not enforce a vague definition of confidential information in a non-disclosure agreement that could create a perpetual non-compete agreement (*HCC Specialty Underwriters*, 289 F. Supp. 3d 303).

The federal court in New Hampshire has explained that courts will not accept without question a contractual provision purporting to acknowledge that irreparable harm would result in the event of breach of any terms of the contract. Courts must make an independent finding of irreparable harm prior to issuing injunctive relief. (*Café Indigo, LLC*, 2020 WL 5026745, at \*8.)

For more information on nondisclosure and confidentiality agreements in New Hampshire, see [State Q&A, Non-Compete Laws: New Hampshire](#).



### Miscellaneous

#### 16. What common law duties are recognized in your state that prohibit employees from disclosing employer information even absent an independent contractual obligation?

While the NHUTSA preempts tort misappropriation claims, it does not preempt breach of fiduciary duty claims concerning an employee's conduct essentially in competition with the current employer prior to termination (*Micronics Filtration Holdings, Inc.*, 2019 WL 9104171 (citing *Solito v. Direct Capital Corp.*, 2018 WL 1789877, at \*5)).

In *Mortgage Specialists, Inc. v. Davey*, the New Hampshire Supreme Court interpreted the New Hampshire Uniform Trade Secrets Act (NHUTSA) as broadly preempting the existing common law regarding the disclosure of confidential employer information.

#### 17. Does your state recognize the doctrine of inevitable disclosure?

The New Hampshire Supreme Court has not addressed the doctrine of inevitable disclosure.

However, the New Hampshire trial courts have addressed the doctrine. In *Narrative1 Software v. Arzuian*, the Merrimack County Superior Court (the New Hampshire Business Court) rejected the inevitable disclosure doctrine (*Case No. 2012-CV-00498 (N.H. Super. Ct., Sept. 12, 2012)*). In an earlier decision, *Allot Communications Ltd v. Cullen*, the same court questioned the validity of the doctrine. The court stated that the inevitable disclosure doctrine goes against New Hampshire's public policy of discouraging covenants not to compete and favoring the ability for employees to work. (2010 WL 6620308 (N. H. Super. Ct. Feb. 7, 2010).)

In addition, the US District Court for the District of New Hampshire has not adopted the doctrine. The court explained that to the extent a plaintiff seeks to restrain a defendant from using or relying on recollections of training by the plaintiff in general business, sales, or marketing practices, relief would be denied. (*Cabletron Sys., Inc.* slip op. at 5.)

#### 18. What, if anything, have courts held regarding trade secret misappropriation claims involving memorizing trade secrets rather than the taking of tangible representations of information?

The New Hampshire Supreme Court has not directly ruled on whether memorized trade secrets are treated differently than tangible representations of information. The Grafton County Superior Court trial court has noted, however, that courts must be careful to distinguish trade secrets from experience and skills gained during employment. Employee experience and skills are not considered the employer's trade secrets. (*Fluent Holdings*, 2000 WL 35933066.)

The US District Court for the District of New Hampshire also appears opposed to awarding relief under the doctrine (see Question 6 and Question 17). The court explained that where a plaintiff seeks to restrain defendants from using or relying on their recollections of a prior employer's generalized business, sales, or marketing practices, relief would be denied. (*Cabletron Sys., Inc.*, slip op. at 5.)

#### 19. Do any of the laws identified in Question 1 (statutes and regulations) or Question 3 (common law) preempt other causes of action a plaintiff could assert related to trade secret misappropriation (for example, conversion, breach of fiduciary duty, unfair competition, or tortious interference)?

The New Hampshire Uniform Trade Secrets Act preempts claims based on the misappropriation of trade secrets or other information (*Mortg. Specialists*, 904 A.2d at 665-66). With this in mind, courts in New Hampshire have found the following causes of action preempted in particular circumstances:

- Conversion.
- Breach of fiduciary duty.
- Intentional misrepresentation.
- Deceptive acts under the New Hampshire Consumer Protection Act.
- Tortious interference with contract.
- Unjust enrichment.
- Embezzlement.

(*Mortg. Specialists*, 904 A.2d at 660; *OneSky Litig. Tr.*, 2012 WL 124739.)

To avoid preemption, any alleged common law claims must be based on factual allegations that are different from those on which the trade secret misappropriation claim is based (*Mortg. Specialists*, 904 A.2d at 665). For example:

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- NHUTSA did not preempt the breach of fiduciary duty claims concerning an employee's conduct in competition with a current employer prior to termination in *Micronics Filtration Holdings, Inc.*, 2019 WL 9104171, at \*2.
- Plaintiffs successfully brought a claim for tortious interference with customer contracts along with trade secret misappropriation claims in *Halifax-Am. Co., LLC*, 180 A. 3d at 276-77.

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