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Labor & Employment

Can a Customer List be a Trade Secret? The Oklahoma Legislature Says Yes

By Adam W. Childers

Even though I am an employment defense trial attorney, there are days when I feel more like a family law practitioner. That is because many of my cases involve two parties, the employer and the employee, that are essentially going through a nasty break-up or “divorce.” In no context do I find that to be more true than in those cases where I represent clients involved in disputes with employees who have signed a restrictive covenant that imposes restrictions on their post-termination activities, including the use of corporate “trade secrets.” These cases are immensely interesting because Oklahoma’s laws on non-competition and non-solicitation agreements and

the protection of trade secrets are seemingly always in flux. In particular, the definition of “trade secrets” sometimes feels like a moving target. However, a recent change enacted by the Oklahoma Legislature has brought a little more clarity to the subject. Allow me to explain.

When one thinks about “trade secrets,” the mind inevitably drifts to the heavily guarded formula for Coca-Cola, or the secret as to how in the world those magicians can appear to saw their lovely assistants in half and yet they walk away unscathed. However, in the world of business, trade secrets can be much more mundane, and yet no less important. That includes customer lists, the life-blood of many companies that depend

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Can a Customer List be a Trade Secret?

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on cultivating customer-based relationships to make money. Just a few months ago, the Oklahoma Legislature underscored the importance of customer lists when it amended 21 O.S. § 1732. This statute criminalizes the theft of trade secrets, categorizing such conduct as larceny under 21 O.S. § 1704. The threat of criminal prosecution looming over employees with designs on absconding with company property is a useful deterrent. However, what exactly qualifies for trade secret status is crucial to this

statute's interpretation.

Traditionally, trade secrets have been defined in Oklahoma as information, "deriving independent economic value from not being generally known to and not readily accessible by proper means by other persons." By statute, trade secrets must also be the subject of reasonable efforts to maintain their secrecy. In other words, if your information is already in the public domain, then it probably is not a trade secret, no matter how much you want it to be.

Whether or not a customer list constitutes a trade secret is oftentimes at the heart of criminal prosecution efforts and/or civil litigation over the misappropriation of trade secrets by departing employees. The reason is that an employee who has departed with a

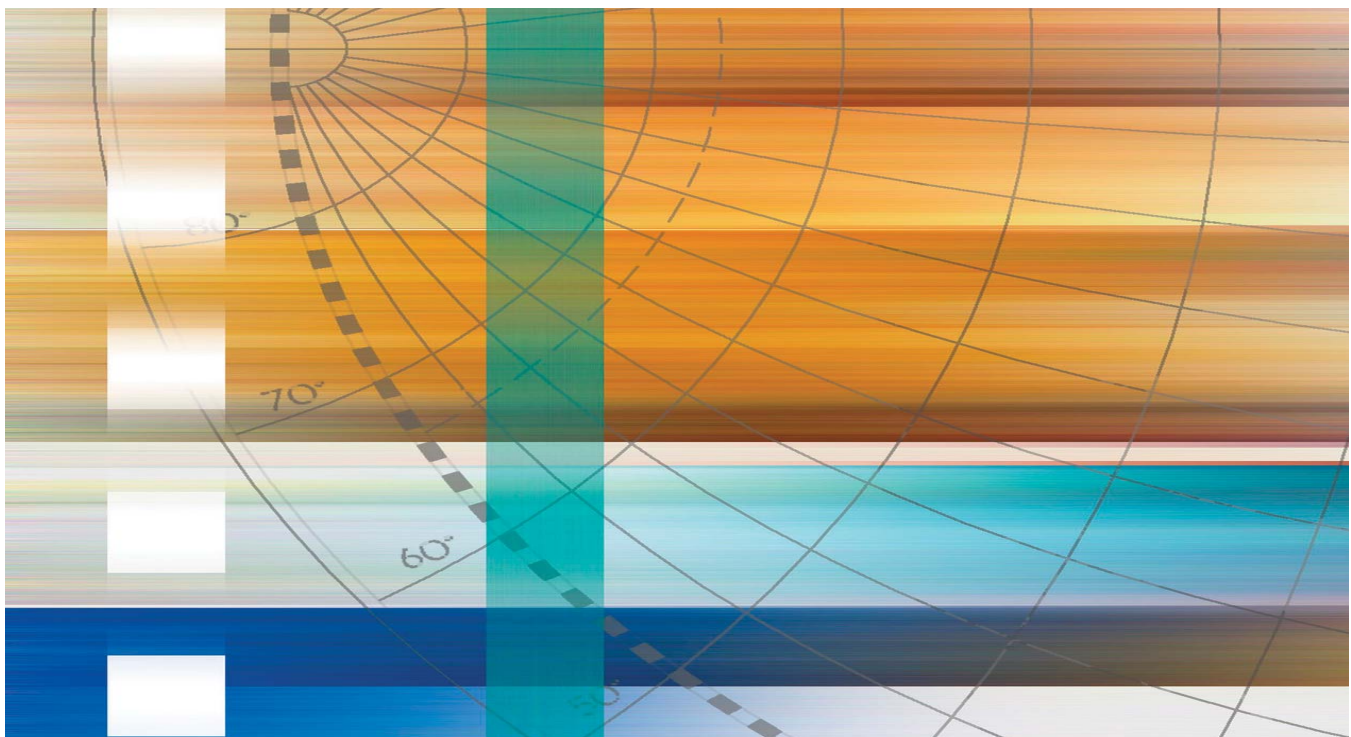
customer list in his or her possession usually argues that the list is not a trade secret because it is "easily ascertainable" by proper means such as just as thumbing through a phone book and searching for potential customers, or that the employer failed to take reasonable steps to protect the customer list from the public eye.

As part of SB 1013, effective November 1, 2009, the Legislature sought to settle this debate, and to clarify the scope of the definition of trade secrets under 21 O.S. § 1732. The Legislature did so by specifically including, "customer lists" and "business records" as examples of potential trade secrets protected by 21 O.S. § 1732, joining the other existing categories including formulas, patterns, compilations, programs, devices, methods,

techniques and processes.

Of course, the inclusion of these new terms does not automatically qualify customer lists for trade secret status. Employers must still meet the other elements of a trade secret before enjoying the protections afforded by this legislative amendment. However, by explicitly adding customer lists to the examples of potential trade secrets, the Legislature is signaling a clear shift towards protecting these lists from theft.

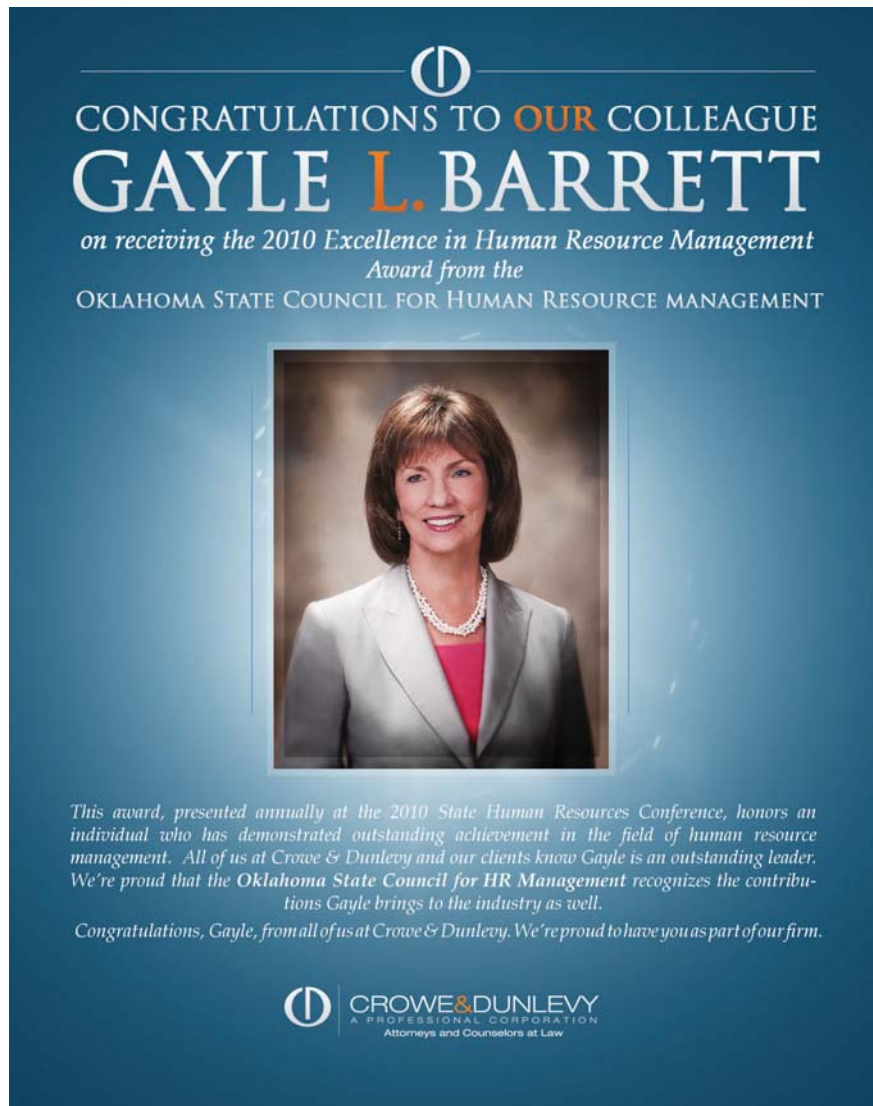
In light of this legislative change, employers would be well advised to take advantage of this policy shift by reviewing their current policies and procedures to ensure that their policies regarding protection of trade secrets and other confidential information are rigorous and strictly enforced. Moreover, it would be




a good idea to add “customer lists” and “business records” to the categories of information protected as trade secrets of the company in all non-solicitation and confidentiality agreements used by your company.

The bottom line is that while the Legislature has made it easier to prosecute those who flee with a company’s trade secrets, including customer lists, it is still up to employers to properly protect the customer lists as trade secrets. Doing so safeguards information that can be as vital as a soft drink formula, or the secret to a magician’s trickery.


Should you have any employment law problems feel free to give any of our Labor & Employment team a call.



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This award, presented annually at the 2010 State Human Resources Conference, honors an individual who has demonstrated outstanding achievement in the field of human resource management. All of us at Crowe & Dunlevy and our clients know Gayle is an outstanding leader. We're proud that the Oklahoma State Council for HR Management recognizes the contributions Gayle brings to the industry as well.
Congratulations, Gayle, from all of us at Crowe & Dunlevy. We're proud to have you as part of our firm.

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Crowe & Dunlevy announces the addition of Christina F. Toon

TULSA, Okla. – Crowe & Dunlevy recently announced the addition of Christina F. Toon as an associate in the firm’s Tulsa office. She will focus her practice on labor and employment, particularly workers’ compensation.

Toon was previously employed by Latham, Wagner, Steele & Lehman, PC, specializing in workers’ compensation defense litigation. Prior to this, she served as a legal clerk for

Toon & Osmond, PLLC and as a legal clerk and an associate for Winters & King, Inc.

A graduate of the University of Tulsa College of Law, Toon was sworn in by the Oklahoma Supreme Court in 2008. She is a recipient of the CALI Award for Legal, Research, Authority and Writing. Toon earned her undergraduate degree in general studies at Grand View College in Des Moines, IA in 2004 and is a member

of the American Bar Association.

With offices in Oklahoma City, Tulsa and Norman, Crowe & Dunlevy represents clients in all aspects of commercial law practice, including complex business transactions, litigation and regulatory practice in both state and federal courts and agencies, energy law and all types of alternative dispute resolution.