This month, Facebook whistleblower Frances Haugen publicly revealed her identity on CBS’ 60 Minutes and testified before a Congressional subcommittee on the matter. Ms. Haugen was formerly a member of Facebook’s civic misinformation team, and in a series of reports to the Securities and Exchange Commission, she detailed Facebook’s ongoing illegal and unethical business practices. These include prioritizing profit over the safety of users, repeatedly lying to investors and...
amplifying the January 6th Capitol Hill attack on their platform. As a result, lawmakers have discussed potential solutions to rein Facebook in, including Section 230 reform and a new national data privacy law.

Previously, we discussed the legal implications of Ms. Haugen’s testimony for whistleblowers and employers, as well as implications for data privacy. In part three of our series, we will discuss the trade secret and intellectual property related implications of the Facebook testimony.

What are the Trade Secret Implications of Frances Haugen's Testimony?

According to reporting from the Wall Street Journal, the confidentiality agreement Ms. Haugen signed with Facebook allowed her to disclose information to regulators, but not to share proprietary information. The company said it will not retaliate against Ms. Haugen for testifying to Congress, but has not said if it will respond to her disclosing information to the press and federal regulators. Trade Secrets as their name implies are the ‘secret sauce’ that is the result of a company’s investment in research and development and what makes them better and different.

However, in an interview with the Associated Press, Facebook’s Head of Global Policy Management Monika Bickert said Ms. Haugen “stole” documents from the company, which sheds light on how Facebook may view Ms. Haugen’s actions and may react differently down the road.

Furthermore, confidential information is not the same thing as trade secrets, with confidential information having its own protections, Davis Kuelthau Senior Attorney Michael J. Bendel explained to the National Law Review.

“From what I have seen, I don’t know if her testimony, or the documents she released, rise to the level of being trade secrets under the relevant law,” he said. “The information is likely confidential information, and that can create its own grounds for protection and breach, such as a breach of a fiduciary duty she may owe to Facebook, but to be a trade secret takes more than simply being confidential information.”

Do Non-Disclosure Agreements (NDAs) Protect Companies’ Trade Secrets?

Mr. Bendel said two laws in particular could be significant in determining if the information would be considered a trade secret and the implications of the sharing the information, including the California Uniform Trade Secret Act (CUTSA) and the Federal Defend Trade Secrets Act (DTSA). Both laws could be used by Facebook against Ms. Haugen, since Facebook is headquartered in California.

Definition of a Trade Secret and How Does it Interact with the CUSTA and DTSA

“Even after the Frances Haugen situation, I predict all the usual trade secret protections will still be available. The basic definition of a trade secret is:
information not generally known to the public that gives economic benefit to its owner and reasonable efforts are made by the owner to maintain its secrecy,” he said. “We would have to look at the particular CUTSA and DTSA requirements to determine how a particular business goes about creating a trade secret in its location, and then what happens to cause an improper disclosure of that trade secret where it occurs, and then what remedies are available to such a company to prevent that or seek damages and try to be made whole from such an improper disclosure.”

NDAs do protect companies’ trade secrets, but laws like the DTSA include whistleblower immunity as a safe harbor to encourage employees to disclose information that may be a trade secret and evidence of a violation of law by the company, Mr. Bendel said.

“An employee takes a risk that the trade secret information is in fact such evidence of a violation (or likely to lead to such evidence) to qualify for the immunity. Differently, the CUTSA does not provide such whistleblower immunity,” he said. “As another example, the DTSA expressly allows an aggrieved company to seek, without any notice to the defendant, a court order to seize property to help prevent further damage to the trade secret. Differently, the CUTSA does not have the same such remedy.”

However, for companies to take advantage of its remedies under the DTSA when a case like Ms. Haugen’s arises, they need to include safe harbor language in employee contracts specifically mentioning that the company promises not to hold individuals liable under federal or state trade secret laws for the disclosure of trade secrets to an attorney, or a federal, state or local government official, directly or indirectly, for the purpose of reporting or investigating a suspected violation of law. Additionally, the law does not allow employees to disclose trade secrets to private entities like newspapers and social media networks.

“So, in the Frances Haugen case where she shared information with The Wall Street Journal, that appears to create a clear issue for her under available trade secret law, if trade secrets were taken from Facebook, as we know that information has been disclosed without Facebook consent,” Mr. Bendel said.

**Conclusion: Is Your Company’s NDA Protecting Your Trade Secrets?**

How effective a company’s NDA is in protecting trade secrets depends on how the agreement is drafted. Despite Facebook saying it won’t retaliate against Frances Haugen for testifying to Congress, it’s possible they may decide to press charges against her for talking to the press about their internal documents.

Even if Facebook decides to go down that route, whistleblower attorneys told the National Law Review that Ms. Haugen’s testimony may open the door for more whistleblowers to come forward with similar allegations against other tech companies. Additionally, even if a company can take action against an employee for disclosing trade secrets, they should not use NDAs to cover up evidence of wrongdoing.
“This position has some extensive basis in the law of public policy that prevents private actors from using their private business activities, and even such a thing as a trade secret, from being used to violate the law,” Mr. Bendel said. “This is similar rationale as the ‘safe harbor’ approach, but grounded in the fact that we do not want to enable people to hide behind certain tools like non disclosure agreements and trade secret protection, if the people/company is using these tools to hide activities that break the law.”

Read the first part in our series on Frances Haugen’s Facebook whistleblower testimony here.

Read more on the privacy implications of Frances Haugen’s Facebook whistleblower testimony here.

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