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Why Having Employment Counsel Is an Important Consideration for IP Lawyers

By Aimee Dayhoff – January 29, 2026

With the ten-year anniversary of the Defend Trade Secrets Act (DTSA) rapidly approaching, now is the time to reflect on how much the trade-secret enforcement landscape has evolved—and why the next decade will likely demand a more integrated, cross-disciplinary approach.

Enacted in May 2016, the DTSA created a federal private right of action for trade-secret misappropriation, giving intellectual property rights owners a powerful new tool to pursue claims in federal court alongside state law. Over the past decade, IP litigators have increasingly relied on the DTSA to strengthen enforcement strategies, particularly in cases involving employee mobility and competitive departures.

But here's the practical reality: When the alleged misappropriator is a current or former employee—especially one headed to a competitor—the trade-secret claim is rarely the whole story. And that is where employment counsel becomes indispensable. What might initially appear to be a "pure IP" dispute often implicates a whole host of contractual, statutory, and common-law employment issues that can materially shape both litigation strategy and outcome.

Below are key reasons why IP lawyers should seriously consider partnering with employment counsel when confronting employee-to-competitor trade-secret risk.

1. Employment Law Claims Can Multiply Leverage
A DTSA or state trade-secret claim typically centers on misappropriation or unauthorized use or disclosure. Employment counsel can aid in identifying parallel claims grounded in breach of contract, breach of duty of loyalty, breach of fiduciary duty or tortious interference. Layering these theories can significantly increase leverage—not just in court, but at the negotiating table—by exposing the employee (and sometimes the new employer) to broader remedies, accelerated damages or injunctive relief untethered from trade-secret claims alone.

2. Agreement Drafting Is Where Many Cases Are Won or Lost
Employment lawyers are typically best positioned to draft—and later defend—confidentiality, invention-assignment, non-solicitation, and non-compete provisions (where enforceable), along with less obvious but highly strategic terms such as garden-leave clauses, post-employment audit rights and repayment or forfeiture triggers. Involving employment counsel early—particularly during onboarding of key hires—can produce agreements that are more enforceable, more litigation-resilient, and better aligned with the realities of employee mobility and state-law constraints.

3. Creating Hooks Beyond the Employee
Employment counsel can help incorporate (or validate) provisions requiring departing employees to notify a new employer of ongoing confidentiality or restrictive-covenant obligations, or clauses that expressly confer third-party beneficiary or enforcement rights. While not a substitute for a trade-secret claim, these contractual hooks can expose a new employer to independent liability and meaningfully alter the risk calculus—often prompting earlier intervention or resolution.

4. Crafting Injunctions that Survive DTSA Limits
The DTSA expressly restricts injunctions that would effectively bar a person from entering new employment. As a result, injunctive relief must be narrowly tailored and supported by evidence of threatened misappropriation, not mere knowledge. Employment counsel can help frame injunction requests that thread this needle.

5. Managing Discovery and Employment Law Defenses
Employment counsel brings critical perspective during discovery, particularly where the employee raises defenses rooted in employment law: whistleblower protections, retaliation claims and statutory carveouts for protected disclosures. Navigating privilege, relevance, and proportionality in this context—especially given the DTSA's whistleblower immunity provisions—requires sensitivity to both IP and employment doctrines. Overlooking these details can derail an otherwise strong trade-secret case.

6. Structuring Settlements and Exits with Teeth
When cases move toward resolution, employment counsel's deal-making and negotation experience is invaluable. They can structure severance or exit agreements that meaningfully protect trade secrets through mechanisms such as staged payments, clawback provisions tied to post-separation conduct, quarterly certifications, audit rights, or expressly preserved injunctive remedies. Just as importantly, they can ensure that releases are carefully drafted in scope so as to avoid inadvertently waiving future trade-secret claims or undermining ongoing enforcement efforts.

7. Navigating Public-Policy Limits and Enforcement Risk
Employee-mobility laws vary dramatically by state, and missteps can invite counterclaims for retaliation, wrongful termination, or statutory violations. Employment counsel is best positioned to assess enforceability risks, tailor protective measures to jurisdictional constraints, and design alternatives that reduce exposure while preserving legitimate trade-secret interests

Takeaway
Trade-secret misappropriation by employees is rarely just an IP problem. Treating it as one leaves leverage on the table and risks unaddressed. Partnering with employment counsel early adds strategic depth, expands enforcement options, and helps ensure that both preventive measures and litigation tactics are enforceable, defensible, and aligned with evolving public-policy constraints.

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