



# **Driving Away Business: Employee Furloughed During COVID-19 Accused Of Misappropriating Trade Secrets While Opening Competing Company**

Insights

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An Ohio driving school has recently filed an action alleging that its former employee retained its trade secrets after being furloughed amid COVID-19 and then used these materials to open a competing driving school. For employers in all states and industries, the case not only highlights the ongoing need to assess the steps you are taking to protect your trade secrets, but also how the pandemic may increase the potential for competitive threats to surface from within your current workforce.

## **Case Summary**

New Direction Driving School, LLC alleges that Robert Swinton refused to return company materials, including its curriculum, lesson plans, and educational materials, when he was furloughed at the beginning of the pandemic. New Direction further alleges that Mr. Swinton submitted the misappropriated information to the Ohio Department of Public Safety and obtained a license to open his own driving school within weeks of the furlough. New Direction also claims that Mr. Swinton is using New Direction's customer reviews to promote his new school.

New Direction is now seeking injunctive relief and asked the court to order (1) Mr. Swinton to return New Direction's materials; (2) Mr. Swinton to be prohibited from operating his competing driving school until he develops his own curriculum, lesson plans, and educational materials, and has them approved by the Ohio Department of Public Safety; and (3) Mr. Swinton to be prohibited from using New Direction's customer reviews to promote his new business. New Direction does not cite to any contract executed by Mr. Swinton in support.

Mr. Swinton has not yet filed a response to New Direction's allegations and the court has not yet ruled on New Direction's request for injunctive relief.

## **Takeaways For Employers**

At this point, New Direction's allegations remain just that – allegations. However, regardless of how this litigation unfolds, the claims in this lawsuit and request for injunctive relief offer employers great lessons they can take to heart when it comes to protecting trade secrets, especially during the pandemic.

## 1. Put It In Writing

In order for you to enforce your trade secret rights, you must show that your company took reasonable measures to protect your trade secrets. You can increase the likelihood of trade secret protection if you have valid confidentiality agreements executed by your employees. Given that New Direction has not referenced any confidentiality agreement or related written policies, it is presumable that no such documentation exists.

Moreover, New Direction is requesting the court prohibit Mr. Swinton from operating his driving school until he can obtain a license based on materials that he develops on his own. While this request is heavily tied to the trade secret misappropriation allegations, there is no indication that Mr. Swinton executed any agreement that restricted his post-employment activities.

You can use this situation as an opportunity to determine whether your company has valid agreements containing the confidentiality provisions and restrictive covenants necessary to protect your trade secrets and business interests. If you do not, determine whether and how you can obtain agreements from current employees pursuant to the applicable law. For example, some states require that employers offer something more than continued employment in exchange for an agreement from an existing employee. You should also be mindful of recent developments regarding the enforcement of restrictive covenants against employees who have been terminated or furloughed during COVID-19.

## 2. Time Is Of The Essence

New Direction filed this action nine months after making its initial demand for the return of its materials and eight months after Mr. Swinton opened his competing driving school. The delayed filing may jeopardize the employer's ability to obtain injunctive relief, as the court may determine that New Direction is not suffering from the requisite immediate and irreparable harm. The court may take the position that the allegedly misappropriated information cannot be sufficiently valuable to New Direction if it allowed Mr. Swinton to retain it, and use it to his competitive advantage, for months before it filed the action. Moreover, the delay may have also impacted New Direction from a business standpoint, as it was competing with Mr. Swinton's new company for eight months before it filed.

From both legal and business perspectives, it is important to act quickly to ensure the return of your trade secrets and, if necessary, to seek injunctive relief in court.

## 3. Be Mindful Of The COVID-19 Climate

The case also serves as a reminder that the present landscape has placed employees in an unprecedented situation that may lead to increased misconduct and may ultimately harm your business. Given concerns about job security, employees may be more incentivized to misappropriate trade secrets in order to advance their own interests with respect to future employment.

## Conclusion

While this case is still in its infancy, you should be familiar with these issues in order to assess how you are protecting your trade secrets and your business interests during this time. [Fisher Phillips' Employee Defection and Trade Secrets Practice Group](#) includes team members who handle these types of matters and who can provide you with guidance, specifically including [strategies for protecting your trade secrets during the pandemic](#).

For additional information regarding COVID-19 related litigation being filed across the country, and to perform your own analysis of our litigation data, you can visit [Fisher Phillips' COVID-19 Employment Litigation Tracker](#). Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney or visit our [COVID-19 Resource Center for Employers](#).

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*This Legal Alert provides an overview of developing workplace issues. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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