

I recently spoke with Pamela McGuire, senior vice president and deputy general counsel for business practices and compliance at PepsiCo. We discussed PepsiCo's deft handling of an attempt by three conspirators to sell Coca-Cola trade secrets to PepsiCo. Pam said that the episode really didn't test the strength of their ethics program. Instead, she explained it was a no-brainer. Once PepsiCo received the letter, there was never any

Ethical Espionage

BY JIM NORTZ

deliberation about what should be done because the correct course of action was so obvious. Her only surprise was that the media responded as though what PepsiCo did was remarkable, when, in fact, it was what any responsible company would have done.

To remain competitive in any business, it is absolutely necessary to gather and process key information about the marketplace and the competition. Given this relentless pressure to obtain such competitive intelligence, what guidance should be given to employees to ensure that they always behave as honorably as PepsiCo did last year? Here are four principles you might consider conveying to employees to help them:

Always abide by the law.

Although abiding by the law is a threshold ethical obligation, it is not safe to presume that your employees know and understand intellectual property laws relating to their jobs. For example, it is likely that most of your employees do not know that misappropriation of trade secrets is prohibited in most states and is a federal crime in the United States under the Economic Espionage Act of 1996 (EEA). The EEA subjects individual violators to

up to 10 years in jail and \$500,000 in fines. The EEA also has an extraterritoriality clause that extends its reach even to US citizens abroad and to non-US citizens, (1) while on US soil or (2) abroad, if the act committed abroad violates the EEA and there is "an act in furtherance of the offense was committed in the United States." This is likely not the only intellectual property law your employees are unaware of. So, it is essential that you raise awareness and set the expectation that employees will always comply with applicable intellectual property laws.

Never misrepresent your identity or engage in disreputable activities.

The reputational and legal risks associated with misrepresenting one's identity to obtain information or "pretexting" became very apparent last year during Hewlett Packard's public flogging after it was discovered that this technique was used in an investigation of an HP board member. Despite the risks, the temptation to engage in pretexting is great because it is a successful corporate espionage technique. To keep your company out of this kind of trouble, your employees must understand that it is never appropriate to pose as someone else in order to gather information about a competitor. For example, employees must keep their identity badges on at all times when visiting competitor's displays at trade shows.


It is also important that employees understand that, even if legal, they should never engage in competitive intelligence gathering activities that could damage the corporation's reputation. If you think that HP had it bad in the press, imagine the humiliating headlines you might have to endure if your company was caught "dumpster diving" near a competitor's office.

Never induce or knowingly permit someone to breach their confidentiality obligations.

All companies recruit in order to obtain the best industry talent. However, it must always be clear to both prospective candidates and their would-be managers that they are being recruited solely for their expertise rather than their specific knowledge of trade secrets or other confidential information. Also, employees should understand that whenever someone begins a sentence by saying, "I shouldn't be telling you this but..." the employee should halt the conversation before the damage is done and explain that they will not be a party to someone else's confidentiality breach.

Hire someone else to gather competitive intelligence who agrees to do so according to your company's principles.

Employees must be on guard when they hire a contractor to perform competitive intelligence gathering. Independent contractors in this field are notorious for their unethical and illegal practices and the company will be held accountable. When hiring a firm to assist in understanding the competition or the marketplace, employees should insist upon a clause in the contract that obliges them to abide by the three principles outlined above. Also, employees should always ask the contractor to disclose any potential conflicts of interest to ensure that your competitors are not also using the same firm to do their market research.

Intellectual property laws are very complex and there is great value in providing clear and simple guidance to help employees understand where the legal and ethical boundaries are drawn when playing the corporate spy game.... 

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