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**CFAA Actions/ Trade Secret
Criminal Prosecutions**

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**Computer Fraud and Abuse Act
18 USC 1030**

- Criminal statute with a civil remedy for anyone who suffers loss from a violation
- Intended to regulate computer hacking
- Applicable in two ways in employee mobility cases
 - Unauthorized access (1030a4)
 - Unauthorized damage (1030a5)

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Benefits from Including a CFAA Claim in an Employee Mobility Suit

- Federal court jurisdiction over claims against non-diverse defendant
- Greater ability to focus in on adversary's computer misuse
- Benefit from asserting violation of statute with criminal components

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Requirements Common to 1030a4 and 1030a5

- Protected computer- used in or affecting interstate or foreign commerce
- Loss of \$5,000 to any one or more persons during any one year period

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Elements of Unauthorized Access Claim Under 1030a4

- Access to protected computer
- Without authorization or exceeding authorization that was granted
- Knowing action with intent to defraud
- As a result, furtherance of the fraud and obtaining anything of value
- Losses to victim in excess of \$5,000 in any one-year period

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Issues Under 1030a4

- When does a disloyal employee's computer access become unauthorized?
 - 1st /7th Circuits- as soon as employee begins to violate duties to employer
 - 3rd Circuit- if employee still may access computer, no 1030a4 violation even if use not authorized
 - 9th Circuit- ?

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Steps to Protect Employer Rights Under 1030a4

- Define any unauthorized use as unauthorized access- e.g., transferring files to personal computer, taking trade secret information, deleting files from work computer
- Obtain employee acknowledgements on limits to access

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Elements of Unauthorized Damage Claim Under 1030a5

- Knowingly causing transmittal that intentionally causes damage without authorization
- Intentionally accessing protected computer without authorization and recklessly causing damage
- Intentionally accessing protected computer without authorization and causing damage and loss

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What are "Damage" and "Loss"

- Both are essential to 1030a5 claim
- Damage- Any impairment to the integrity and availability of data/program/system
- Loss- Response costs, cost of damage assessment, restoring data/program/system, or revenue lost because of interruptions in service

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What is damage "without authorization"?

- The term "without authorization" does not require a rule prohibiting deletions (compare 1030a4)
- In any CFAA claim, employer must quantify losses of at least \$5000 from any violation of the Act

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Criminal Prosecutions for Trade Secret Theft

- Economic Espionage Act
- Mail /Wire Fraud laws
- Transporting stolen goods
- CFAA

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Economic Espionage Act

- Courts have generally though not always rejected vagueness challenges
- Knowledge that something of value is being taken is sufficient- no need to know that items are trade secrets

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Consideration: Use of Criminal Prosecution

- Can the threat of criminal prosecution be leveraged?
- There are ethical and criminal considerations

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Ethical Rules

- Old disciplinary Rule 7-105(A) expressly prohibited a lawyer from threatening to use, or using, criminal prosecution solely to gain an advantage in a civil matter
- 1986 revision, this prohibition omitted
- 1992 Opinion
- "The Model Rules do not prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a private civil matter to gain relief for a client, provided that the criminal matter is related to the client's civil claim, the lawyer has a well-founded belief that both the civil claim and the criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process."

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Related Ethical Rules

- But, still cannot violate other ethical rules
- Rule 8.4(b): cannot "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."
- Rules 8.4(d) and (e): it is unethical for an attorney to commit an act that is prejudicial to the administration of justice or to represent that the attorney has an ability improperly to influence a government official or agency
- Rule 4.4: prohibits an attorney from engaging in conduct in which the primary purpose is to embarrass, delay, or burden a third person
- Rule 4.1: an attorney must not make false statements when dealing with third parties on a client's behalf
- Rule 3.1: an attorney must not assert frivolous claims

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Pennsylvania

- May 2008 Attorney Newsletter of the Pennsylvania Disciplinary Board
 - The Board noted the removal of Model Rule 7-105 from Pennsylvania's Rules of Professional Responsibility, discussed how the rule against threats of criminal prosecution was seldom enforced, and remarked that such threats run afoul of ethical rules only if they violate other remaining rules, such as Rule 3.1, 4.1, and 4.4

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Do Not Commit Your Own Crime

- "Compounding a crime," occurs when a person "accepts or agrees to accept any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission or suspected commission of any offense or information relating to an offense." 18 Pa.C.S. § 5108(a)
 - Affirmative defense: "that the pecuniary benefit did not exceed an amount which the actor believed to be due as restitution or indemnification for harm caused by the offense." *Id.* at § 5108(b)
- "Theft by extortion," which occurs when the person:
 - intentionally obtains or withholds property of another by threatening to: (2) accuse anyone of a criminal offense; (3) expose any secret tending to subject any person to hatred, contempt or ridicule; (4) take or withhold action as an official, or cause an official to take or withhold action; (6) testify or provide information or withhold testimony or information with respect to the legal claim or defense of another; or (7) inflict any other harm which would not benefit the actor. *Id.* at § 3923(a).
 - Affirmative defense: (a)(2) through (a)(4), if the "property obtained by threat . . . was honestly claimed as restitution or indemnification for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services." *Id.* at § 3923(b)

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Other Considerations

- Agreements in which all or part of the consideration consists of a promise to “stifle or compound” a criminal prosecution have been deemed void because they are against public policy
- The defendant may be able to successfully challenge the enforceability of the agreement at a later date

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