

# Protecting confidential company information

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Confidential information and know-how consists of essential and at the same time highly sensitive data that therefore need protection. However, companies cannot fully restrict access to this kind of information as the professional activity of com-

pany employees and contractors is impossible without it. This issue is especially important for companies involved in software engineering, complex technical equipment manufacture and provision of engineering services. But not always is an **effective system for protection** of commercially valuable information developed in company. At the same time, not having such a system or wrongly implementing it legally can lead to the company being **unable to seek damages** from an infringer in case of misuse of information. In this alert, we present a short survey on how to set up an effective legal system for protecting commercial secrets<sup>1</sup>.

## PROBLEMS IN PROTECTING COMMERCIAL SECRETS

Problems in protecting commercial secrets often arise when an employee is dismissed and then moves to a rival company. In some cases, top managers start developing their own business and compete with their ex-employer after dismissal. From a legal perspective, these problems intensify because the clause on non-disclosure of commercial secrets is set only in the employment agreement. We should not overlook the fact that only certain types of employee liability can be set in **an employment agreement**: dismissal, recovery of actual damage, or lost income. Moreover, it is possible to recover lost income (loss of profits) only when damage is incurred by an employee acting off duty. In other cases it is possible to claim recovery of actual loss. But what is not possible is to claim both payment of a penalty and compensation for loss of expected profit to the employer on the basis of an employment agreement. This is connected to the fact that that liability has to be agreed in a separate civil contract (a non-disclosure undertaking or confidentiality agreement).

<sup>1</sup> This publication is prepared on the basis of the Law of the Republic of Belarus of 5 January 2013 no 16-3 "On commercial secrets", Law of the Republic of Belarus of 10 November 2008 no 455-3 "On information, informatization and protection of information", Labour Code of the Republic of Belarus of 26 July 1999 no 296-3, Civil Code of the Republic of Belarus of 07 December 1998 no 218-3.

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So, even if an employment agreement includes provisions for penalty and loss of profit, these **will only be legally binding** if there is a separate civil contract, without which it is not possible to rely on these provisions in court proceedings. In that light, legally possible measures of liability under employment law may not be in line with the negative consequences caused by disclosure of commercial secrets. That is why the need arises to set up an appropriate legal basis to protect a company's commercial secrets.

## CONFIDENTIALITY AGREEMENT

Together with an employment agreement, a civil contract for protection of confidential information (a **confidentiality agreement** or **non-disclosure agreement**) forms the legal basis for protecting commercially sensitive information. This agreement can be made with both employees and contractors of the company (e.g. clients, suppliers).

The main advantage of a civil contract for protection of commercial secrets is that it can include a clause imposing a penalty on an employee or contractor who discloses a company's commercial secrets. Besides, restrictions on the amount of penalty or how it is calculated are not set by law. So the amount can be tied to the employee's salary or the fee paid to a contractor under a civil contract. The amount of penalty can be set as a fixed sum.

### Author's position:

From our standpoint, the optimum alternative is to set liability as a fixed sum, as it eliminates the risk of an employee or contractor disputing the sum by relying on changes in salary or reward.

Although there are no limits on the amount of liability set by law, the amount should still be appropriate and at the same time dissuade an employee or contractor from disclosing confidential information. However, the level of liability should be high enough to eliminate the possibility of so-called "sale" of commercial secrets.

In addition to a penalty, the injured legal entity can claim damages.

Note, however, that these measures will be applied **only when a company establishes a non-disclosure regime** so that liability is set not only in **contracts with employees and contractors** but also in the **internal legal acts of the company**.

## CREATING AN EFFECTIVE NON-DISCLOSURE REGIME

Under current legislation a non-disclosure regime is considered to be created after (i) specifying the information that falls within the scope of non-disclosure protection and (ii) the person who legally possesses certain information takes appropriate measures to ensure its confidentiality. This involves developing a **list of information comprising commercial secrets**. Employees (contractors as well, if necessary) should be made familiar with this list. Note: not all information can be secured by a non-disclosure regime. This means that information comprising commercial secrets should meet the following requirements:

- **it is not generally known and publicly available** to third parties in spheres where it can be used/dealt with;
- **it has commercial value** for its holder due to its non-public nature;
- **it is not an item covered by exclusive rights** to the results of intellectual activity;
- **it does not relate to state secrets.**

Legislation lists information which as such cannot be treated as commercial secrets. This should be taken into account when preparing a list of information comprising commercial secrets.

**Note:**

Personal data of employees, employers, contractors and others can be protected in internal legal acts. In that case, the Law of 10 November 2008 № 455-3 "On information, informatization and protection of information" should be taken into consideration.

Along with developing list of information comprising trade secrets, a record should be kept of those who have gained access to commercial secrets, and also the way how to treat such information should be determined. Using legal technical measures to protect information (password setting for document access, file encryption and so on) is reasonable. Key documents can be marked as "Commercial Secret" (mark/stamp "CS"). In any case, it should be borne in mind that an employer is also obliged to create all the conditions necessary for non-disclosure behaviour.

## NECESSARY LEGAL INSTRUMENTS

At least the following legal documents should be developed for an effectively functioning company system to protect commercial secrets:

- **Commercial secrets-related rules** detailing the current non-disclosure regime and measures to implement it. The rules should contain an annex with a list of information comprising commercial secrets.
- **Non-disclosure obligation** with those who work at the company under an employment agreement.
- **Confidentiality agreement** with individuals and entities who are parties to civil contracts.
- Provisions on compliance with non-disclosure policy and liability for breach with corresponding reference to the non-disclosure obligation and the confidentiali-

ty agreement should also be included in employment agreements and civil agreements with contractors.

A non-competition clause can be inserted in these documents. This prohibits employees from working for a competing company for a certain period after an employment agreement ends, or from setting up their own company using skills acquired from the employer. However, current judicial practice does not provide legal protection for these kinds of condition. This means that a non-competition clause will have only a moral impact on an employee.

## CONCLUSION:

Creating an effective system of commercial secrets protection involves:

- listing information comprising commercial secrets,
- drafting a confidentiality agreement,
- drafting a non-disclosure obligation and confidentiality agreement based on the obligation to protect commercial secrets,
- duly informing employees and contractors about the current non-disclosure regime and having them sign a non-disclosure obligation / confidentiality agreement accordingly,
- applying technical aids to protect commercial secrets and, in certain cases, specifying the procedure and conditions for applying technical aids in the commercial secrets-related rules.

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We will be happy to answer any questions and provide support in drafting any necessary documents for the effective functioning of a non-disclosure regime in your company.

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