

PROTECTION OF TRADE SECRETS IN BUSINESS

The article describes what information is classified as a trade secret, thanks to which the company benefits. It also discusses the requirements for the protection of trade secrets, what applies to it and how employees need to work with it. In conclusion, the responsibility for the disclosure of secrets is considered, depending on the situation.

Keywords: *trade secret, regulations, responsibility*

After the collapse of the USSR in 1991, a Regulation on trade secrets was adopted in Belarus. It established signs of a trade secret and information that cannot be related to it.

In the Civil Code of the Republic of Belarus of 1998, one article was devoted to trade secrets. It obliged the person who divulged an official or commercial secret to compensate for the damage caused. A similar article was contained in the Russian Civil Code of 1994. The criminal codes of Belarus and Russia of that time also provided punishment for the disclosure of commercial or banking secrets and commercial espionage [1].

Now the relations related to trade secrets and their protection in Belarus are regulated by the law “On Trade Secrets” of 2013 [1]. In Russia, a federal law with the same title was adopted in 2004, and it is still valid today in the 2018 edition. Both laws provide legal protection of trade secrets and protection of the rights of its owners.

A trade secret is information of any nature that meets the requirements of the Law of the Republic of Belarus “On Trade Secrets”, in respect to which a special trade secret regime is established [2].

The trade secret regime is necessary in order to protect information from its misuse by employees, partners, customers, competitors, and government agencies. When disclosing a trade secret, such a regime makes it possible for the owner of a trade secret to obtain protection of his (her) rights and bring the perpetrators to justice.

A trade secret regime may be established with respect to any information that simultaneously meets the following criteria:

1. The information is not generally known or easily accessible to third parties in those circles that usually deal with this kind of information (for example, a trade secret regime cannot be established with respect to information from official websites).

2. The information has commercial value for its owner due to the fact that it is unknown to third parties (for example, information about planned investments, projects, mergers, acquisitions of the company).

3. Information is not subject to exclusive rights to the results of intellectual activity (for example, works of science, literature, art).

4. The information is not classified as state secrets.

The legislation does not contain any other criteria regarding information that can be protected by the trade secret regime.

It is also necessary to take into account that the legislation establishes an open list of information that cannot constitute a trade secret. For example:

- contained in the constituent documents of a legal entity (for example, in the charter);
- entered into the Unified State Register of Legal Entities and Individual Entrepreneurs;
- contained in documents granting the right to conduct business (for example, in a license);
- on the employers’ arrears in the payment of wages and social benefits;
- other.

In practice, there is also a question about the possibility of attributing information about the amount of employees’ salaries to a trade secret. In this case, it is necessary to consider the criteria that the information must meet in order to establish a trade secret regime in relation to them. Such information should not be publicly known or easily accessible to third parties in those circles that usually deal with this kind of information [3].

According to Article 51 of the Labor Code of the Republic of Belarus, the employer is obliged to issue a certificate indicating the specialty, qualification, position, working hours and salary amount no later than within five days at the request of the employee [4] (including the dismissed one). Next, the

employee submits such a certificate at the place of claim, for example, to a bank, a tax authority. Thus, information about the amount of an employee's salary becomes easily accessible to third parties. In this case, the above criterion is not met.

It should be kept in mind that the company's availability of information that meets the criteria for establishing a trade secret regime does not automatically protect such information as a trade secret.

Special measures must be taken to fix this mode:

1. Create a written decision on the establishment of a trade secret regime and appoint an appropriate responsible person.

2. Develop an algorithm of measures to establish a trade secret regime, including:

- organizational measures;
- providing the responsible person with information that may constitute a trade secret;
- technical and legal measures.

3. Determine the composition of information that includes a trade secret.

4. Restrict access to such information through the procedure for accessing the carriers of trade secrets and monitoring compliance with such an order.

5. Organize the registration of persons who have gained access to trade secrets.

6. To control relations related to access to trade secrets of employees in the employment contract, and for employees who receive access to trade secrets – additionally in the obligation of its non-disclosure.

The employment contract should specify the general provisions on trade secrets established by the employer. The reflection of such provisions in the contract will allow disciplinary measures to be applied to the employee for breach of contract, however, it will not fully protect trade secrets.

With employees who gain access to trade secrets, an additional obligation of non-disclosure of trade secrets should be concluded, in which the following should be recorded:

- the rights and obligations of the parties;
- the procedure for handling information and carriers of trade secrets;
- responsibility of the parties;
- duration of the obligation;
- responsibility of the employer for improper performance of the obligation to notify the cancellation of the trade secret regime.

The advantage of concluding an obligation of non-disclosure of trade secrets is the termination of an employment contract (contract) that does not entail the termination of the obligation of non-disclosure of trade secrets. Thus, after the termination of the employment relationship with the employer, the employee is obliged to respect the confidentiality of the information to which the employee had access, during the term of the non-disclosure obligation or until the cancellation of the trade secret regime with respect to this information.

Non-signing (refusal or evasion of signing) by an employee of an obligation not to disclose a trade secret or its disclosure is the basis for termination of an employment contract with an employee. Moreover, an employment contract can be terminated on such grounds with a pregnant woman, a woman with a child under three years old, a single woman with older children, a single father.

However, in this case, the employer must confirm the refusal or evasion of signing the obligation of non-disclosure of trade secrets by the employee. In this regard, the company must send a written offer to the employee to sign the obligation with the text of the obligation itself attached for review.

This is due to the fact that the employer must have proof:

- that the information that has been disclosed relates to confidential information;
- that this information is known to the employee in connection with the performance of his work duties;
- that the employee was given an obligation not to disclose this information;
- that the employer's local normative act has established all necessary rules regarding the trade secret regime.

7. Settlement of relations related to counterparty access to trade secrets.

Obligations to ensure the confidentiality of information constituting a trade secret may be provided for in a contract with a counterparty or in a separate confidentiality agreement. At the same time, the confidentiality agreement allows you to protect information that constitutes a trade secret and information related to the subject of the contract, even before the conclusion of the contract, at the stage of negotiations and agreement on the terms of the contract.

The obligation of non-disclosure of a trade secret is concluded between its owner and a person who is in an employment relationship with him, and a confidentiality agreement is concluded between the owner of a trade secret and his counterparty.

8. Identification of employees responsible for taking measures to ensure the confidentiality of information constituting a trade secret.

It is most expedient to establish a trade secret regime by developing and approving an appropriate Regulation.

Thus, the algorithm of the commercial secret Regulation may include:

1. General provisions and terms.
2. The procedure for classifying information as a trade secret.
3. Establishment of a trade secret regime.
4. Providing employees with access to this information.
5. Turnover of commercial secret carriers.
6. Control over compliance with the procedure for handling commercial secret carriers.
7. The procedure for granting access to the information that makes them up.
8. Responsibility.

You must also enter the following applications:

- List of information constituting a trade secret;
- List of persons who have gained access to trade secrets;
- Obligation of non-disclosure of trade secrets;
- Confidentiality agreement;
- A signature list.

Another solution of a special local regulatory legal act on the procedure for handling confidential information is the instruction on using the information constituting a trade secret, or the instruction on the organization and record keeping of documents marked “Commercial secret”.

To prevent double interpretations, the terminology of the Law “On Trade Secrets” should be used in the regulations and appendices.

The final action of securing and putting into effect the commercial secret regime will be the order approving the commercial secret regulations with all appendices and a list of persons responsible for taking measures to ensure the confidentiality of information constituting a commercial secret.

The legislation provides following types of employee’s liability for disclosure of trade secrets:

- material [3];
- disciplinary [3];
- civil law [2]
- administrative [5];
- criminal [6].

The obligation of non-disclosure of commercial secrets, being a civil contract, can only provide for civil liability.

In practice, situations often arise when the parties include confidentiality conditions in the contract or conclude a confidentiality agreement in addition to the main contract without observing all the conditions for establishing a trade secret regime provided for by the Law “On Trade Secrets”. In the author’s opinion, in this case, the terms of the contract will be a transaction, i.e. a voluntarily assumed obligation arising from the agreement of the parties, and for violation of such conditions, only general measures of civil liability for violation of contractual obligations will be applied. Special protection measures provided by the legislation for the protection of commercial secrets will not be applied.

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