Dear Readers,

new regulations on trade secrets have been in force since 4 September. This entails several important changes for you.

The regulation that limited the non-disclosure obligations of former employees to three years from termination of employment is gone. This obligation is now unlimited in time. It applies in the same way to everybody, including employees.

The definition of trade secret has changed. In addition, a list has been introduced of exceptional circumstances in which a trade secret can be disclosed. In practice, this will lead to many disputes.

In this issue of PRO HR, we are commenting on the practical aspects of the application of the new provisions. We indicate what conditions must be met for a given piece of information to be considered a trade secret. We discuss the consequences that may follow an unlawful disclosure of such a secret by an employee. We list the cases in which trade secret can be disclosed and we suggest what to do to minimize the related risks. We also discuss obligations with respect to non-disclosure of confidential information by union representatives.

legal advisor Katarzyna Sarek-Sadurska

New requirements concerning trade secrets

Trade secret is technical, technological, organizational or other information which has economic value and which is not universally known to persons who usually deal with type of information, or is not easily accessible to such persons, provided that the entity to whom the information applies has acted with due diligence to keep it confidential.

advocate trainee
Agnieszka
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In the light of the new provisions, information will not be considered a trade secret if it is not appropriately protected. Until now, entities were also required to protect such information appropriately, but the regulations did not specify how. Now, an entity that aims to protect information that constitutes a trade secret is required to protect it with due diligence.

A business entity should apply means that will truly reduce the possibility of an information leak, for instance by stamping documents with a "Confidential" seal, giving the documents appropriate titles, defining a confidential information file, protecting documents and confidential information physically against access by unauthorized individuals. If such due diligence has not been followed, the employee or another person may attempt to avoid the consequences of their use of confidential information by accusing the company of overly loose information access policy.

Non-disclosure obligations binding trade union representatives

The new provisions make an exception allowing trade secret to be disclosed to employee representatives (i.e. in particular to a trade union) in connection with the function performed by them by virtue of the law, as long as this is necessary for the proper performance of such functions.

legal advisor.
Robert Stępień

The new provisions confirm that trade secret can be disclosed to trade union representatives. In this context, we should pay attention to a few practical issues involved in such information transfer and the non-disclosure obligations of union representatives.

First, trade secrets can only be disclosed to persons in representative functions (including in trade unions) in connection with the performance of these functions. Thus, it is not the case that rank and file union members will have access to confidential information. This means, in particular, that information constituting trade secret cannot be disclosed by trade union representatives to regular members.

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Second, the information may be disclosed to employee representatives only to the extent necessary to perform these functions correctly. This is in line with the provisions of the Act on Trade Unions which obligate the employer to provide the union with information that is essential for union activities. The employer (in particular HR employee acting on behalf of the employer) can refuse to transfer information if it is not essential, invoking, in particular, trade secret protection. Therefore, it is justified to inquire every single time what exactly the union needs the given piece of information for.

Third, information may only be transferred to authorized employee representatives who perform their function pursuant to the provisions of the law. Before information is transferred, the employer is entitled to request that the union indicate how a given individual is authorized to represent it. If the union fails to indicate its representatives, the employer (in particular HR employee acting on behalf of the employer) can refuse to transfer information invoking trade secret protection.

Given that the provisions clearly allow for trade secrets to be disclosed to trade union representatives, it is vitally important that they preserve the confidentiality of such information. If there is reasonable doubt on the employer's side as to the security of information transferred, the employer may make the transfer of information conditional on the conclusion of a non-disclosure agreement with trade union representatives.

Internal documents should be adjusted and trade secret protection rules should be verified

Many organizations have copied the previous regulations into contracts and internal regulations. All these documents require an update.

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legal advisor
Piotr
Lewandowski

This refers in particular to the period during which the non-disclosure obligations remain in force as well as the definition of trade secret. Until now, the practice has been to include the 3-year non-disclosure period into contracts, or to modify it by extending this period. This is no longer necessary, as this obligation is now unlimited in time.

The new definition of trade secret requires that the business act with due diligence in order to maintain confidentiality.

The most basic form of due diligence will surely by an audit of the current procedures of the flow of confidential information that constitutes trade secret, as well as keeping the number of people who have access to it to a minimum. It is also a good idea to introduce the obligation to apply protective measures (e.g. data encryption, access privileges, applications that filter outgoing messages). Internal regulations and contracts should also clearly indicate the scope and the purpose of the use of trade secret by a person who has access to it.

What are the sanctions for disclosure of trade secret?

The Act on Unfair Competition foresees an entire catalog of claims possible in the case of trade secret violations. In particular, business entities can demand that illegal practices be terminated or their effects be eliminated, or that the so-called public apology be issued.

The most obvious claim is repairing the damage done. However, when we consider practical aspects and evidence needs, pursuing such a claim may be most difficult in practice. The entity can also demand that unfairly obtained benefits be returned, and that an appropriate amount be paid to charitable causes (if the unfair competition act was culpable). In addition, the amendment has introduced the possibility of making the ruling public, and instead of a court order to stop the illegal acts and to pay compensation, the entity can demand the remuneration that would be payable in the case of an authorized use of the trade secret. Despite the expansion of the claim catalog, the most practical protection for a company is still a contractual penalty for illegal trade secret violation.

Another important reason to introduce a whistleblowing line

New regulations allow for the disclosure, use or acquisition of a trade secret with a view to disclose irregularities, infringements and illegal acts in order to protect public interest. This is another argument in favor of the introduction of procedures regulating whistleblowing.

legal advisor
Katarzyna Wilczyk

It should be assumed that the disclosure of a trade secret will only be legal when the whistleblower had no other legal way to disclose irregularities or violations of the law. In such a case, the exclusion of liability of whistleblowers also reflects the provisions that grant protection to such persons. Is there a way, however, to practically reduce the risk that we will learn about irregularities at our company not from our coworkers, but, for example, from the media? The answer is “yes”. What is necessary, however, is implementing internal procedures that regulate, inter alia, whistleblowing. The procedure should be easily accessible and simple, and it should allow for anonymous reporting.

It should also guarantee that the ensuing investigation will be objective. On the other hand, employees should be obligated, for example by work regulations or by their contracts of employment, to initially report all irregularities within this procedure. This should be regularly repeated, for example during training sessions. Solving a problem inside the company will make it possible to avoid unnecessary negative publicity about irregularities at your company, and it will limit the risk that trade secrets will be disclosed outside the company.

Exceptions to the ban on disclosure, use or acquisition of trade secrets

The new regulations introduce exceptions to the ban on disclosure, use or acquisition of trade secrets. These exceptions apply in four situations, i.e. when it happened:

1. in order to safeguard a reasonable and legally protected interest;
2. when taking advantage of the freedom of speech;
3. to disclose irregularities, infringements and illegal acts in order to protect the public interest, or
4. when the disclosure of information that constitutes trade secret to employee representatives was made in connection with the function performed by them by virtue of the law, as long as this was necessary for the proper performance of such functions.

The most questionable exception is the possibility to disclose, use or acquire information constituting trade secret when taking advantage of the freedom of speech. The legislative rationale provided for the bill references to the provisions of the Constitution, where the freedom of speech is understood very broadly. It includes the freedom to express views and acquire and distribute information, also in media activities. This raises a question whether an employee will be able to invoke freedom of speech in order to disclose confidential information about the employer (e.g. to publicly criticize the way in which the employer’s products are made).

At this time, it is difficult to give an unequivocal answer to this question. If freedom of speech is understood too broadly, this could practically undermine trade secret protection, which means that this exception should be construed narrowly. It certainly does not encompass situations in which trade secrets would be disclosed under the pretext of the freedom of speech in order to harm the former employer. What is more, disclosing trade secret on this basis can only be allowed in the cases in which there is no other legal way to guarantee freedom of speech that does not infringe on trade secrets.