

## What Employers Should Know About Protecting Confidential Information in England

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Confidential information is one of a business' most prized and valuable assets. However, it is rarely something that can be locked in a safe, because employees often require access to it for the purposes of carrying out their duties.

Below we consider how confidential information is protected in England and what options are available when confidential information is misused.

### **Trade secrets**

In the absence of express contractual confidentiality restrictions, the English courts will act to protect and prevent former employees from using 'trade secrets'. This category is limited to confidential information of the highest degree, such as secret manufacturing processes, chemical formulas or confidential methods of construction. An often-cited example of a 'trade secret' is the recipe for Coca-Cola. The hurdle for information to be considered a 'trade secret' is high but, if reached, such information will be protected after termination of employment even in the absence of express confidentiality restrictions, and there is no time limit on the protection.

### **'Mere confidential information'**

Information that falls short of being considered a 'trade secret' will be 'mere confidential information', either because an employee is informed that the information is confidential or because they are aware it is (for example, because of the nature of their job or because the information is marked as confidential). In the absence of an express confidentiality protection, such confidential information will only be protected against misuse during employment but not after its termination. What will amount to confidential information is fact-specific and is, at best, a nebulous concept.

After employment terminates, an employee is permitted to use their skill, experience, general knowledge and know-how, which can include commercially sensitive information. The distinction between whether information is a 'trade secret' or an employee's skill and knowledge can be complex. However, what is clear is that information that is rightfully in the public domain (and not unlawfully disseminated) cannot be protected.

### **Implied contractual duty of confidentiality**

All employees owe an implied duty of fidelity and good faith to their employer. This includes a duty not to disrupt their employer's business and an obligation not to misuse their employer's confidential information. Statutory directors, partners, trustees and certain senior staff in a position of trust in relation to their employer's assets or employees also owe fiduciary duties, including a core obligation of loyalty.

The existence of these implied obligations can be helpful in protecting trade secrets and 'mere confidential information' to the extent

permitted by common law; however, it is advisable for an employer to put in place an express contractual protection of confidential information.

## **Express contractual confidential provisions**

The best method of providing clarity is to include express confidentiality provisions in the employment contract that clearly define what constitutes confidential information and provide for it to be protected after employment terminates. The definition of confidential information should be tailored to each company's individual needs. If a company can demonstrate a legitimate proprietary interest in information, then it can be protected; information in the public domain (other than because of unlawful disclosure) cannot.

In addition to specific express protection of confidential information, a well-drafted employment contract should also include the right to require delivery up of company property and confidential information at any time, including on termination. Equally, it should include obligations on employees to delete information they may have stored on any personal devices upon request and upon termination, as well as producing evidence of having done so, as an employer may reasonably request.

## **Post-termination restrictive covenants**

Above and beyond the basic contractual protection of confidential information, it is advisable for employment contracts to include post-termination restrictions designed to prevent an employee from working for a competitor – or from soliciting or dealing with clients, suppliers or former colleagues for a period of time after employment terminates.

Post-termination restrictions must be tightly drafted and go no further than is reasonably necessary to protect legitimate business interests, but well-defined provisions (in terms of duration, scope and tailoring to an employee's seniority, role and responsibilities) can provide excellent business protection. By way of example, legitimate business interests may include protecting an employer's confidential information and trade secrets, client contacts, business relationships with external stakeholders, goodwill and general stability of its workforce.

## **Consequences of breach**

If there are concerns that confidentiality may have been breached, then the first step will be to establish – with strong evidence – what confidential information has been misappropriated or misused, by whom, when and to what extent. It is imperative for an employer to act quickly and efficiently with its investigation to minimise the potential ramifications of the breach (or suspected breach) – and because delay in seeking injunctive relief can be fatal to achieving that protection. It will be equally important to identify the express or implied confidentiality protections that have been breached.

It is likely that the next step will be to put the (most likely former) employee on notice of the claim (unless there is a real risk that doing so will place the confidential information at further risk). There also may be a cause of action against a former employee's new employer (or another third party) for inducing breach of contract.

The most common outcomes of confidential information action are as follows:

- Contractual undertakings (if a claim has not been issued) or undertakings to the court (if a claim has been issued) to deliver up and to not use the confidential information in question.
- Injunctive relief to restrain a former employee from using (or continuing to use) the confidential information. This will require the former employer to give a cross-undertaking in damages to the court in case it later transpires that it was inappropriate to grant the injunction – for example, because the information was not truly confidential. It is possible to apply for an 'interim injunction',

which can be obtained on an urgent basis.

- Damages in respect of the financial loss that the former employer has suffered because of the former employee's breach(es) of contract. In practice, such damages can be difficult to quantify.

## Trade Secrets Regulations

The European Union Trade Secrets Directive was transposed into English law on 9 June 2018 by means of the Trade Secrets Regulations 2018.

The directive was designed to address the significant variation in trade secret protection across the EU. Accordingly, it introduced a statutory definition of 'trade secret' for the first time as being confidential information that:

- Is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among, or readily accessible to, persons within the circles that normally deal with the kind of information in question.
- Has commercial value because it is secret.
- Has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

Under the Trade Secrets Regulations, the acquisition, use or disclosure of a 'trade secret' is unlawful where the acquisition, use or disclosure constitutes a breach of confidence in confidential information. The regulations do not affect the remedies available at common law for breach of confidence, but they do provide some potentially helpful additional tools in a confidential information dispute – for example, the possibility for the court to order, at the expense of the infringer, appropriate measures for the dissemination of information concerning the judgment. The court has used that power in one case to order a defendant to display a statement on its website about its misuse of the claimant's confidential information.

## Final thoughts

Express contractual protection of confidential information is fundamental but, on a practical level, restricting key information to a limited group of employees and ensuring that it is clearly marked as 'confidential' and – where necessary – password-protected will all help limit the risks of a leak and assist any argument that the information has the necessary nature of confidence.

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