

SORAINEN



Trade secrets

Content

1. The essentials of the legal regulation of trade secrets in Belarus
2. General procedure
3. Typical mistakes
4. Useful tips when preparing the documents



The essentials of the legal regulation of trade secrets in Belarus

A company has the right to claim legal defence regarding commercial information only if this information has officially been classified as a trade secret (TS). In other cases, it would be troublesome to impose liability on employees and counterparties of the company with respect to the disclosure and unauthorised use of such information.

To define information as TS, the company has to:

1. draw up a list of information that is subject to protection due to being defined as TS;
2. adopt a TS policy;
3. appoint employees responsible for taking measures to ensure the confidentiality of the TS;
4. keep records of the individuals and entities that have access to the TS;
5. conclude agreements on maintaining confidentiality (non-disclosure commitments and confidentiality agreements).



STEP 1. Draw up a list of information that is subject to protection due to being defined as TS

- In written form, preferably as a list approved by a director (i.e. the sole executive body) or another authorised person (for example, it may be an appendix to the TS policy).
- In the list may be included information that:
 - simultaneously meets the following requirements: (a) it is not commonly known or easily accessible to third persons who usually deal with this kind of information; (b) it has commercial value for its owner because it is unknown to third persons (i.e. the possession of such information allows an entity, under existing or possible circumstances, to increase its revenue; to reduce expenses; to preserve its position on the goods, works or services market; or to obtain other commercial benefits); (c) it is not intellectual property and (d) it is not classified as state secrets under the established procedure; and also
 - does not belong to the type of information that cannot constitute TS, in particular: (a) information from the constituent documents of a legal entity or information included in the Unified State Register of Legal Entities and Individual Entrepreneurs (the Belarusian companies register); (b) information from the documents granting the right to carry out entrepreneurial activity; (c) information about the number and composition of employees, working conditions and work safety, on-the-job injury rate and occupational morbidity, or about unfilled positions (vacancies); (d) information about the indebtedness of employers for salaries and social benefits etc.

STEP 2. Adopt a TS policy

- In the form of a bylaw approved by a director or another authorised person.
- In the TS policy, as a minimum, the following information has to be included:
 - the regime for handling TS carriers, and also for control over compliance with this regime;
 - liability for breach of confidentiality of information defined as TS.
- Bring the content of the policy to the attention of employees and ensure they confirm with their signature that they have read and understood the policy.

Preparation of the TS policy should not simply be a formality. It should be a document corresponding to the specific character of a particular company's activities. For this reason, the relevant departments of the company should be engaged in this process: for example, the accounting department, IT specialists, the legal department etc.



STEP 3. Appoint employees responsible for taking measures to ensure the confidentiality of the TS

- To appoint by the director's order/make provisions in the TS policy stipulating that the director himself/herself will be that responsible person, unless another person is appointed by the director.

STEP 4. Keep records of entities that have access to the TS

- In written/electronic form (for example, in the form of an Excel spreadsheet).
- It is not only the employees who have access to the TS that have to be recorded, but also the counterparties.

STEP 5. Conclude agreements to maintain confidentiality

- Conclude non-disclosure commitments with employees who have gained access to TS:
 - the non-disclosure commitment must contain all the significant terms and conditions stipulated by law: the rights and obligations of the parties regarding compliance with the confidentiality of TS, the access regime to TS for employees, the term of the agreement and a provision about the liability of the employer for improper performance of the obligation to notify the employee about a change or cancellation in the status of information classified/defined as TS (or the provision that the employer does not have such an obligation);
 - if an employee who needs access to TS for the performance of his/her job refuses to sign the commitment, an employer has the right to fire him/her.
- Conclude confidentiality agreements with the company's relevant counterparties:
 - agreements may be included in the main contract with a counterparty or constitute a separate agreement;
 - the confidentiality agreement must contain all the significant terms and conditions stipulated by law: a list of information that constitutes TS or the way it can be determined, limits of the use of this information, and also a provision about the term during which the counterparty is obliged to ensure its confidentiality, including in cases of termination of the contract or refusal to perform the contract.

Typical mistakes

- A company does not have the above-described documents. For example, there is a widespread misconception that for the protection of TS it is enough to write down the appropriate obligations in an employment contract.
- Agreements with employees are drawn up as unilateral commitments, which are signed only by an employee. In spite of the name "non-disclosure commitment", it must be signed by both the employer and the employee and establish mutual rights and obligations.
- Agreements to maintain confidentiality do not contain all the necessary significant terms and conditions.

Useful tips when preparing the documents

- To indicate a fixed fine for a breach of non-disclosure obligations, because the amount of losses is rather difficult to prove in practice.
- To indicate in the TS policy that, in order to avoid any doubts, the absence of a crypto “trade secret” or comparable watermark throughout the text does not mean that the document is not subject to protection as TS.
- If a contract with a counterparty does not come into force at the moment of signing but later, it is recommended to indicate directly that the provisions of the contract regarding confidentiality are effective as of the moment of signing by both parties.
- To ask employees to confirm that they are familiar with the TS policy by signing the acknowledgement list attached to the TS policy and not by signing the contract, non-disclosure commitment or any other similar document. Otherwise, in case of a dispute, some difficulties may arise with proving that the employee was provided with exactly that policy and not any other version or that the employee was provided with amendments to the TS policy if they were approved after signing the contract (or any other appropriate document) by the employee.



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