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劳动与雇佣

## 雇主如何防范员工泄露商业秘密的行为？

### How to Prevent the Disclosure of Trade Secret by the Employee?

商业秘密是企业市场上保持竞争力的关键因素之一。然而，随着市场竞争的加剧，商业秘密的泄露和不当使用也成为了很多企业担心的事情。其中，掌握商业秘密的员工发生的泄密行为是很多企业碰到的泄密原因之一。

Trade secret is one of the key factors which enable the company to keep competitive in the market. However, due to the increased competition in the market, many companies are concerned with the disclosure and improper use of trade secret, among which, the disclosure of trade secret by the employee is one of the reasons leading to disclosure of trade secret.

员工发生的泄密行为，其动机和情形可能包括如下之一：

The disclosure of trade secret by the employee can be caused due to one of the following reasons:

- 在职员工受到与本单位存在竞争关系的其他企业的引诱而发生的泄密行为；  
the employee is induced by other competitive company leading to the disclosure of the trade secret;
- 因本单位欠缺完善的保密制度，员工离职后到与本单位存在竞争关系的其他企业就业而发生的泄密行为；  
Due to the lack of complete company regulation for protecting confidentiality, the employee works for other competitive company after he leaves the company and discloses the trade secret;
- 尽管本单位存在一定的保密制度，员工离职后恶意向竞争单位泄密；  
Regardless of company regulation for confidentiality, the employee discloses the trade secret to competitive companies in bad faith after he leaves the company;
- 离职员工自主创业过程中使用原单位的商业秘密。  
The employee makes use of the trade secret for his own business.

尽管存在泄密行为，但是，很多企业在追究泄密员工的法律责任时，却发现困难重重。此类问题的产生与企业对商业秘密保护的防范意识不足和制度不健全存在很大的关联。

Despite of the disclosure of trade secrets, many companies may find themselves difficulty to pursue against the employee for legal liability, which is usually caused due to the lack of sense for protection of trade secret and the incompleteness of company regulation.

那么，在规划和制定保密制度时，需要注意哪些方面呢？

So when the regulation for confidentiality is planned, what shall be noted?

## I. 什么是商业秘密。

### What is trade secret?

很多企业会在与员工的劳动合同中约定保密条款，但是，根据我们的观察，很多类似保密条款非常概括，导致对商业秘密的界定和范围存在争议。

Many companies will include the clause of confidentiality in the employment contract with the employee. However, according to our observation, these clauses are very general which may cause dispute over the definition and scope of trade secret.

商业秘密，根据《反不正当竞争法》的定义，是指不为公众所知悉、能为权利人带来经济利益、具有实用性并经权利人采取保密措施的技术信息和经营信息。

Trade secret, according to the definition in the Law of Anti-unfair Competition, refers to technology information and operation information which is not known to the public and capable of bringing economic benefit to the holder, and has practical utility with measures taken by the holder to keep confidential.

从类别上看，商业秘密可大致分为技术信息和经营信息两大类。其中：

Therefore, trade secret consists of technology information and operation information.

技术信息包括例如程序、设计、制作工艺、产品配方、制作方法等；经营信息包括例如管理诀窍、客户名单、货源情报、产销策略、招投标中的标底及标书内容等。

Technology information including programs, designs, manufacturing processing, product formula, manufacturing method etc; Operation information including management know-how, client list, goods resource intelligence, production and marketing strategy, base price of the tender and content of bid document etc.

企业在界定需要作为商业秘密保护的信息范围时，应当充分了解法律对商业秘密的范围界定。

也就是说，不是任何涉及企业的信息均可构成法律意义上的商业秘密。

When the company defines the scope of confidential information for protection, it shall fully understand the definition of trade secret by the law. That means, not all information relating to the company can constitute trade secret by the law.

## II. 保密合同

### Confidentiality Agreement

签订保密合同是重要的保密措施,也是认定商业秘密的特征之一。在签署和执行保密合同时,应当注意下述方面:

The conclusion of a confidentiality agreement is an important measure to protect confidential information, which is also one of features to identify the trade secret. When concluding and enforcing the confidentiality agreement, the followings shall be noted:

#### 1. 界定保密内容

##### Definition of Confidential Information

界定保密内容,是指根据企业自身的经营特点,就存在或可能存在的保密信息的范围进行界定。

The company shall define the scope of confidential information in accordance with the nature of its business.

保密内容一般可采取列举的方式进行。如企业系生产型或技术研发型企业,则应当侧重对技术信息范围的界定,如系营销类、贸易类企业,可着重从经营信息的角度进行界定。

If the company is a manufacturer or technology-oriented development company, it shall particularly emphasize on the protection of technology information while a marketing-oriented company or trading company shall emphasize on the protection of operation information.

#### 2. 对相关商业秘密采取明示的保护措施

##### Explicit measures shall be taken to protect confidential information

除了签订保密协议,在涉及向相关员工交付包含商业秘密的文件,或者进入包含商业秘密的场所或系统时,企业应当以显著的方式标注商业秘密的属性,例如,在包含商业秘密的文件首页标注“保密”字样,对涉密信息载体采取加锁等防范措施等,并留存相关员工接收或接触商业秘密的记录。通过这种方式,企业一方面可有效提醒接收保密信息的员工的注意义务,另一方面,一旦该等信息被泄露,有助于界定商业秘密的范围和内容。

Besides the conclusion of confidentiality agreement, during the course of delivering documents containing confidential information to the employee, or access to the place or system containing confidential information by the employee, the company shall mark the nature of confidentiality of the information in an explicit way. For example, the company can mark “confidentiality” on the first page of the document containing confidential information, or add a lock to the carrier of confidential information. Meanwhile, a record of receipt of or access to the confidential information by the employee shall be maintained. In doing so, the company can remind the employee receiving the confidential information of the nature of information received, on the other hand, once these information is disclosed, it will be easier to define the scope of disclosed confidential information.

### 3.约定违约金

#### Penalty

在保密协议中，可以约定如员工违反保密义务，企业有权向员工追究的法律责任，包括员工应当支付的违约金。

In the confidentiality agreement, penalty can be agreed if the employee breaks the obligation of confidentiality.

针对在保密协议中设定违约金的做法，根据上海目前的司法实践，事实上存在以下两方面的问题：

However, it shall be note that under current practice in Shanghai, the penalty for breaking the confidentiality obligation will actually apply to following situations:

- 针对员工发生在在职期间的违反保密义务的行为，法律上目前并不支持违约金的做法。但是，如果企业因此受到损失的，企业可以就实际发生的损失要求员工赔偿；  
if the employee breaks the obligation of confidentiality during the term of labor contract, penalty will not be supported by the court. However, if the company suffers actual loss, the company can request for compensation against the employee;
- 针对员工发生在离职后的违反保密义务的行为，可以约定违约金。但基于权利义务的对等性，建议企业应当支付员工适当的保密费用。  
if the employee breaks the obligation of confidentiality after he leaves the company, the penalty is acceptable to the court. However, we suggest a reasonable consideration shall be paid to the employee for his confidentiality obligation.

### III.保密义务和竞业限制

#### Confidentiality and Non-competition

竞业限制协议与保密协议两者之间既有联系，又有区别，表现如下：

Confidentiality agreement and non-competition agreement are inter-linked but two separate legal concepts:

- 竞业限制协议意在限制负有保密义务的公司员工在离职后到与本单位存在竞争关系的其他单位就职；保密协议本身并不存在竞业限制的内容；  
The main purpose of a non-competition agreement is to restrict the employee with confidentiality obligation to seek employment in a competitive company after he leaves the company. However, confidentiality agreement itself does not contain any clause of non-competition;
- 根据法律规定，竞业限制协议的最长期限不得超过 2 年，而保密协议，可以存在较长期限，甚至无期限，直到保密信息非因员工原因公开为止；

According to the law, the maximum term for non-competition is 2 years while the obligation of confidentiality can be with indefinite term;

- 签署竞业限制协议的员工限于企业高级管理人员、高级技术人员和其他负有保密义务的人员等，而保密协议可适用于任何接触或可能接触企业商业秘密的员工；  
Only management personnel, senior technology personnel and other employees with confidentiality obligation can be requested to conclude non-competition agreement while confidentiality agreement applies to any employee having access to confidential information;
- 企业可以分别约定因员工违反竞业限制义务和保密义务而需支付的违约金。  
Penalty for breaking the obligation of non-competition and confidentiality can be agreed separately;
- 在必要的情况下，企业可以与同一员工同时签署保密和竞业限制协议。  
If necessary, the company can conclude both confidentiality agreement and non-competition agreement with same employee.

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