It just became a little easier to protect trade secrets in Sweden and Finland

The EU has taken measures to harmonise EU law on trade secrets. The stated goal of the new Trade Secrets Directive is to strengthen competition and to improve conditions for innovation and the transfer of knowledge within the inner market. The new Directive was supposed to be implemented by the member states by June 2018.

Therefore, Sweden and Finland have reviewed their legislation concerning trade secrets to meet the goals of the new Directive. See how the new legislation will affect your business below.

In Sweden, trade secrets are now protected after the termination of the employment

The major changes in the new Swedish Trade Secrets Act compared to the old act are that more actions are considered illegal and prohibited. Additionally, anyone who unlawfully utilises a company secret may become liable for damages in more situations than before.

Previously, when the employment was terminated, the duty of loyalty ceased to apply. However, company secrets may still be protected under the new Trade Secrets Act. The new Act further strengthens the protection for companies in Sweden, but it also encourages trade secret holders to take active measures to protect their secrets. It is not required to register the information, which the holders' wants protected – this protection occurs automatically. However, in Sweden and in Finland, employers must take reasonable measures to keep the information confidential. For example, by storing the information on servers that require login information.

The new Finnish law offers better opportunities to file breaches as disputes

Finland did not have a trade secrets law before the Directive was implemented. Trade secrets were protected by, for example, the Penal Code, the Employment Contracts Act, and the Unfair Business Practices Act. The new Trade Secrets Act replaced the provisions of the Unfair Business Practices Act and further strengthened the protection of trade secrets. Traditionally, trade secrets have been handled as criminal offences. However, the new act offers better and more expedient opportunities to file breaches even as disputes.

In Finland, the obligation of professional secrecy extends to the time after the employment has ended. After the end of the employment relationship, the employee has a two-year obligation of professional secrecy under the Finnish Criminal Code, even if the information has been legally obtained. However, an additional confidentiality agreement can be entered into by the employer and the employee. A confidentiality agreement can clarify the statutory obligation of professional secrecy and specify the obligation of professional secrecy after the 2-year time limit as set in the statutory obligation.

What does this mean for your business?

Even when the legislation in the Nordic countries may seem similar, especially after EU harmonisation, one should still pay attention to the details. As indicated above, there are still some key differences between Swedish and Finnish trade secrets practice. Therefore, it is important not to neglect fact-checking different national legislation. We, as an international law firm, can help you understand the different legal frameworks, and how to comply with the requirements they hold.

Further, for the protection of trade secrets, the mere fact that specific information is considered a trade secret will no longer suffice. Companies must actively take reasonable steps to protect their trade secrets – and be able to prove this in court. In this regard, do not forget to conduct a review of safety measures including, but not limited to, technical monitoring and IT security.

The Directive strengthens the position of employees – most notably, their freedom to bring any knowledge and experience gained during their employment to their next employer. Companies should, therefore, take steps to ensure confidentiality during employment contractually. Additionally, it could be a good idea to conduct training with employees to inform them of what information constitutes trade secrets. For example, in Sweden to constitute a breach of an obligation not to disclose trade secrets, it is sufficient that an employee sends confidential information that is considered trade secrets to his or her private e-mail without permission or uploads such information to their private cloud storage service. We advise companies to inform their employees about the changes in the legislation.

It is important to understand the distinction between competition clauses and confidentiality agreements. Although the new act provides enhanced protection of an employer's trade secrets, your protection can be strengthened by such agreements. Too often, competition clauses are made without specific reflection on their necessity. A confidentiality agreement is in most cases sufficient for the protection of trade secrets, and there is no need for a separate competition clause. The wisest thing would be to enter into an obligation of confidentiality already when signing the employment contract. Consider whether sanctions and provisions about contractual damages should be included in the employment contract, which you may require if the employee violates the confidentiality obligation. However, do not add unnecessary competition clauses, which usually appear to be expensive for both parties.

We recommend to review current confidentiality agreements and agreements entered into with employees with access to trade secrets and to implement new agreements accordingly. In case you do not have an existing confidentiality agreement there is also the option of signing one when an employment relationship is terminated. Furthermore, we recommend to conduct an internal review of all instances of previous and current trade secret misappropriations, as well as potential future instances and do not forget to review agreements with consultants and contractors.

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