

Feng Xuchao (Charles)<sup>1</sup>

### **'Protecting Trade Secrets is a Human Resource Issue'**

The protection of trade secrets lies not only in how many or which measures are adopted by companies to protect their secrets from being easily disclosed or used. It also lies in how to manage employees well, so they do not disclose trade secrets. In a way, the latter is more important, because the confidentiality measures adopted by companies will never be one hundred percent perfect however strict the measures may be. In China, about seventy percent of trade secret infringement cases are caused by employees. Therefore, human resource management plays a very important role in trade secrets protection.

### **How to Effectively Enforce Non-competition**

Non-competition is one of the legal measures that protect trade secrets in the People's Republic of China (PRC). Protecting trade secrets through non-competition means to physically isolate employees from joining rival companies, to prevent them from "accidentally" disclosing the trade secrets of their former employers to their new bosses, or using such trade secrets in technological research and development while working in rival companies. Therefore, the PRC Employment Contract Law provides a system of liquidated damages for employees' breaches of non-competition agreement. That said, companies often make mistakes on enforcing non-competition. They include:

- (1) No employee has executed a non-competition agreement and non-disclosure agreement;
- (2) The company forgets to sign the non-competition agreements with new employees after they are on board;
- (3) The company fails to get back the executed originals of contracts in a timely manner after delivering the non-competition agreements to employees;
- (4) The company forgets to give a notice to employees to enforce the non-competition when they leave the company (in case it is specified in the agreement that the company will determine whether or not to require the employees to perform the non-competition obligations at the time of their departure);
- (5) The company fails to pay non-competition compensation;
- (6) No liquidated damages clause is specified in the non-competition agreement or the amount of liquidated damages is excessively low; etc.

Some of the mistakes are committed by human resources departments, some by legal departments, and some by the person in charge of a company. Any one of these mistakes may cause problems in enforcing non-competition protections. For example, in case the company forgets to sign a non-competition agreement with a new employee when they join, and then tries to ask them as they are about to leave, the employee may not easily agree. Or, if the agreement provides that the enforcement of the non-competition obligations shall be determined by the company in writing at the departure of the employee, but the company forgets to send the notice when the employee leaves, it may result in it being unenforceable.

In a remarkable case, that I dealt with in practice, the parties agree that the company should pay the first installment of non-competition compensation on the departure date of the employee. If the company fails to pay such installment, the company shall be deemed to have released the non-competition obligations of the employee. When the employee leaves the

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<sup>1</sup> Feng Xuchao (Charles) (冯旭超) is a partner at T&C Law Firm, Shanghai (天册律师事务所)

company, the company forgot to make the payment of non-competition compensation on the departure date and was delayed for a month. The labor arbitration committee held the view that the

employee has been exempted from their non-competition obligations since the company did not pay the first installment according to the agreement. Lawyers and businesspeople would do well to note this case.

Hence, the effective enforcement of non-competition lies not only in the refining of the contract terms, but also in the details of practical implementation. This needs the joint efforts of both the human resources department and legal department.

### **Employee Training**

Non-disclosure agreements on their own are far from enough. Companies also need to establish employees' commitment to protect trade secrets through training. Protecting trade secrets is a requirement placed by companies to their employees and it is impractical for employees to learn and understand the importance of trade secrets protection on their own initiative. After all, it is not they, but the employer, who decided that they should remain classified. As such, if companies want employees to care about and protect trade secrets, they should make employees realise that it is relevant to their interests. Systematic training is one way to achieve this, and can also be used as proof of confidentiality measures.

For new employees, the company may conduct induction interviews, informing them of the confidentiality requirements and measures they are required to comply with. For employees on active duty, the company might organise training or seminars on trade secrets protection from time to time, and request the legal department or engage external lawyers to elaborate the importance and legal consequences of trade secrets protection and infringement, interspersed with some practical cases to deepen the learning. For employees who are leaving, the company may have a leaving talk, to emphasise the obligations of protecting trade secrets, and confirming, in person, with the employees that they have handed over and deleted all the documents and information related to the company's work stored on their own devices.

The training cycle should, of course, be appropriate for its context and the training methods could be diversified to increase the interest of training (such as case seminars, knowledge contests and prize quizzes).

### **Corporate culture is not a walk in the park**

Training alone may not achieve the long-term purpose of maintaining employees' consciousness of trade secrets protection. Over time, their awareness of confidentiality will decrease, and the admission of new employees will also dilute the atmosphere of confidentiality. Therefore, companies should pursue a long-term strategy to build up a corporate culture of trade secrets protection. I once had a chat with a ByteDance employee, trying to find out some "inside information" about ByteDance. Passing the test by remaining loyal to his firm, the employee refused to reveal a word. I realised that ByteDance's trade secrets protection culture mattered for this employee, and I appreciate their mum response.

The following guidelines should provide a good idea for how to build a corporate culture of trade secrets protection. Firstly, the company needs to establish complete rules and regulations to specify the scope of their trade secrets, covering protection methods, a specific code of conduct and reward and punishment measures. This should serve as the foundation. Secondly, the company needs to establish and deepen the concept of confidentiality among employees. This could be achieved through systematic and diversified training. Thirdly, it is very necessary to strengthen physical confidentiality measures, such as posting

*Swiss Chinese Law Review*, Volume 1 , Issue 3, 2021.

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confidentiality-related posters, publishing relevant laws, regulations and articles in internal journals, stamping confidentiality seals on relevant documents, setting reminder boxes on electronic documents or intranet systems containing trade secrets, and hanging billboards in places relating to trade secrets, and so on.

Corporate culture is not an abstract concept. It is a soft management tool that can be broken down into various concrete measures, which, if applied correctly, should halt any inertia over trade secrets protection.