

Research on Legal Regulation of Employees' Disclosure of Trade Secrets

Yi Cao

Anhui University of Finance and Economics, Bengbu, 233030, China

Abstract: Under the current high-quality development of business economy, there is a risk that trade secrets will be leaked by employees in a considerable number of industries. Due to the particularity of their own identity, the leakage of enterprise employees will often have a great negative impact, especially some employees who can have access to customer resources and core technologies, The trade secrets they hold have great potential risks for enterprises. In order to maintain the normal market competition order, it is necessary to think about the method of employees disclosing trade secrets from the perspective of legal regulation. This problem should be regulated separately according to the object, which is divided into core employees, resigned employees and employees who "change jobs" and "set up their own portal". It can be considered to improve the legal regulation of employees' disclosure of trade secrets by providing multi-party linkage, consultation between the two sides, clarifying the confidentiality obligation and the meaning of relevant concepts.

Keywords: Resigned employees, Trade secrets, Market order.

1. Introduction

Business secrets held by employees need to be regulated by law for the risks existing in enterprises. With the intensification of international competition, business secrets often have the shadow of fierce competition among countries. A business secret can greatly affect the implementation of a scientific and technological achievement. At present, the downward pressure on the economy has increased, and the economic development has entered a new era of high-quality development. Today, when market competition requires more order and rules, it is even more necessary to clarify and refine the protection of trade secrets. Firstly, this paper expounds the legal regulation of employees' disclosure of trade secrets from both theoretical and practical aspects, then explains some problems existing in this regulation, and finally puts forward my own opinions.

2. Legal Provisions and Practice Status of Employees' Disclosure of Trade Secrets

2.1. legal provisions

Article 9, paragraph 3 of China's Anti-Unfair Competition Law clearly stipulates the infringement of trade secrets. Paragraph 5 clarifies the liability of the third party in the case of disclosure of relevant employees. At the same time, the relevant regulations of non-competition in China also have the function of protecting trade secrets. The existence of non-competition system adds the obligation of keeping business secrets for employees, which plays a very important role in

protecting the business interests of enterprises[1].The protection object of Article 501 of China's Civil Code is expanded from "commercial secrets" to "other confidential information". Some scholars believe that it aims at maintaining the fair competition order in the contractual relationship and restraining improper behaviors. The party who violates the confidentiality obligation bears the tort liability in essence, and there is concurrence with the liability for breach of contract under certain circumstances. The breach of confidentiality obligation is not premised on the parties' express confidentiality, and usually manifests as disclosure or improper use[2].

At present, there is no special legislation on trade secrets in China. On this issue, some scholars think that China should strengthen this special legislation as soon as possible. They think that the current legal norms of trade secrets in China are too general to be specific, and it is difficult to implement and operate them. The related industry subjects are not willing to start legal procedures, and their weak awareness of protecting trade secrets is also one of the reasons. Under the influence of multiple factors, Chinese enterprises are often at a disadvantage in foreign trade competition and suffer unnecessary loss of interests[3].

2.2. Practice status

With the development of knowledge economy, trade secrets can be used as knowledge assets to maintain competitive advantage, increase profit sources and attract venture capital[4]. In the current judicial practice, especially after the revision of the Anti-Unfair Competition Law in 2018, the number of cases and reports of disclosing trade secrets to employees by enterprises has gradually increased.

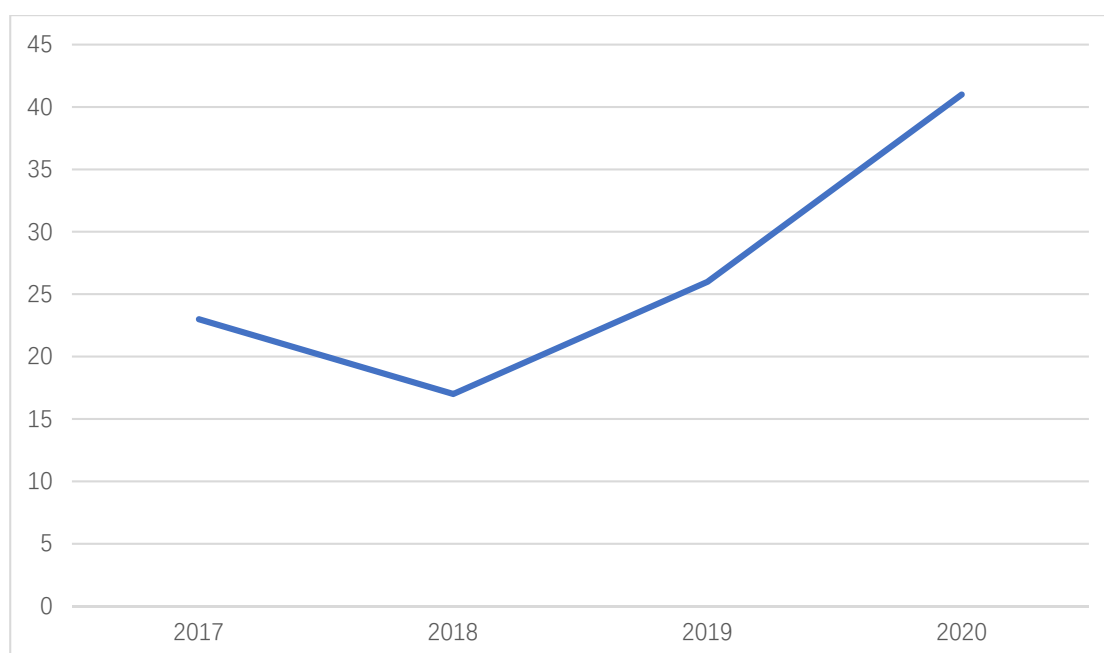


Figure 1. Number of cases involving "trade secrets"

A typical example is that in 2020, Midea Group reported to Foshan Municipal Market Supervision Bureau that its two on-the-job employees and one off-the-job employee violated confidentiality obligations and leaked Midea Group's business secrets. "Legal Daily" also disclosed that Zhu Moumou, an engineer of Guangzhou Taier, colluded privately with Changan Company, suddenly resigned in order to obtain illegal benefits, and leaked and used a variety of product formulas and process technologies after signing a confidentiality agreement with the employer, causing huge losses to Taier Company[5]. In February, 2017, the media revealed that Gao De sued the court, telling Didi to win over six employees of his company who had mastered the core trade secrets to leave and infringe on their trade secrets[6].

3. Issues Related to The Legal Regulation of Employees' Disclosure of Trade Secrets

3.1. Risk regulation of core employees revealing trade secrets

The key employees who master the key technologies and business secrets of an enterprise are often the backbone members and senior managers of the enterprise, and the business secrets they master are often the parts that can determine the next development strategy of the enterprise and affect huge profits. Once the disclosure of business secrets occurs, it will affect the performance of the enterprise, or the market competition order and economic stability, with great potential risks. At the same time, due to its high position in the enterprise, it is often difficult to receive effective constraints, which requires early intervention and regulation at the legal level, long-term management and control, and risk reduction. In some large state-owned enterprises with high-tech skills, the core technology and trade secrets of their core members are often related to state secrets such as the development details of cutting-edge industries, which play a huge role in international competition, which makes it necessary to regulate the risk of core employees leaking trade secrets.

3.2. The disclosure of trade secrets by departing employees lacks institutionalized means of regulation

It is not uncommon for employees to reveal the business secrets of their former work units after leaving their jobs, and the flow of talents is gradually accelerated. Many people aim at job-hopping to better enterprises and getting better remuneration. The reasons are, in fact, the weak standardization of the current labor market, the weak awareness of enterprises in protecting trade secrets, the low risk and high return of employees' disclosure of trade secrets after leaving their jobs, the imperfect legal norms, the late establishment of the protection system and so on.

3.3. Legal regulation of employees' disclosure or utilization of customer resources of the original unit after leaving the company

In the fierce market competition, the frequent flow of talents often leads to the leakage and infringement of trade secrets, which bring economic losses to the obligee and seriously threaten the business secrets of enterprises[7]. At present, it is difficult to define the loss of enterprise customers and the leakage of business secrets caused by employees' "leaving" or "setting up another portal". In practice, there is often such a situation. After an employee of Enterprise A resigned, he set up an enterprise B with similar business scope, but the original customers all established cooperative relations with the current enterprise B, resulting in the loss of customers of Enterprise A and the loss of interests. In this case, is the customer information held by employees a trade secret? If so, what kind of behavior constitutes an infringement of this trade secret?

4. Suggestions on Legal Regulation of Employees' Disclosure of Trade Secrets

4.1. Establish an early intervention regulation system for the disclosure of business secrets by core employees

In order to minimize and avoid the risks mentioned above, we should establish an early intervention regulation system for the disclosure of trade secrets by core employees, which can be divided into the following aspects:

(1) Establish a review mechanism for entry and promotion. For employees through social recruitment, campus recruitment and even talent introduction, it is necessary to establish a relatively complete review mechanism, and make a detailed understanding of their personal credit information, criminal records, civil dispute history and work experience, especially for employees who will enter classified positions in the future. In terms of promotion, since the promoted employees are already internal employees of the company, the review process is often a mere formality, so it is necessary to further strengthen the review of the promoted employees, especially for those employees who may become senior executives or other employees who are easy to contact with core technologies and trade secrets in the future. This is a pre-insurance measure to prevent the core employees from revealing trade secrets.

(2) Clarify the internal personnel management and supervision system. Considering the independence of enterprise management, we can consider establishing a linkage supervision mechanism among the legislature, the judiciary, the government and the enterprise, jointly formulating an internal anti-leakage system for commercial secrets that may involve stable economic operation, and formulating a specific supervision mechanism for key employees who master these commercial secrets to prevent the internal supervision of enterprises from being loose or even ineffective.

(3) Relevant enterprises hold regular meetings to prevent employees from leaking business secrets in private. It is highly probable that the core employees will reveal trade secrets to related enterprises with competitive relations. To some extent, the establishment of an open joint consultation mechanism can eliminate the commercial risks caused by private collusion and prevent unfair competition.

(4) Establish an early warning mechanism for the disclosure of business secrets of core employees. This mechanism should be mainly led by local judicial organs, which should carry out early warning detection and normalization analysis on the open trips and transactions of the core employees in enterprises, and incorporate it into the overall analysis of local economic big data analysis to maintain market competition order and economic security and stability.

In addition, some scholars believe that improving the personnel files of employees can also be used as a job to manage core employees and prevent them from leaking trade secrets. The so-called personnel files, that is, information about employees' academic qualifications, expertise, inventions and research and development achievements, can not only be the basis for their competence, but also be one of the references for the possibility of leaking trade secrets[8].

4.2. Establish a complete legal regulation system for departing employees to keep business secrets

Some laws and regulations of our country have made some regulations on the behavior of employees who leave the company to reveal trade secrets, such as "People's Republic of China (PRC)"labour law"Article 22"labour contractThe parties may agree in the labor contract on matters related to keeping the business secrets of the employing unit ",and Article 4 of the Compensation Measures for Violation of the Labor Contract" If the laborer violates the confidential matters agreed in the labor contract, causing economic losses to the employing unit, according to the anti-unfair competition lawThe provisions of Article 20 shall pay the compensation expenses of the employer ". However, these regulations need to be refined and improved.

(1) Legislation requires enterprises to clearly stipulate confidentiality obligations when signing employment agreements with employees.

Because the vast majority of employees have not received legal knowledge education when entering into contracts with enterprises, let alone confidentiality knowledge, so this requires that the undertaker of late risks, that is, the employer, should clarify its confidentiality obligation with the employee when the agreement is signed, and the legislation is clear to protect the subsequent rights and interests of both the employee and the employer from infringement.

(2) Strengthen confidentiality measures for trade secrets that relevant employees can easily access.

Confidentiality measures not only have its own protection function, but also have a function of "expressing" trade secrets. In law, it can be understood that an enterprise explicitly expresses that the information or articles are trade secrets and adopts confidentiality measures, which is of great significance for safeguarding the rights of trade secrets after they are leaked. It can be said that keeping trade secrets in a confidential state is one of the prerequisites for enterprises to safeguard their trade secrets' rights and interests.

(3) Define the time limit for the departing employees to keep business secrets.

Some enterprises have required employees to keep business secrets for life after leaving their jobs. Although China's Labor Contract Law stipulates that employers and employees can stipulate in the labor contract to keep the business secrets of employers and confidential matters related to intellectual property rights, this does not mean that enterprises have the right to require employees to keep business secrets for life after leaving their jobs, especially when employees leave their jobs or set up another portal, this requirement is even more unreasonable. So since we can't ask to keep business secrets for life, how can we define the upper limit of this period? The author thinks that the upper limit can refer to China's time limit for non-competition. According to China's laws and regulations, after the labor contract is dissolved or terminated, the time limit for non-competition for the personnel specified in the preceding paragraph to go to other employers that have a competitive relationship with their own units to produce or operate similar products or engage in similar businesses, or to start their own businesses to produce or operate similar products or engage in similar businesses, shall not exceed two years. Then, it is quite reasonable for the employees who are most affected by keeping business secrets to go to employers engaged in

similar businesses after leaving their jobs for two years, so that they are not obliged to keep confidential the business secrets of their original units after two years. On the contrary, it is illogical and unnecessary to ask the departing employees to keep the business secrets of their former units for life while satisfying the non-competition restrictions.

At the same time, some scholars believe that enterprises should control the business secrets to a minimum. According to the principle of "knowing when you need it", enterprises should control the scope of knowing trade secrets to a minimum[9]. Restricting the quantity and degree of employees' knowledge of trade secrets is actually the protection of trade secrets in internal management.

4.3. It is clear that qualified customer resources are trade secrets

Customer resources are of extraordinary importance to enterprises, and employees who have left the company, especially those who have worked for a long time, often have a lot of customer resources, but it is unreasonable to list all customer resources as business secrets. When employees are engaged in business activities, they will inevitably come into contact with a considerable amount of customer information, and some employees will even establish close personal contact with customers. However, these situations are all positive behaviors that are beneficial to the business operation before employees leave. Most enterprises not only do not object to this, but more often they agree and encourage it. After employees leave, different types of customer resources should not all be included in the category of trade secrets, otherwise it will be extremely unfair to the departing employees. It is necessary to further classify customer resources, so as to scientifically protect trade secrets and safeguard the rights and interests of both employers and employees. What kind of customer resources need to be included in the category of trade secrets and regulated by law, the author has the following thoughts:

(1) It has not been known to the public and has not entered the public domain. This itself is also a general feature of trade secrets. Only when it is specified, customer resources unknown to the public can become trade secrets.

(2) The enterprise has made legal investment to obtain the customer resources. Generally speaking, the customer resources may require a lot of money and time investment. If the customer resources are completely obtained by the employees themselves with their financial resources and energy, then from the perspective of fairness, the customer resources should be classified as their personal resources and cannot be legally possessed by enterprises.

(3) The enterprise has strictly managed and protected the customer resources. Some scholars have put forward their own views on the protection of customer information of commercial banks: the secrecy of customer information should be ensured. From the collection, processing, submission, review and use of customer information, it needs to go through several links, and it must also involve personnel in multiple positions. So, to ensure that customer information is kept secret, after classifying customer information, the first thing is to define the classified positions and personnel, and define the confidentiality scope and responsibility of each

position[10].

Like other trade secrets, enterprises should take protective measures against them before they can classify the corresponding customer resources into the category of trade secrets. At the same time, the customer resources themselves often exist in the form of information. Enterprises should manage these customer resources reasonably in their daily operations. If the management is disorderly or even chaotic, it means that enterprises do not think these customer resources are valuable, so they cannot be classified as trade secrets.

5. Conclusion

It is emphasized that the protection of trade secrets is the protection of the competition order between enterprises and the market under the new situation, and it is also the protection of national interests under the current international competition. Since the Sino-US trade war, the United States has repeatedly provoked disputes about trade secrets, among which there are not only the technical advantages of the United States, but also the imperfect laws and counter-measures of our country, which objectively promote the perfection of China's anti-unfair competition law. From the angle of legal regulation of employees' disclosure of trade secrets, this paper analyzes it from many aspects, and improves the relevant legal regulation methods through multi-participation and multi-perspectives, which can provide ideas and suggestions for solving legal problems from a new angle.

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