



Are your trade secrets protected under the new law?

By **Lisa Rix** - 30 July 2018

Imagine you've just found out that one of your ex-employees has joined a competitor and has shared your most important trade secret with them. What legal protection do you have?

Last month, the UK Government added a new layer of statutory protection by enacting the Trade Secrets (Enforcement, etc) Regulations 2018.

The new Regulations set out the remedies available when trade secrets have been unlawfully used or disclosed and provide measures by which courts can keep trade secrets confidential whilst such remedies are sought; this article will guide you through the key points you need to know.

What is a trade secret?

A trade secret is a commercially valuable piece of information which gives an enterprise a competitive advantage for example, the Coca-Cola recipe.

Under the new Regulations, a 'trade secret' means information which is:

- secret
- has commercial value because it is secret and
- has had reasonable steps taken to keep it secret.

The third element (to take "reasonable steps" to protect a trade secret's confidence) is new.

The Regulations allow for trade secret holders to enforce their rights through interim measures, injunctive relief and other remedies.

What does this mean for employers?

It means that there is an additional course of action available to employers who are seeking to act to protect their trade secrets: they can apply for remedies under breach of confidence rules in addition to or as an alternative to remedies under the Regulations where it provides wider protection than under the Regulations. It's not clear at this early stage how these actions will interrelate in practice, but we expect that most claimants issuing applications in the High Court will plead both actions to give themselves the best chance at success.

Since the Regulations provide better enforceability across the EU, it is worth employers making sure that they can show that they have taken "reasonable steps" to protect their trade secrets by, for example:

- Ensuring that trade secrets are protected in employee contracts and confidentiality agreements through non-disclosure clauses and restrictive covenants;
- Restricting access to trade secrets to only those who are under confidentiality obligations by limiting email distribution lists or only making available in hard copy;
- Labelling documents as confidential;
- Encrypting files or using password protection;
- Updating security policies, such as introducing and enforcing a 'clean desk' policy, implementing appropriate information control methods and banning the use of private emails at work. Require employees to sign a document confirming that they have read and agree to such policies;
- Rolling out training for employees to raise their awareness of trade secrets and how to handle that information; and
- Ensuring that employees who leave sign a document confirming that they have returned all copies of trade secrets in their possession and that they will not use or disclose any company trade secrets following their exit from the business.

When recruiting, employers should also consider new employees' restrictive covenants and explore whether new employees are bringing with them any trade secrets. This is because acquisition, use or disclosure of a trade secret will be unlawful if the user knew or ought to have known it was a trade secret, posing a potential risk of liability to employers if they do not carefully consider such issues when hiring.