Protecting confidential information in the remote working environment

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The restrictions on workplaces resulting from provincial emergency orders and the need to physically distance have created a myriad of challenges for employers. Chief among these challenges is setting up or operationalizing remote working for employees. One area that may be overlooked by employers is the security and protection of intellectual property, including trade secrets and confidential information.

What you need to know

- Now that employees are working from home or other remote-access locations, they may require access to confidential company information. This creates a risk that confidential information may be released, shared, or otherwise dispersed. In the event that a company does not take proper precautions in respect of its confidential information, it may be limited in its ability to seek relief from the courts to protect its interests;
- The legal framework surrounding confidential information, including what it is, and how it can be protected; and
- Best practices for managing confidential information in this new mass remote-work environment.

Trade secrets and confidential information

Not all intellectual property will be protected by copyright or patents. Often, companies will treat information as confidential or as a trade secret. Broadly put, trade secrets are forms of information that are generally not publicly known and which give the owner of the secret a competitive or economic advantage over others who are unaware of the information. A company may opt for trade secret protection where there are potential patent registration issues or in an effort to maintain protection for a longer period than that afforded, under the *Patent Act* by example. Trade secrets are a particular type of confidential information, however, confidential information can include a broader scope of documents or knowledge. For example, confidential information that will support a breach of confidence claim may include customer lists, business plans or other data specific to a company's operations that is not publicly known or otherwise obtainable.

It is critical to take steps to protect confidential information. Without taking precautions, not only might trade secrets and confidential information be released to the public, it may also become more difficult to enforce an action for breach of confidence in the event that information is released or misused by an employee or competitor. The test for bringing a claim of breach of confidence requires that the claimant show:

- the information itself must have the necessary quality of confidence about it
- information must have been imparted in circumstances importing an obligation of confidence
- there must be an unauthorized use of that information to the detriment of the party communicating it

In order to establish the above factors, trade secrets and confidential information must be handled in a manner that protects its confidentiality. A trade secret will become lost when it becomes generally known to the public. This concern is now further complicated when the workplace has shifted to remote access, and employees require the ability to access company information in ways that previously would have been confined to the office or job site.

Remote working and protecting company intellectual property

Now that employers are required to shift their employees and operations to deliver services remotely, it is important to review and consider what measures are in place to protect company intellectual property. General security measures that the courts may look at to determine whether information is confidential include:

- security codes and password protection of company information
- labelling of information as confidential, and storage in a secure area or place
- limiting employee remote access to trade secrets and confidential information to certain key employees
- terms in employment agreements in respect of confidentiality
- confidentiality or non-disclosure agreements (NDAs) with contractors

Now is a key time for companies to review and consider whether they currently have appropriate measures in place, and whether any in-place policies require revisions to address the challenges posed by remote work. It will also be prudent to consider updating or implementing policies concerning remote work, including:

- ensuring that employees have access to secure electronic file storage
- review or creation of a work-from-home policy that sets out or reiterates company policy in respect of confidential information, trade secrets and intellectual property generally
- access requirements and permissions for certain employees or contractors
- instructions on storing files and company records (*i.e.*, not on unencrypted thumb drives or physical copies that are not secured)
- utilizing systems that allow the monitoring of intellectual property, including tracking who has access to files and records, and whether information has been downloaded or transferred through other electronic means

In the event that a company or employer suspects that its trade secrets or confidential information have been improperly released or misused, it will be necessary to take swift action, including filing a Statement of Claim which seeks injunctive relief to prevent the use or further disclosure of the confidential information or trade secret.

Takeaway

The challenges facing companies in this new mass remote working environment may impact the security of confidential information. BLG has the experience and personnel to review any policies and company methods to ensure best practices, as well as effectively navigate the court system to enforce company rights in the event of a release or unauthorized use of intellectual property.

By

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