

Conference Paper

Non-disclosure Agreements (NDA) as a Legal Protection on Trade Secrets in Work Agreements in Indonesia

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ORCIDZiana Mahfuzzah: <https://orcid.org/0000-0003-4574-2713>**Abstract.**

A confidentiality agreement or what is often called a non-disclosure agreement (NDA) is often used in every cooperation agreement as a form of protecting a company's trade secret. NDA is a form of a special agreement between business actors as owners of trade secrets and other parties in a working relationship who have access to the trade secrets of a company. However, a business needs to disclose confidential information to other stakeholders to develop its business interests for better profitability. Through the NDA, the recipient agrees not to disclose confidential information contained in the employment agreement. The problem is how to arrange the NDA as a form of trade secret protection in the work agreement in Indonesia. This paper uses a normative juridical approach, secondary data types, and data collection techniques using literature study with qualitative data analysis techniques. The results of the study show that NDAs are not regulated explicitly but can be found implicitly in the Trade Secret Law. By making a confidentiality agreement or NDA, the Parties are obliged to maintain confidential information or trade secrets in order to protect the owner of the Trade Secret. Policymakers in a company require the inclusion of an NDA clause in making work agreements that require employees to maintain the confidentiality of company information in accordance with statutory regulations and company regulations.

Keywords: non-disclosure agreement, trade secret, work agreements

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1. INTRODUCTION

Very fast and significant economic development encourages companies to continue to develop their business and technology for high competitiveness. Many companies in Indonesia are ready to spend a sizeable budget to support their business development. Apart from trying to provide the best results and maximize the fulfillment of consumer rights, strategies, methods and technology are significant factors in maintaining the company's existence.[1]

Of course, those factors are not necessarily publicly acknowledged, especially competitors. Information like this is important for improvement and company benefits

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because of its high economic value. Due to their secrecy, companies implement trade secrets as an ideal protection for their business.[2]

In Indonesia, trade secrets are regulated in Law Number 30 of 2000 concerning Trade Secrets. Trade secret is a very expensive asset, because it will be a very powerful tool to compete with competitors in the business field.[3] Trade Secret is information that is not known by the public in the field of technology and/or business, has economic value because it is useful in business activities, and is kept confidential by the owner of the Trade Secret.

The scope of protection for Trade Secrets includes production methods, processing methods, sales methods or other information in the field of technology and/or business that has economic value and is not known to the general public. This IPR regime is one of the right ways to protect ideas, apart from patents.

Owners of trade secret rights have exclusive rights. The exclusive right of the trade secret holder is to use the trade secret for himself or share it with other parties through a license. The substance of the license agreement is made based on the applicable intellectual property rights provisions and the structure of the agreement adheres to the general provisions of the agreement as stipulated in the Civil Code, including the Non-disclosure Agreement (NDA).

Non Disclosure Agreement (NDA) is a confidentiality agreement between the owner of a Trade Secret and employees to maintain the confidentiality of certain information and/or materials that they share with access/information, but are not allowed to be known by outside parties (third parties).

The owner of a Trade Secret is obliged to maintain and maintain the confidentiality of the information in his possession. This can be done through various steps, such as through making contracts whose contents explicitly oblige other parties not to divulge secrets with the NDA. This kind of written contract will be very helpful, especially to avoid misunderstandings over the scope of confidentiality.

The problem raised in this research is how to arrange a Non-Disclosure Agreement as a form of trade secret protection in work agreements in Inonesia?

2. METHODOLOGY

The research method used in this paper is normative juridical research, namely by analyzing legal principles that refer to positive norms or rules that apply. The source of legal materials is in the form of primary legal materials consisting of laws and regulations

and other regulations related to the discussion of issues, and secondary legal materials which are non-official publications as references.

3. RESULT AND DISCUSSION

Trade secret protection is based on business plans, business management, production processes and procedures that are secured from the public in the technology and/or business fields. They have economic value because they are useful for business activities and their confidentiality is protected.[4] Trade secrets are sensitive, abstract, and closed intellectual property for information that is intentionally withheld. [5]

In Indonesia, trade secrets are regulated for the first time in Law Number 30 of 2000 Concerning Trade Secrets (hereinafter referred to as the Trade Secret Law). The basis for this arrangement is the ratification of the Agreement Establishing the World Trade Organization (WTO) which also includes the Agreement On Trade Related Aspects Of Intellectual Property Rights (TRIPs agreement) with Law Number 7 of 1994 so that it is necessary to regulate secrecy. trade.[6]

As previously stated, Indonesia is a member of the TRIPs agreement, so Indonesia is obliged to harmonize its legal system with Intellectual Property, including copyright[7], as well as trade secrets.

The protection of trade secrets is aimed at protecting the creations of human minds that have commercial value as well as being a means of preventing unfair business competition. The owner of the trade secret has the right to share his trade secret through a licensing scheme or prohibiting other parties from using it.

At first glance, the concept of trade secret protection is similar to a patent, namely protection of information owned by individuals or corporations. The difference is related to the time the information is protected. Patents can be given protection after the inventor submits a patent application to the Minister of Law and Human Rights (HAM). Meanwhile, trade secrets apply automatically without the need to be registered or applied for in advance as long as they meet the criteria as a trade secret.

In article 1 paragraph (1) of the Trade Secret Law, "Trade Secret is information that is not known by the public in the field of technology and or business, has economic value because it is useful in business activities, and its confidentiality is kept by the owner of the Trade Secret".

As we know, trade secrets are information that is not known in general or is known in a limited way by certain parties on matters relating to trade. This trade information needs to be protected confidentially because:

- a. morally reward the party who finds it;
- b. materially provide incentives.

Trade secret protection is provided if an information is considered confidential. Confidential means information that is not known in general. Information is considered to be kept confidential if the owner or parties controlling it have taken appropriate and appropriate steps. Appropriate and appropriate are all steps that contain measures of fairness, feasibility and propriety that must be carried out. For example, in a company there is a standard procedure for keeping confidential records. There is a confidentiality agreement signed by the employee when the initial recruitment of employees or workers working in the confidential environment is operational so that the secret is truly protected.

Trade secret arrangements in the Trade Secret Law cover production methods, processing methods, sales methods or information in the field of technology or other businesses that have economic value that is not known to the general public, including food/beverage recipes, formulas, production processes, client lists and marketing plan.

Trade secrets have something special, namely the length of time the protection provided by this law is unlimited. However, without a time limit, this has conditions, namely as stated in Article 3, namely that trade secrets are protected if the information is still confidential, has economic value, and is kept confidential through appropriate efforts. In Indonesia, forms of trade secret protection can be classified into preventive and repressive forms (actions taken after receiving legal consequences).[9] Preventive protection is in the form of contracts or agreements that aim to create legal certainty and justice for both parties who made the agreement or a third party. Consequently, the agreement or contract must be made in accordance with applicable law.

Every company in carrying out the trading process has its own trading strategy which cannot be known by other parties, therefore Trade Secrets are needed to protect this strategy. Trade secrets can emerge from work agreements between workers and companies, one of which is by implementing a Non-Disclosure Agreement (NDA) in the work agreement.

Non-disclosure Agreement, known as Confidentiality Agreement, is a legal contract between parties that authorizes to provide confidential information disclosed by the disclosing party to the party receiving the information for specific purposes in work relations or for business purposes.[10],[11]

NDA is an effort to protect trade secrets from inside companies between business actors or company owners as owners of trade secrets and their workers. This effort is very important considering that it is not only external parties or third parties who

violate trade secret rights, but internal parties such as workers also have the potential to commit violations such as leaking confidential company information or for the benefit of opening a similar business by utilizing trade secrets from the company where they work. .

The regulation of NDA as a form of trade secret protection is not explicitly regulated in the Indonesian's Trade Secret Law. There are no laws that regulate explicitly regarding agreements between workers and employers regarding the obligation to maintain the trade secrets of the companies where they work, both in Law no. 30 of 2000 concerning Trade Secrets (Trade Secret Law), laws and regulations in the field of manpower, Law no. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (Anti Monopoly Law), as well as in the Civil Code (KUHPdata) and the Criminal Code (KUHP)

The NDA regulations are implicitly contained in the provisions of article 4 letter b of the trade secret law which mentions granting licenses to or prohibiting other parties from using trade secrets or disclosing trade secrets to third parties for commercial purposes.

Then a question arises regarding, "What is the difference between a written agreement and a license agreement?" (The agreement is written in Article 5 paragraph (1) letter d while the license is listed in Article (6). The difference between a written agreement and a license agreement is more clear in the Elucidation section of Article 6 of the Trade Secret Law which stipulates that, in contrast to the agreement on which the transfer of Confidential Trade, the license only provides a limited amount and with a limited time as well.

License is only granted for the use or use of a Trade Secret within a certain period of time. Based on the consideration that the nature of a Trade Secret is closed to other parties, the implementation of the license is carried out by sending or directly assisting experts who can guard the Trade Secret. This is different, for example, from the provision of technical assistance which is usually carried out in the framework of project implementation, operation of new machines or other activities specifically designed in the framework of technical assistance. The license agreement must be registered with the Director General of Intellectual Property Rights and is subject to a fee as stipulated in the law.

We can draw a simple conclusion that the license is known for a time limit, which is essentially (according to the Trade Secret Law) different from the transfer of Trade Secret rights.[12] The rights of the licensee are limited. As for the written agreement, this agreement contains full rights to all confidential information.[13]

Based on the description above, it can be concluded that NDA is a transfer through a written agreement which has an important role to provide obligations and responsibilities to workers that bind the parties in a cooperation contract.

NDA which is regulated in the cooperation contract, the legal basis refers to the Civil Code (KUHPer). In principle, the law will protect confidentiality based on contract law principles such as the consensual principle, the principle of freedom of contract and the principle of *pacta sunt servanda* as stated in book III part three of Article 1338 of the Civil Code.

In other provisions, it has sufficiently accommodated the interests of the owners of Trade Secrets in the form of legal protection under the contract law system. Article 1234 BW states that each engagement is to give something, to do something or not to do something. The sentence “not to do anything” implies that the parties can enter into an agreement whose object is “not leaking trade secrets” that have been known to certain parties, who are in the process of cooperating within a company such as acquiring or consolidating a company.

Based on this explanation, it can be concluded that work contracts in the form of NDAs are permitted by law. The NDA contains all matters relating to the confidentiality of a company’s trade secrets which will incur the rights and obligations as well as the responsibilities of each party to prevent trade secret violations from occurring.

Regarding the rights and obligations of the subject of the agreement, it is stipulated that the company providing the Trade Secret is willing to disclose to the recipient the required information within a certain time, provided that the recipient will keep it confidential and will not disclose it to others and will use it for purposes other than this agreement. This obligation to keep confidential also applies to subsequent agreements that may be made by the receiving party.

The company owner must be careful in making the NDA, apart from paying attention to the contents of the agreement, also by paying attention to the legal terms of the agreement in Article 1320 of the Civil Code so that there is no loophole for workers or third parties to violate trade secrets.

The NDA that has been made by the company and its employees has legal force to be used as a legal basis in the event of a trade secret violation. Article 11 of the Trade Secret Law states that trade secret rights holders or licensees can sue anyone who intentionally or unlawfully commits an act in the form of:

- a. Claims for compensation and/or;
- b. Cessation of all actions referred to in Article 4.

Based on the provisions above, the holder of a trade secret has a monopoly or exclusive right. That is, he can use his own trade secrets and grant licenses to other parties or prohibit anyone from using trade secrets or disclosing trade secrets to third parties for commercial purposes.[14]

From the explanation above, it can be seen that the position of a holder of trade secret rights is very strong. If there is a violation of their rights, the holder of trade secret rights can file a criminal or civil lawsuit

4. CONCLUSION AND RECOMMENDATION

The Non-Disclosure Agreement in Law Number 30 of 2000 has not yet been regulated in detail regarding the Non-Disclosure Agreement as an effort to protect trade secrets. By making a confidentiality agreement or Non-Disclosure Agreement, the Parties are obliged to maintain a confidential information or trade secret disclosed by the disclosing party in order to protect and protect the owner of the Trade Secret. Policy makers require the inclusion of Non-Disclosure Agreement (NDA) clauses in making work agreements that require employees to maintain the confidentiality of company information in accordance with laws and regulations and company regulations.

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