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Intellectual Property & Technology
UK's Trade Secrets Regulations – Five Steps UK Businesses Should Take Now

The Trade Secrets (Enforcement, etc.) Regulations 2018 (the Regulations), which came into force in the UK on 9 June 2018, implement the provisions of the EU Trade Secrets Directive (Directive 2016/943EU). The Regulations will not replace the current UK regime. Instead, they are intended to supplement and sit alongside the existing common law (case law) in relation to trade secrets and confidential information.

Under the Regulations, for the first time, the UK will have a statutory definition of a "trade secret". Broadly defined, a "trade secret" is:

- Information that is secret
- Has commercial value because it is secret, and
- Has been subject to reasonable steps to keep it secret

This definition is narrower than the one currently used by the UK courts and focuses more on whether the information has been kept secret rather than its inherently secret nature.

The new requirement that information must have been subject to reasonable steps to keep it secret means that businesses must continue to use, or put in place for the first time, the usual commercial confidentiality processes. However, the expectation is that the UK's current law on confidential information will continue to apply to protect information that has the necessary "quality of confidence", even if that is not information which is protected by the Regulations.

The introduction of this new legislation should prompt UK businesses to review the processes they have in place to protect their trade secrets to ensure they are robust. After all, it is much better to prevent the misuse of trade secrets in the first place than have to take expensive enforcement action after the event.

Businesses should take the following steps:

1. Put in place a process to identify your trade secrets in accordance with the definition in the Regulations.
2. Undertake a confidentiality audit/health check and create a register of your key trade secrets.
3. Determine if your current trade secret protection process is sufficient to satisfy the new requirements. Businesses should ensure their internal policies are robust enough to demonstrate to a court that reasonable effort was taken to protect trade secrets internally. Acceptable "reasonable steps" will depend on the nature of the information and the circumstances, e.g., the value of the information and the state of the art of technology and measures that can be put in place to protect it.
4. Put procedures in place to secure your information, e.g., ensure confidential documents are marked as such. Protect electronic files with passwords and keep hard copy documents secure. Access to both should be limited on a need to know basis, under clear duties of confidentiality. Use encryption where possible.
5. Ensure you have non-disclosure agreements in place every time you disclose confidential information to a third party. You should also have express contractual provisions in place with anyone to whom confidential information is disclosed. For example, agreements with customers and suppliers, agents and other business partners, plus your contracts of employment should include appropriate confidentiality wording and post-termination restrictions. Certainly, the practice of entering into robust non-disclosure agreements before disclosing information about a transaction or collaboration is ever more important (e.g., a share or business purchase or research project).

Some of these processes will simply not be practicable for some businesses. Ultimately, it will be a trade-off between the inconvenience of having these processes in place and the need to protect data central to the business. However, where the trade secrets are particularly valuable to the business, such inconvenience is likely to be worthwhile.

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