Law on Trade Secrets: commercial considerations

MKK Corporate Law Team (research by Miranda Mamahit, S.H.)

Law 30 of 2000 on Trade Secrets stipulates that a party that divulges the trade secrets of a company could be subject to criminal charges. A secret is defined as that which has an economic value and which is only accessible to a select group: however, if such knowledge enters the public domain, it can no longer be termed to be a trade secret. The company must have taken reasonable measures to ensure that such secrets were kept confidential and secured from outside access to be able to claim that they are in fact secrets. Under Indonesian Law No. 30 of 2000 on Trade Secrets (**"Law 30"**), employers also entitled protection of their trade secrets, i.e. (i) methods of production; (ii) methods of processing; (iii) methods of sale, and; (iv) other information in the area of technology and/or business that has economic value and is not otherwise available to the general public. A company may grant the right to an outside party to access its trade secret for business purposes, and this should be memorialized in a contract.

In practice, companies often require outside parties to sign Non-Disclosure Agreements (NDAs) to protect company secrets or the details of ongoing projects. If a signatory to such a NDA violates the confidentiality clause of the agreement, he could find himself exposed to penalties of up to Rp300,000,000 and potentially two years in prison as per the articles of Law 30. This would be in addition to any penalties set out in a contract that is binding on the parties. If a loss can be proven by one of the parties as a result of the distribution of trade secrets, litigation could follow.

The foregoing highlights the importance of having an effective indemnification clause in a contract to hold the company harmless in the event of losses which the counter-party may allege. Care should be taken in signing NDAs and in keeping all information therein confidential.

Employees who leave a company are also asked to sign termination agreements with non-compete and confidentiality clauses to help protect company secrets and company interests, and employees should be careful in respecting the terms or they too could find charges leveled against them in accordance with Law 30. All employers are advised to include a misconduct clause, including disclosure of confidential information in their employment agreements and Company Regulations, provided that such terminations are subject to Labor Court approval as per all other terminations.

Pre-employment procedures under the law

Made Barata, S.H. and Miranda Mamahit, S.H.

Prior to hiring an employee and sending an Offer Letter, various screening procedures can be carried out. Background checks, the checking of references and reputation research (for manager-level positions) are not regulated under the law. However, we can cite Law No. 13 of 2003 dated March 25, 2003, regarding Labor and Law No. 11 of 2008 regarding Electronic Information and Transactions (**"Law 11"**), which could be of relevance in this case: pursuant to Law 11, it would be prudent and recommended to request a subject's permission before seeking to collect his personal data. During the interview process, such a Release Form can be drawn up and signed by the potential candidate.

Another step that can be taken to check references of a potential employee would be to hire an HR consultant to carry out a background check and sign an Indemnity Letter to ensure that no laws were broken during the course of researching the potential candidate. The original of the Indemnity Letter from the HR consultant should be archived indefinitely since following Constitutional Court Decision No. 1 of 2012, there is no time limit on labor claims.

The company can also request that the candidate obtain a letter from the local police which states that he is not currently the subject of any ongoing investigations. This letter only covers the district where the candidate is domiciled and is only valid for six months prior to the date of the Letter. Another measure that can be taken by employers is to check all references of previous employers. This is a low cost method that can reap a large amount of information if former employers are prepared to speak on the subject.

For more information on pre-employment screening, the selection process, please contact Made Barata at mb@mkklaw.net

What positions are open to expatriates in an insurance company?

MKK Insurance Team (research by Miranda Mamahit, S.H.)

Foreign insurance companies may establish themselves in Indonesia, but there is an 80 percent cap on ownership. The remaining 20 percent must be held by a local partner in a Joint Venture (JV) arrangement. This leads to the question of whether foreign employees are allowed to work in an insurance company. According to POJK 67 of 2016 on Insurance (POJK 67), foreigners are allowed to work in a local or JV insurance company but are limited to certain positions. Foreigners may be employed as (i) an insurance expert, one level below the Board of Directors; (ii) an actuary; or (iii) insurance consultant. POJK 67 also stipulates that a foreigner may only work for five years after which time he must leave the company.

In addition, he is also subject to the Fit and Proper Test (FPT) which he must pass to prove his competence in the insurance industry; the company must assign an assistant to him who he will train as part of the Transfer of Technology (ToT) program, and for every foreigner, the company must employ at least three Indonesian employees (though usually this is not an issue for an insurance company which has a large head count).

For more information on employment matters, please contact Made Barata, S.H. at mb@Mkklaw.net.