



Japanese Employment Law Update



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Employees Joining Competitors and Protection of Confidential Information

According to the National Police Agency, there were 29 criminal cases related to the infringement of trade secrets in 2022, marking the largest number of such cases since 2013 when the government started compiling statistics. This could be attributed to an increase in the number of people changing jobs, as well as stricter information management and heightened awareness regarding trade secrets.

In this issue, we provide an overview of the risks associated with confidential information in (1) the case of an existing employee leaving for a competitor and (2) the case of accepting a new employee who has worked for a competitor.

1. An existing employee leaving for a competitor

(1) Post-termination non-compete obligation and its limitations

Generally speaking, workers can resign at any time with a two-week notice, and they have a constitutional right to choose their new job.

Even if it is not possible to prevent an employee from resigning, imposing an obligation not to compete after resignation would protect current employers to a certain extent.

The validity of such obligation however is not always upheld in courts. In addition, even when an obligation not to compete can be effectively imposed, if violations occur, there are difficult decisions to make, such as whether an injunctive relief can be obtained

during the contractual non-compete period, proving an amount of monetary damage caused by the violation, and whether to expend efforts and costs of a legal action.

(2) Measures to be taken when trade secrets and/or personal information are misappropriated

If a former employee misappropriates information that falls under the category of “trade secrets” as set forth in the Unfair Competition Prevention Act (“UCPA”), special measures can be taken pursuant to the UCPA.

Specifically, in addition to destruction of trade secrets that are deemed to have been removed from the employer, the employer may be able to seek injunctive relief against the use of such trade secrets (such as the sale of products manufactured using such trade secrets and business activities using such trade secrets), and compensation for damages. The UCPA has a presumptive provision regarding the use of trade secrets and the amount of damages which may be used depending on the situation.

Furthermore, if an act constitutes the crime of infringement of trade secrets, a criminal complaint may also be filed.

In order to proceed with such legal actions, employers must prove that the former employee has taken or disclosed the information fraudulently, and although employers may file a "preservation of evidence" procedure in court, it is important to establish an internal system so that employers can track the history of such removal or leakage.

The UCPA defines “trade secrets” which are subject to its protection as meeting the following requirements: non-public knowledge, usefulness and confidentiality management. Of these three requirements, "confidentiality management" is the most easily contested requirement. In order to receive protection under the UCPA, employers need to ensure that this requirement is satisfied by formulating systems and rules to protect the confidentiality of its proprietary information and managing them appropriately on a daily basis.

If information removed by a former employee includes personal information, the employer would need to file a report with the Personal Information Protection Commission in accordance with the Act on the Protection of Personal Information and the former employee can be subject to a criminal penalty under the Act. In addition, the employer could also potentially be subject to criminal penalties in certain circumstances.

(3) Measures to be taken against other malicious actions

There can be cases where former employees' actions constitute tort depending on the maliciousness of the act of acquiring or using protected information or solicitation of employees.

(4) Contacting former employees and their new employers

If there is a concern that a former employee may have misappropriated trade secrets or may engage in a malicious action, one option is to immediately notify the former employee and/or the new employer that the company will consider taking legal action if the former employee has misappropriated the company's trade secrets and use them for the new employer, and will monitor the situation.

The aim of this notification is to make the former employee hesitant about committing violations, and at the same time, encourage the new employer to keep a close eye on the former employee.

If there are indications that the former employee is acting upon the misappropriated trade secrets, the company may consider waiting for a while before sending such a notification in order to collect evidence of the former employee's misappropriation before alerting the former employee.

2. Accepting a new employee who has worked for a competitor

The situation is generally the opposite of 1 above.

In the recruitment process, employers should confirm whether or not a candidate has a post-termination non-compete obligation. If a former employer sends a warning or takes other legal action, the employer needs to consider how to react, including, if necessary, reassigning the employee to another role or putting the employee on "garden leave."

Regardless of whether or not a new employee has an obligation not to compete, if an employee brings in trade secrets of the former employer, the new employer could be subject to criminal charges in the worst case scenario.

To this end, it may not be sufficient to merely ask a new employee to refrain from bringing

such information. In cases where there is a concern in light of the identity of the former employer or the role of the employee, employers should actively take steps to ensure that new employees do not bring such information with them (by, for example, requiring a pledge upon hiring), as well as to continuously confirm and monitor whether such information has not been brought or used by new employees in the course of performing their duties.

Establishing appropriate internal rules for information management and providing periodic education and training would be helpful as well.

TMI Associates

Cross-Border Labor and Employment Team

23rd Floor, Roppongi Hills Mori Tower
6-10-1 Roppongi, Minato-ku, Tokyo 106-6123, Japan
Tel +81(0)3-6438-5511 Fax +81(0)3-6438-5522
Email XBorDerLE@tmi.gr.jp
<http://www.tmi.gr.jp/english/>

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