

4 ways to safeguard confidential information in the era of hybrid working

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As the world is opening up more and more, we are seeing many employers implementing a hybrid working system for many of their employees. In terms of these systems, we are seeing employees being able to work from home and/or from the office and in some cases anywhere in the world.



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A critical question is how does an employer still maintain the integrity of its confidential information, including its trade secrets, in this hybrid working system.

Policies and contracts of employment

When putting into place these new ways of working, it becomes important for employers to determine the rules around the use of confidential information given that employees are more likely to now be taking and keeping confidential information at home, in soft and hard copy. These rules could be set out in a policy or an employee's contract of employment (in the case of new employees).

Such rules should include any measures the employee is required to take to safeguard the confidential information (including but not limited to not using personal devices), how and when such information should be destroyed (if in hard copy), how such information can and should be accessed and how to report a breach of confidential information (for example, if the employee suffered a home invasion or car theft).

The usual confidential information clauses should be retained in contracts of employment, which prohibit an employee from using and/or disclosing confidential information to any unauthorised third party. These clauses must survive beyond the termination of employment.

It would be a good idea for an employer to conduct an assessment on its operations and determine what confidential information its employees have access to, whether such access is necessary for the employee to perform his/her duties and whether there is a need to put in place restrictions as to which employees have access to particular confidential information, especially that which relates to the employer's trade secrets and provides the employer with its unique competitive advantage.

Upgrading of IT infrastructure

There is no doubt that the Covid-19 pandemic and the lockdowns which have happened across the world have shown us the importance of a good IT infrastructure and being able to ensure employees are able to be productive while working from home and share information effectively.

Employers should explore upgrading their IT infrastructure to ensure that the confidential information is safeguarded from any external threats, has restricted access and requires employees to have the necessary access. Such systems can also be used to track the metadata which shows when a document was created, edited or deleted and more importantly who has opened, edited or printed such a document. When an employee prints a document, a non-editable watermark could also be imposed.

Employees should, as far as possible, be provided with company-issued devices to enable the employee to perform his/her duties. This will assist in ensuring that all information on such devices remains in the employer's possession and also provides the employer with the right to monitor and/or call for the return of such devices at any time.

Restraints of trade

Another way in which to ensure that employees do not unfairly compete against an employer and use the know-how gained during their employment is to place key employees on restraints of trade. Restraints of trade operate during the employee's employment and for a specific period thereafter.

Restraints of trade remain controversial given their effect of preventing an employee once they leave the employer from working within a particular industry and territory for a specific amount of time. As much as an employer should ensure that their restraints of trade are well-drafted and have the appropriate clauses (especially if it is to apply in another country), whether it is ultimately enforceable in South Africa will only ever be known when the employer seeks to enforce the restraint, in either the High Court or Labour Court, by way of an interdict.

Key considerations which the court will look at when deciding whether to enforce the restraint are: whether the employer has a protectable proprietary interest, the role of the employee and his/her access to confidential information and the reasonableness of the length of time, territory and scope of the restraint of trade. Restraints of trade can be an effective way to prevent an employee and former employee from using the employer's confidential information unlawfully and/or to gain a competitive advantage. While we are beginning to see the courts apply a more commercial approach to the enforcement of restraints, the downside is that their enforcement is reliant on the employer launching the court proceedings, often on an urgent basis, which can be an expensive exercise.

Training

It is important for employees to understand that the misuse of confidential information and the misappropriation of confidential information could not only result in their dismissal but could also result in the employer being forced to take drastic steps such as seeking an Anton Pillar/"dawn raid" order, whereafter SAPS will raid an employee's place of residence and could, amongst other things, seize the employee's devices.

Employers should introduce regular training on the proper use and safeguarding of confidential information, proper use of the employer's IT system and what should be done upon the termination of employment with any confidential information the employee may still have.

All of the above is of course only as good as their enforcement. Therefore employers will need to ensure that there are effective monitoring processes put in place, regularly monitoring its employees use of confidential information. In addition, compliance, human resources and management teams need to be consistent in their approach to confidential information, ensure that there is the consistent application of the policies and rules and enforce consistent employee discipline where such policies and rules are contravened.

It is also likely that employers will need to do more than simply flex their muscles in respect of restraints of trade and in situations where it becomes aware of an employee misusing and/or misappropriating confidential information. Consequently, employers will need to be more willing to litigate in order to protect their confidential information.

Hybrid working systems are undoubtedly welcomed by many employees and show the positive progression so many employers are making. However, in celebrating this breakthrough, it is important for employers to ensure that their businesses are geared up and properly equipped to safeguard one of their most important assets.

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