

**LEGAL CONSEQUENCES OF VIOLATION OF NON
DISCLOSURE AGREEMENT OBLIGATIONS AS
IMPLEMENTATION OF LEGAL PROTECTION
AGAINST TRADE SECRETS**

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Abstract

This high percentage of potential leakage of trade secret information that has economic value from a company can occur either from parties within the company or from parties outside the company if there is no commitment to safeguard the information. The purpose of this writing is to analyze the regulations regarding non-disclosure agreements in trade secrets law and to examine the legal consequences of violations of these agreements. The benefit of this writing is to provide a juridical understanding of the regulation of non-disclosure agreements in efforts to protect trade secrets, as well as to offer scientific contributions in the dimension of legal science related to the regulation of non-disclosure agreements. This study is based on the vagueness of norms, utilizing a type of normative legal research through a legislative approach and analyzed using descriptive and argumentative techniques. The research results show that non-disclosure agreements are not specifically regulated but are generally addressed in trade secrets law. In terms of legal consequences arising from non-fulfillment of the agreement, there are criminal sanctions, including a maximum prison sentence of 2 years and/or a fine of Rp. 300,000,000, as well as civil sanctions in the form of compensation imposed on parties who harm the company. It would be better if non-disclosure agreements were explicitly regulated by law to strengthen their legal force and provide legal certainty for the parties involved in the agreement.

Keywords: Trade Secret, Non Disclosure Agreement, Legal Impact

1. INTRODUCTION

Trade secrets are a form of intellectual property that has a high economic value because it can be used to increase the competitiveness of the company. The terms confidential information and unknown information are among the various terms commonly used to allude to the concept of trade secrets (Rizkia & Fardiansyah, 2022). Trade secrets are kept when they have economic value, are kept secret through acceptable means, and are confidential. If an information is not known to the public at large or only known by a few people, then the information is considered confidential. In accordance with the definition of trade secret in Article 1 paragraph 1 of the Law of the Republic of Indonesia Number 30 of 2000, hereinafter referred to as UURD, it is explained that "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." For example, information about a confidential production process can help businesses to produce effective and superior goods. Therefore, legal protection of trade secrets is crucial. one way to protect trade secrets is to use a Non Disclosure Agreement (NDA).

Non-disclosure agreement or hereinafter referred to as NDA, which is an agreement or agreement that has the binding force of the parties, because the agreement is included

in the underhand deed, where the underhand deed has the same legally binding force as the authentic deed, however, its formation must not conflict with the current law, then in line with Civil Code Article 1338 which states: *"Every agreement made according to law has legal force against its maker."* This agreement cannot be revoked without the consent of both parties or for legally mandated reasons. Contracts must be followed and made in good faith. Therefore, unless it is based on mutual agreement between the parties or on grounds provided by law, it is irrevocable (Rismadewi & Utari, 2015). A legally binding professional working relationship is established based on the NDA. Information collected during the professional employment relationship may not be disclosed to the employee or any other party to the agreement. Employees remain legally obligated to keep information provided to them during employment confidential even after they have ceased employment (Aliya, 2022).

Confidentiality agreements are seen as important in professional engagements as they will serve as the foundation of the working relationship between the parties. This agreement also applies to workers with indefinite status, but there is no restriction on workers with definite status. The purpose of this confidentiality agreement is to highlight the mutual rights and obligations of the parties, just as the rights of workers are the obligations of employers and the rights of employers are the responsibilities of their workers. In addition, employment agreements are basically made as a preventive measure to anticipate problems or stop disputes that may occur (Ramadhani, 2018).

One of the most likely problems arising from this employment agreement is the alleged leakage of company secrets at the next place of work by the former employee. In the absence of a non-competition clause in the employment agreement, this problem can also occur. By signing a non-competition agreement, employees have committed not to work for a competing company after completing work for a company for a certain period of time. This non-competition clause explains the agreement that the resigning employee will not work for a similar or competing company. However, the application of this non-competition clause has the potential to violate Article 32 paragraph 2 of Law Number 39 of 1999 concerning Human Rights which implies *"Everyone has the right to freely choose the job he likes and is also entitled to fair labor conditions"*.

Therefore, it is necessary to solve the problem as a solution to the problem through company policy in order to apply the principle of certainty and create legal certainty regarding the non-disclosure of company information to third parties or anyone who has given permission in the future. if the employee leaves the company. Gustav Radbruch's legal premise states that the law is made certain if it is in written form (Julyano & Sulistyawan, 2019). When working together, whether as company partners or employees and employers, the parties involved must be able to protect and manage sensitive information so that it does not get out of control and harm the parties in the future. Establishing a cooperation agreement with a non-disclosure agreement to safeguard confidential information is one appropriate approach and a good start (Rismawaty & Dagang, 2019).

Referring to the explanation given earlier, the problem formulations that will be raised for discussion in this article are: 1) How is the Regulation of Non Disclosure Agreement in the Trade Secrets Law? 2) What are the legal consequences for workers in the non-fulfillment of obligations agreed upon in the Non Disclosure Agreement? The purpose of this study is to examine how confidentiality agreements, or NDAs, are regulated as a means of legal protection against the possibility of disclosure of trade secret

information. This research also examines and analyzes the legal consequences for employees who fail to keep their promises if the NDA obligations are not fulfilled. The author hopes to contribute to the understanding of the laws relating to the regulation of NDAs from this research.

Before this writing was carried out, previous research had been used as a reference and source of writing in this study including: 1) Article written by Nugroho et al (2022) entitled "Legal Consequences of Refusal to Sign a Cooperation Agreement (Non-Disclosure Agreement) by Resigned Workers" 2) The article was written by Trilaksana & Rudy (2022) with the title "The Urgency of Non-Disclosure Agreements for Workers who Transfer to Competitor Companies". In the first article, the discussion focuses on "The legal consequences arising if a resigned worker refuses to sign a Non-Disclosure Agreement." In the second article, the discussion focuses on "The inclusion of a confidentiality clause in the addendum to the employment agreement as a win-win solution between the employer and the worker who moves to a competing company." While the research made by the author focuses on "the regulation of NDA in Law Number 30 of 2000 concerning Trade Secrets and the legal consequences for workers in the non-fulfillment of obligations agreed upon in the NDA. so that previous legal studies are updated with this paper when compared to what has been written before. Therefore, the author is interested in raising and conducting legal journal research writing with the title "Legal Consequences of Violation of Obligations in Non Disclosure Agreement as Implementation of Legal Protection of Trade Secrets".

The structure of the discussion in this research is developed systematically to address the main problem formulation related to the legal issues discussed earlier. The findings presented in this article are reviewed, expanded, and given detailed explanations to ultimately provide a definitive response. To clarify the answers, suggestions, and originality of the research findings, the topics researched and debated in this article are based on a study of relevant literature, including recent findings. The structure is presented in sub-chapters that discuss the NDA arrangements in the Trade Secrets Act and then the legal consequences for workers in the event of non-fulfillment of the obligations agreed upon in the NDA. The purpose of this writing is to analyze the regulations regarding non-disclosure agreements in trade secrets law and to examine the legal consequences of violations of these agreements.

2. RESEARCH METHODS

Quoting the opinion of Mahmud Marzuki in his book entitled Legal Research, Legal Research is defined as a process of identifying doctrines, norms, and legal guidelines to solve legal problems faced by the parties (Susanti et al., 2022). Normative legal research is used in this essay. Normative legal research uses legislation as its focal point. In addition to using data sources from primary and secondary legal sources as comparative material, this writing uses a statutory approach.

In order to create a systematic writing in the research, the author provides a review of relevant rules along with arguments based on the law. The method for collecting legal materials for this writing is called library research, which means using descriptive, evaluative, and argumentative techniques as well as thorough reading and understanding of the contents of each legal material to support the analysis carried out.

The writing of this research uses a descriptive data analysis approach to provide an objective description of the legal phenomena being discussed, comparative techniques, namely comparing a legal document with other key documents in order to reach an agreement on legal issues that arise, especially those relating to the regulation of confidentiality agreements or NDAs, reasoning and legal argumentation as a form of argumentative technique used in argumentation strategies to support the disclosure of scientific truth about research findings.

3. RESULTS AND DISCUSSION

3.1. Non Disclosure Agreement Arrangement in the Trade Secrets Act

The regulation of trade secrets in Indonesia has been regulated for the first time in the UURD (Trade Secrets Act). The main objective is to promote industry to be able to compete in the realm of trade both domestically and internationally. To achieve this goal, the Intellectual Property Rights system must create an environment that respects the inventiveness of society through the provision of legal protection. The regulation of the provisions on trade secrets is deemed necessary because Indonesia has also ratified the Agreement on the Establishment of the World Trade Organization which includes the Agreement on Trade-Related Intellectual Aspects. Property Rights, or TRIPs Agreement related to Law Number 7 of 1994. From the discussion, it is deemed necessary to establish this Law on Trade Secrets.

A number of laws and regulations become the legal basis for this draft law including Article 5 paragraph (1), Article 20, and Article 33 of the 1945 Constitution of the Republic of Indonesia, Law Number 7 of 1994 concerning Ratification of the Agreement Establishing the World Trade Organization, and Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition.

In article 1 paragraph 1 of the UURD, "Trade Secret is information that is not known to the public in the field of technology and/or business, has economic value because it is useful in business activities, and is kept or kept secret by the owner of the Trade Secret". The UURD has regulated this trade or company secret. What is meant by such information includes recipes, formulas, production procedures, customer lists, food marketing tactics, manufacturing techniques, processing, sales, or information regarding technology or other industries that have commercial value but are not yet known by the general public. There are several requirements that must be met on the part of the trade secret owner in order to obtain protection for the company's confidential information, among others:

- a. The information therein is confidential
- b. Contains economic value
- c. There is an attempt by the owner of the trade secret to safeguard the confidentiality of this information.

Protection efforts regarding this trade secret can be divided into 2 efforts in it, which include:

- a. Efforts to protect trade secret information from outsiders
- b. Efforts to protect trade secret information from inside the company

In an agreement, there is the principle of freedom of contract which is used as one of the foundations for making the agreement. The meaning of the principle of freedom of contract explains that everyone can basically make an agreement with the substance and type according to the will of the agreement maker, as long as the contents of the agreement do not conflict with the law, decency and public order. The provisions regarding the principle of freedom of contract are stated in Article 1338 of the Civil Code which states that all legal agreements apply as laws for those who make them. If one of the parties breaks the promise of the contents of the agreement, one of the parties who feels harmed from the non-fulfillment of the agreement can file a claim for compensation, in accordance with applicable legal provisions.

The regulation of NDA as a form of effort to protect trade secrets has not been specifically regulated in the Law in the UURD or Law related to employment. Apart from that, if you look at the Law, it has not been regulated or does not allow the preservation of information through this agreement related to the secrets of a business. The principle of freedom of contract can be applied in regulating non-disclosure agreements as long as the agreement does not conflict with applicable laws and regulations.

To provide obligations and responsibilities to employees who have access to the company's trade secrets both those who are still actively working in the company and those who have left, confidentiality agreements are the best way to protect trade secrets, or can be described as the most beneficial effort. To prevent trade secret violations, the confidentiality agreement itself contains provisions regarding the confidentiality of trade secret information in a corporation, which in turn will give rise to rights and obligations and matters that become the responsibility of each party. This effort is considered very important considering that in addition to external parties, internal parties such as employees can also violate company policies by leaking trade information or company secrets in order to gain an advantage over competitors in similar businesses using the company.

Regarding the safeguarding of trade secret information, business owners should be more careful when drafting confidentiality agreements. This includes carefully reviewing Article 1320 of the Civil Code which lists the factors in making an agreement, which states that certain factors must be met for the agreement to be considered valid, the four prerequisites in question are:

- a. Agreement of those who bind themselves
- b. Capacity to enter into an agreement
- c. A certain subject matter
- d. A cause that is not prohibited

The NDA becomes the legal basis if there has been a violation of the trade secret because the NDA has legal force. When one of the parties violates the contents of the previously agreed non-disclosure agreement, it is considered that a default has occurred, where by definition default means not fulfilling something that is required as stipulated in the agreement. In the event of a default or non-performance of what is demanded by the contents of the agreement, a lawsuit for default can be filed with the legal basis of the contractual relationship between the parties that caused the loss and the party who suffered the loss, the violation of the law can be subject to sanctions. The sanction can be in the form of payment of compensation by the party who made the default by the opposing party. The purpose of making this default lawsuit is to put the plaintiff in a

position if the agreement is fulfilled with compensation in the form of loss of expected profits (Safira, 2016).

3.2. Legal consequences for workers in the non-fulfillment of obligations agreed in the Non Disclosure Agreement

A company must have workers or employees who work under the company. Over time, as long as the business is still running, employees will continue to regenerate. Workers who are no longer active in the company have the potential to steal and/or leak company secrets within the company, it is not only inactive employees who have this potential, however, it is possible that current employees will steal trade secrets from the business. Contracting with employees to protect the company's trade secrets should be the first proactive action a company can take. Create and require employees to sign confidentiality agreements, which bind them to keep the company's trade secrets, especially when they leave the company (Sulistyaningsih & Setiawan, 2020).

The creation of a non-disclosure agreement makes workers have an absolute responsibility to fulfill their obligations to maintain the confidentiality of company information in accordance with the non-disclosure agreement that has been agreed upon by both parties bound by the agreement, namely workers both who are still active and who are no longer actively working with business actors as owners of trade secrets. If it is found in the future that the worker does not fulfill his obligations according to the agreement, then the worker is considered to have violated the NDA related to trade secret information. In accordance with what has been regulated in Article 51 paragraph (1) of the Manpower Law states "Work agreements are made in writing or orally," where an agreement is certainly better made in writing to prevent violations or preventive so that there is less potential for violations.

There are types of violations regarding trade business secrets as an unlawful act by using company data or information without permission from the owner. There are 2 types of violations of trade secrets that are expressly stated in the Trade Secrets Act, including:

- a. Intentionally divulging and breaching a written or unwritten agreement or obligation for trade secrets.
- b. Denial of trade secrets that belong to another person who obtains the information or data and holds access to the trade secrets through actions that are considered to deviate from existing regulations (Al-Murtadho, 2023).

One of the parties to the trade secret protection agreement is deemed to have violated the trade secret if the agreed confidentiality agreement responsibilities are not fulfilled. The offending party will receive punishment or sanctions as a form of legal consequences for the worker's mistake in accordance with the agreement agreed between the worker and the owner of the trade secret as outlined in the confidentiality agreement. Especially if the violation is in the form of misuse of information or leakage of information even though the person concerned is still working at the company concerned or has worked at the company. However, regulations prohibiting trade secret violations have some exceptions, which relate to the use or disclosure of trade secrets to protect public safety, health, security, or legal interests. On the other hand, an employee can be sued for breach of contract or tort if the employee fails to perform the duties specified in the confidentiality agreement. If an employee breaches a trade secret, they will be subject to compensation as a civil penalty.

In the event of default or non-fulfillment of obligations on the part of workers either who are still active workers or who are no longer workers under the company concerned in accordance with what has been regulated in the non-disclosure agreement, the owner of trade secrets can take steps to resolve the case in accordance with what has been regulated in the Trade Secrets Act, as for the article in question, among others, Article 11 paragraph 1 of the Trade Secrets Act which reads "The holder of Trade Secret Rights or the licensee may sue anyone who intentionally and without the right to commit the acts referred to in Article 4, in the form of a lawsuit for compensation; and / or cessation of all acts as in Article 4. "To settle claims without going to court or non-litigation, Article 12 of the UURD states, "In addition to resolving the lawsuit as referred to in Article 11, the parties may resolve disputes through arbitration or alternative dispute resolution." or so-called alternative dispute resolution.

Trade secret infringement can also be prosecuted as a criminal offense that gives rise to a complaint, which implies that the complaint of the entitled party will be the basis of the investigation. The party receiving the right in this case is called the entitled party. This is mentioned in the UURD on criminal penalties, which states that any person who violates Article 13 or 14 or willfully and unfairly uses the trade secrets of another party, shall be punished by imprisonment for a term not exceeding two years, as well as a fine in the amount of Rp 300,000,000 (Semaun, 2011).

4. CONCLUSION

In the law related to non-disclosure agreements in the UURD, the absence of special and specific arrangements regarding this type of NDA confidentiality agreement affects the implementation of legal protection of trade secret information. This is critical to protect the company from potential leakage of trade secret information to competitors or the general public through employees who are either still actively working or no longer working in the related company.

As a legal consequence for workers not fulfilling the obligations agreed upon in the non-disclosure agreement, the workers who cause the leakage of confidential company information can be prosecuted for committing an unlawful act (default) against the non-disclosure agreement previously agreed upon with the company. The sanctions for workers who violate the agreement can include civil sanctions in the form of compensation to the company, as well as criminal sanctions in the form of imprisonment for a maximum of 2 years and/or a fine of up to three hundred million rupiah, depending on the demands of the injured party.

A non-disclosure agreement, as a type of confidentiality agreement made to protect confidential information in a company, should be explicitly regulated in the law with the aim of strengthening legal force and providing legal certainty. This is crucial because problems related to the leakage of confidential information have the potential to expose sensitive information to the public and competitors. For the parties who have bound themselves to a confidentiality agreement, in this case the non-disclosure agreement, it is important to adhere to the contents of the agreement that has been mutually agreed upon from the beginning. This should be done to avoid undesirable outcomes for both parties bound by the agreement, as both have the potential to be harmed if the agreement is violated.

REFERENCES

- Al-Murtadho, F. K. N. (2023). *Pelanggaran Rahasia Dagang dan Perlindungannya Menurut Hukum*. Pintar Hukum. <https://pinterhukum.or.id/pelanggaran-rahasia-dagang-dan-perlindungannya-menurut-hukum/>
- Humaira Aliya. (2022). "Semua yang Perlu Kamu Ketahui Tentang Non-Disclosure Agreement (NDA)". Glints.Com. <https://glints.com/id/lowongan/nda-adalah/>
- Julyano, M., & Sulistyawan, A. Y. (2019). Pemahaman Terhadap Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Hukum. *Jurnal Crepido*, 1(1), 13–22.
- Nugroho, K. A., Djumadi, D., & Hafidah, N. (2022). Akibat Hukum Penolakan Penandatanganan Perjanjian Kerjasama (Non-Disclosure Agreement) oleh Pekerja yang Mengundurkan Diri. *Notary Law Journal*, 1(3), 227–246.
- Ramadhani, D. A. (2018). Implementasi Undang-Undang Ketenagakerjaan Dalam Perjanjian Kerja Antara Perusahaan Dan Tenaga Kerja Di Perseroan Terbatas (PT). *Jurnal Yuridis*, 5(2), 186–209.
- Rismadewi, A., & Utari, A. A. S. (2015). Kekuatan Hukum Dari Sebuah Akta Dibawah Tangan. *Denpasar: Jurnal Kertha Semaya Fakultas Hukum Universitas Udayana*.
- Rismawaty, A., & Dagang, R. (2019). Non Disclosure Agreement Sebagai Perlindungan Hak Kekayaan Intelektual Dalam Perjanjian Kerjasama. *AKTUALITA: Jurnal Hukum*, 2, 339–353.
- Rizkia, N. D., & Fardiansyah, H. (2022). *Hak Kekayaan Intelektual Suatu Pengantar*. Penerbit Widina.
- Safira, M. E. (2016). *Hukum ekonomi di Indonesia*. CV Nata Karya.
- Semaun, S. (2011). Perlindungan Hukum Terhadap Rahasia Dagang. *DIKTUM: Jurnal Syariah Dan Hukum*, 9(1), 30–42.
- Sulistyaningsih, D., & Setiawan, A. (2020). *Rahasia Dagang Dalam Perspektif Hak Kekayaan Intelektual*. BPFH UNNES.
- Susanti, D. O., SH, M., & A'an Efendi, S. H. (2022). *Penelitian Hukum: Legal Research*. Sinar Grafika.
- Trilaksana, I. K. H., & Rudy, D. G. (2022). *Urgensi Perjanjian Kerahasiaan (Non-Disclosure Agreement) Terhadap Pekerja yang Pindah Kerja ke Perusahaan Kompetitor* *Jurnal Magister Hukum Udayana* 11, no. 3 (2022): 677-690.

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