

Defend Trade Secrets Act Creates a New Federal Cause of Action for Trade Secret Misappropriation

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President Obama signed the Defend Trade Secrets Act of 2016 ("DTSA") on May 11, 2016, creating a new federal cause of action for trade secret misappropriation. The DTSA became effective immediately.

The following is a summary of the Act:

- Almost every type of information can qualify as a trade secret, as long as: (1) the information is actually secret; (2) the owner took reasonable measures to maintain that secrecy; and (3) independent economic value is derived from that secrecy.
- DTSA's misappropriation cause of action is available to the owner of any trade secret "related to a product or service used in, or intended for use in, interstate or foreign commerce" and a civil action can be brought in federal court against anyone who violates the law.
- Trade secret owners can now choose between a state and federal forum, and may ask a federal court to order an ex parte civil seizure of the misappropriated product or service on the same day the trade secret owner files suit.
- DTSA provides the following remedies: (1) seizure of property necessary to prevent the propagation or dissemination of the trade secret; (2) an injunction to prevent any actual or threatened misappropriation; (3) an award of damages; (4) an award of exemplary damages; and (5) an award of attorneys' fees.
- DTSA forbids injunctions that conflict with an applicable State law prohibiting restraints on the practice of lawful profession, trade, business or limit employment based "merely on the information the person knows".
- DTSA seeks to protect whistleblowers from criminal or civil liability for disclosing a trade secret when reporting a violation of the law if the disclosure is made in confidence to a government official, directly or indirectly, or to an attorney.

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Employers should update their employment agreements and/or policies to provide DTSA notices, including notice about the whistleblower immunity provision, and make sure their definition of “trade secret” complies with DTSA. If an employer fails to provide the proper notice, the employer may lose its ability to be awarded damages or attorney’s fees in an action against an employee who misappropriates the trade secrets.

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