# New Statute Creates Federal Trade Secret Claim

## Labor & Employment Law Update

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On May 11, 2016, President Obama signed into law the Defend Trade Secrets Act (DTSA). DTSA provides a new federal cause of action for misappropriation of trade secrets. A "trade secret" is a broad category of intellectual property. Essentially, it includes any business information that is confidential and derives value from not being known to competitors. It can include everything from technology, to business strategies, to proprietary information about customers and prospects. Unlike patents, copyrights or trademarks, there is no registration system for trade secrets nor is there any set expiration date.

Frequently, trade secret claims are asserted where parties accuse competitors of stealing proprietary information. Trade secret claims can also be used where an employee uses his or her access to company information to compete unfairly, but never signed a restrictive covenant.

Legal protection of trade secrets has been available for many years under the Uniform Trade Secrets Act (UTSA), which has been enacted in some form by 47 states. Now, under DTSA, so long as the trade secret dispute meets threshold Commerce Clause requirements – basically, a nexus with interstate commerce – litigants can access the federal courts. DTSA does not pre-empt state statutes or common law doctrines that govern trade secret misappropriation.

The DTSA adopts the framework of the UTSA with some subtle definitional changes which may or may not be significant depending on how courts interpret the Act. This blog will provide updates as the statute is interpreted. Like the UTSA, it provides for recovery of legal fees for willful violations, allows for punitive damages, and provides for sanctions for bad faith lawsuits. DTSA is not retroactive. It applies to violations that occur on or after May 11, 2016.

Although DTSA is similar to UTSA in most respects, there are some noteworthy differences:

- The Act has a "whistleblower" notice provision that requires employee confidentiality agreements to include language putting employees on notice that they are immune from DTSA liability if they disclose trade secrets in confidence to the government with suspected violations of law or in compliance with subpoenas. If this notice is not provided, an employer cannot avail itself of exemplary damages or attorneys' fees in DTSA litigation against

such persons. Accordingly, employers should update their agreements to provide this notice.

- The Act provides for *ex parte* seizures of property in "extraordinary circumstances."
- The Act has heightened criminal penalties for trade secret misappropriation.

Notwithstanding these provisions, for most employers, the main impact is the option to file in federal court. This enhances lawyers' ability to choose the best forum for their clients' claim. In addition, as the DTSA is interpreted by federal courts, substantive differences in the law applicable to trade secret misappropriation may develop between the state and federal statutes, such that employers would be better served by filing in federal court as opposed to state court.

We will keep you updated in this blog as to the development of the DTSA. Click here to read a follow up on how to comply with notice requirements regarding DTSA.