

Insights: Alerts

A Few Highlights From The Newly-Enacted Federal Defend Trade Secrets Act

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The federal Defend Trade Secrets Act (the “DTSA” or “Act”) became law on May 11, 2016. Here are a few highlights:

1. The DTSA seeks to address the significant effects that trade secret misappropriation has on the United States economy (estimated to be hundreds of millions of dollars each year). The Act passed with overwhelming support based on widespread recognition that the threat of trade secret misappropriation has never been greater (and is increasing) in light of the ease with which information (often stored digitally) can be transferred.
2. The Act creates a federal private right of action for “an owner of a trade secret that is misappropriated . . . if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce.”
3. The Act is meant to coexist with, not replace or preempt, existing state laws protecting trade secrets. There is a significant amount of overlap between the DTSA and many state laws because both draw heavily on the Uniform Trade Secrets Act.
4. The Act applies to misappropriation that occurred after the date of enactment and provides a three-year statute of limitations that runs from when the misappropriation was discovered or should have been discovered through the exercise of “reasonable diligence.”
5. The Act authorizes a number of remedies. Money damages are available to compensate for the actual loss stemming from misappropriation. Where payment of the actual loss is an unsuitable remedy, unjust enrichment or a reasonable royalty may be used as a measure to compensate for misappropriation.
6. The DTSA also allows for injunctive relief to prevent threatened or actual misappropriation. The Act also raises the possibility of awards of attorneys’ fees and exemplary damages.
7. The Act even authorizes *ex parte* seizures in extraordinary circumstances. To support that remarkable remedy, the Act requires an applicant to make a strong showing (similar to that required to support a TRO) that a seizure is needed to prevent an ongoing theft of a trade secret that could cause the trade secret to be lost irretrievably. As a counterbalance, however, the DTSA affords a defendant the right to seek damages for a wrongful seizure.

8. The Act also requires employers to notify employees in employment contracts or agreements governing the use of trade secret or other confidential information about certain immunities the Act provides to employees in whistleblower suits, sealed pleadings, and whistleblower retaliation suits. An employer can meet its notice obligation by providing the required notice in the contract or agreement or by providing a cross-reference to a policy document that sets forth the employer's reporting policy for suspected violations of law. An employer cannot recover exemplary damages and attorneys' fees under the Act if does not comply with the notice requirement.

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