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Defend Trade Secrets Act Signed Into Law

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President Obama signed into law yesterday the Defend Trade Secrets Act, establishing for the first time an ostensibly uniform national trade secret protection standard.

Under the DTSA, a party may bring a civil lawsuit in federal court to enforce any trade secret “related to a product or service used in, or intended for use in, interstate or foreign commerce.” The DTSA does not preempt state law, and therefore parties will retain the option of enforcing interstate (as well as intrastate) trade secrets in state court. Intrastate trade secrets, or trade secrets that are not “used in, or intended for use in, interstate or foreign commerce,” will continue to be enforceable under state law. A party has three years from discovery of a misappropriation (or from when misappropriation reasonably should have been discovered) to file suit under the DTSA. The law sets a maximum penalty of \$5 million or three times the value of the misappropriated trade secret, whichever is greater. In addition, the law provides for an award of double-damages and attorney fees for “willful[] and malicious[]” misappropriation.

Companies may need to update Non-disclosure Agreement forms that they use with their employees and independent contractors. The DTSA includes provisions immunizing from liability certain confidential disclosures made to the government or in court filings. In particular, the law immunizes from criminal or civil liability, under any Federal or State trade secret law, trade secret disclosures made: 1) in confidence to a government official or to an attorney, and solely for the purpose of reporting or investigating a suspected violation of law; or 2) made in a complaint or other document filed under seal in a lawsuit or other proceeding.

Effective May 12, 2016, the law requires employers to provide notice of these immunities in any contract or agreement with an employee, including contractors and consultants hired by the employer, that governs the use of a trade secret or other confidential information. Failure to comply with the notice provisions may result in the employer being barred from obtaining exemplary damages or attorney fees. Thus, if a company hires an independent contractor or consultant to perform work and provides a contract defining confidentiality provisions, the new DTSA requires that the hired party be informed of the immunities the law creates. Most existing NDAs that employers use likely do not include such provisions, and will need to be updated to conform to the new law.

Overall, the DTSA promises additional protection to companies seeking to enforce their valuable trade secrets. Going forward, companies should consider the impact of the law on their employee contracts and agreements, as well as their overall trade secret enforcement strategy.

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If you have any questions or wish to discuss how this decision impacts your business, please contact

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