The Defend Trade Secrets Act of 2016: What Employers Need To Know

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The Defend Trade Secrets Act of 2016 (DTSA), signed into law by President Obama on May 11, 2016, creates a new federal cause of action for trade secret misappropriation. Historically, a civil action regarding actual or threatened trade secret misappropriation was governed by state common law. Although 48 states have adopted some form of the Uniform Trade Secrets Act as their trade secret protection, significant differences remain between the various jurisdictions. The DTSA provides the first federal civil remedy for trade secret misappropriation, thus creating uniformity in the law in this area.

An important new form of relief contained within the DTSA is the seizure provision, which allows a plaintiff to now request, through an ex parte proceeding, seizure of any property "necessary to prevent the propagation or dissemination of the trade secret that is subject to the action." It should be noted that the seizure provision may be used "only in extraordinary circumstances," and a seizure order may only be used as a remedy when other forms of equitable relief are inadequate. This form of relief imposes a high burden of proof on the seeking party and will likely be granted infrequently by the courts, and only as a last resort.

What Should Employers Do Now?

One provision of the DTSA requires immediate action for employers. The DTSA provides civil and criminal immunity to whistleblowers for confidential disclosure of trade secrets to government officials or attorneys "solely for the purpose of reporting or investigating a suspected violation of law." Employers must give notice of that immunity "in any contract or agreement with an employee that governs the use of a trade secret or other confidential information."

Importantly, the DTSA's definition of "employee" is very broad, and includes independent contractors and consultants. In order to satisfy this notice requirement, an employer must either (a) include a notice provision in every employee contract or (b) cross reference a company policy document that is provided to the employee and that sets forth the employer's reporting policy for a suspected violation of law, and also explicitly references the DTSA's notice provisions. This notice obligation is required for every employee's contract entered into after May 11, 2016. Failure to include such notice requirement will result in the employer not being entitled to punitive damages or attorney's fees that may otherwise be available to the employer under the DTSA.

Employers should revise their existing policies regarding trade secret information, and are urged to establish such policies if they do not currently exist. They must also ensure that all employment, non-disclosure, proprietary information assignment agreements, and other agreements relating to trade secrets and/or other confidential information are compliant with the DTSA. Any such agreement that does not comply with the DTSA requirements would limit the employer's right of recovery should a trade secret be misappropriated by an employee or third party.

If you have any questions regarding the issues discussed in this Alert, please contact the author, **Peter B. Phillips**, a member of the firm's Employment Law Practice Group and Corporate Department.