

The Federal Defend Trade Secrets Act Immediate Implications for Businesses That Utilize Employment Agreements and Contracts To Protect Trade Secrets and Other Confidential Information

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On May 11, 2016, President Obama signed into law the Defend Trade Secrets Act of 2016 ("DTSA"), which provides uniform federal protection for trade secrets and confidential business information. The DTSA received bi-partisan support in both the House and the Senate, with the goal of developing a more predictable federal case law governing trade secrets. Prior to its enactment, the substantive law governing trade secrets varied from state to state. The DTSA adds a federal civil enforcement scheme to the existing criminal protections under the Economic Espionage Act, but does not preempt state trade secret laws. Thus, the option to file for protections in state court under state trade secret law remains.

Of immediate importance to employment and human resources practitioners, the DTSA includes whistleblower protections for employees who confidentially disclose trade secrets to a Federal, State, or local government official, or to an attorney, for the purpose of reporting or investigating a suspected violation of the law. The Act also provides criminal and civil immunity to employees who use trade secrets in litigation, including retaliation claims for reporting a suspected violation of law, if they are filed under seal.

Employers also must provide express notice of the whistleblower immunity protections in every written "contract or agreement with an employee that governs the use of a trade secret or other information." Covered employees include individuals performing work as a contractor or consultant.

An employer's failure to provide notice precludes the award of exemplary damages or attorney fees otherwise available under the DTSA.

Businesses with policies or agreements that protect trade secrets and other confidential information should review those agreements for compliance with the DTSA to be in a position to take full advantage of the protections under the Act. This may include employment agreements, confidentiality and non-disclosure agreements, proprietary information and invention assignment agreements, and policies and other agreements that govern the use or disclosure of trade secret or confidential information. Employers should consider the addition to all such new agreements, or amendments to existing agreements, an express notice under the DTSA, or reference to a policy document provided to the employee, that sets forth the employer's reporting policy for a suspected violation of the law.

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