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Legislation and Rulemaking

New Legislation Provides Federal Protection for Trade Secrets

After several years of consideration, the United States Congress has enacted the Defend Trade Secrets Act ("DTSA"), the first federal law designed to protect companies' trade secrets. The DTSA passed with strong bipartisan support, and it was signed into law on May 11, 2016.

Prior to the enactment of the DTSA, businesses seeking to hold someone accountable for the misappropriation of their trade secrets had to rely on the Uniform Trade Secrets Act ("UTSA"), a version of which has been adopted in forty-eight states. Although there is significant overlap between most states' version of the UTSA, some differences do exist, and courts in certain states are more receptive than others to claims under that statute. The DTSA does not preempt or eliminate state law remedies for the misappropriation of trade secrets, and claims now will exist under both federal law and state law (except for New York and Massachusetts, the only two UTSA hold-outs). The enactment of a federal law is predicted to create two significant benefits: (1) consistent, uniform outcomes across the country, particularly for companies with national operations and employees in multiple states; and (2) a guaranteed path to federal court, which may sometimes be preferable to commencing litigation in state court.

Another significant aspect of the DTSA is its authorization of seizure orders. Specifically, the DTSA includes a provision allowing, under certain circumstances, a suing party to obtain an ex parte order authorizing the civil seizure of property wrongfully possessed by the party accused of misappropriating trade secrets. This provision is intended to apply in very rare circumstances where the more conventional approach of seeking an injunction from a court may create significant risk for dissemination of the trade secrets at issue. Injunctions are also available under the DTSA, as is the case with the UTSA, but in the DTSA Congress expressed the clear intention that injunctions under the new law are not intended to be available as "backdoor" noncompete agreements. Other remedies that may be available under both the DTSA and the UTSA include: (1) monetary damages caused by the misappropriation; (2) exemplary damages; and (3) attorneys' fees.

Moving forward, companies interested in fully protecting their trade secrets should be mindful of the DTSA's requirements. In particular, in order to recover attorneys' fees or exemplary damages, the law requires that all employee

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agreements setting out any obligations or restrictions regarding trade secrets or confidential information must provide notice of the statute's whistleblower provisions. In addition, it remains important for businesses to specifically and meaningfully identify their trade secrets and to take concrete steps to protect that information, including but not limited to labeling of trade secrets and limitation of access to that information.