

Advice to Employers: Lessons from the Defend Trade Secrets Act

By Trish Weaver

Congress actually agreed on something! After passing in the Senate, the federal Defend Trade Secrets Act (DTSA) was approved by the House (410-2) and is headed to the White House for signature. The new law provides an additional arrow in a company's quiver when protecting its proprietary information. While most states have adopted some version of the Uniform Trade Secrets Act, the statutory language, interpretation and enforcement vary from state to state. The DTSA provides rights and remedies in addition to the state laws and does not preempt or override state law on trade secrets, confidential information, or restraints on trade.

The DTSA includes a novel and "extraordinary" provision allowing a court – on an ex parte emergency application -- to order the seizure of property to prevent the dissemination of a trade secret. The seizure of property, including computers or other medium containing electronic information, is available where the requirements for obtaining an injunction are satisfied, but the injunction would be inadequate because the party who has misappropriated the trade secret would evade or otherwise not comply with the order. The court must hold a hearing within 7 days of seizure and, typically, no party is permitted access to the seized property until the hearing. The seizure remedy must be pursued with caution as the DTSA imposes liability on an applicant if the seizure is determined to have been wrongful or the scope excessive.

The DTSA also provides for the recovery of actual damages and unjust enrichment resulting from the misappropriation, or alternatively, the imposition of a reasonably royalty for the misappropriator's unauthorized disclosure of use of the trade secret. Punitive damages for malicious conduct and attorney's fees for bad faith filing are expressly provided in DTSA. But in order for an employer to recover these, it must include a notice of whistleblower immunity in any contract or agreement with an employee entered into or updated after the DTSA is enacted if such contract governs the use of a trade secret or other confidential information.

Given its anticipated enactment, employers should review their agreements and policies to ensure compliance with DTSA's provisions. Should you have any questions or like to discuss, please contact Trish Weaver at (301) 951-9360.