

Three Things to Know about the New Federal Trade Secret Law

A new law signed by President Obama on May 11 will have at least three broad effects: 1) federal lawsuits over trade secrets will likely increase, 2) plaintiffs in extraordinary circumstances may now seek seizure orders without prior notice to defendants, and 3) all employers must ensure their employment and confidentiality contracts with employees contain appropriate notice of certain whistleblower protections.

More Trade Secrets Cases Will Go to Federal Courts

The new law, known as the Defend Trade Secrets Act of 2016 ("DTSA"), allows parties to sue in federal courts, even against citizens of the same state and regardless of the amount at stake. Before the DTSA, trade secret cases were governed by state law, usually a relevant state's version of the Uniform Trade Secrets Act ("UTSA"). With the DTSA, Congress hoped to bring more uniformity to the field and direct more trade secret cases to federal judges, who by law already hear all patent and copyright (and most trademark) disputes in the United States.

The DTSA does not preempt or replace each state's trade secret law; instead, it adds options for plaintiffs. Federal trade secret complaints will now likely contain counts under both the DTSA and the appropriate state trade secret statute.

Ex parte Seizures Now Allowed in Limited Circumstances

The DTSA also contains a powerful—and potentially disruptive—new weapon: the power to seize certain things, like computers and servers, on an ex parte basis, without first giving notice to the defense. To curb abusive ex parte seizures, Congress included safeguards requiring plaintiffs to post a bond and granting defendants the right to seek damages and court-ordered sanctions against a plaintiff that seeks ex parte seizure in bad faith. However, Congress also included a section in the DTSA requiring the Federal Judicial Center to develop best practices for seizing and securing "information and media storing the information," and report back within two years. In the meantime, the uncertainty will likely intensify the proceedings. Plaintiffs fearing harm from trade secret theft

POSTED:

May 17, 2016

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will need to move quickly to win an appropriately narrow seizure order, and accused defendants will need to respond just as fast to limit the immediate damage, mount a longer term defense, and push back against abuse by competitors or parties trolling for settlements.

As with any new law, time will tell how sparingly federal courts will grant no-notice seizure orders, just as time will tell how willingly courts will sanction parties who wield the new weapon in bad faith.

Notice Now Required About Whistleblower Rights

But the DTSA, with its nationwide reach, will affect businesses and individual employees right away; employers must notify employees that the DTSA grants employees immunity in cases where whistleblowing (reporting wrongdoing to the government) might disclose a trade secret, and employers must include that written notice in "any contract or agreement with an employee that governs the use of a trade secret or other confidential information." The requirement applies to all such contracts "entered into or updated" after May 11, 2016. Employers who fail to comply forfeit the right to seek enhanced damages or attorneys' fees in a suit under the DTSA.

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