

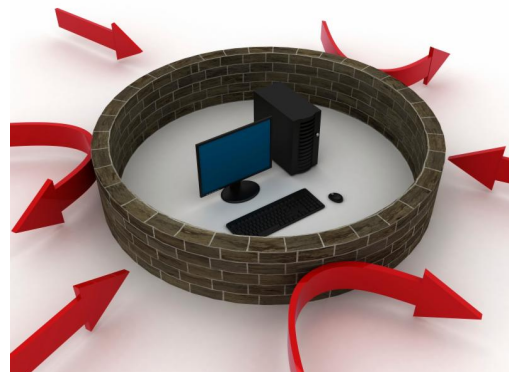
Weston Hurd Client Advisory
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**If You Have Trade Secrets,
You Need To Read This Now**

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Employers should become familiar with a newly enacted federal law which affects their ability to enforce trade secrets protections against their employees and independent contractors. In summary, the Defend Trade Secrets Act of 2016 ("DTSA"), enacted on May 11, 2016, is a new federal law which:

1. Expands an employer's ability to bring trade secret misappropriation claims under federal jurisdiction;
2. Protects certain employees and independent contractors who disclose trade secrets under limited whistleblower protections; and
3. Obligates employers to provide written notice of the DTSA's whistleblower immunity protections in any contract or agreement that governs the use of the employer's trade secrets or confidential information. [1]



The DTSA creates a federal cause of action for the misappropriation of trade secrets if such trade secrets are related to products or services used in or intended for use in, interstate commerce. Before the enactment of the DTSA, claims for trade secret theft were solely adjudicated under varying state laws. This created an inconsistent patchwork of state rulings not only in the application of trade secret laws, but also in the type of protections and damages a litigant could receive should they bring a successful claim for trade secret misappropriation. Fortunately, the DTSA provides an opportunity for uniformity in defining trade secret protections and enforcement at the federal level. For example, employers can now move for the following remedies under the DTSA in federal courts:

1. Actual damages and damages for unjust enrichment;
2. Exemplary damages (not to exceed two (2) times more than what the actual damages would

- be);
- 3. Reasonable attorneys' fees for misappropriations made in bad faith, or found to be malicious and willful; and
- 4. Injunctive relief. [2]

In cases involving "extraordinary circumstances" as defined under the DTSA, the new law provides a mechanism for courts to issue *ex parte* civil seizure orders of property to prevent further dissemination of trade secrets.[3]

The DTSA's statute of limitations is three years from the date on which the theft or misappropriation of the trade secret occurred, or reasonably should have been discovered by the employer. [4]

Additionally, the DTSA provides certain whistleblower immunity protections for individuals who disclose an employer's trade secrets under three limited scenarios:

1. A confidential disclosure made, either directly or indirectly, to an attorney or federal, state, or local government official, solely for the purpose of reporting or investigating the suspected violation of law;
2. A disclosure, filed under seal, made in a complaint or other document related to a lawsuit or other proceeding; or
3. A disclosure made by an individual who files a claim of retaliation against an employer for the individual's reporting of a suspected violation of law; provided that such disclosure is made to an attorney or in a court proceeding under seal, and the individual does not otherwise disclose a trade secret except pursuant to a court order. [5]

The whistleblower protections apply to both state and federal claims of trade secret misappropriation, and also to civil and criminal allegations thereof.

The DTSA requires each employer to provide written notice of the whistleblower disclosure immunity in "any contract or agreement with an employee [or independent contractor] that governs the use of trade secrets and confidential information." [6] Consequently, this notice requirement applies to a vast array of employment and service related agreements, including employment agreements, independent contractor service agreements, confidentiality agreements, business protection agreements, consulting agreements, separation agreements and non-disclosure agreements. Accordingly, this whistleblower immunity notice must be added to each agreement referenced above, or alternatively, cross-referenced in each agreement to an employer policy provided to employees and contractors which governs the use of the employer's trade secrets or confidential information.

Employers who do not comply with the notice requirement under the DTSA are not completely barred from filing claims under the DTSA, but are barred from recovering exemplary damages or attorneys' fees under federal DTSA claims. [7]

The DTSA is not retroactively applied, but does apply to all agreements and misappropriation claims as of May 12, 2016. Furthermore, the DTSA does not preempt state laws regarding theft or misappropriation of trade secrets, except for the provisions related to the whistleblower immunity protections and notice requirements.

Employers are advised to contact your Weston Hurd attorney to review and revise your employment related contracts, service agreements, and confidentiality policies to ensure compliance with the DTSA.

- [1] 18 U.S.C. § 1836
- [2] 18 U.S.C. § 1836(b)(3)
- [3] 18 U.S.C. § 1836(b)(2)
- [4] 18 U.S.C. § 1836(d)
- [5] 18 U.S.C. § 1833(b)(1) - (b)(2)
- [6] 18 U.S.C. § 1833(b)(4)
- [7] 18 U.S.C. § 1833(b)(3)(C).



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