New Federal Defend Trade Secrets Act Prompts Businesses To Revise Their Contracts

Client Advisories

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Congress recently passed the Defend Trade Secrets Act of 2016 ("DTSA"), which President Obama signed into law on May 11, 2016. The main thrust of the DTSA is to create federal remedies for the misappropriation or theft of trade secrets. Information that gives companies a competitive edge in the market often meets the technical legal definitions of trade secrets or confidential information. These definitions, and the protections they are afforded under the law, vary widely. No matter the technicalities, owners of that information are required to take measures to keep the information "confidential" in order to retain the legal protections against their unauthorized use or disclosure. The DTSA has provisions that make it advisable for businesses to revise their contracts that govern the use of trade secrets or confidential information. These measures commonly include confidentiality provisions in agreements with employees and consultants, as well as similar restrictions contained in employee handbooks. If your business does not routinely use agreements of this nature, it should. The DTSA creates a remedy that allows a federal court to award a variety of "compensatory" damages for the misappropriation of a trade secret. If the owner of the trade secret proves that the trade secret was willfully and maliciously misappropriated, the court may also award punitive damages of up to two times the amount of the "compensatory" damages, as well as reasonable attorney's fees.

What Companies Need to Know

Companies need to be aware that the DTSA also contains a "whistleblower immunity" provision which gives immunity from trade secret misappropriation claims to whistle blowers who, provided certain conditions are met, disclose trade secrets or confidential information to government authorities in order to report or investigate the violations of the law, or who file a lawsuit for retaliation by an employer for reporting a suspected violation of law. The DTSA also contains a provision that requires an employer to provide notice of this immunity "in any contract or agreement with an employee that governs the use of a trade secret or other confidential information." This requirement extends not only to employees, but to contractors and consultants for an employer. The employer may comply with this section by including the notice directly in an agreement

with the employee. It may also comply by providing a "cross-reference to a policy document provided to the employee that sets forth the employer's reporting policy for a suspected violation of law" - such as, among other things, an employee handbook. These requirements apply to contracts and agreements that are entered into, or updated after, the May 11, 2016 enactment of the DTSA.

Next Steps for Your Business

The bottom line is that the next time your business enters into an agreement, or amends an existing agreement, with an employee or consultant that pertains to trade secrets or other confidential information, you are required to include notice of the DTSA "whistleblower immunity" in that agreement, or in a collateral document that is provided to the employee. The result of not doing so means your business will not be entitled to punitive damages or attorney's fees in cases of willful misappropriation. Any business that does not provide the notice will be giving up an important right provided by the DTSA to deter people from misappropriating their trade secrets.

If you have questions about the Defend Trade Secrets Act of 2016, or the need to revise your agreements with employees or consultants, please contact your attorney, or Robert T. Egan at 856-354-3079, or Thomas A. Muccifori at 856-354-3056, or any member of Archer's Trade Secret Protection and Non-Compete Group in these offices: Haddonfield: 856-795-2121, Hackensack: 201-342-6000, Philadelphia: 215-963-3300, New York: 212-292-4998.

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