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Defend Trade Secrets Act – What Employers Need to Know

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On May 11, 2016, President Obama signed the Defend Trade Secrets Act of 2016 (the “DTSA” or the “Act”) into law. Prior to enactment of the DTSA, the law governing trade secrets was left to the states, most of which have adopted the Uniform Trade Secrets Act. The DTSA creates a federal cause of action for misappropriation of trade secrets, which is available in conjunction with claims under state law. Among other forms of relief, the DTSA provides for attorneys’ fees and exemplary damages, a form of punitive damages, under certain circumstances. An additional means of protecting trade secrets is great for employers, but the DTSA sets forth specific steps that employers must take to enjoy all of its protections.

The DTSA protects whistleblowers who disclose trade secrets to a government official or an attorney while reporting a suspected violation of law. The DTSA states that “any contract or agreement^[1] with an employee^[2] that governs the use of a trade secret or other confidential information” must notify the employee of the immunity provided by the Act. If the contract or agreement fails to do so, the employer waives its right to recover the attorneys’ fees and exemplary damages available under the DTSA. Notice of the immunity provision must be added “to contracts and agreements that are entered into or updated after the date of enactment of [the DTSA],” which was May 11, 2016.

Here is an example of the type of notice language that could be used after consulting with your attorney:

Pursuant to the Defend Trade Secrets Act of 2016, I understand that: An individual may not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that: (a) is made (i) in confidence to a federal, state, or local government official, either directly or indirectly, or to an attorney, and (ii) solely for the purpose of reporting or investigating a suspected violation of law; or (b) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.

I further understand that: An individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual: (a) files any document containing the trade secret under seal, and (b) does not disclose the trade secret, except pursuant to court order.

So, what is the main takeaway? Be sure to contact your attorney and ask him or her about the DTSA so your relevant employment documents can be revised to ensure you receive the full protections of the Act.

[1] The Act further explains that “[a]n employer shall be considered to be in compliance with the notice requirement . . . if the employer provides 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.”

[2] The Act defines “employee” to include “any individual performing work as a contractor or consultant for an employer.”

