

PUBLICATION

Congress Passes the Defend Trade Secrets Act

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On April 27, 2016, the U.S. House of Representatives passed the Defend Trade Secrets Act (DTSA) by a vote of 410 to 2. Since the Senate already passed the bill and the Obama Administration has long been in favor of it, the bill is virtually ensured to become law.

The Act marks a profound change in trade secrets law. Until now, the protection of trade secrets has been the province of state law, meaning that the legal principles governing such secrets have varied, in some cases quite significantly, from state to state. With the passage of the Defend Trade Secrets Act, the protection of trade secrets will be the subject of a developing body of federal law.

In addition to providing a more consistent body of law governing trade secrets, the new Act will provide procedural enhancements to enforcement of trade secrets. First, assuming that the trade secret to be protected is one that "is related to a product or service used in, or intended for use in, interstate or foreign commerce," the Act provides that an action for the protection of the trade secret may be brought in federal district court. Depending upon whether appropriate steps have been taken for the protection of the trade secret in question, products or services used or intended for use in interstate commerce presumably may include financial services, hospitality services, manufactured products and virtually all other services and products that American businesses market.

Second, the Act provides an unprecedented remedy in the form of a court order for a civil seizure of the allegedly misappropriated trade secret. This means that the victim of a trade secret theft will be able to petition the federal court for an order to seize the materials and associated equipment, including computers, hard drives, storage media and any electronically stored information, pending the final outcome of the case. Trade secrets owners seeking this seizure will need to seriously consider whether such an extreme remedy is merited, because the owners will be required to post security and may be required to compensate the person from whom the property was seized if the seizure is later found to have been improper.

A key issue for employers is whether this will affect non-compete agreements and confidentiality agreements. The DTSA won't be able to create a non-compete agreement if you don't have one in the first place, and it further provides that it will not conflict with existing state laws regarding "restraints on the practice of a lawful profession, trade, or business." As to confidentiality agreements, the DTSA contains an immunity provision that protects individuals who disclose trade secrets to government officials or attorneys for the purpose of "reporting or investigating a suspected violation of the law."

Employers should take time to review their existing non-compete and confidentiality requirements. Please reach out to your regular Baker Donelson attorney or the author of this alert for more information.