



Amending your employment agreements in light of DTSA requirements

May 24, 2016

Earlier this month, President Obama signed the [Defense of Trade Secrets Act](#) (DTSA) — a law that creates a federal cause of action for trade secret misappropriation. This means that a claim for trade secret misappropriation may now be brought in federal district court regardless of the amount in controversy, provided that the trade secret is “related to a product or service used in, or intended for use in, interstate or foreign commerce.” Because the DTSA expressly states that it does not supersede state law in this area, victims of trade secret theft may still file in state court if they so choose.

Under the DTSA’s new whistleblower provisions, individuals are immunized from a trade secret misappropriation claim when the disclosure is made in confidence to: (a) a federal, state or local government official or (b) an attorney, so long as the disclosure is for the sole purpose of reporting or investigating a suspected violation of the law.

Importantly, the DTSA imposes an affirmative duty on employers to provide their employees with notice of these whistleblower provisions. Should an employer fail to provide proper notices in its agreements, that employer will not be able to take advantage of the full range of remedies available under the DTSA, such as exemplary damages (up to two times actual damages) and attorneys’ fee for willful violations.

Accordingly, in order to receive the maximum benefits of this new law, employers should amend any agreement or employment policy relating to trade secret, confidentiality or nondisclosure obligations to include notification of the DTSA's whistleblower protections. This includes, but is not limited to:

- Employment agreements;
- Separation agreements;
- Retention agreements;
- Non-compete agreements;
- Independent contractor agreements; and
- Consulting agreements.

Additionally, it would be in an employer's best interest to also include such notification in any handbook policies or orientation materials relating to the use of trade secrets or other confidential information.

Finally, because the DTSA now creates a federal cause of action, employers should consider amending any forum selection or venue provisions to include a particular federal court desirable to the employer.

