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Client Alert

New Law Gives Employers an Easier Path in to Federal Court in Trade Secrets Cases

By Gary Peeples

A recently enacted federal statute, the Defend Trade Secrets Act ("DTSA"), offers a new path into federal court for employers seeking to protect their trade secrets from misappropriation by former employees. The DTSA expressly creates a private right of action for the misappropriation of trade secrets. This means that employers can now file suit in federal court whenever their trade secrets are threatened, subject to the limitation that the trade secrets must be related to a product or service used in interstate commerce, a requirement that should not be difficult to satisfy in most circumstances. Before the enactment of the DTSA, employers often had no choice but to file trade secret actions in state court.

The DTSA defines the term "trade secret" broadly; the statutory definition includes "all forms and types of financial, business, scientific, technical, economic, or engineering information" so long as (1) the owner has taken reasonable measures to keep the information secret and (2) the information derives economic value from not being generally known or ascertainable by another person who would derive economic value from such information. Remedies available under the DTSA include injunctive relief, compensatory damages, exemplary damages, and attorneys' fees.

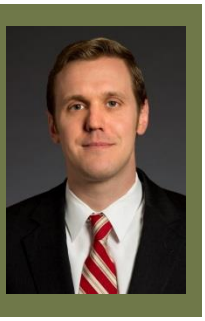
Notably, the DTSA does not displace state-level trade secrets laws, but instead only supplements them. If a particular state's trade secrets laws are more employer-friendly, then filing in state court might be a better option. The DTSA, unlike many states' laws, does not permit a trade secret misappropriation claim to be founded solely on the inevitable disclosure doctrine (i.e., that the new employer will inevitably require the disclosure of the trade secrets in the course of the employment relationship). Rather, an employer that wishes to proceed under the DTSA must proffer some evidence of threatened misappropriation, which is a higher hurdle than inevitable disclosure.

The final component of the DTSA that deserves discussion is its whistleblower notice provision. An employer cannot recover attorneys' fees or exemplary damages under the DTSA unless that employer has, prior to filing suit, provided the employee with written notice that the disclosure of trade secrets to government officials for the purpose of whistleblowing will not subject that employee to criminal or civil liability. Employers should accordingly revise their confidentiality and non-disclosure agreements to include this statutory notice.

Gary Peeples is a part of the Labor and Employment law group at Burch, Porter & Johnson, representing employers in all phases of litigation. He enjoys advising employers on compliance so that they can avoid litigation altogether.

Another significant component of Mr. Peeples' practice is business litigation, representing companies both large and small, with experience at every stage of litigation, from pre-suit investigations to appeals.

If you have questions, please contact gpeeples@bpjlaw.com.



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