

# New Law Creates Federal Enforcement of Trade Secret Rights

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On May 11, 2016, President Obama signed into law the Defend Trade Secrets Act (“DTSA”), which passed both houses of Congress by a combined 497-2 bipartisan vote. The DTSA is the first federal law that allows a private party to enforce its trade secret rights in federal court. Trade secret rights are a form of intellectual property protection afforded to information from which a business derives independent economic value because the information is not generally known, and the business makes reasonable efforts to maintain its secrecy. An example of a trade secret is the formula for Coca-Cola®.

Until the enactment of the DTSA, trade secret rights were governed solely by state law. Each state has laws governing trade secrets, with all but two states (Massachusetts and New York) having adopted the Uniform Trade Secrets Act (“UTSA”). The DTSA does not displace those state laws. Rather,

the DTSA provides an additional legal framework for trade secret protection and creates original jurisdiction in federal courts for lawsuits involving enforcement of trade secret rights.

The DTSA and UTSA have many similarities. For example, the definition of what qualifies as a trade secret and what constitutes “misappropriation,” or theft, of a trade secret is generally the same under both the DTSA and UTSA. Also, both the DTSA and UTSA provide for the recovery of money damages and the issuance of an injunction against future use of the misappropriated trade secret.

However, there are a number of important differences between the DTSA and UTSA. For example, unlike the UTSA, the DTSA provides a federal district court explicit authority to seize assets necessary

to prevent further harm from the trade secret theft. If a former employee downloads a trade secret protected file onto a laptop before leaving to work for a competitor, the court may issue an order to seize the laptop while the case proceeds.

Under the DTSA, a business is required to include a “whistleblower” disclaimer in its confidentiality or non-disclosure agreements with employees, consultants, or independent contractors. This requirement places an affirmative duty on a business to state in its confidentiality or non-disclosure agreements that no one is subject to criminal or civil liability when disclosing a trade secret for the purpose of reporting a violation of law. The UTSA has no similar provision.

Also, unlike the UTSA, the DTSA

does not recognize the “inevitable disclosure doctrine,” which provides that, when an employee has knowledge of trade secrets through his employment, his improper disclosure of the trade secrets is inevitable when the employee goes to work for the competitor. Many states follow the “inevitable disclosure doctrine.”

In sum, the DTSA provides a new federal law for the protection and enforcement of trade secret rights. Similarities and differences between the DTSA and state laws governing trade secret rights require businesses to evaluate the pros and cons of enforcing their trade secret rights under the new federal law, existing state law, or both.

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