

Federal Trade Secrets Act Allows Seizure of Stolen Information

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Practice Area: Labor and Employment

On May 11, 2016, the President signed into law the Defend Trade Secrets Act ("DTSA"), which was passed by Congress in response to increased theft of United States trade secrets by foreign companies. The DTSA includes several provisions focused on immediate protection of trade secrets that are in jeopardy of misuse or disclosure. However, businesses must take certain steps to make use of these enhanced protections.

How Is This Different From State Trade Secret Laws?

Wisconsin—along with 46 other states and the District of Columbia—has adopted a form of the Uniform Trade Secrets Act ("UTSA"). The DTSA and a typical version of the UTSA (including Wisconsin's UTSA) view trade secrets similarly, including empowering courts to order individuals and companies to stop using ill-gotten trade secrets, and providing double damages and attorneys' fees. The DTSA builds on the UTSA to accommodate our ever-expanding international marketplace and recent increases in industrial espionage.

Most importantly, the DTSA allows businesses, under rare circumstances, to ask a court to seize information from a competitor that it contends was stolen. Under such a situation, the court will not just issue an order, but authorize law enforcement to physically seize all documents, including computers and hard drives. This is a very extreme remedy, so businesses must satisfy extremely high requirements before getting a seizure order, including proof that:

- A typical temporary restraining order or other injunction will not suffice;
- Immediate and irreparable injury will occur;
- Greater harm will occur to the party requesting the seizure, if the seizure is denied, than to the party from whom information is seized if the seizure is ordered;
- The requesting party is likely to succeed in proving that the information is a trade secret and it was improperly misappropriated;
- The party from whom the information would be seized actually has possession of the trade secret;
- The requesting party can identify the location of the would-be trade secrets;
- The party from whom the information would be seized could otherwise destroy, move, hide, or make inaccessible the information if given notice; and
- The requesting party has not publicized their request for seizure.

Once the information is seized, the court will protect the information until it can hold a hearing on whether continued court protection is necessary. If the information is seized, neither party will have access to the seized information or the resources on which the information is kept, such as computers or hard drives. The court also will encrypt the information, if requested and shown to be necessary by either party or a third party.

Additionally, the DTSA expands the application of trade secret protection on a nationwide basis, hopefully with additional consistency. First, the DTSA extends trade secret protection to the three remaining states that have not adopted a version of the UTSA. Second, the DTSA is intended to allow consistent application of one federal trade secret law, as opposed to many variations on the UTSA that have resulted from the interpretations of different state courts. Third, the DTSA provides for immediate access to the federal courts, whereas UTSA cases frequently must be brought in state court unless certain jurisdictional requirements are satisfied.

How Can Businesses Take Advantage of the DTSA?

In order to take advantage of the increased protections under the DTSA, businesses must make their employees aware of their obligations to protect trade secrets. This can be accomplished through a reference to DTSA obligations in a traditional non-disclosure agreement, inclusion of such reference in confidentiality policies, confidentiality training, and the various other methods of protecting a business' intellectual property. Additionally, businesses must clearly state in their non-disclosure agreements and policies that an employee who files a retaliation lawsuit may disclose trade secrets to their attorney for purposes of pursuing their claims and use trade secret information in any subsequent court proceeding, provided that the information is filed under seal and is not disclosed, except pursuant to court order. If a business fails to include this notice, it will not be able to pursue double damages or attorneys' fees under the DTSA.

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