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NEWSLETTER

THE NEW TRADE SECRETS ACT – IMPLICATIONS FOR CALIFORNIA EMPLOYERS

On May 11, 2016, President Obama signed into law the Defend Trade Secrets Act (the "**DTSA**"). The DTSA creates a federal civil cause of action to sue in federal court for misappropriation of trade secrets.

The DTSA is similar to, but contains key differences from, the California Uniform Trade Secrets Act. Since the DTSA does not replace or preempt state law, a company will generally have the option of enforcing its rights under both federal and state law.

The DTSA provides for jurisdiction over lawsuits involving trade secrets which are related to a product or service used in, or intended for use in, interstate or foreign commerce. In view of the use of electronic commerce, federal law should be applicable in most instances.

A unique feature of the DTSA is its seizure of evidence provision. The DTSA authorizes *ex parte* (without notice to the opposing party) civil seizures of trade secret material by federal law enforcement. This means that a company may ask the court to order that law enforcement personnel seize the trade secret material from the alleged misappropriator's possession if "necessary to prevent the propagation or dissemination of the trade secret" without an evidentiary hearing. The seizure mechanism is only available under "extraordinary circumstances" where typical injunctive relief would be inadequate. This remedy is not available under California law.

The DTSA provides immunity from civil liability and criminal prosecution for the unauthorized disclosure of trade secrets, for an individual making such disclosure to government officials or an attorney solely for the purposes of reporting or investigating a suspected violation of the law, in a complaint filed in court under seal, or in connection with a lawsuit asserting retaliation for reporting a suspected violation of the law.

An employer is required to notify employees, contractors and consultants asked to sign a confidentiality agreement of this immunity. An employer failing to include this immunity notice will forfeit the right to recover punitive damages and attorneys' fees under the DTSA.

The DTSA's provision regarding confidentiality agreements means that a company using confidentiality agreements, employment agreements, consulting agreements and/or independent contractor agreements containing non-disclosure provisions, should revise the confidentiality provisions to provide for the appropriate immunity provision.

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