



Congress Authorizes Federal Cause of Action for Trade Secret Misappropriation

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Last week, the United States House of Representatives passed the Defend Trade Secrets Act of 2016 (DTSA), a bill that will allow companies to directly file a civil lawsuit in federal court to fight the theft of trade secrets. The bill cleared the Senate with no opposition and passed the House by a vote of 410-2. The bill will now be sent to the White House where President Obama has indicated that he will sign it into law.

Currently, companies cannot file a lawsuit directly in federal court when seeking to protect their trade secrets. Yet, in a 2013 report, the Commission on the Theft of American Intellectual Property found that theft of intellectual property, including trade secrets, is estimated to cost American companies more than \$300 billion a year. This problem is only worsening as cyber theft continues to increase. It is just so much easier to steal information than it was, say, 25 years ago.

Under current law, there are two remedies for victims of trade secret misappropriation. First, the Department of Justice can investigate the theft and file a criminal suit. These projections rarely occurred, however, unless the theft involved a foreign government. Second, a company can file a civil suit in state courts under the various state laws.

The DTSA seeks to streamline that process and provide businesses with a more reliable and predictable way to protect their trade secrets. Specifically, the DTSA will enable a trade secret owner to file a civil action in a U.S. district court seeking relief for trade secret misappropriation related to a product or service in interstate or foreign commerce. The Act also lets the trade secret owner obtain both an injunction and damages as remedies.

A more controversial part of the bill allows a trade secret owner to apply for a seizure order, which requires a court to take custody of the materials, to prevent dissemination of the trade secret. The bill

even allows a party to ask the federal court to permit a seizure without the other side knowing about the request. The seizure remedy is only available if the court makes specific findings, including finding that an immediate and irreparable injury will occur if seizure is not ordered. Any party harmed by the seizure order may move to dissolve or modify the order, and may also seek relief against the applicant of the seizure order for wrongful or excessive seizure.

Other key portions of the DTSA include:

- A three-year statute of limitations on bringing a trade secret misappropriation claim.
- The trade secret owner may recover the following damages:
 - (1) actual loss caused by the misappropriation
 - (2) any unjust enrichment caused by the misappropriation
 - (3) in lieu of damages measured by other methods, a reasonable royalty for the misappropriator's unauthorized disclosure or use of the trade secret; and
 - (4) Double damages and attorneys' fees on top of actual losses if the trade secret is willfully and maliciously misappropriated.
- The trade secret owner may not use the "inevitable disclosure doctrine" to bar an employee from working at a new employer under federal law.
- Immunity is granted to those who disclose a trade secret if:
 - (1) The trade secret is disclosed to a government official for the purpose of reporting or investigating a suspected violation of law;
 - (2) The trade secret is disclosed in an employee's lawsuit against an employer, where the employee alleges retaliation for reporting a suspected violation of law, if the lawsuit is filed under seal.
- An employer is required to provide notice of the immunity provision in any contract or agreement with an employee that

governs the use of a trade secret or other confidential information. In the DTSA, “employee” also includes contractors and consultants. This will require employers to update their agreements concerning confidential information if they wish to take advantage of the DTSA.

- Every two years, the Attorney General and Under Secretary of Commerce for Intellectual Property will submit a report on the scope and breadth of trade secret theft outside the United States.

In allowing civil suits in federal court for illegal procurement of trade secrets, including manufacturing processes, formulas, computer algorithms, industrial designs, business strategies, and customer lists, the bill maintains standards for what constitutes trade secret theft.

If you have questions about the Defend Trade Secrets Act or any other aspect of trade secret or competition law, please contact [Catherine Burgett](#), [Jennifer Rulon](#), [David Skidmore](#), or any other member of the Frost Brown Todd [Labor and Employment Group](#).

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