Did They Need to Make a Federal Issue Out of It? A Brief Overview of the Newly-Enacted Defend Trade Secrets Act and a Few Reasons Businesses May Care.

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Until earlier this month, a form of intellectual property that is often most valuable to owners — trade secrets — lived largely under state law. While its more famous IP cousins — patents, trademarks and copyrights — have been protected by federal law in various forms throughout our nation's history (or around 70 years in the case of trademarks), trade secrets have not been given the same federal protection. That changed on May 11, 2016, when the Defend Trade Secrets Act ("DTSA") became federal law as part of an amendment to the Economic Espionage Act of 1996. That law did not come without skepticism or opposition. But as one group of law professors noted in their letter of opposition to the DTSA in late 2015, the DTSA is "the most significant expansion of federal law in intellectual property since the Lanham Act in 1946 [protecting trademarks]." Legal scholars, pundits and others can engage in a lively debate about the need — or lack thereof — for the DTSA. But what most people will care about is how this "most significant expansion" impacts them.

While the DTSA is similar in many respects to the uniform trade secrets law that all but a few states enacted decades ago, there are a few differences in those laws, as explained below and in future posts. As I explained in a previous blog post, state trade secret laws do not provide an exhaustive list of what constitutes a trade secret. The same is true for the DTSA, which includes a definition that is substantially similar to the definition of "trade secret" found that uniform law. The DTSA provision governing damages recoverable for misappropriation of the trade secret also contains the same types of remedies. So if the scope and basic remedies are the same as existing state law, what is different? Put another way, are

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the critics right when opining that the DTSA was not needed? That debate, while interesting to some, is largely irrelevant to trade secret owners; it is akin to debating whether Obamacare was a good idea instead of figuring out how it impacts you.

What business leaders likely want to know is why the DTSA matters to them. Here are a few thoughts. First, if only for optics, this law places trade secrets on somewhat equal footing as other forms of intellectual property. This may have the effect of helping companies see the importance of identifying and protecting trade secrets, as I wrote about previously. Perhaps that is wishful thinking given that state laws has afforded protection for decades, but one can hope. Second, the DTSA provides a ticket to the federal courthouse that may not have been there previously for victims of trade secret theft. For companies that operate in state court jurisdictions that may be less hospitable to corporate interests, a ticket to federal court is important. Third, the DTSA gives a remedy unavailable under the uniform law enacted by most states: civil seizure. That option is appealing, risky and a bit complicated, which I'll explain in a future blog post.

As for the downside for employers, the DTSA imposes a new requirement that employers notify employees — which includes "contractors and consultants" — of their rights and protections as whistleblowers. Failure to provide that notice could result in limiting the trade secret owner's remedies should it need to pursue litigation to protect those secrets. But more about that requirement — which is both broad and vague in its wording — in an upcoming post.

In sum, the DTSA is an important expansion of intellectual property law, and the additions of (1) a federal court option; (2) civil seizure; and (3) the notice-to-employees obligation are worthy of notice. Did the federal government need to pass a law to provide federal protections of trade secrets? Post your comments below.

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