

# CLIENT ALERTS

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## Defend Trade Secrets Act Signed Into Law

5.12.2016

Nearly two weeks ago Butzel Long was one of the first law firms in the nation to announce the passage by both chambers of Congress of the Defend Trade Secrets Act of 2016 (the "DTSA"). The DTSA passed with overwhelming support in both houses. Yesterday, President Obama signed the DTSA into law, and the Act is now effective. Below is a recap of what is new and what every company should be looking to do in light of this new law. Specifically, there are new provisions that must be written into every non-compete or other restrictive covenant signed by any employees. Butzel Long can help keep your company up to date and in conformance, and in doing so keep your assets protected.

### What is New?

First, and most significantly, the new Act will give parties a federal cause of action for misappropriation of trade secrets, so long as the trade secret is related to a product or service used in interstate or foreign commerce. This means that Plaintiffs can now bring a trade secrets case in federal court. This will also permit parties to more easily subpoena witnesses across state lines, subpoena documents from out-of-state parties, and to enforce injunctions and court orders throughout the United States.

The DTSA also provides a significant new weapon where trade secrets are threatened, if stringent elements are met, for a party to obtain ex parte seizure orders. This means that if someone steals a company's trade secrets, the company can seek a court order to seize the trade secrets, the electronic devices or computers they are found in, or other means or devices of misappropriation without first providing notice to the defendant. This means that a person or company accused of misappropriating trade secrets could have federal marshals arriving at its doors to confiscate computers or servers without even having a chance to be heard. This type of seizure is

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intended only in “exceptional circumstances” where an injunction would not suffice and it can be shown that the person who misappropriated the trade secret would destroy, move, hide, or otherwise make the matter inaccessible to the court if that person were given notice of the claims against it. It is anticipated that such orders will be rarely granted, but this is left to be seen as the courts begin to implement the law.

The DTSA also specifies that any injunction must be “based on evidence of threatened misappropriation and not merely on the information the person knows.” Depending on how courts interpret this, this is likely to curtail use of the “inevitable disclosure” theory. Similarly, the DTSA provides that any injunctive relief cannot “otherwise conflict with an applicable State law prohibiting restraints on the practice of a lawful profession, trade or business.” Thus, in states such as California where non-competes and other restrictive agreements are essentially unenforceable, parties cannot use the DTSA to circumvent state policy.

Lastly, the DTSA also has a whistle blower protection provision. This offers immunity from liability for the confidential disclosure of a trade secret to the government or in a court filing made under seal. This provision includes a notification requirement that employers should immediately implement in all of its agreements with its employees. Butzel Long can assist with updating your agreements.

### **What Should You Do?**

The passing of the DTSA only underscores what every company and every employer should be doing. If you have trade secrets, you should take reasonable steps to keep such information secret. This means, as a minimum starting point, drafting non-compete/non-solicit/confidentiality agreements for those employees that come into contact with your trade secrets. If you already have such agreements, they should be reviewed to make sure that they comply with the new law, including the new employee notice provisions. It also means enforcing those agreements when they are breached. The Butzel Long Trade Secrets team can help with this as they have counseled clients and/or litigated these matters in all 50 states.

Once there is a misappropriation or a threatened misappropriation, you must contact and engage your expert attorneys immediately and move swiftly. Butzel Long will work with you to identify the best and most cost-efficient strategy going forward, including an analysis on whether to file in state or federal court and what extraordinary remedies may be pursued. As always, Butzel Long will remain on the forefront of this DTSA, its implementation, interpretation and enforcement.

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