



New Jersey Human Resources Law Alert

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NEW FEDERAL ACT PROVIDES CIVIL CAUSE OF ACTION FOR TRADE SECRET MISAPPROPRIATION, BUT REQUIRES PROPER NOTICE

Employers must update all employee agreements to take advantage of the protections provided by the recent amendments to the Defend Trade Secrets Act.

Trade secrets can be the lifeblood of any company. Employers should take utmost precaution to prevent disclosure of their trade secrets, particularly in instances where employees use and/or have access to such trade secrets.

Until May of this year, the only federal relief for any incidence of trade secret misappropriation was a criminal action under the Economic Espionage Act. Employers who took legal action against an employee for wrongfully using or disclosing trade secrets typically brought such an action in state court.

On May 11, 2016, the Defend Trade Secrets Act of 2016 ("DTSA"), Pub. L. No. 114-153, 130 Stat. 376 (2016) (codified in scattered sections of 18 U.S.C.), was signed into law. It provided the first federal civil cause of action for the misappropriation of trade secrets related to products and services intended for use in interstate or foreign commerce. The DTSA provides claimants with the following potential forms of relief:

- (i) court-ordered civil seizure of property, which may be done on an *ex parte* application, 18 U.S.C.A. §1836(b)(2);
- (ii) injunctive relief, 18 U.S.C.A. §1836(b)(3)(A);
- (iii) damages (calculated as either (1) actual loss plus unjust enrichment damages or (2) a reasonable royalty), 18 U.S.C.A. §1836(b)(3)(B);
- (iv) up to two times the damages awarded in certain cases, 18 U.S.C.A. §1836(b)(3)(C); and

(v) in certain cases, attorneys' fees, 18 U.S.C.A. §1836(b)(3)(D).

These remedies are in addition to and do not change any state law remedies already available.

However, in order to be eligible for double damages and attorneys' fees under the DTSA, employers must provide proper notice to their employees, contractors, and/or consultants (either in confidentiality/non-disclosure agreements with an employee or in confidentiality/non-disclosure policy documents) that they can avoid liability for disclosure of a trade secret only if such a disclosure is part of a report of illegal activity or a filing of a legal complaint (or other legal documents) under seal.

The Takeaway

The DTSA can provide potentially strong protection for an employer's trade secrets. However, in order to take advantage of all of the protections of the DTSA, including an award of double damages and attorneys' fees, it is recommended that all employee, contractor, or consultant contracts or policy documents regarding trade secrets and confidentiality be updated to provide notice of the protection for employees who disclose trade secrets under the scenarios discussed above. Though the language of the Act requires that such notice be provided only in new or updated employee contracts after May 11, 2016, we recommend that *all employee contracts be updated* as soon as possible.

For a review of your company's current confidentiality and non-disclosure policies, or if you have any questions about your employment practices, please contact Sean R. Kelly or DanaLynn Colao.

About the Co-Editors

For over 30 years, [Sean R. Kelly](#) has focused his practice on counseling employers and defending employment cases, and has successfully tried many employment cases to verdict. He is certified by the Supreme Court of New Jersey as a Civil Trial Attorney, has been repeatedly included in New Jersey Monthly Magazine's list of New Jersey "Super Lawyers," holds the highest rating awarded by the Martindale-Hubbell Lawyers Directory, has been named a Master of two separate American Inns of Court, and is included on the New Jersey Superior Court roster of court-approved mediators.

For nearly 20 years, [DanaLynn Colao](#) has focused her practice on business litigation with an emphasis on employment issues. On a daily basis she counsels public and private clients, both big and small, on a wide array of issues that arise in the workplace including medical leaves of absence, wage and hour claims, disciplinary matters, internal grievances, and hiring and firing decisions. She also drafts employment agreements, handbooks, separation agreements and provides training to staff and management. Through strategic thinking, collaborative discussion and affirmative measures, DanaLynn is able to significantly reduce potential liability for her clients.

Disclaimer

This notice is for informational purposes only and should not be relied upon as legal advice applicable to any specific employment situation. The reader should consult with an attorney to determine how the information discussed in this notice may apply to a particular workplace context.

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