# Defend Trade Secrets Act Advances: Getting Closer to Law?

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Practices

Litigation
Restrictive Covenants, Trade Secrets and Unfair Competition

Defying claims that bi-partisanship in Congress is dead, the United States Senate has passed the Defend Trade Secrets Act by a vote of 87-0. The measure, approved by the upper chamber on April 4, goes to the House of Representatives, which is considering a very similar bill with sponsorship from both sides of the aisle. The President has expressed support for such a law. (Our article, Defend Trade Secrets Act — Congress Tries Again, discusses the introduction of the DTSA in the Senate.)

The DTSA, for the first time, would create a federal private right of action for misappropriation of trade secrets. This would provide companies that are victims of trade-secret theft an alternative to state law (and thus, to the state courts in which cases often are brought) to bring a civil action to enjoin violations of trade-secret theft and to seek a remedy for violations that already have occurred.

There are many similarities between the DTSA and state trade secrets acts. But these similarities have not always been reflected in interpretations of those statutes. The uncertainty of protection for trade secrets from one state to another, as well as the chilly reception in some state courts to out-of-state plaintiff companies, remains a significant motivating factor behind the DTSA. By providing a federal forum and remedy, the DTSA, over time, would create a nationwide body of law and provide a degree of predictability to company litigants. That said, the DTSA does not preempt state trade secrets laws, and thus state law and state courts will remain an option for victims of trade secret theft. Companies still will need to consider whether the state law and court is preferable to the DTSA and federal court, but the DTSA will be helpful in protecting trade secrets across multiple jurisdictions. Even for companies with operations in only one state, access to federal courts and federal judges under the DTSA can be a significant benefit, particularly if the relevant state courts have shown themselves to be slow to respond, or even hostile, to trade-secrets litigation.

Perhaps the the new law's most significant addition to trade secret protection is its authorization of *ex parte* seizure orders — a provision that, in the past, has derailed passage of these bills and which is still controversial. The DTSA addresses these concerns by more narrowly restricting the ability of a court to issue a seizure order. Such an order must be the "narrowest" necessary to achieve the purpose of the order, according to the Senate bill. Further, the circumstances under which such an order can be issued also are restricted. Filing a complaint does not mean a seizure order is automatic or even likely; fairly substantial proof will be required to obtain this extraordinary interim remedy. And there are significant sanctions the court can impose on a plaintiff that wrongfully obtains an order to seize another's property.

## What's Next?

President Barack Obama has come out strongly in favor of the DTSA. So have numerous companies and business groups. Now, the DTSA goes back to the House of Representatives for further consideration in conjunction with the nearly identical House bill with numerous bi-partisan sponsors. The House bill, however, has been stuck in committee since October of last year. It remains to be seen whether the House leadership will move its bill out of committee and reconcile it to the Senate version. If it does, then the DTSA may well be one of the few pieces of legislation to get passed and signed into law this election year.

## In the Meantime,...

Whether the DTSA passes or not, companies are well-advised to identify their trade secrets, protect them against inappropriate use or disclosure, and establish the steps taken to maintain their secrecy. For example, documents containing trade secrets should be labeled as confidential, their distribution should be limited, they should be maintained in secure areas (*e.g.,* locked cabinets), and individuals who are privy to such secrets should be trained on the nature of that information and how to safeguard it. Similarly, access to computer files containing such information should be restricted, and those with access should be trained on the files' confidentiality. Such steps not only can limit the risk of inappropriate use or disclosure, they also are invaluable when seeking a court's protection of the trade secrets at issue.

For companies with multi-state operations, and even for companies with single-state operations but whose trade secrets are portable across state lines (by hard copy documents or electronically), the DTSA provides an opportunity to create uniformity and certainty in protecting trade secrets. In addition, because trade

secrets litigation often involves violations of non-competition or non-solicitation agreements, such claims also may be brought in federal court in tandem with the DTSA violation. Thus, the DTSA could provide a new, meaningful alternative to state court litigation when seeking to protect trade secrets and related unfair competition.

Jackson Lewis attorneys are available to answer inquiries regarding this and other workplace developments and assist with trade secrets protection.