

Gavel to Gavel: New law, regulator settlement affect confidential information

By: Chris Thrutchley Guest Columnist October 5, 2016



Two recent developments necessitate that owners of confidential proprietary information take immediate steps to review and update contracts and policies.

The recently enacted Defend Trade Secrets Act of 2016 gives owners of confidential proprietary information important new tools and options for protecting valuable trade secrets.

The DTSA not only allows victims of trade secret theft to recover compensatory damages, royalties, punitive damages, attorney fees and costs, but also empowers victims to obtain injunctive relief limiting what former employees, consultants and contractors can do for new employers to prevent even the threatened misappropriation and disclosure of trade secrets. When injunctive relief would be inadequate, the DTSA provides for very potent ex parte seizure orders, enabling victims to seize stolen secrets. Further, the DTSA authorizes trade secret owners to sue in and remove actions to federal court.

Keep in mind, the law requires notice of whistleblower immunity to be incorporated in contracts and policies governing trade secrets and confidential information in order to recover punitive damages and attorney fees.

To capitalize on the advantages of the DTSA, companies should review and update their trade secret and proprietary information protection strategies. It is also advisable to audit and consider revising forum selection clauses. If company contracts limit venue to state court, consider revising them to allow a federal option.

A second recent development affects how companies protect confidential information.

In August, a building products distributor agreed to pay a \$265,000 Securities Exchange Commission civil penalty, in part for including language in severance agreements that prohibited employees from disclosing confidential information or trade secrets unless compelled by law to do so and only after first informing the company and securing the company's written consent.

Rules implementing the Dodd-Frank Act's whistleblower protections prohibit impeding a person from reporting suspected wrongdoing to the SEC, and enforcing or threatening to enforce overly broad confidentiality agreements as did the building products distributor. As part of the settlement, the company agreed to amend its severance agreements to remove the overly broad confidentiality provisions.

In light of this recent enforcement case, businesses should take steps to ensure that agreements prohibiting disclosure of confidential information or trade secrets allow communication and cooperation with government agencies and participation in agency proceedings without having to obtain prior approval and without loss of whistleblowing-related relief.

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