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If Your Confidentiality Agreements Do Not Comply With New Federal Law, You Are Leaving Money On The Table

By Andrew R. Nelson, Shareholder, Friedman Stroffe & Gerard, P.C.

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Here's the situation: you, a business, believe you have secret information that gives you a leg up on your competition. You likely refer to it as "proprietary," "confidential," and your "trade secrets," whether plans, designs, procedures, methods, or other form of information. To help ensure this information stays secret and keep your competitive advantage, you (hopefully) enter into agreements that require employees, independent contractors, and vendors keep your information confidential.

Historically, if you suspected someone of purloining your business information, your legal options were most likely limited to pursuing a state court lawsuit. There you would allege that the offender breached a contract or misappropriated trade secrets–straightforward violations of state law. If you were successful, you might recover some money for your injury, maybe some added money for punishment of the offender, and possibly even money for the attorneys' fees you spent.

Just recently, however, the federal government decided to get in on the action, enacting into law the Defend Trade Secrets Act ("DTSA") on May 11, 2016. At first glance, your reaction might be "who cares?" But this new law does affect you.

First, going forward, if your trade secrets are misappropriated, you now have the option to seek help in state court or federal court (and while there are pros and cons to each, having the option is great).

Second, the DTSA allows you, in "extraordinary circumstances," to obtain an emergency, secret, order to seize property to prevent your trade secrets from getting out in the open. What's the advantage? If it is ultimately a choice between unauthorized disclosure of trade secrets and a potentially uncollectible money judgment versus preserving your trade secret, it stands to reason that you would probably prefer to keep the information secret.

Third, similar to conventional remedies under state law, you might recover monetary relief, punitive damages, and attorneys' fees under a DTSA claim. The latter two (punitive damages and attorneys' fees), however, come with an asterisk. The DTSA includes a new whistleblower provision providing civil and criminal immunity to those who disclose trade secrets under certain limited circumstances, including when the purpose of disclosure is for reporting or investigating a suspected violation of law.

To get the message out, so to speak, the DTSA requires that employers who use agreements addressing trade secret or confidential information provide notice of whistleblower immunity. Such agreements apply not only to agreements with employees, but also with independent contractors, and possibly even vendors. Agreements can provide this notice explicitly or by cross-reference to a policy document that sets forth your reporting policy for a suspected violation of the law. What if you don't comply? If an employer fails to provide the required notice, the employer forfeits any claim to seek both punitive damages and its attorneys' fees in a subsequent lawsuit for trade secret misappropriation. In most cases losing these remedies would significantly alter the cost-benefit analysis of enforcing your rights.

The takeaway? Know that going forward you have additional options when it comes to protecting your trade secrets. Competent legal counsel can explain the details. But remember, to realize the full extent of those options, your agreements now need to comply with the DTSA's whistleblower notice, no matter what industry you are in.

Andrew R. Nelson is a shareholder at Friedman Stroffe & Gerard, P.C., a full-service business law firm based in Irvine. His practice emphasizes cost-effective resolution of disputes. Contact him at anelson@fsglawyers.com or 949-265-1110.