

Will There Finally Be Federal Private Right of Action for Trade Secret Misappropriation?

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On April 4, 2016, by a vote of 87-0, the U.S. *Senate* unanimously passed the **Defend Trade Secrets Act**. The legislation, originally proposed by a bipartisan group of legislators in July 2015, seeks to create a private right of action allowing companies to assert civil trade secret misappropriation claims under federal law (which would supplement the existing patchwork of state law remedies).

With approval from the full Senate, the Defend Trade Secrets Act has taken a big step that eluded similar bills in 2013 and 2014. The counterpart bill in the House of Representatives remains for now with the House Judiciary Committee, where it has been referred to the Subcommittee on Courts, Intellectual Property, and the Internet. Given the resounding vote in the Senate and the fact that 127 Representatives have already signed on as co-sponsors of the bill, passage in the House seems likely.

Protections of the Defend Trade Secrets Act

Similar to past legislative efforts, the Defend Trade Secrets Act would amend the Economic Espionage Act of 1996 (which allows prosecutors to bring criminal charges relating to trade secret theft) to empower private companies to bring civil suits to protect their trade secrets. As noted in [a recent report of the Senate Judiciary Committee](#), a federal cause of action “will allow trade secret owners to protect their innovations by seeking redress in Federal court, bringing their rights into alignment with those long enjoyed by owners of other forms of intellectual property, including copyrights, patents, and trademarks.”

The Defend Trade Secrets Act’s definition of “misappropriation” is consistent with the definition used under the Uniform Trade Secrets Act, which is currently enacted, at least in part, by 48 states. The available remedies are also similar. The legislation would allow for injunctions to preserve evidence and prevent disclosure, and for damages to account for economic harm to plaintiffs whose trade secrets are stolen. Attorneys’ fees would also be recoverable if the misappropriation is willful or malicious.

Criticism of the Defend Trade Secrets Act

The previous bills were criticized for, among other things, allowing federal courts to issue relatively broad orders for seizure of purported trade secret materials and information. Mindful of such criticism, the 2015 Defend Trade Secrets Act narrows the circumstances in which an ex parte seizure order can be obtained and, to prevent hacking of seized devices, the bill bars a seized electronic storage medium from being connected to the Internet without the consent of both plaintiff(s) and defendant(s). The bill also allows for defendant(s) to make a motion to encrypt any seized material that is stored on an electronic storage medium.

The 2015 Defend Trade Secrets Act is backed by a varied assortment of trade associations and corporations and has strong support from the White House. The proposed legislation is not without its critics, however. In [a November 17, 2015, letter](#) to Congress, more than 30 law professors raised a variety of concerns regarding the bill, including many that were previously raised in opposition to the 2014 version of the Defend Trade Secrets Act. They argue that the latest bill does not address cyber espionage directly and, rather, is “likely to create new problems that could adversely impact domestic innovation, increase the duration and cost of trade secret litigation, and ultimately negatively affect economic growth.”

Can Employers Look Forward to Bringing Federal Claims of Trade Secret Misappropriation?

It appears that the currently pending Defend Trade Secrets Act may break the pattern established by past bills of failing to be enacted into law. The Defend Trade Secrets Act has already garnered far more legislative support and progressed farther than similar bills did in 2013 and 2014. The increase in cyber espionage and the threat to U.S. businesses posed by international theft of trade secrets have captured the public’s attention. There is certainly support in the business community weighing in favor of the bill passing. Given the recent passage in the Senate and the

growing concern over trade secret protection, it seems likely that the 2015 Defend Trade Secrets Act will succeed in creating the first private right of action for civil trade secret misappropriation under federal law.

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