

New Federal Law Provides Additional Protection for Trade Secrets

By ***Lee Levin, Counsel***

For the first time in U.S. history, a new law was recently added providing federal protection for businesses' trade secrets. The Defend Trade Secrets Act, 18 U.S. Code Section 1831 et. al. (DTSA) became law as an amendment to the Economic Espionage Act.

Prior to the adoption of this law, federal law provided protections to other forms of intellectual property, such as patents, trademarks and copyrights, but the protection of trade secrets was left to the individual states. While the new law does not preempt a party's ability to enforce any theft of trade secrets actions under state law, this new law gives parties a potential enforcement action in federal courts.

The definition of "trade secrets" in the DTSA follows the definition utilized in many states. Under Section 1839, the definition of "trade secret" means:

"All forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs or codes, whether tangible or intangible, and whether or how stored, compiled or memorized physically, electronically, graphically, photographically, or in writing if – (A) the owner has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, for not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information."

While there are no cases interpreting this definition, it is highly likely that a patient list or client list could be determined to be a "trade secret" under this definition based on the various states' case law.

The key text of the law regarding the theft of trade secrets reads as follows:

- A. Whoever, with intent to convert a trade secret, that is related to a product or service used in or intended for use in interstate or foreign commerce, to the economic benefit of anyone other than the owner thereof, and intending or knowingly that the offense will, injure any owner of that trade secret, knowingly –
1. steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains such information;
 2. without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys such information;
 3. receives, buys, or possesses such information, knowing the same to have been stolen or appropriated, obtained, or converted without authorization.
 4. attempts to commit any offense described in paragraphs (1) through (3); or
 5. conspires with one or more other persons to commit any offense described in paragraphs (1) through (3), and one or more of such persons do any act to effect the object of the conspiracy

It should be advised that the law also provides for immunity to employees in the event they engage in whistleblowing activities that may involve disclosures of trade secrets. To that end, if a business or practice is looking to utilize the protections under the new law with regard to the potential for theft of trade secrets by its employees, their employment agreements must disclose the whistleblower immunity provisions in the DTSA. A failure to do so will essentially prohibit employers from enforcing the provisions of the DTSA against their employees.

The DTSA affords protection to trade secrets related to a product or service based on or intended for use in interstate or foreign commerce. So, if you run a multi-state medical or dental practice or a multi-state medical or dental management company, you may wish to further explore the possibility of revising your employment agreements with your employees to allow for the possibility of additional federal enforcement of your trade secrets.

If you have any questions about this topic, please contact one of the listed Roetzel attorneys.

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