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# WANT TO PROTECT YOUR TRADE SECRETS? UPDATE YOUR EMPLOYMENT AGREEMENTS!

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Since 2016, the Defend Trade Secrets Act (DTSA) has provided employers with a federal cause of action against employees, former employees and other bad actors who misappropriate trade secrets. In addition to injunctive relief, DTSA remedies include civil seizure, compensatory damages, punitive damages and attorney fees. However, in order to preserve the right to seek punitive damages and attorney fees from an employee or former employee, the employer must have provided notice of the whistleblower-protection provisions of the Act. Those provisions protect employees and former employees from criminal or civil liability for disclosure of trade secrets made (a) in confidence to a government official or an attorney for the purpose of reporting or investigating a suspected violation of law, or (b) under seal in a judicial proceeding.

Notice of the whistle-blower protection provisions must be included "in any contract or agreement with an employee that governs the use of a trade secret or other confidential information." This would commonly include, for example, employment agreements, confidentiality or nondisclosure agreements, noncompetition agreements, and separation agreements. The notice requirement applies to all such contracts entered into or revised after May 11, 2016.

The notice may be provided by including the whistleblower-protection provision in the agreement or by cross-referencing a policy that contains the required disclosure. It is unclear whether paraphrasing the statutory language will be sufficient. Therefore, the safer course is to quote the pertinent text, such as:

> Notwithstanding the foregoing, 18 U.S.C. §1833(b) provides, in part: *"(1) An individual shall not be held criminally or civilly liable under any Federal or State trade secret law for the disclosure of a trade secret that (A) is made (i) in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; and (ii) solely for the purpose of reporting or investigating a suspected violation of law; or (B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal..... (2) An individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual (A) files any document containing the trade secret under*

*seal; and (B) does not disclose the trade secret, except pursuant to court order."* Nothing in this Agreement, any other agreement executed by Employee, or any Company policy is intended to conflict with this statutory protection.

Failure to provide the notice as required will not leave the employer defenseless against employees and former employees who have misappropriated trade secrets. The employer may pursue a DTSA claim without the right to seek punitive damages or attorney fees and/or sue under the applicable state's trade secrets law. But the employer will have lost two powerful remedies of a powerful statute – solely because it failed to update its forms of employment-related agreements.

Takeaway for Employers:

If you have entered into, or amended, any contract with an employee since May 11, 2016, and that contract addresses trade secrets or confidential information, make sure that it includes the DTSA whistleblower-protection provision. If not, consider amending that contract. Your trade secrets will thank you.

*Bryan Cave Leighton Paisner LLP has a team of knowledgeable lawyers and other professionals prepared to help employers review their employee policies. If you or your organization would like more information on this or any other employment issue, please contact an attorney in the Employment and Labor practice group.*

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