

ANOTHER REASON TO RETHINK CONFIDENTIALITY AGREEMENTS: THE DEFEND
TRADE SECRETS ACT

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In our firm's January 2016 Client Alert, "*Prohibitions Against Pay Secrecy Policies*," we discussed the impact of President Obama's Executive Order 13665 ("EO") and a Final Rule issued by the Department of Labor expounding upon the EO. The EO requires government contractors to amend confidentiality agreements to eliminate restrictions prohibiting employees from questioning other workers about their pay. The January Client Alert is available at <http://www.dbd-law.com/Client-Alert-Pay-Secrecy-Policies-Jan-2016.pdf>.

Although we suspect that President-elect Trump may rescind EO 13665 and the Final Rule, there is a pattern of additional protection for whistleblowers in other contexts that may not be rescinded. The January 2016 Client Alert touches on NRLA and SEC policies and rules protecting similar rights.

This Client Alert presents yet another development that may require amending existing confidentiality agreements - the Defend Trade Secrets Act or ("DTSA"). DTSA, which went into effect on May 11, 2016, is important to technology and other companies since it provides expanded remedies available in case an employee, contractor or other third party pirates a company's trade secrets. For instance, DTSA explicitly provides *ex parte* procedures for the seizure of property under "extraordinary circumstances" to prevent the dissemination of stolen secrets. *Ex parte* seizure is an extraordinary remedy, essentially allowing the victim of trade secret theft to quickly obtain an order from a court by merely presenting an affidavit or verified complaint satisfying certain requirements.

DTSA also provides other extraordinary remedies for violations occurring inside and outside the United States. Punitive damages of up to double the compensatory award are available in the case of willful or malicious misappropriation. Reasonable attorneys' fees are available in the case of willful or malicious misappropriation, if the claim of misappropriation was made in bad faith, or if a motion to terminate an injunction was made, or opposed, in bad faith. Perpetrators

can also be fined up to the greater of \$5,000,000 or three times the value of the stolen trade secret.

DTSA continues a pattern of recent legal protections for whistleblowers, including the protections discussed in our January 2016 Client Alert. DTSA requires that any confidentiality agreement with an employee or contractor include the explicit ability to disclose a trade secret to the government solely for the purpose of blowing a whistle or as part of a lawsuit. Failure to provide the notification prevents an employer from seeking punitive damages or attorneys' fees. As a result, we are recommending that employment agreements, independent contractor agreements and other similar agreements be revised to incorporate the necessary notifications.

This Client Alert is intended as an introduction only to the topics addressed – it is not indicative of a full discussion of the issues. Let us know if you want to discuss the issues in this Client Alert in greater detail.

DISCLAIMER. This Client Alert does not provide legal advice. We are providing it for general informational purposes only.