The federal Defend Trade Secrets Act (the “DTSA”) became effective on May 11, 2016. It permits companies to pursue a federal remedy for misappropriation of their trade secrets. Before the enactment of the DTSA, private rights of action for trade secret misappropriation were governed exclusively by state law. The DTSA is intended to provide access to a uniform body of federal law and more robust trade secret protection for companies.

The DTSA also contains immunity protections for whistleblowers, who will not be liable under state or federal law for disclosing trade secrets if they make that disclosure (1) in confidence to a federal, state or local government official, or to an attorney, for the sole purpose of reporting or investigating a suspected violation of law, or (2) in a document filed in a lawsuit or other proceeding, if the filing is made under seal and protected from public disclosure. The DTSA requires employers to notify employees and independent contractors of this immunity. Required notice of this immunity provision applies to contracts and agreements entered into or updated after the DTSA’s enactment that contain confidentiality provisions governing the use of the employer’s trade secrets. If an employer fails to provide this notice and later sues a prior employee or independent contractor for misappropriating its trade secrets, that employer cannot recover exemplary damages available under the DTSA (which can be up to double the amount of regular damages) or its own attorneys’ fees or costs, which may otherwise be awarded when trade secrets are willfully and maliciously misappropriated. Although there are no other penalties under the DTSA for failing to give required notice of this immunity, such failure may be viewed with disfavor by the SEC, which has recently fined companies for using language in severance agreements that restricted departing employees from seeking monetary awards for whistleblowing (see SEC orders against Health Net, Inc. and Blue Linx Holdings Inc.).

Employers should give notice of the DTSA immunity provision either by (1) including appropriate notice language directly in the relevant agreement that includes confidentiality provisions prohibiting disclosure of trade secrets or (2) cross referencing, in that agreement, the employer’s policy document that sets forth its policy for a suspected violation of law, and including the appropriate notice language in that policy.

We recommend that investment advisers contact us to update their policies and procedures, form of employee and independent contractor agreements, and other contracts with confidentiality provisions entered into after May 11, 2016, such as employee separation agreements or management company partnership or limited liability company operating agreements with key employees.

For further assistance, please contact John Broadhurst, Carolyn Reiser, Neil Koren, Jim Frolik, Christina Hamilton, Joan Grant or David Suozzi.

Previous letters to our investment advisory clients and friends and discussions of other topics relevant to private fund managers, investment advisers and private investment funds can be found at our insights page: www.sflaw.com/blog/investment-funds-advisers-insights.

Download PDF Version