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THE PROSPECT OF A FEDERAL TRADE SECRET CLAIM

The Prospect of a Federal Trade Secret Claim: Why Now and What Would It Mean For You

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By Susan Hargrove and Kayla Marshall

Trade secrets constitute the only category of intellectual property that is governed primarily by state law. This status may soon change—two bills, [House Bill 5233](#) and [Senate Bill 2267](#) were introduced in Congress last term to create a federal cause of action for trade secret misappropriation. The proposed legislation would allow trade secret owners to bring a federal civil action if the trade secret is “related to a product or service used in, or intended for use in, interstate or foreign commerce.”

Why the Current Press for Federalization?

Currently, 48 states and the District of Columbia have enacted some version of the Uniform Trade Secrets Act (UTSA).[1] The outliers, New York and Massachusetts recognize a common law claim for misappropriation and follow the Restatement of Torts for the key elements. Given that all states provide a cause of action for misappropriation of trade secrets, why is there now a push to enact federal legislation? Commonly promoted explanations include:

1. Misappropriation of trade secrets is expensive. According to the [Center for Responsible Enterprise and Trade](#), the annual economic impact of trade secret theft is one to three percent of the United States' Gross Domestic Product (GDP).
2. There is bipartisan support for federal trade secret legislation during a time where there are few issues that inspire cooperation across the aisle. Penalizing and deterring theft of trade secrets does not appear to be controversial, at least as a big picture concept.
3. Some proponents of federal legislation argue that it is needed to provide uniformity to trade secret law. Notably, however, there is little significant divergence among the various states' interpretation and application of the UTSA. More to the point, both of the 2014 bills specifically state that they would not preempt state law, so the enactment of federal legislation would actually generate another level of authority along with the existing and developing state case law.

What Would the Federal Legislation Change?

The definition of a trade secret provided by the proposed legislation (incorporating that of the Economic Espionage Act) is similar to the definition provided by the UTSA. Therefore, it is unlikely that the type of information that is protected will change. Based on the 2014 draft bills, the changes you can expect from a federal bill would include:

1. Providing subject matter jurisdiction for a trade secret claim in federal court. North Carolina provides trade secret litigants access to a business court with a judiciary dedicated to complex commercial cases. For jurisdictions without this opportunity, the ability to bring a trade claim in federal court is especially significant.
2. An extended Statute of Limitations. The limitations period in each 2014 bill is five years after the date on which the misappropriation is discovered. This is two years longer than North Carolina's Statute of Limitations, giving businesses more time to file a claim.
3. A new opportunity for expedited relief. Proposed federal law would expand the scope of available emergency relief to an aggrieved trade secret owner, creating a right of *ex parte* seizure to the extent necessary to preserve evidence or to prevent dissemination of the trade secret. The House version of the bill imposes additional safeguards to the exercise of an *ex parte* seizure order, including requiring the requesting party to show that a Rule 65 restraining order would be ineffective. However, it may be that the prospect of *ex parte* seizure will create an atmosphere of deterrence that will itself provide greater protection for businesses' trade secrets.

Wake-up Call to Businesses

The current high level of buzz surrounding the expansion of the protection of trade secrets deserves attention. Too often businesses are caught in a reactive mode during the expedited chain of events that is triggered by the suspicion of misappropriation. Both existing and proposed laws protecting trade secrets mandate that the trade secret owner specifically identify its trade secret information and demonstrate that it has taken reasonable steps to safeguard its confidentiality. Time spent thoroughly performing this evaluation on the front-end will maximize the opportunity to enforce a company's trade secret rights when the emergency arises.

[1] Though North Carolina has not adopted the UTSA, it has implemented a modified version with the same key principles.

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