Are Your Confidentiality Agreements Compliant with the Defend Trade Secrets Act of 2016?

On May 11, 2016, the new Defend Trade Secrets Act of 2016 ("DTSA") was signed into law. The DTSA establishes a federal cause of action for misappropriation of trade secrets. Unlike state laws governing trade secret misappropriation, which can vary significantly, the DTSA applies consistently regardless of the state in which the misappropriation occurs. Here is a list of the top five things employers and HR professionals need to know about the DTSA and how it affects your company's existing agreements:

1. The DTSA applies to agreements with employees, contractors and consultants if the agreement contains a confidentiality provision related to trade secrets. This could include employment agreements, offer letters, independent contractor agreements, consulting agreements, non-compete and non-solicitation agreements, confidentiality and proprietary information agreements, and provisions in employee handbooks if they prohibit the unauthorized use or disclose of trade secrets.

2. The DTSA does not require revisions to prior agreements, but it does apply to any agreements entered into on or after May 11, 2016.

3. The DTSA provides immunity to employees, consultants and contractors who divulge trade secrets to government officials investigating crimes and in certain other limited circumstances. This is what is known as the "whistleblower" protection or immunity afforded by the DTSA.

4. Effective May 11, 2016, employers must provide notice of the immunity afforded by the DTSA to employees, consultants and contractors in confidentiality provisions that impact the disclosure of trade secrets. If an employer does not provide the required notice, the employer may not be awarded exemplary damages or attorneys' fees in a federal trade secret action brought pursuant to the DTSA.

5. The DTSA notice requirement can be satisfied in two ways: an employer can either revise the confidentiality provisions in existing agreements or can prepare and circulate a stand-alone policy that cross-references the applicable agreements and provides the required notice. The DTSA contains an immunity provision that can be used to provide the required notice, which can be accessed at 18 U.S. Code § 1833(b).

What can employers and HR professionals do now? In addition to bringing agreements into compliance with the DTSA, use this as an opportunity to review or "audit" confidentiality provisions in your existing agreements. Does the confidentiality provision actually identify the information your company views as confidential or trade secret protected information? Does it prohibit the unauthorized use or disclose of confidential information or trade secrets and does it identify the consequences of a violation? Do your agreements with employees, consultants and contractors require them to return of all confidential and trade secret information upon the termination of relationship? Would a mandatory exit interview with employees make sense so that you can confirm all confidential information has been returned? Considering that approximately 50% of departing employees and business partners retain confidential information when leaving their jobs and 40% plan to use the data at their new jobs, these are important things to think about.

Do you have additional questions about the DTSA? Feel free to contact Holly Hammer, an attorney at Hutchison PLLC and the Governmental Affairs Director of RWHRMA, at 919.829.4289 or hhammer@hutchlaw.com at any time.