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The New “New Jersey Trade Secrets Act”: What Employers, Human Resources Directors, and In-House Counsel Should Know

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New Jersey has joined 46 other states in adopting a version of the Uniform Trade Secrets Act (UTSA). Signed into law by Governor Christie on January 9, 2012, the New Jersey Trade Secrets Act (the Act) became effective immediately. While the Act codifies a significant portion of the common law, it includes some important changes. Under the Act, a trade secret is:

information, held by one or more people, without regard to form, including a formula, pattern, business data, compilation, program, device, method, technique, design, diagram, drawing, invention, plan, procedure, prototype or process, that:

- (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

This definition broadens the protection previously offered under common law because the Act does not require that a trade secret be business related or that it be continuously used in the operation of a business.

Misappropriation is defined as:

- (1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- (2) Disclosure or use of a trade secret of another without express or implied consent of the trade secret owner by a person who:

(a) used improper means to acquire knowledge of the trade secret; or

(b) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was derived or acquired through improper means; or

(c) before a material change of position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired through improper means.

In consonance with common law, the Act prohibits a defendant from arguing that proper means to acquire a trade secret existed at the time of its misappropriation.

Companies will have three years after the date on which they know or should have known that misappropriation has occurred to bring a claim. This is a significant reduction in the statute of limitations considering that the common law limitations period was six years. The New Jersey Trade Secrets Act is not retroactive; thus, the six-year limitations period and other provisions of the common law continue to apply to misappropriation occurring before the Act's adoption. Furthermore, any misappropriation that began before the Act's January 9, 2012 effective date is not subject to the Act, even if the misappropriation continued after that date.

A remedy for misappropriation can take the form of monetary or injunctive relief. A court may enjoin any actual or threatened misappropriation or otherwise require a party to perform certain acts to protect a trade secret. An injunction may be issued conditioning future use of a trade secret upon payment of a reasonable royalty.

Monetary damages can consist of both the actual loss suffered and any unjust enrichment enjoyed by the defendant. The Act provides for punitive damages in the case of willful and malicious misappropriation. Although common law also permits punitive damages, it does so under a standard of “gross and wanton” conduct. Any punitive damages award is limited to twice the actual damages award.

The Act allows for the recovery of expert witness fees – a remedy that was unavailable under common law. A court may award “a reasonable sum to cover the service of expert witnesses” where willful and malicious misappropriation exists or in the case of bad faith litigation by any of the parties. Because expert fees could be substantial in any given case, this provision could increase the willingness of parties to assert trade secret claims.

The New Jersey Trade Secrets Act differs in some noteworthy ways from the UTSA, on which it was patterned. For example, unlike the UTSA, the New Jersey law does not provide examples of reasonable means by which a court should preserve the secrecy of an alleged trade secret. A previous draft of the Act contained a presumption in favor of granting protective orders for certain purposes such as limiting access to confidential information, holding *in camera* hearings, sealing the records, and preventing any person involved in the litigation from disclosing an alleged trade secret without court approval. However, the state Senate voted to exclude this provision. In its place, the Act now

simply states, “In an action under this act, a court shall preserve the secrecy of an alleged trade secret by reasonable means consistent with the Rules of Court as adopted by the Supreme Court of New Jersey.” While this provision gives the courts more discretion in how to preserve trade secrets, it is anticipated that they will continue to use the traditional means that the state Senate dropped from the bill.

The Act specifies that when a defendant is a public entity or public employee, the provisions of the state’s Tort Claims Act will trump any conflicting provisions of the New Jersey Trade Secrets Act. In contrast, the UTSA omits any special provisions for lawsuits involving public defendants.

While the new law is a major step toward bringing New Jersey law into alignment with other states’ laws, it does not offer any relief to companies that are careless in protecting their confidential information. Companies should be vigilant in identifying their trade secrets and other proprietary data and in taking reasonable, protective steps. This can include developing policies and procedures to safeguard electronic data and limiting information access to those with a need to know. Companies with sensitive data should implement confidentiality and non-competition agreements to ensure that valuable corporate assets are not lost to the competition.

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