

# The Defend Trade Secrets Act: A New Tool to Fight Trade Secret Theft

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This past month, in a rare act of bipartisan agreement, Congress created a powerful new tool to protect trade secrets. The *Defend Trade Secrets Act* (more commonly known as the “DTSA”) represents a critical development for any company that relies on the confidentiality of its proprietary information, processes, customer lists, or data.

## What It Does

The DTSA accomplishes five key things:

1. Authorizes trade secret misappropriation actions to be brought in federal courts;
2. Creates remedies permitting the award of exemplary damages and attorney fees;
3. Authorizes *ex parte* seizures from a court “necessary to prevent the propagation or dissemination of the trade secret,” just as trademark or copyright owners can seize counterfeit goods;
4. Requires certain notices to employees of their rights and immunities under the DTSA—specifically to protect whistleblowers and government investigations; and
5. Recognizes that employee mobility is a feature of the modern economy by precluding the use of trade secret law to restrict future employment absent evidence of threatened misappropriation.

Notably, the DTSA does *not* preempt existing state laws, which means that in many instances a claim under the DTSA may also be combined with various additional state law actions.

## Why It Was Necessary

For decades, critics have bemoaned the fact that trade secret law—arguably the most important and common proprietary right used by companies—has been applied in wildly varying ways across the

country, despite the widespread adoption of the Uniform Trade Secrets Act. Moreover, while the Economic Espionage Act enacted in the late 1990s did create some federal recourse for the victims of trade secret theft, it provided only for criminal penalties.

Many practical considerations helped create an atmosphere where passage of the DTSA became possible. First, the transformation of electronic communication platforms over the course of the past decade meant that seizure orders (especially of computer hardware and storage devices) became increasingly necessary to protect against the dissemination of confidential information. Second, corporate America has relied increasingly on a workforce and data structure spread across multiple states, which meant that the patchwork of state level protections became inadequate and unpredictable. Last, in an age where the scope of patent protection is subject to revision by the courts, opting instead to use the trade secret route has become a more effective and stable tool for many companies to protect their proprietary information.

## **What This Means For You**

Companies should review their employee and vendor contracts, the language of NDAs, policies for departing (and arriving) employees, and competitive intelligence efforts. Just as companies should periodically audit their registered intellectual property rights to gauge how they can better protect and capitalize on their value, they should engage in systematic introspection to better understand what they consider a secret, how they protect it, and whether those efforts are adequate. The DTSA is a powerful new tool, but like any tool it is best used by those who have carefully considered how to use it.

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National Law Review, Volume VI, Number 152

Source URL: <https://natlawreview.com/article/defend-trade-secrets-act-new-tool-to-fight-trade-secret-theft>