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Did You Know Whistleblowers Can Divulge Trade Secrets?

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The prevalence of employees identifying themselves as "whistleblowers" has expanded in recent years due to expansion of federal and state whistleblower rights. Recently, a recently enacted federal law, the Defend Trade Secrets Act of 2016 ("DTSA"), created a new class of whistleblower protection rights. The DTSA creates a federal private civil action for the misappropriation of trade secrets. Included in this Act, however, is a provision for immunity from both civil and criminal allegations, under state and federal law, for employees and independent contractors who are whistleblowers.

The DTSA's whistleblower immunity provision provides that an employee may disclose confidential information or a trade secret, without violating the DTSA, if the disclosure is made: (1) in confidence to a federal, state, or local government official, either directly or indirectly, or to an attorney, and solely for the purpose of reporting or investigating a suspected violation of law, or (2) in a complaint or other document filed in a lawsuit or other proceeding, if the filing is made under seal (and thus not available as part of the public record).

As part of the whistleblower immunity provision, employers must provide a "notice of immunity" to any employee or contractor, if such employee or contractor has a "contract or agreement . . . that governs the use of a trade secret or other confidential information." This notice requirement covers contracts and agreements that are entered into, or updated after, the date of enactment of the DTSA, which was May 11, 2016. The notice can be made by cross-referencing policy documents concerning such protections that have been previously provided to the employee, if such documents exist.

Failure to comply with the DTSA's whistleblower immunity notice requirement will prevent an employer who later sues their employee or contractor for trade secret misappropriation under the Act from collecting exemplary and double-damages or attorney's fees. Employers should review their policy documents and consult with counsel to determine compliance with the new notice requirements under the DTSA.