# New Federal Trade Secret Law Would Protect Whistleblowers

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Civil claims for trade secret misappropriation have always been grounded on state law, with only limited access to federal courts. That would change with the Defend Trade Secrets Act (S.1890) now pending in Congress as an amendment to the Economic Espionage Act. The proposed law enjoys broad industry and bipartisan political support, and was favorably reported out of the Senate Judiciary Committee on January 28. Most of the focus to this point has been on the need for a federal option when misappropriation occurs across state or national borders. But at the recent hearing a new amendment was proposed and accepted that would have an impact well beyond the original legislation. Suggested by Senators Patrick Leahy and Chuck Grassley, this part of the law would provide immunity under federal and state law to whistleblowers who confidentially report suspected illegal activity to the authorities.

The idea for this proposal originated with a draft article, Tailoring a Public Policy Exception to Trade Secret Protection, recently posted by Professor Peter Menell of the UC Berkeley School of Law. Professor Menell was confronting what should be a rather obvious issue: how do we support and encourage the private disclosure to government of needed information about possible wrongdoing, while recognizing the legitimate secrecy interests of business owners? It turns out that current law does not provide a clear answer, and this has negative consequences for whistleblowers and law enforcement.

Although an exception of sorts exists for personal disclosure of trade secrets in the public interest, it is expressed in vague terms that require a balancing of interests in the context of case-specific facts. For example, the Restatement (Third) of Unfair Competition § 40, comment c, states that "a privilege to disclose another's trade secret depends upon the circumstances of the particular case, including the nature of the information, the purpose of the disclosure, and the means by which the actor acquired the information." You might imagine that an employee, discovering evidence of corporate wrongdoing, should be comfortably protected by this principle when taking that evidence in confidence to the

government. But you would be wrong.

In cases where the whistleblower has reported illegal activity through a qui tam action under the False Claims Act, 31 USC § 3729, some companies have reacted by asserting claims against the former employee for having misappropriated the very secrets that made the action possible. Claims have even been filed against the whistleblower's attorneys for their part in their client's alleged violation of a standard nondisclosure agreement. Arguments against applying a public interest exception include that the former employee took too much information, or should have reported their concerns in some other way. In any event, the limited case law and ambiguous formulation of the exception expose potential whistleblowers not only to the expense of litigation but also to its inherent personal stress.

And the risk of litigation is only one of many negative consequences that can result from reporting internal evidence of wrongdoing. As Professor Menell explains, studies show that whistleblowers frequently suffer job loss or demotion, personal shunning or blacklisting. This affects their finances, their families and their health. As one researcher put it, "the surprising part is not that most employees do not talk; it is that some talk at all."

When employees know of illegal activity but are too scared to come forward, the public suffers. The insider typically is in a unique position to provide the evidence, which then remains walled up within the organization. On the other hand, businesses have a compelling need, particularly in the modern information economy, to protect their legitimate trade secrets from exposure, and sometimes whistleblowers are wrong, driven by self-interest. But at the moment there is no reliable way to balance and protect all these interests by ensuring that the relevant information can get to the officials who can consider it in confidence and make a decision on whether to proceed.

The Leahy-Grassley amendment appears to do this well, adopting what Professor Menell calls a "sealed disclosure/trusted intermediary" approach. Specifically, the amendment would rephrase 18 USC § 1833(2) (defining exceptions to the EEA) to provide that a person may not be held criminally or civilly liable for disclosure of a trade secret, if the disclosure is made (a) in confidence to a government official or to an attorney and (b) for the sole purpose of "reporting or investigating a suspected violation of law." Immunity would also apply for disclosures made in a complaint or other filing, but only if done under seal. Nondisclosure agreements presented to

employees or contractors must contain a notice of the immunity, at least by reference to the company's relevant policy document. (Failure to provide the notice will forfeit the right to recover attorneys fees or enhanced damages against the employee under the DTSA.)

Significantly – and this point was emphasized by Senator Dianne Feinstein at the January 28 hearing – the amendment would not protect any otherwise wrongful behavior of the employee, such as hacking a computer system in violation of the Computer Fraud and Abuse Act.

If the amendment survives and becomes law, it is not likely to create substantial new burdens or risks for employers. Statutory notice provisions have been required in employee NDAs for decades, as a result of state laws protecting the rights of individual inventors. Recent action by federal agencies like the NLRB and SEC have signaled that employee contracts must expressly confirm the individual's right to share and report certain kinds of information. And although there is always some incremental risk when secret data is provided to the government, experience has shown it to be manageable.

The benefit to the public of this new approach could be profound. Government plays a central role in the modern economy, and can only enforce rules affecting safety, public health and financial integrity when it has access to information about what might be going wrong. Whistleblowers are usually the best source of this information, but they will almost never come forward if they face the risk of being sued for violating obligations of confidentiality. The DTSA whistleblower amendment provides a sensible answer: a safe harbor for disclosures in confidence to the government.

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Read more: http://www.law.com/sites/lawcomcontrib/2016/02/05/new-federal-trade-secret-law-would-protect-whistleblowers/#ixzz3zncap5O3

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