

New Jersey Assembly Approves Trade Secrets Act

Legal Alert

December 19, 2011

On December 5, 2011, the New Jersey General Assembly gave final legislative approval (79-0) to a bill (A-921) that, if signed by Governor Chris Christie, would provide state businesses statutory protection against the misappropriation of trade secrets for the first time. The New Jersey Trade Secrets Act, sponsored by Assemblyman Upendra Chivukula, is set to supersede decisional law established by state courts, altering how a trade secret is defined and expanding the remedies available to the owner of a trade secret that has been improperly misappropriated.

Based on the Uniform Trade Secrets Act, a law adopted in 46 other states and the District of Columbia, the New Jersey bill defines a "trade secret" as any information that derives economic value from not being generally known to or readily ascertainable by proper means by other persons and that is the subject of reasonable efforts to maintain its secrecy. Notably, the bill's definition eliminates the requirement adopted by some New Jersey courts that information must be in continuous business use in order to be considered a trade secret.

Under the legislation, if a trade secret has been acquired by improper means or improperly disclosed, a holder of a trade secret could be awarded:

- Damages for both actual loss and for any amount by which the misappropriating person has been unjustly enriched
- Injunctive relief for actual or threatened misappropriation of a trade secret, and in exceptional circumstances, a reasonable royalty for future use of the misappropriated trade secret
- Punitive damages limited to twice the amount awarded for actual damages and unjust enrichment in cases involving willful and malicious misappropriation of a trade secret
- Attorney's fees and costs, including a reasonable amount to cover expert fees, in cases where misappropriation is willful and malicious, or where a claim of misappropriation or request to terminate an injunction is made in bad faith

The act would eliminate the commonly used defense that proper means to acquire the trade secret existed at the time of misappropriation.

The bill also shortens the time during which a claim for misappropriation of a trade secret can be asserted. Under existing case law, a holder of a trade secret has six years to file suit for misappropriation; the new legislation requires an action for misappropriation to be brought within three years of the date the misappropriation is discovered or should have been discovered through the exercise of due diligence.

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Currently, New Jersey, New York, Texas, Massachusetts and North Carolina are the only states relying on common law and that have yet to adopt legislation addressing the misappropriation of trade secrets. If signed by Governor Christie, the bill would go into effect immediately, and apply to all misappropriation occurring after the effective date.

To learn more about how your company's trade secret policy may need to be revised, or to discuss the implications of the new legislation, please contact a member of the Intellectual Property Group at Flaster Greenberg PC.