HANCOCK ESTABROOK, LLP
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NOT-FOR-PROFIT CORPORATION LAW - POTENTIAL UPDATES


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The nonprofit, tax-exempt and religious organizations that help communities meet their cultural, academic and spiritual needs face unique and frequently sophisticated challenges, not only with tax compliance but with the oversight imposed by the New York Attorney General (AG).

Specifically in our state, nonprofits have recently faced many intricate struggles as a result of the adoption in 2014 of the Revitalization Act (the Act). The Act was an overhaul to the Not-for-Profit Corporation Law (N-PCL) and its intent was to eliminate unnecessary administrative and procedural burdens, modernize the N-PCL, and strengthen governance through compliance with certain best practices. While sound in its intent, the Act imposed onerous burdens on New York nonprofits in its practical application.

In April of 2015, the AG publically acknowledged these burdens, especially with respect to how nonprofits deal with conflicts of interest and related party transactions. To mitigate some of the unintended effects of the Act, the AG issued guidance that offered some clarity to State nonprofits. Unfortunately, the guidance was not statutory authority and, in some ways, conflicted with the law.

In December of 2015, Governor Andrew Cuomo signed into law changes intended to clarify some of the provisions of the Act, and to assist nonprofits in better implementing the law. The amendments, however, failed to address the challenging requirements imposed on nonprofits to seat "independent directors", a charge that proves especially difficult in rural areas of the State. The amendments also failed to provide for exceptions to the stringent related party transaction rules.

Senate Bill No. S07913B (the Bill) incorporates some of the AG guidance and potentially alleviates these larger issues. The Bill includes a number of amendments that affect (i) the definition of independent director; (ii) the authority of committees; (iii) the conflict of interest policy and whistleblower policy; (iv) the responsibility of the audit committee; and (v) the ability of an employee of the organization to serve as chair of the board. Most significantly, the Bill amends the related party transaction rules, that have become an obvious struggle for nonprofits to satisfy. By creating certain exceptions, such as allowing for committee approval, authorizing ratification of past transactions and narrowing the group of persons that are subject to the related party transaction rules, the Bill has the potential to extinguish the burdens that have been placed on nonprofits.

As we see these changes become part of the N-PCL, nonprofits should be mindful how they will impact internal governance documents. Once the law is adopted, we recommend that all nonprofits update their governance documents to take advantage of and benefit from these changes.

If you have any legal questions relating to nonprofit organizations, please contact Briana Wright at bwright@hancocklaw.com.

DEFEND TRADE SECRETS ACT GIVES PROTECTION TO COMPANIES' COMPETITIVE ADVANTAGES


JAMES P. YOUNGS

From confidential business processes, to secret sales forecasts or strategies, to proprietary computer code or programs, trade secrets often lie at the heart of a company's competitive advantage. As a result, many businesses face misappropriation or theft of their trade secrets at one time or another.

But trade secrets – defined as any confidential formula, pattern, device or compilation of information that a business uses to obtain an advantage over its competitors – have long been the subject of inconsistent and uncertain state-law protections. With the May 2016 enactment of the federal Defend Trade Secrets Act (DTSA), businesses now have a federal cause

of action to protect these critical, but often overlooked, intellectual property assets. Companies should be familiar with several aspects of the new law.

1. Federal cause of action for misappropriation of a trade secret

The DTSA creates a civil cause of action in federal court for misappropriation of trade secrets related to products or services used or intended for use in interstate or foreign commerce. The law is designed to harmonize sometimes disparate trade secrets laws throughout the country. In addition to creating a truly uniform law for interstate and international businesses, the DTSA is designed to put trade secret protection on par with enforcement of other intellectual property rights, including trademarks, copyrights and patents. The DTSA does not preempt state trade secret protections, but rather provides additional federal protections for companies facing misappropriation of their trade secrets.

2. Exemplary remedies for misappropriation

In addition to allowing parties to obtain an injunction to prevent dissemination or publication of trade secrets, the DTSA provides for the possibility of ex parte civil seizure of materials in the event of an imminent threat of trade secret disclosure. Courts have traditionally been hesitant to order seizure of materials containing or embodying a trade secret, and this remedy could be a powerful tool for employers concerned about data losses associated with employee computers, among other things. The DTSA permits a court to award exemplary damages of up to two times the amount of actual damages incurred due to the misappropriation, and/or attorneys' fees, if the misappropriation is "willful and malicious." Businesses should not, however, be overzealous in their enforcement activities, since the law also permits a court to award attorneys' fees to a defendant that has been subject to a bad faith misappropriation claim.

3. Whistleblower protection and employer notice requirements

Of particular interest to businesses that have nondisclosure or non-compete provisions with their employees or contractors, the DTSA contains a "whistleblower immunity" provision, which immunizes a person disclosing a trade secret in the course of reporting violations of law to an attorney or government official from criminal or civil liability under any federal or state trade secret law. The DTSA also contains a notice requirement, stating that "an employer shall provide notice of the immunity set forth [above] in any contract or agreement with an employee that governs the use of a trade secret or other confidential information." This notice requirement is satisfied if the agreement cross-references a policy document containing this notice. If an employer fails to comply with this provision, it may not be awarded exemplary damages or attorney fees permitted in the DTSA in the event of a misappropriation claim.

By giving creators and innovators access to the broad authority of the federal courts, Congress has made a strong statement of support for trade secrets. With this powerful new tool, companies are now well poised to quickly and aggressively protect their unique competitive advantage.

If you have any questions on the legal issues relating to trade secrets, please contact Jim Youngs at jyoungs@hancocklaw.com.

HANCOCK ESTABROOK WELCOMES KATHERINE MAGUIRE DAVIS

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Furthering our expansion into the Ithaca area, Hancock Estabrook, LLP welcomes Katherine Maguire Davis to the firm.

Ms. Davis is counsel in our Corporate, Real Estate and Tax Practices. She represents lending institutions and borrowers in connection with commercial and residential real estate transactions, provides bond counsel services, advises clients with respect to tax credits and other economic incentives, and counsels closely-held corporate clients on entity formation, acquisitions, financing transactions and general business planning.

Ms. Davis has experience drafting and negotiating asset purchase agreements, license agreements, real property purchase and sale contracts, lease agreements, employment agreements and loan documents for corporate and commercial real estate transactions. She received her B.A. from the University of Michigan in 2002 and her J.D. from Syracuse University College of Law in 2006. She is admitted to practice in New York. Ms. Davis will be splitting her time between the Ithaca and Syracuse offices of Hancock Estabrook.