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Employee Nondisclosure Agreements in South Carolina: Easily Made, Easily Broken

Samuel C. Williams

EMPLOYEE NONDISCLOSURE AGREEMENTS IN SOUTH CAROLINA: EASILY MADE, EASILY BROKEN

Samuel C. Williams*

I. INTRODUCTION

Businesses often require their employees to sign nondisclosure agreements, commonly known as NDAs, which restrict employees from using or disseminating their employer's proprietary information during and after the employment relationship.[1] These agreements can encompass both trade secrets and contractually protected confidential business information (CBI).[2]

* J.D. Candidate, May 2022, University of South Carolina School of Law; B.A., University of North Carolina Wilmington.

1. *See* Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, HARV. BUS. REV. (Jan. 30, 2018), https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change [https://perma.cc/KW98-Y933].

2. There are three categories of business information that exist on a continuum: (1) trade secrets, (2) CBI, and (3) "general skills and knowledge." Orthofix, Inc. v. Hunter, 630 F. App'x 566, 567 (6th Cir. 2015). Trade secrets and CBI, although closely related—and often used

Surveys and studies show that these agreements are pervasive in the American workplace.[3] In fact, by one recent estimate, over half of American workers are now bound by NDAs.[4]

NDAs are a necessity to employers. Without them, innovation and economic growth would be stifled.[5] For example, developing a profitable

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interchangeably—are not synonymous. Trade secrets are creatures of state statutory law, while CBI is a creature of state contract law. South Carolina, along with forty-seven other states, has adopted the Uniform Trade Secrets Act (UTSA), which defines a "trade secret" as:

> information including . . . a formula, pattern, compilation, program, device, method, technique, . . . or process, . . . that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by . . . other person[s] who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

S.C. CODE ANN. § 39-8-20(5)(a) (Supp. 2021). On the other hand, courts and commentators have struggled to define the contours of CBI, which is frequently identified not by what it is, but by what it isn't. *See* Susan J. Becker, *Discovery of Information and Documents from a Litigant's Former Employees: Synergy and Synthesis of Civil Rules, Ethical Standards, Privilege Doctrines, and Common Law Principles*, 81 NEB. L. REV. 868, 975 (2003); Jodi L. Short, *Killing the Messenger: The Use of Nondisclosure Agreements to Silence Whistleblowers*, 60 U. PITT. L. REV. 1207, 1226 (1999); *see also* Bernier v. Merrill Air Eng'rs, 770 A.2d 97, 104 (Me. 2001) (noting that CBI is information "that does not rise to the level of a trade secret but is more than general skill or knowledge"); Craig P. Ehrlich & Leslie Garbarino, *Do Secrets Stop Progress? Optimizing the Law of Non-Disclosure Agreements to Promote Innovation*, 16 N.Y.U. J.L. & BUS. 279, 279–80 (2020) (defining CBI as information that "is not quite a trade secret but is not publicly known either"); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. g. (AM. L. INST. 1995) (stating that NDAs can be used to extend the scope of information protectable by trade-secret law). Perhaps the most complete definition comes from Robert Unikel, who states that CBI:

> roughly can be defined as data, technology, or know-how that is known by a substantial number of persons in a particular industry (such that its status as a technical "trade secret" is in doubt) but that, nonetheless, retains some economic and /or competitive value by virtue of the fact that it is unknown to certain industry participants.

Robert Unikel, *Bridging the "Trade Secret" Gap: Protecting "Confidential Information" Not Rising to the Level of Trade Secrets*, 29 LOY. U. CHI. L.J. 841, 844 (1998).

3. *See* 2 MELVIN F. JAGER, TRADE SECRETS LAW § 13:3 (2021) ("Surveys show that a confidentiality agreement or clause is included in virtually all employment agreements used by major corporations.").

4. Natarajan Balasubramanian et al., Bundling Employment Restrictions and Value Capture from Employees 18 (Nov. 2021) (unpublished manuscript), https://ssrn.com/abstract=3814403 [https://perma.cc/C9AG-XB5U].

5. *Cf.* Rockwell Graphic Sys., Inc. v. DEV Indus., Inc., 925 F.2d 174, 180 (7th Cir. 1991) (Posner, J.) ("The future of the nation depends in no small part on the efficiency of industry, and the efficiency of industry depends in no small part on the protection of intellectual property."). The enforcement of properly tailored NDAs furthers the twin goals of confidentiality law: preserving commercial morality and encouraging innovation. First, by punishing actors "who engage in commercially undesirable practices," and thus increasing their

client list requires a firm to invest substantial time, money, and manpower.[6] Absent a way to prevent a free-riding employee from setting up shop across town and using its client list, the business would be discouraged from developing such information in the first place.[7] Moreover, NDAs play a vital role in any meaningful trade-secret protection plan, as they provide employers with a low-cost way of safeguarding their proprietary information—the theft of which can be financially devastating.[8]

These agreements, however, are not without criticism. Some argue that NDAs are harmful from a public-policy standpoint in that they restrict employee mobility, suppress speech, and chill creativity.[9] Employers may be reluctant to hire a prospective employee covered by an NDA, especially if "the former employer has a reputation for strictly enforcing its contracts through litigation."[10] And covered employees may be dissuaded from seeking new employment if they fear they will face liability merely for switching

costs, "confidentiality law attempts to impose a moral code upon the business world with respect to the procurement of proprietary information." Unikel, *supra* note 2, at 846. Second, by affording legal protection to misappropriation, confidentiality law allows innovators to reap the full benefit of their innovative activity by decreasing the amount of time, money, and effort they must expend to protect their developments. *Id.* at 847–48.

6. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. f. (AM. L. INST. 1995).

7. *See* Unikel, *supra* note 2, at 847.

8. The theft of intellectual property is estimated to cost the American economy hundreds of billions of dollars annually. *See* THE COMM'N ON THE THEFT OF AM. INTELL. PROP., THE IP COMMISSION REPORT 11 (2013). Merely litigating a trade-secret or breach-of-contract suit involving the misappropriation of confidential information can cost a firm millions. *See* Malathi Nayak, *Costs Soar for Trade Secrets, Pharma Patent Suits, Survey Finds*, BLOOMBERG L. (Sept. 10, 2019, 8:01 AM), https://news.bloomberglaw.com/ip-law/costs-soar-for-trade-secrets-pharma-patent-suits-survey-finds [https://perma.cc/T5Q8-PPFZ].

9. *See* Lobel, *supra* note 1; Pat Garofalo, Opinion, *How Amazon, Google and Other Companies Exploit NDAs*, N.Y. TIMES (June 29, 2021), https://www.nytimes.com/2021/06/29/opinion/nda-amazon-google-facebook.html [https://perma.cc/5B4Q-HXNB] (arguing that "NDAs impede government accountability and public involvement in economic policymaking"); Jennifer Elias, *Google Contractors Allege Company Prevents Them from Whistleblowing, Writing Silicon Valley Novels*, CNBC (Oct. 1, 2020, 6:02 PM), https://www.cnbc.com/2020/10/01/google-contractors-allege-ndas-violate-free-speech-laws.html [https://perma.cc/87DX-WGUL] (discussing NDAs signed by Google contractors prohibiting them from "talk[ing] about their wages, working conditions, or colleagues"); Sarah O'Connor, Opinion, *The NDA Boom Is Bad for Both Employers and Workers*, FIN. TIMES (Aug. 10, 2021), https://www.ft.com/content/463c917d-c8b5-418d-b8f7-d582747091be [https://perma.cc/DXL8-TZPG] (discussing NDAs used to cover up sexual harassment).

10. Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 642–43 (1999).

jobs.[11] Such issues will likely become even more prominent now that Americans are working more jobs in their lives than ever before.[12]

NDAs also raise practical concerns. Just "how does someone take his or her accumulated experience to a competitor without getting sued?"[13] Or in the words of Judge William Alsup, who presided over the infamous Uber–Waymo trade-secrets case: "Is an engineer supposed to get a frontal lobotomy before they go on to the next job?"[14] Finally, NDAs have come under fire in the wake of the #MeToo movement[15] and their usage by high-profile public figures such as former President Donald Trump and Hollywood mogul Harvey Weinstein.[16] This Note doesn't discuss, or make a value judgment as to the propriety of, NDAs used to settle discrimination or sexual harassment claims. It instead takes the view that an employer has a legitimate, non-nefarious reason for using NDAs: preventing former employees from exploiting its confidences and thereby obtaining a competitive advantage.[17]

Courts across jurisdictions generally agree with this proposition.[18] But most courts, including those in South Carolina, are skeptical when an NDA

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11. Rex N. Alley, *Business Information and Nondisclosure Agreements: A Public Policy Framework*, 116 NW. U. L. REV. 817, 869 (2021).

12. *See* Luciana Paulise, *Why Millennials and Gen-Z Are Leading the Great Resignation Trend*, FORBES (Oct. 26, 2021, 10:09 AM), https://www.forbes.com/sites/lucianapaulise/2021/10/26/why-millennials-and-gen-z-are-leading-the-great-resignation-trend/?sh=29e6433c44fe [https://perma.cc/Z73A-Z64L].

13. Camilla A. Hrdy, *The General Knowledge, Skill, and Experience Paradox*, 60 B.C. L. REV. 2409, 2416 (2019).

14. Lobel, *supra* note 1.

15. *See, e.g.*, Emily Otte, Comment, *Toxic Secrecy: Non-Disclosure Agreements and #MeToo*, 69 U. KAN. L. REV. 545, 546–47 (2021); Rebecca Beitsch, *#MeToo Has Changed Our Culture. Now It's Changing Our Laws.*, PEW (July 31, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/31/metoo-has-changed-our-culture-now-its-changing-our-laws [https://perma.cc/TU3V-8PHU]; Emily J. Roth, *Is a Nondisclosure Agreement Silencing You from Sharing Your 'Me Too' Story? 4 Reasons It Might Be Illegal*, ACLU (Jan. 24, 2018, 9:45 AM), https://www.aclu.org/blog/womens-rights/womens-rights-workplace/nondisclosure-agreement-silencing-you-sharing-your-me-too [https://perma.cc/2KKE-KBLG].

16. *See, e.g.*, Jeffrey Steven Gordon, *Silence for Sale*, 71 ALA. L. REV. 1109, 1111–12 (2020).

17. This Note uses the term "NDA" to refer to a nondisclosure agreement that covers confidential business information or CBI.

18. *See, e.g.*, Milliken & Co. v. Morin, 399 S.C. 23, 37, 731 S.E.2d 288, 295 (2012) ("It is widely recognized that an employer may 'restrain a former employee from disclosing and using confidential information which was developed as a result of the employer's initiative and investment and which the employee learned as a result of the employment relationship.'" (quoting GTI Corp. v. Calhoon, 309 F. Supp. 762, 768 (S.D. Ohio 1969))); Roberson v. C.P. Allen Constr. Co., 50 So. 3d 471, 475 (Ala. Civ. App. 2010) ("[A]n employer has a protectable interest sufficient to justify enforcement of a noncompete agreement '[i]f an employee [was] in a position to gain confidential information, access to secret lists, or to develop a close

covers an employee's general skill or knowledge instead of just trade secrets or CBI.[19] Consider the hypothetical case of ABC Corp., a software company, and Bob, an IT engineer. ABC Corp. hires Bob and requires him to sign an employment agreement containing a nondisclosure provision. Bob agrees, if he is terminated, not to disclose or use at all times any of ABC Corp.'s CBI that he had access to during his employment. The agreement defines "Confidential Information" as:

> (i) all software (source and object code), algorithms, computer processing systems, techniques, methodologies, formulae, processes, compilations or information, drawings, proposals, job notes reports, records, and specifications, and (ii) *all information concerning any matters relating to the business of ABC Corp.*, and its customers, customer contacts, licenses, the prices it obtains or has obtained for licensing of its software products and services, or any other information concerning the business of ABC Corp.[20]

After two years of working for ABC Corp., Bob is lured away and hired by XYZ Corp., a rival software company. He then files a declaratory-judgment action, arguing the agreement is unenforceable for lack of a reasonable time or geographical restraint. ABC Corp. counters that the agreement is narrowly tailored and doesn't prevent Bob from using either the skills he developed while working for ABC Corp., or his general knowledge about the software industry, in his employment with XYZ Corp. Yet for reasons this Note examines, ABC Corp. would likely be out of luck were this a real case. This brief hypothetical should give pause to South Carolina employers who rely on NDAs to protect their hard-earned CBI.

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relationship with clients.'" (quoting DeVoe v. Cheatham, 413 So. 2d 1141, 1143 (Ala. 1982))); ACAS Acquisitions (Precitech) Inc. v. Hobert, 923 A.2d 1076, 1084–85 (N.H. 2007) ("Legitimate interests of an employer that may be protected from competition include: the employer's trade secrets that have been communicated to the employee during the course of employment; [and] confidential information other than trade secrets communicated by the employer to the employee, such as information regarding a unique business method . . . ." (citing Nat'l Emp. Serv. Corp. v. Olsten Staffing Serv., 761 A.2d 401, 404–05 (N.H. 2000))).

19. *See, e.g.*, Carolina Chem. Equip. Co. v. Muckenfuss, 322 S.C. 289, 294, 471 S.E.2d 721, 724 (Ct. App. 1996) ("When an employee leaves a job, he is entitled to take the skills and general knowledge he has either acquired or increased during his employment with him . . . ."); Bodemer v. Swanel Beverage, Inc., 884 F. Supp. 2d 717, 735 (N.D. Ind. 2012) ("Indiana courts seem to be in harmony with other courts that prohibit the use of restrictive covenants to prevent employees from using general knowledge or experience during future employment."); Serv. Ctrs. of Chi., Inc. v. Minogue, 535 N.E.2d 1132, 1135 (Ill. App. Ct. 1989) ("[I]n a society based on competition, the employee has a right to make use of the general knowledge and skills acquired through experience in pursuing the occupation for which he is best suited.").

20. This language is borrowed from *Stuber v. CGH Techs.*, No. 03:07-cv-3094-JFA, 2008 WL 11349816, at *2 (D.S.C. Jan. 29, 2008).

This Note proceeds in three parts. Part II provides an overview of noncompete agreements in South Carolina. Part III explores how South Carolina courts evaluate NDAs in the employer–employee context. Part IV provides practical guidance to employers like ABC Corp. seeking to ensure that their NDAs remain legally enforceable.

II. OVERVIEW OF NONCOMPETE AGREEMENTS IN SOUTH CAROLINA

Before discussing NDAs in detail, an overview of the enforceability of noncompete agreements in South Carolina is in order. To be sure, the two types of agreements are conceptually distinct, and "true" NDAs are reviewed under a less stringent reasonableness standard than noncompete agreements.[21] But if an NDA is found to be overbroad—either because it encompasses publicly available information or the general skills and knowledge of the employee—it will be reviewed under the same standard as a noncompete.[22] Thus, as one treatise writer has cautioned, "[s]erious problems in contract interpretation and enforcement will arise if the distinctions between these two totally different agreements are ignored or blurred."[23]

A "noncompete agreement" or "covenant not to compete" is simply an agreement that one individual will not compete against another person or entity in some capacity.[24] Such agreements are common in the employment and sale-of-business contexts.[25] When used in an employment agreement, an employee agrees not to engage in a particular line of work after the employment relationship ends.[26] In the sale-of-business setting, a seller usually promises not to work in the same type of business in the same market as the buyer.[27]

A. History of Restrictive Covenants Generally

Restrictive covenants have a long history, dating back to at least fifteenth-century England.[28] Early English common law treated them as per se invalid

21. *See* discussion *infra* Part III.

22. *See* discussion *infra* Part III.

23. JAGER, *supra* note 3, § 13:2.

24. Nancy Morrison O'Connor, *"Promises and Pye-Crusts": State Statutes Threaten Broadcast Noncompetes*, 21 COMMC'NS LAW. 3, 3 (2003).

25. Steve D. Shadowen & Kenneth Voytek, *Economic and Critical Analyses of the Law of Covenants Not to Compete*, 72 GEO. L.J. 1425, 1426 (1984).

26. *Covenant Not to Compete*, BLACK'S LAW DICTIONARY (11th ed. 2019).

27. *Id.*

28. *See* Milton Handler & Daniel E. Lazaroff, *Restraint of Trade and the Restatement (Second) of Contracts*, 57 N.Y.U. L. REV. 669, 721 (1982).

as conflicting with the operation of the guild system in place at the time.[29] But as the principles of laissez-faire took hold and society became more mobile, eighteenth-century English courts began to distinguish between "general" restraints, unlimited as to time and place, and "particular" restraints, applying to specific "places or persons."[30] The former remained per se unenforceable, while the latter were valid if supported by consideration and "just reason."[31] American courts would later adopt the English "rule of reason" approach in the antitrust context.[32] In the seminal case *United States v. Addyston Pipe & Steel Co.*, then-Sixth Circuit Judge William Howard Taft famously posited:

> [N]o conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the

29. *See id.* at 721–723; 1 SALLY SCOGGIN & ANN HUNTRODS, BUSINESS TORTS § 4.02 (2021). The first reported case involving a restrictive covenant appears to be the *Dyer's Case*, decided in 1414. In that case, the court rejected a wool dyer's attempt to enforce the terms of an agreement with his former apprentice, under which the former apprentice agreed not to engage in the dye business in the master's town for six months following his apprenticeship. In striking down the agreement, the judge exclaimed, "By God, if the plaintiff were here he would go to prison until he paid a fine to the King." Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 636 & n.33 (1960); *see also* Mark A. Glick et al., *The Law and Economics of Post-Employment Covenants: A Unified Framework*, 11 GEO. MASON L. REV. 357, 360–61 (2002) (discussing the *Dyer's Case*). This hostility is understandable when considering the economic and social conditions of fifteenth-century England:

> > Skill in a trade was the vital factor in a man's economic status and it was obtainable only through apprenticeship to an experienced worker. The guild system permitted a man to work only in the trade in which he was apprenticed. Membership in a guild was not easily attained. Travel was difficult. Strangers were not welcome. If a man couldn't work at his trade in his particular locality, he could hardly work at all; might become a pauper; and the public would be deprived of a worker at a time when the Black Death had made workmen scarce.

Arthur Murray Dance Studios v. Witter, 105 N.E.2d 685, 691 (Oh. Ct. Com. Pl. 1952). The use of NDAs, on the other hand, is a relatively modern phenomenon, dating back to the 1970s and the budding tech industry. EJ Dickson, *What, Exactly, Is an NDA?*, ROLLING STONE (Mar. 19, 2019, 6:17 PM), https://www.rollingstone.com/culture/culture-features/nda-non-disclosure-agreements-809856/ [https://perma.cc/K2XC-LV8C]; Michelle Dean, *Contracts of Silence*, COLUM. JOURNALISM REV. (Winter 2018), https://www.cjr.org/special_report/nda-agreement.php [https://perma.cc/6KNX-R7H8].

30. Mitchel v. Reynolds, 24 Eng. Rep. 347, 349 (Q.B. 1711).

31. *Id.*; *see also* Maureen B. Callahan, Comment, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703, 709–10 (1985) ("The *Mitchel v. Reynolds* approach has survived virtually unchanged to the present day.").

32. *See* John F. Fischer, *A Non-Compete Case Is an Antitrust Case: An Analysis of Oklahoma's Postemployment Restraint Law*, 72 OKLA. L. REV. 755, 763 (2020).

> enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party.[33]

Taft observed that certain restrictive covenants—such as those between the buyer and seller of a business or between an employee and employer—could be upheld if "reasonably necessary."[34]

In 1889, the South Carolina Supreme Court first recognized that "contracts in partial restraint of trade" may be valid if supported by valuable consideration, limited in geography, and reasonable as to the covenantee, covenantor, and general public.[35] Relying on this formulation, the supreme court in the 1930 case of *Metts v. Wenberg* upheld a five-year covenant not to compete ancillary to the sale of a barbering business.[36]

The modern reasonableness test for noncompete agreements has its roots in *Standard Register Co. v. Kerrigan*, a case involving a noncompete in the employer–employee context.[37] Standard Register, an Ohio manufacturer and seller of business forms, sought an injunction to prevent Kerrigan, a former salesman, from violating his covenant not to compete.[38] Kerrigan had agreed not to sell to his former accounts, or in the territory where he had performed his job duties, for two years after leaving his employment.[39] The court gave effect to the Ohio choice-of-law provision and ultimately found that the agreement was valid under Ohio law and didn't violate the public policy of South Carolina (the location of Kerrigan's former accounts) for three primary reasons.[40]

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33. 85 F. 271, 282 (6th Cir. 1898).
34. *Id.* at 281.
35. Carroll v. Giles, 30 S.C. 412, 417–18, 9 S.E. 422, 423 (1889).
36. 158 S.C. 411, 155 S.E. 734 (1930). Wenberg sold his barbering business to the Metts brothers and agreed not to "engage in the barber trade directly or indirectly within the City of Orangeburg" for five years. *Id.* at 413, 155 S.E. at 734. Wenberg moved away briefly but returned to Orangeburg two years later to work for a competitor of the Metts. Wenberg argued the contract didn't prevent him from working at a barber shop in which he didn't have an ownership interest and that interpreting the agreement otherwise "would render [the] contract unlawful and void as being wholly unreasonable, contrary to public policy, and in unlawful restraint of trade." *Id.* at 413–14, 155 S.E. at 735. The supreme court disagreed. It noted that whatever the early English common law view may have been, partial restraints of trade would be upheld if supported by consideration and reasonably limited as to time and territory—i.e., "where the time is not more extended or the territory more enlarged than essential for a reasonable protection of the rights of the purchasing party." *Id.* at 415, 155 S.E. at 735. To the court, these requirements were easily met because valuable consideration had been exchanged and the five-year time limit and the territory restriction covering Orangeburg's city limits were necessary to protect the Metts' business interests given that Wenberg had been serving his old customers upon returning to Orangeburg. *Id.* at 415–416, 155 S.E. at 735.
37. 238 S.C. 54, 57, 119 S.E.2d 533, 535 (1961).
38. *Id.* at 57–58, 119 S.E.2d at 535.
39. *Id.* at 58–59, 119 S.E.2d at 535.
40. *Id.* at 70–72, 119 S.E.2d at 541–42.

First, the court recognized that Standard Register had a legitimate interest in preventing Kerrigan from raiding its "stock of customers," and the fact that Kerrigan had indeed contacted seventeen of his eighteen former accounts revealed the restraint was necessary.[41] Second, the restraint didn't curtail Kerrigan's ability to earn a living because he remained free to sell business forms to hundreds of other customers in the Greenville area.[42] Finally, the covenant didn't violate the public interest because the local business-form industry was highly competitive, meaning the public wouldn't be deprived of his skills or services.[43]

B. Noncompete-Reasonableness Test

Subsequent decisions synthesized from *Standard Register* five criteria to consider when evaluating the reasonableness of a noncompete agreement:

> [A] covenant by an employee not to compete with his employer after the termination of his employment will ordinarily be upheld if it [1] is necessary for the protection of the legitimate interest of the employer, [2] is reasonably limited in its operation with respect to time and place, [3] is not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood, [4] is reasonable from the standpoint of sound public policy, and [5] is supported by a valuable consideration.[44]

Although the supreme court once suggested that these criteria are to be weighed against one another,[45] South Carolina appellate courts routinely treat them as elements, meaning all five must be satisfied before a noncompete will be enforced.[46]

41. *Id.* at 65–66, 119 S.E.2d at 539.
42. *Id.* at 68–69, 119 S.E.2d at 541.
43. *Id.* at 69, 119 S.E.2d at 541.
44. *E.g.*, Oxman v. Sherman, 239 S.C. 218, 224, 122 S.E.2d 559, 561–62 (1961).
45. *See* Almers v. S.C. Nat'l Bank of Charleston, 265 S.C. 48, 56, 217 S.E.2d 135, 139 (1975) ("The ultimate test of reasonableness depends on a sifting and weighing of the individual of the individual facts of each case.").
46. Timothy D. Scrantom & Cherie Lynne Wilson, *Postemployment Covenants Not to Compete in South Carolina: Wizards and Dragons in the Kingdom*, 42 S.C. L. REV. 657, 665 n.35 (1991).

1. Employer's Legitimate Interests

Broadly speaking, an employer has a legitimate interest in protecting itself against improper and unfair methods of competition.[47] Though an employer has no valid interest in simply preventing competition,[48] it may seek to protect existing business relationships[49] and customer goodwill[50] and prevent the dissemination of its trade secrets and CBI.[51]

2. Limited in Time and Place

A territorial limitation is invalid "if it covers an area broader than necessary to protect the legitimate interest of the employer."[52] South Carolina courts have routinely held that a noncompete's enforceability is limited to the territory where the employee worked for the employer.[53] For instance, the court in *Oxman v. Sherman* found a noncompete covering the entire state invalid where the insurance agent worked only in two counties.[54] As to time, there's no bright-line rule for what's reasonable, though restrictions of two and three years have been upheld.[55]

47. *See id.* at 668.

48. *See* Hagemeyer N. Am. Inc. v. Thompson, No. 2:05–3425, 2006 WL 516733, at *4 (D.S.C. Mar. 1, 2006).

49. The Supreme Court of South Carolina has expressly recognized that the "most important single asset of most businesses is their stock of customers." Standard Reg. Co. v. Kerrigan, 238 S.C. 54, 66, 119 S.E.2d 533, 539 (1961).

50. *See Almers*, 265 S.C. at 58, 217 S.E.2d at 140.

51. *See* Milliken & Co. v. Morin, 399 S.C. 23, 37, 731 S.E.2d 288, 295 (2012).

52. *Standard Reg. Co*., 238 S.C. at 66, 119 S.E.2d at 539.

53. *Id.* ("[T]he territorial restraint in a covenant not to compete will . . . be considered reasonable if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers."); *see* Delmar Studios of Carolinas v. Kinsey, 233 S.C. 313, 321, 104 S.E.2d 338, 342 (1958) ("[A] restrictive covenant must bear some relation to the activities of the employee. It must not restrain his activities in a territory into which his former work has not taken him or given the opportunity to enjoy undue advantages in later competition with his employer."); *Hagemeyer*, 2006 WL 516733, at *5 (finding noncompete provision covering Georgia reasonable when the employee was responsible for sales throughout Georgia, North Carolina, and South Carolina).

54. 239 S.C. 218, 225, 122 S.E.2d 559, 562 (1961).

55. *See Standard Reg. Co.*, 238 S.C. at 68, 119 S.E.2d at 541 (two years); Rental Unif. Serv. of Florence, Inc. v. Dudley, 278 S.C. 674, 676, 301 S.E.2d 142, 143 (1983) (three years); Sermons v. Caine & Estes Ins. Agency, 275 S.C. 506, 509, 273 S.E.2d 338, 339 (1980) (observing that "a limitation of two or even three years may not obnoxious"). Limitations of five years have been upheld in the sale-of-business setting. *See, e.g.*, Metts v. Wenberg, 158 S.C. 411, 411, 155 S.E. 734, 735 (1930); Cafe Assocs., Ltd. v. Gerngross, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991).

3. Unduly Harsh or Oppressive

Much like the public-policy element, courts rarely discuss this element "except to say it is necessary to determine whether an employee competition covenant is enforceable."[56] Intuitively this factor would appear to be the most important given that early common-law cases treated such agreements as per se unlawful because they denied an individual the "right to exercise his trade or calling."[57] Put differently, the right of every person to pursue his or her chosen profession was the very interest those cases sought to protect.[58] While per se illegality is no longer the prevailing view, a covenant not to compete will be struck down if it imposes economic hardship on the employee.[59] *Standard Register* suggested that courts consider the conditions of the current labor market, whether the employee will be deprived of "the opportunity of supporting himself and his family," and whether the employee will be forced to relocate or change professions.[60]

4. Public Policy

Besides mentioning the oft-repeated maxim that noncompete agreements are "looked upon with disfavor"[61] because of their potential anticompetitive effects, courts usually gloss over the public-policy element by mentioning it and briefly discussing it,[62] or failing to do so altogether.[63] This element should theoretically focus on the degree to which society is deprived of the employee's skill or productivity.[64] With that said, in at least two decisions,

56. Scrantom & Wilson, *supra* note 46, at 672.
57. *Standard Reg. Co.*, 238 S.C. at 59, 119 S.E.2d at 536.
58. Scrantom & Wilson, *supra* note 46, at 672 & n.79.
59. *Standard Reg. Co.*, 238 S.C. at 68, 119 S.E.2d at 540–41.
60. *Id*. at 67–68, 119 S.E.2d at 540–41.
61. Almers v. S.C. Nat'l Bank of Charleston, 265 S.C. 48, 51, 217 S.E.2d 135, 136 (1975).
62. *See, e.g.*, Carolina Chem. Equip. Co. v. Muckenfuss, 322 S.C. 289, 295, 471 S.E.2d 721, 724 (Ct. App. 1996).
63. *See, e.g.*, Hagemeyer N. Am. Inc. v. Thompson, No. 2:05–3425, 2006 WL 516733 (D.S.C. Mar. 1, 2006); Dove Data Prods., Inc. v. Murray, No. 4–05–CV–72–25, 2006 WL 463588, at *3 (D.S.C. Feb. 23, 2006).
64. *See Standard Reg. Co.*, 238 S.C. at 69, 119 S.E.2d at 541 (concluding that the restraint was not "injurious to the public" because "the sale of business forms in the Greenville area [wa]s highly competitive"). Described as the "loss-to-society rationale" by one commentator, this concern was very real in pre-industrial England—a time when "the removal of a skilled person from the work force . . . might have exacted significant social costs" due to a plague-induced labor shortage. Callahan, *supra* note 31, at 724. However, this reasoning isn't as compelling today in light of contemporary economic conditions. *Id.*; *see also* Outsource Int'l, Inc. v. Barton & Barton's Staffing Sols., 192 F.3d 662, 669–70 (7th Cir. 1999) (Posner, J., dissenting) ("The original rationale [behind the judicial hostility towards noncompete agreements] had nothing to

South Carolina appellate courts have analyzed whether the agreement was "freely entered into by the parties."[65] This suggests that the element's proper focus is on the contracting process itself (e.g., the parties' relative bargaining power and sophistication, whether the agreement was procured through fraud or duress, and so forth) rather than the agreement's competitive effects.

5. Consideration

Like any other contract, a noncompete agreement must be supported by valid consideration. When a restrictive covenant is signed at the inception of employment, the promise of initial employment is sufficient.[66] Likewise, consideration is proper when such agreement is signed at the end of employment in exchange for severance pay, for example.[67] "The more difficult question," however, "becomes whether continued at-will employment is sufficient consideration to enforce a covenant entered into days, months, or even years after the initial employment offer."[68] The answer, at least in South Carolina, is no; continued employment by itself is insufficient.[69] Instead, to be enforceable, a restrictive covenant must be signed in exchange "for a change in the employee's conditions of employment, such as a raise, a promotion, or access to confidential information."[70]

III. ENFORCEABILITY OF NDAS IN SOUTH CAROLINA

Unlike noncompete agreements, NDAs are not automatically disfavored since they implicate "restrictions on access to information, rather than employee movement."[71] In this vein, employees bound by NDAs "remain free to work for whomever they wish, wherever they wish, and at whatever they

do with restraint of trade in its modern, antitrust sense. It was paternalism in a culture of poverty, restricted employment, and an exiguous social safety net. The fear behind it was that workers would be tricked into agreeing to covenants that would, if enforced, propel them into destitution . . . . This fear, though it continues to be cited, . . . has no basis in current American conditions.").

65. Wolf v. Colonial Life & Accident Ins. Co., 309 S.C. 100, 109, 420 S.E.2d 217, 221 (Ct. App. 1992); Oxman v. Profitt, 241 S.C. 28, 33–34, 126 S.E.2d 852, 854 (1962).

66. Poole v. Incentives Unlimited, Inc., 345 S.C. 378, 382, 548 S.E.2d 207, 209 (2001).

67. Maura Irene Strassberg, *An Ethical Rabbit Hole: Model Rule 4.4, Intentional Interference with Former Employee Non-Disclosure Agreements and the Threat of Disqualification, Part II*, 90 NEB. L. REV. 141, 146 (2011).

68. *Poole*, 345 S.C. at 382, 548 S.E.2d at 209.

69. *Id.*

70. Strassberg, *supra* note 67, at 146; *see Poole*, 345 S.C. at 382, 548 S.E.2d at 209 (holding consideration was sufficient because the employee "received a change in duties, change in pay, and change in position").

71. Terry Morehead Dworkin & Elletta Sangrey Callahan, *Buying Silence*, 36 AM. BUS. L.J. 151, 157 (1998).

wish, subject only to the prohibition against misusing [their employer's] proprietary information" in subsequent employment.[72] For this reason, NDAs are not strictly construed in favor of employees.[73] Yet because they are, at their core, restrictive covenants, South Carolina courts still review them for reasonableness.[74] The South Carolina Supreme Court has instructed courts to consider two of the *Standard Register* elements when assessing true NDAs—that is, the restriction must (1) be tailored to protect some legitimate business interest of the employer and (2) not be overly burdensome or oppressive in that it limits the employee's ability to secure future employment.[75]

But not all restrictive covenants that purport to be NDAs are evaluated under this standard. In evaluating NDAs, South Carolina courts seemingly engage in a two-step analysis.[76] A court first delineates the agreement's scope.[77] South Carolina courts look beyond the label given to the particular agreement and instead look at whether it ends up restricting the employee's future employment opportunities.[78] Essentially, if the purported NDA walks, swims, and quacks[79] like a noncompete agreement, it will be evaluated under the heightened noncompete-reasonableness standard at the second step, meaning it must be limited as to time and territory.[80] But if the agreement isn't facially overbroad, it will be reviewed under the less searching NDA-reasonableness standard described above.[81] A trio of cases highlight South Carolina's approach to evaluating NDAs: *Carolina Chemical Equipment Co.,*

72. Mai Basic Four, Inc. v. Basis, Inc., 880 F.2d 286, 288 (10th Cir. 1989).

73. Milliken & Co. v. Morin, 399 S.C. 23, 39, 731 S.E.2d 288, 296 (2012).

74. *Id.* at 33, 731 S.E.2d at 293.

75. *Id.*

76. *See* Fay v. Total Quality Logistics, LLC, 419 S.C. 622, 630–32, 799 S.E.2d 318, 323–24 (Ct. App. 2017).

77. *Milliken*, 399 S.C. at 37–38, 731 S.E.2d at 295.

78. *See* Carolina Chem. Equip. Co. v. Muckenfuss, 322 S.C. 289, 293–94, 471 S.E.2d 721, 723 (Ct. App. 1996); *Fay*, 419 S.C. at 631–32, 799 S.E.2d at 324.

79. The "duck test" is a form of abductive reasoning holding that if something "walks like a duck, swims like a duck, and quacks like a duck, it's a duck." Lake v. Neal, 585 F.3d 1059, 1059 (7th Cir. 2009). The so-called "test" has received widespread judicial recognition. *See, e.g.*, Hussain v. Obama, 718 F.3d 964, 968 (D.C. Cir. 2013) ("Evidence that Hussain carried an assault rifle given him by Taliban forces while living among Taliban forces near a battle line fought over by Taliban forces brings to mind the common sense view in the infamous duck test."); Sessoms v. Grounds, 768 F.3d 882, 884 (9th Cir. 2014) ("When a suspect says 'give me a lawyer,' that request walks, swims, and quacks like a duck. It is an unambiguous request for a lawyer, no matter how you slice it."); United States v. Flores, 888 F.3d 537, 545 (1st Cir. 2018) ("[T]he Fourth Amendment does not require that an officer rule out potentially innocent explanations for every piece of evidence before reaching a reasonable conclusion that there is probable cause to believe that a crime has been committed and that the suspect has committed it. When it waddles like a duck, quacks like a duck, swims like a duck, and looks like a duck, it is quite likely to be a duck.").

80. *Milliken*, 399 S.C. at 33 n.5, 731 S.E.2d at 293 n.5.

81. *See id.* at 39, 731 S.E.2d at 296.

Inc. v. Muckenfuss,[82] *Milliken & Co. v. Morin*,[83] and *Fay v. Total Quality Logistics, LLC*.[84]

In *Milliken*, the supreme court held that the NDA in question was not in restraint of trade because it was reasonably tailored to protect the employer's legitimate interest in restricting the disclosure and use of its CBI.[85] Morin was first hired as a research physicist by Millikin.[86] He signed an employment agreement containing a confidentiality provision, which defined "confidential information" as "all competitively sensitive information of importance to and kept in confidence by Milliken, which becomes known to [Morin] through [his] employment with Milliken and which does not fall within the definition of Trade Secret above."[87] The agreement prohibited Morin from using or disclosing Milliken's CBI for three years after his termination.[88]

As part of his job duties, Morin was tasked with exploring a way to create a new type of fiber.[89] Shortly after attending a trade show on Milliken's behalf to seek out potential uses for this new fiber, he began drafting a business plan in hopes of manufacturing the fiber himself.[90] After Morin resigned and patented the new fiber, Milliken caught wind of his plans and filed suit for breach of the confidentiality agreement, among other things.[91] At trial, the jury found for Milliken, and the court of appeals affirmed.[92]

The supreme court began its discussion by noting that an employer has a legitimate interest in preventing former employees from using its confidential information in later employment.[93] The court then looked to the language of the agreement to decide whether it fell within this legitimate business purpose.[94] The agreement was narrow enough in the court's view because it covered only "(1) competitively sensitive information (2) of importance to and (3) kept in confidence by Milliken, (4) which [became] known to [Morin] through his employment with Milliken, and (5) which [was] not a trade secret."[95] In other words, it didn't encompass publicly available information, nor did it prevent Morin from using his general knowledge and skills he

82. *Muckenfuss*, 322 S.C. 289, 471 S.E.2d 721.
83. *Milliken*, 399 S.C. 23, 731 S.E.2d 288.
84. 419 S.C. 622, 799 S.E.2d 318 (Ct. App. 2017).
85. *Milliken*, 399 S.C. at 38–39, 731 S.E.2d at 296.
86. *Id.* at 27, 731 S.E.2d at 290.
87. *Id.* (alterations added).
88. *Id.* at 27–28, 731 S.E.2d at 290.
89. *Id.* at 29, 731 S.E.2d at 291.
90. *Id.*
91. *Id.*
92. *Id*. at 30, 731 S.E.2d at 291.
93. *Id.* at 37, 731 S.E.2d at 295.
94. *Id.* at 37–38, 731 S.E.2d at 295.
95. *Id.* at 38, 731 S.E.2d at 296.

acquired while working for Milliken.[96] As a result, the court evaluated the agreement under the NDA-reasonableness standard and upheld it, finding it "str[uck] an appropriate balance between protecting [Milliken's] valuable interest in its proprietary information and permitting [Morin] to find gainful employment in his chosen field."[97]

In contrast, in *Muckenfuss*, the court of appeals held that a "Covenant Not to Divulge Trade Secrets," despite its designation, amounted to an unenforceable noncompete.[98] Muckenfuss was one of three shareholders of Carolina Chemical during the 1980s.[99] After he was voted out by the other two shareholders, he sold his stock back to the company under a Stock Redemption Agreement, which provided, in part:

> [Muckenfuss] agrees to not divulge any trade secrets of the Corporation. Trade secrets means *any knowledge or information concerning any process, product, or customer of the Corporation* and more generally any knowledge or information concerning any aspect of the business of the Corporation which could, if divulged to a direct or indirect competitor, adversely affect the business of the Corporation, its prospects or competitive position.[100]

The court subjected the agreement to noncompete scrutiny because it swept "so broadly that virtually all of the information Muckenfuss acquired during his employment would fall within its definition."[101] And because the agreement lacked a temporal or territorial restriction, it failed to pass muster at the second step of the analysis.[102] The court also briefly addressed the third *Standard Register* element and found that the restraint subjected Muckenfuss, a high school graduate who had only ever worked in the industrial chemical business, to undue economic hardship.[103]

Similarly, in *Fay*, the court of appeals held that an NDA was facially overbroad and unenforceable as against South Carolina public policy after employing full-blown noncompete-reasonableness review.[104] Fay was hired by TQL, an Ohio-based motor carrier logistics and brokerage company, in

96. *Id.*
97. *Id.* at 39, 731 S.E.2d at 296 (alterations added).
98. Carolina Chem. Equip. Co. v. Muckenfuss, 322 S.C. 289, 293, 471 S.E.2d 721, 723 (Ct. App. 1996).
99. *Id.* at 291, 471 S.E.2d at 722.
100. *Id.* at 293, 471 S.E.2d at 723 (alteration in original) (emphasis added).
101. *Id.* at 296, 471 S.E.2d at 725.
102. *Id.* at 294, 471 S.E.2d at 723.
103. *Id.* at 294–95, 471 S.E.2d at 724.
104. Fay v. Total Quality Logistics, LLC, 419 S.C. 622, 633, 799 S.E.2d 318, 325 (Ct. App. 2017).

2012 as a "Logistics Sales Account Executive."[105] Paragraph four of his employment agreement prevented him from using "Confidential Information" without TQL's authorization.[106] Under the agreement, which contained an Ohio choice-of-law provision, Fay agreed "all information disclosed to [him] or to which [he had] access during the period of his . . . employment shall be presumed to be Confidential Information hereunder if there is any reasonable basis to believe it to be Confidential Information or if TQL appears to treat it as confidential."[107] This provision lacked a time restriction and was binding "at all times" following his employment.[108]

Paragraph six added that, if Fay were to work for a "Competing Business 'in a position similar'" to his job at TQL, it would "necessarily and inevitably result in [Fay] revealing, basing judgments and decisions upon, or otherwise using TQL's Confidential Information to unfairly compete with TQL."[109] A "Competing Business" was defined as "any person, firm, corporation, or entity that is engaged in the Business anywhere in the Continental United States."[110] "Business," in turn, meant "providing motor transport and related services, including third-party logistic[s] services, motor freight brokerage services and supply-chain management services."[111]

Fay was terminated in June 2013 and began working as a broker for a competitor soon after.[112] After TQL threatened legal action, Fay preemptively filed suit against TQL seeking a declaratory judgment that the employment agreement was overbroad.[113] The trial court applied Ohio law and upheld the agreement, reasoning that its limitations "were no greater than required for TQL's protection, did not impose undue hardship on Fay, and were not injurious to the public."[114]

The court of appeals disagreed and held that the nondisclosure provisions were, in reality, noncompete provisions because they ended up restricting Fay's post-employment mobility.[115] The court came to this conclusion by reading paragraphs six and four together.[116] Paragraph six provided that by simply holding a similar position for a business in the same industry, Fay would "necessarily and inevitably" reveal or use TQL's CBI—which

105. *Id.* at 625, 799 S.E.2d at 320.
106. *Id.*
107. *Id.* (alterations in original).
108. *Id.* at 626, 799 S.E.2d at 321.
109. *Id.* (alteration in original).
110. *Id.*
111. *Id.* (alteration in original).
112. *Id.*
113. *Id.*
114. *Id.* at 627, 799 S.E.2d at 321.
115. *Id.* at 629, 799 S.E.2d at 322.
116. *Id.* at 630–31, 799 S.E.2d at 323.

paragraph four prohibited him from doing "at all times" after leaving TQL.[117] Basically, Fay could never work as a broker in the freight transportation industry again without violating the agreement.[118] Thus, the court determined the agreement was a de facto noncompete required to have a reasonable time restriction.[119] Because it didn't, the court held the entire agreement was invalid under South Carolina's public policy.[120]

IV. GUIDANCE FOR SOUTH CAROLINA EMPLOYERS

So far, this Note has provided an overview of noncompete agreements, NDAs, and the standards for evaluating each under South Carolina law. This Note now turns its focus to providing practical guidance for employers and practitioners seeking to ensure the enforceability of their future NDAs.

A. The Importance of Definitions

As with any contract, the importance of careful drafting can't be overstated. For starters, cases such as *Muckenfuss* and *Fay* elucidate that CBI shouldn't be defined so broadly as to include essentially all information an employee learns during his or her employment. As another example, the District of South Carolina in *Nucor Corp. v. Bell* found an NDA facially overbroad that defined "confidential information," in part, as "all Inventions and all other business, technical and financial information [Bell] develop[s], learn[s] or obtain[s] during the term of [his] employment that relate to . . . the Company . . . ."[121] The same court did, however, uphold two other Nucor NDAs that limited the definition of "trade secrets and confidential information" to "plant design, specifications and layout; equipment design, specifications and layout; product design and specifications; manufacturing processes, procedures and specifications; data processing programs; research and development projects; marketing, pricing, cost and financial data; and

117. *Id.* at 631, 799 S.E.2d at 323.

118. *Id.*

119. *Id.*

120. *Id.* at 633, 799 S.E.2d at 325.

121. Nucor Corp. v. Bell, 482 F. Supp. 2d 714, 728 (D.S.C. 2007) (alterations in original). Interestingly, the court held the agreement was unenforceable, not because it lacked a geographical or temporal restriction, but because it wasn't supported by adequate consideration. *Id.* at 730; *see also* McGough v. Nalco Co., 496 F. Supp. 2d 729, 756 (N.D. W. Va. 2007) ("By defining confidential information as essentially all of the information provided to Mr. McGough during his employment, the nondisclosure covenants amount to a post-employment covenant not to compete that is completely unrestricted in duration or geographic scope."); Serv. Ctrs. of Chi., Inc. v. Minogue, 535 N.E.2d 1132, 1133 (Ill. Ct. App. 1989) (refusing to enforce NDA that prohibited the employee from "disclos[ing] or disseminat[ing] any information or material provided to him" by his employer).

which have not been made available to the public by Nucor."[122] As a general rule, CBI should include only information that isn't generally known or publicly available,[123] has some economic value to the employer,[124] and which doesn't encompass the general skills and knowledge the employee acquires during employment.[125] Courts have routinely found that "customer lists, specific information about customers, and pricing formulas," for example, qualify as protectable CBI.[126]

Relatedly, employers should avoid using "including, but not limited to" language or similar catch-all phraseology when defining their CBI.[127] Doing

122. *Bell*, 482 F. Supp. 2d at 730.

123. *See* Richard F. Dole, Jr., *Limitations Upon the Enforceability of an Employee's Covenant Not to Disclose and Not to Use Confidential Business Information Without Authorization*, 23 UCLA J.L. & TECH. 1, 6 (2019) ("Information that either is or becomes public implicitly is excluded from the definition of confidential information."); Ehrlich & Garbarino, *supra* note 2, at 279–80 (defining CBI as information that "is not quite a trade secret but is not publicly known either"); *see also* T&S Brass & Bronze Works, Inc. v. Slanina, No. 6:16-3687-MGL, 2016 WL 11201768, at *7 (D.S.C. Dec. 20, 2016) (holding NDA was "carefully tailored to avoid interfering with the defendants' ability to work in their chosen field" because its definition of CBI did not include "general skills, experience or information that is generally available to the public, other than information which has become generally available as a result of Employee's direct or indirect act or omission").

124. *See* RESTATEMENT OF EMPLOYMENT LAW § 8.07 cmt. b (AM. LAW. INST. 2015) ("Courts will generally protect nonpublic commercial information that provides a clear economic advantage to the employer by virtue of its confidentiality, provided that the restrictive covenant is otherwise reasonable . . . and the information has been treated as confidential by the employer."); *see also* Milliken & Co. v. Morin, 399 S.C. 23, 27, 731 S.E.2d 288, 290 (2012) (enforcing confidentiality agreement defining CBI as "all competitively sensitive information of importance to and kept in confidence by [the employer], which bec[ame] known [by the employee] through [his] employment" and was not a trade secret).

125. *See* RESTATEMENT OF EMPLOYMENT LAW § 8.07 cmt. b (AM. LAW. INST. 2015) ("An employer cannot protect as confidential any information in which it does not have a protectable interest, such as information that has entered the public domain and information that would be considered part of the general experience, knowledge, training, and skills that an employee acquires in the course of employment."); *see also* Herring v. Lapolla Indus., Inc., No. 2:12-CV-2705-RMG, 2013 WL 12148850, at *3 (D.S.C. Nov. 26, 2013) ("At the heart of this dispute is whether the provision forbids Herring from using his general knowledge, skills, and experience in later employment because the parties agree that, if the provision does so, it would be invalid under South Carolina law . . . ."); Williams v. Unum Grp. (Corp.), No. 3:17-cv-01814-CMC, 2017 WL 10756823, at *15 (D.S.C. Oct. 18, 2017) ("South Carolina does not appear to impose any stringent rules for defining what constitutes 'confidential' information subject to such an agreement so long as it does not preclude the former employee from using his general skills and knowledge.").

126. Dole, Jr., *supra* note 123, at 5 n.30.

127. *See* Carlson Grp., Inc. v. Davenport, No. 16-cv-10520, 2016 WL 7212522, at *4 (N.D. Ill. Dec. 13, 2016) ("Although [the NDA] itemizes particular information in which TCG likely has a protectable interest (*e.g.*, customer 'contract terms'), and excludes information 'generally known to [TCG's] competitors,' the broad catch-all language ('of or concerning' TCG's business), without further limitation, calls into question its enforceability." (second alteration in

so may make it impossible for a court to determine the bounds of the information protected, which, in turn, could result in the entire NDA being invalidated. *Herring v. Lapolla Industries*[128] illustrates this point. In 2008, Herring was hired as a sales manager by LaPolla, a manufacturer and supplier of spray polyurethane foam.[129] Herring's employment agreement prevented him from "divulg[ing], communicat[ing], or us[ing] in any way, any Confidential Information (as hereinafter defined) pertaining to the business of the Company."[130] The agreement added:

> the term "Confidential Information" includes, *but is not limited to*, information disclosed to the Employee or known by the Employee as a consequence of or through his employment by the Company (including information conceived, originated, discovered or developed by Employee) prior to or after the date hereof, and not generally known, about the Company or its business.[131]

In 2012, Herring resigned from Lapolla and filed suit in South Carolina federal court, seeking a declaratory judgment that the employment agreement was unenforceable.[132]

Because the agreement contained a Texas choice-of-law provision, the court looked to Texas contract-law principles to determine its construction yet noted that South Carolina's public policy would ultimately dictate whether it was enforceable within the state.[133] The court reasoned that if "Confidential Information" wasn't limited to information shared with or known by Herring

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original)); HCC Cas. Ins. Servs., Inc. v. Day, No. 20 C 7620, 2021 WL 1165096, at *7 (N.D. Ill. Mar. 26, 2021) ("Certainly, HCC likely has an interest in keeping the enumerated types of information confidential. The [NDA], however, expressly states that '[c]onfidential [i]nformation includes, *but is not limited to*' these specific categories of information, and thus, does not actually limit the reach of the broad preceding language 'any information . . . that relates to any aspect of' HCC's business." (first alteration added)); CleanFish, LLC v. Sims, No. 19-cv-03663-HSG, 2020 WL 4732192, at *4 (N.D. Cal. Aug. 14, 2020) (holding, in a trade-secret case, that "by employing 'including but not limited to' language within the definition of 'Trade Secrets,'" the employer made it impossible to ascertain "what is and is not protectable"); *cf.* Memorandum from Stewart Schwab, Reporter, to Noncompete Drafting Committee Members and Observers 2 (Nov. 2, 2020) (noting that such language "might suggest that virtually any private information can be protected as confidential information, which goes against the ethos of the [Uniform Noncompete Agreement] Act, which is to limit the use of restrictive covenants to situations where an employer's legitimate interests (other than limiting competition) need protection").

128. *Herring*, 2013 WL 12148850.

129. *Id.* at *2.

130. *Id.*

131. *Id*. (emphasis added).

132. *Id.* at *1.

133. *Id.* at *2.

resulting from his employment with Lapolla, it arguably included some information he knew and learned of apart from his job.[134] If this were the case, the agreement would be void under both Texas and South Carolina law because it would prevent Herring from using his general knowledge, skills, and experience in future employment.[135] The interpretation problem was compounded, in the court's view, because the agreement expressly precluded Herring from "divulg[ing] . . . any Confidential Information *(as hereinafter defined)* pertaining to the business of the Company."[136] As a result, the court reasoned it was prohibited from looking to the common usage of the term "confidential information" because the agreement's plain language provided otherwise.[137] Thus, because it wasn't "'definite, certain[,] and clear' what information [wa]s protected by the non-disclosure provision," the provision was unenforceable against Herring.[138]

B. A Reasonable Time Restriction Will Likely Not Salvage an Overbroad NDA

Recall in *Fay* that the South Carolina Court of Appeals held the purported NDA was a de facto noncompete agreement and was thus subject to heightened scrutiny.[139] The court also held the agreement was unenforceable as a matter of public policy because it lacked any sort of time restriction.[140] By implication, such an agreement may well be enforced despite an overbroad definition of CBI if it contains a reasonable time limitation, right? As discussed earlier, South Carolina courts have routinely enforced noncompete agreements containing time restrictions of up to three years.[141] In all likelihood, however, an overbroad NDA with a reasonable time restriction would still likely fail for another reason: the lack of a geographical restriction. This may seem counterintuitive at first glance. Including a geographical limitation in an NDA "defeat[s] the entire purpose of restricting disclosure, since confidentiality knows no temporal or geographical boundaries."[142] To this end, South Carolina District Court Judge David Norton has recognized:

134. *Id.* at *3.

135. *Id.*

136. *Id.* at *2 (emphasis added).

137. *Id.* at *4.

138. *Id.* (quoting Kanan v. Plantation Homeowner's Ass'n Inc., 407 S.W.3d 320, 330 (Tex. App. 2013)).

139. Fay v. Total Quality Logistics, LLC, 419 S.C. 622, 632, 799 S.E.2d 318, 324 (Ct. App. 2017).

140. *Id.* at 633, 799 S.E.2d at 325.

141. *See* cases cited *supra* note 55.

142. Bernier v. Merrill Air Eng'rs, 770 A.2d 97, 104 (Me. 2001) (quoting Revere Transducers, Inc. v. Deere & Co., 595 N.W.2d 751, 761 (Iowa 1999)).

> As . . . intangible goods, trade secrets are not bound by geography. If [an employer] drafted a non-compete provision that contained a geographic limitation, former employees could comply with the non-compete while sharing [the employer's] trade secrets with its competitors outside of the geographic area. The competitors could then use those trade secrets to [the employer's] detriment by engaging in direct competition or by further disseminating [the employer's] proprietary information, thus making a geography-based provision completely ineffective.[143]

Even so, once an NDA is found to be overbroad (meaning it covers more than CBI and prevents the employee from using his or her general knowledge, skill, and experience in subsequent employment)[144] and is thus subject to a noncompete analysis, it will almost certainly be found to be unenforceable.

The reasons underlying this conclusion are threefold. First, absent an express geographic restriction, the limitation will presumed to be worldwide.[145] Second, it's well established under South Carolina law that a covenant not to compete's enforceability is limited to the geographic area where the employee worked for the employer.[146] Third, South Carolina courts will not "blue pencil" an indivisible restrictive covenant or add a nonexistent geographic restriction to make a covenant enforceable.[147] True, it might be

143. Lampman v. Dewolff, Boberg & Assocs., Inc., No. 2:06-CV-00062-DCN, 2007 WL 9728566, at *6 (D.S.C. Sept. 26, 2007). South Carolina law expressly provides that a contractual provision creating a duty not to disclose a *trade secret* "must not be considered void or unenforceable or against public policy for lack of a durational or geographical limitation." S.C. CODE ANN. § 39-8-30(D) (Supp. 2021).

144. *See* Nucor Corp. v. Bell, 482 F. Supp. 2d 714, 729–30 (D.S.C. 2007).

145. *See* Creative Snacks, Co. v. Hello Delicious Brands LLC, No. 1:17CV50, 2017 WL 4043564, at *3 (M.D.N.C. Sept. 12, 2017) ("Conspicuously absent from . . . the Supply Agreement is any specific geographic region within which its prohibitions exist. Because there is no limitation, the geographic restriction is worldwide."). *But see* Market Am., Inc. v. Christman-Orth, 520 S.E.2d 570, 578 (N.C. Ct. App. 1999) ("[T]he non-competition covenant contains no fixed geographic restriction, but given that Market America is a national company, it is likely that the covenant is intended to reach the entire United States.").

146. *See* discussion *supra* Section II.B.2.

147. "Blue penciling" is the process by which "a court of equity will take notice of the divisions the parties themselves have made [in a restrictive covenant], and enforce the restrictions in the territorial divisions deemed reasonable and refuse to enforce them in the divisions deemed unreasonable." Welcome Wagon Int'l, Inc. v. Pender, 120 S.E.2d 739, 742 (N.C. 1961). Thus, a court can use its blue pencil only "if the offending provision is neatly severable." Deutsche Post Glob. Mail, Ltd. v. Conrad, 116 F. App'x 435, 439 (4th Cir. 2004). This approach can be illustrated through the following example. Assume an employee worked only in counties A and B, yet her employment agreement restricted her from working in counties A, B, C, and D post-employment. A blue-pencilling court could strike through counties C and D and uphold the rest of the agreement. But if the agreement instead prevented the employee

conceivable, based on this reasoning, that an overbroad NDA between a worldwide corporation doing business on every continent and one of its executives may still be enforceable.[148] But the South Carolina Supreme Court has suggested that failing to include a geographical limitation renders a noncompete per se unreasonable, no matter the geographical scope of the employment relationship.[149] At any rate, given that South Carolina courts view noncompete agreements with considerable caution, an NDA found to be overbroad will likely be struck down on public-policy grounds for lacking a reasonable geographic restriction.[150]

As this discussion makes clear, a finding of overbreadth is essentially dispositive. Employers must therefore take care to draft their NDAs narrowly and cover only CBI capable of protection to prevent a court from engaging in the heightened noncompete review at the second step.

C. Choice-of-Law Concerns

Employers should also be aware of South Carolina's choice-of-law rules when drafting NDAs. South Carolina follows the traditional *lex loci*

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from working within a 200-mile radius of her employer's headquarters—covering a territory greater than where she performed her job duties in counties A and B—a strict blue-pencilling court would invalidate the entire agreement because the restriction could be amended only by adding new language identifying a smaller geographical area. Though the case law is somewhat muddled, blue penciling may be permissible under South Carolina law if the covenant is clearly divisible. *See generally* Miranda B. Nelson, Note, *Sharpening South Carolina's Blue Pencil: An Argument for Codifying a Strict Interpretation of the Blue-Pencil Doctrine*, 70 S.C. L. REV. 917 (2019). In any event, what's clear is that South Carolina law categorically prohibits reformation—or adding wholly new contract language. *See* Poynter Invs. v. Century Builders of Piedmont, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010) ("[I]n South Carolina, the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms.").

148. *See* Victaulic Co. v. Tieman, 499 F.3d 227, 237 (3d Cir. 2007) ("In this Information Age, a *per se* rule against broad geographic restrictions would seem hopelessly antiquated, and, indeed, Pennsylvania courts (and federal district courts applying Pennsylvania law) have found broad geographic restrictions reasonable so long as they are roughly consonant with the scope of the employee's duties."); Superior Consulting Co. v. Walling, 851 F. Supp. 839, 847 (E.D. Mich. 1994) ("[A]n agreement [lacking a geographical restriction] can be reasonable if the employer actually has legitimate business interests throughout the world."); Sigma Chem. Co. v. Harris, 586 F. Supp. 704, 710 (E.D. Mo. 1984) (finding worldwide application of noncompete reasonable where the employer operated on a worldwide basis).

149. *See* Stonhard, Inc. v. Carolina Flooring Specialists, Inc., 366 S.C. 156, 161, 621 S.E.2d 352, 354 (2005) ("The absence of a geographical limitation makes the agreement void as a matter of law."); *see also* Int'l Safety Access Corp. v. Integrity Worldwide, Inc., No. 0:09–cv–00315–MJP, 2010 WL 11552932, at *2 (D.S.C. Oct. 27, 2010) (following *Stonhard* and holding noncompete was "per se unreasonable because it [wa]s geographically boundless").

150. *E.g.*, Rental Uniform Serv. of Florence, Inc. v. Dudley, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983) ("Restrictive covenants not to compete are generally disfavored and will be strictly construed against the employer.").

contractus rule. This means that the substantive law of the state where the contract was formed will be applied in disputes over the contract's formation, interpretation, or validity.[151] South Carolina courts will also generally honor choice-of-law provisions.[152] But a choice-of-law provision will not be given effect if applying the other state's law would violate South Carolina's public policy.[153] Questions are thus raised in the restrictive-covenant context where the chosen jurisdiction's law permits blue penciling or contract reformation and the agreement at issue is found to be overbroad by a South Carolina court.

In *Stonhard, Inc. v. Carolina Flooring Specialists, Inc*., the South Carolina Supreme Court considered the effect of a New Jersey choice-of-law provision in a noncompete agreement lacking a geographical limitation.[154] The court noted that New Jersey law permits courts to decrease an overly broad geographical restriction to make a noncompete agreement enforceable but failed to find a case in which a court applying New Jersey law *added* a previously nonexistent geographical term.[155] Ultimately, the court concluded that, even if the agreement could properly be reformed under New Jersey law in this way, the agreement would still be unenforceable because adding a new term not agreed upon by the parties violates South Carolina's public policy.[156]

Stonhard and subsequent cases[157] make clear that employers can't rely on a South Carolina court to reform a defective noncompete agreement containing a non-South Carolina choice-of-law provision. It follows from these cases, and *Fay* in particular, that an overbroad NDA lacking a geographical or temporal restriction, which is found to be a de facto noncompete under the chosen state's law, will not be reformed by a South Carolina court even if doing so would be permissible under the law of the other state. Because South Carolina's use of the public-policy "escape

151. Witt v. Am. Trucking Ass'n, 850 F. Supp. 295, 300 (D.S.C. 1994).

152. Nucor Corp. v. Bell, 482 F. Supp. 2d 714, 728 (D.S.C. 2007).

153. *Id.*

154. 366 S.C. 156, 621 S.E.2d 352.

155. *Id.* at 160, 621 S.E.2d at 353–54.

156. *Id.* at 161, 621 S.E.2d at 354.

157. Poynter Invs. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010) ("[I]n South Carolina, the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms."); Herring v. Lapolla Indus., Inc., No. 2:12-CV-2705-RMG, 2013 WL 12148770, at *3 (D.S.C. Oct. 7, 2013) ("This Court reads *Stonhard*, along with the South Carolina Supreme Court's decision in *Poynter*, to hold that blue penciling non-compete agreements and enforcing them in South Carolina violates South Carolina's public policy because doing so 'requires this Court to bind these parties to a term that does not reflect the parties' original intention.'" (quoting *Stonhard*, 366 S.C. at 160, 621 S.E.2d at 354)).

device"[158] essentially renders choice-of-law provisions worthless,[159] employers should consider using forum-selection clauses in tandem with choice-of-law provisions in their NDAs to ensure that any potential litigation will be heard in a jurisdiction that's more receptive to judicial reformation (or restrictive covenants in general).[160]

D. Reasonable Efforts to Maintain Secrecy?

In a misappropriation-of-trade-secrets claim, a party seeking relief must show that it took reasonable steps to maintain the information's secrecy.[161] Whether non-trade-secret CBI is subject to the same reasonable-efforts-to-maintain-secrecy requirement hasn't been addressed in South Carolina. Courts from other jurisdictions have taken differing views. Given that NDAs are creatures of contract, some courts take a "pure freedom of contract" approach.[162] Under this view, CBI means whatever the parties agree it means,

158. The vested-rights approach to conflicts-of-law issues is frequently criticized as being susceptible to judicial manipulation. Judges may employ "escape devices" to avoid outcomes they perceive as "arbitrary" or "irrational." Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1133–34 (2010). Under the public-policy exception, for example, "a court might refuse to apply another state's law if that law's substantive content [i]s profoundly objectionable" to the forum state's fundamental values. *Id.* at 1135.

159. Judge Geathers noted as much in his concurrence in *Fay*. He contended that the court should have considered first whether modification was possible under Ohio law *before* evaluating the agreement under South Carolina's public policy. Fay v. Total Quality Logistics, LLC, 419 S.C. 622, 635, 799 S.E.2d 318, 326 (Ct. App. 2017) (Geathers, J., concurring).

160. For example, Washington law permits courts "to modify a covenant so that it may be enforced to some extent, rather than invalidating the covenant entirely." Perry v. Moran, 748 P.2d 224, 230 (Wash. 1987). "Under this rule, a court may modify the covenant even though the offending portion is grammatically indivisible from the remainder of the covenant." Armstrong v. Taco Time Int'l, Inc., 635 P.2d 1114, 1118 (Wash. Ct. App. 1981). Similarly, Florida law mandates that "[i]f a contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest or interests, a court *shall* modify the restraint and grant only the relief reasonably necessary to protect such interest or interests." FLA. STAT. ANN. § 542.335(c) (Westlaw through 2022 Second Reg. Sess.) (emphasis added).

161. S.C. CODE ANN. § 39-8-20(5)(a)(ii) (Supp. 2021).

162. Ehrlich & Garbarino, *supra* note 2, at 298; Alley, *supra* note 11, at 832–35 (describing this methodology as the "Enforcement-as-Written" approach); *see also* Loftness Specialized Farm Equip., Inc. v. Twiestmeyer, 818 F.3d 356, 363 (8th Cir. 2016) ("The fact that the parties made no effort to keep [Twiestmeyer's] confidential information confidential, however, does not convince us that the parties intended for the NDA's protections to end."); Chemimetals Processing, Inc. v. McEneny, 476 S.E.2d 374, 377 (N.C. Ct. App. 1996) (enforcing NDA between a manufacturer and distributor without inquiry into the confidentiality of the formula at issue). The primary benefits of this approach are that it's "easy to follow" and "relatively inexpensive to enforce" and gives effect to the plain meaning of the parties' agreement as written. Ehrlich & Garbarino, *supra* note 2, at 302. The obvious criticism of this approach is

and courts will give effect to the agreement, whether or not the information is actually confidential.[163] On the other hand, some courts look beyond the agreement's terms and require both that the information sought to be protected is "actually confidential" *and* that "reasonable efforts were made to keep it confidential."[164]

The latter approach would seem to track South Carolina courts' attitude of distrust towards restrictive covenants. Its first requirement is elementary—it's "hard to see how information could be deemed confidential if its owner shares it freely" or if the information is generally known to the public.[165] And as to the second requirement:

> If the firm claiming a protectable interest did not think enough of it to expend resources on trying to prevent lawful appropriation of it, this is evidence that it is not an especially valuable interest . . . and that the firm may be trying to dampen competition rather than to protect a legitimate investment.[166]

In such a case, a court undergoing a reasonableness analysis may well be inclined to determine the agreement is really a noncompete masquerading as an NDA. At bottom, because there's significant overlap between trade secrets and CBI (e.g., both derive value by not being readily known to other industry participants), South Carolina employers should err on the side of caution and take at least *some* steps in maintaining the secrecy of their CBI.[167]

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that, if applied in the employment context, it would create a bizarre work-around for employers by allowing them to pass off plainly anticompetitive restrictive covenants—wholly lacking temporal and geographical restrictions—as enforceable NDAs.

163. Ehrlich & Garbarino, *supra* note 2, at 298.

164. Tax Track Sys. Corp. v. New Inv. World, Inc., 478 F.3d 783, 787 (7th Cir. 2007) ("An Illinois court . . . will enforce [an NDA] only when the information sought to be protected is actually confidential and reasonable efforts were made to keep it confidential. . . . Tax Track need not show its information rises to the level of a trade secret, but it must nevertheless establish that it engaged in reasonable steps to keep the information confidential."); nClosures Inc. v. Block & Co., 770 F.3d 598, 601–02 (7th Cir. 2014) (looking to both *Tax Track* and *Rockwell Graphic Sys. Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 180 (7th Cir. 1991), a misappropriation-of-trade-secrets case, and holding plaintiff's NDA was unenforceable because it failed to take reasonable steps to protect the confidentiality of its propriety information); Unisource Worldwide, Inc. v. S. Cent. Ala. Supply, LLC, 199 F. Supp. 2d 1194, 1208 (M.D. Ala. 2001) (applying Arkansas trade-secret law and holding the NDA was enforceable, in part, because the plaintiff used passwords to protect its CBI). Alley, *supra* note 11, at 839–42, describes this approach as "Close-Look Reasonableness."

165. Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2363 (2019).

166. Curtis 1000, Inc. v. Suess, 24 F.3d 941, 947–48 (7th Cir. 1994) (Posner, J.) (citing *Rockwell*, 925 F.2d at 179).

167. In fact, the Restatement of Unfair Competition instructs that "the rules governing trade secrets remain relevant in assessing . . . the enforceability of [NDAs]." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. g (AM. LAW. INST. 1995).

The question then becomes: what steps are reasonable? While an employer need not oversee its day-to-day operations with "Gestapo-like tactics,"[168] the South Carolina Supreme Court has held that, at least in the trade-secret context, an employer must exercise "eternal vigilance" to keep its information secret.[169] Given that CBI is often defined as "information that does not rise to the level of a trade secret,"[170] something short of "eternal vigilance" is probably required for CBI.

Lowndes Products, Inc. v. Brower demonstrates the consequence of less-than-adequate secrecy measures.[171] There, the South Carolina Supreme Court found that Lowndes, a nonwoven-textile manufacturer, failed to take reasonable steps to maintain its trade secrets where its employees weren't warned of the confidential nature of its manufacturing processes or required to sign NDAs and were allowed to roam freely throughout the plant.[172] Additionally, no sign-in or badge system existed for visitors, its manufacturing plant often remained unlocked, and actual and potential competitors routinely toured its facilities.[173]

Future Plastics, Inc. v. Ware Shoals Plastics, Inc. is also instructive.[174] Relying on the "eternal vigilance" standard, the District of South Carolina held that a plastics manufacturer didn't have a protectable trade secret in a specific manufacturing process where the alleged appropriator twice refused to sign an NDA and several other employees had been released from their restrictive covenants.[175] The court also highlighted the plaintiff's lax security measures: employees from other parts of the plant, as well as delivery drivers, were allowed to freely enter the section of the plant where the proprietary manufacturing process took place, and prospective purchasers were permitted to observe the process and related equipment.[176]

In terms of practical guidance, employers should know that the reasonableness standard is highly fact specific and likely depends on various factors, such as the type of information being protected, the nature of the industry, and the firm's resources and capabilities. What's reasonable for a mom-and-pop business in Florence, South Carolina will not be reasonable for Google or Apple. That said, there are several best practices available to firms

168. 4 ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS § 18.03 (2021).
169. Lowndes Prods., Inc. v. Brower, 259 S.C. 322, 331, 191 S.E.2d 761, 766 (1972).
170. Bernier v. Merrill Air Eng'rs, 770 A.2d 97, 104 (Me. 2001).
171. 259 S.C. 322, 191 S.E.2d 761.
172. *Id.* at 330, 191 S.E.2d at 765–66.
173. *Id.*
174. 340 F. Supp. 1376 (D.S.C. 1972).
175. *Id.* at 1378, 1382–84.
176. *Id.* at 1380.

of all sizes.[177] First, to restrict access internally, employers are urged to disseminate confidential information only on a need-to-know basis,[178] house electronic documents on password-protected networks,[179] place physical documents under lock and key,[180] and limit or ban employees' access to confidential information on personal devices.[181] Moreover, employee handbooks should clearly describe confidentiality policies,[182] and recipients of CBI should be periodically reminded of their obligations to such information via, for example, email newsletters or the posting of bulletins.[183]

177. *See generally* Michael A. Epstein & Stuart D. Levi, *Protecting Trade Secret Information: A Plan for Proactive Strategy*, 43 BUS. LAW. 887 (1988).

178. *See, e.g.*, RKI, Inc. v. Grimes, 177 F. Supp. 2d 859, 874 (N.D. Ill. 2001) ("Disclosure to only those who need the contents of a trade secret is adequate protection under the [Illinois Trade Secret Act].").

179. *See, e.g.*, Propel PEO, Inc. v. Roach, No. 6:19-3546-HMH-KFM, 2020 WL 4606551, at *9 & n.7 (D.S.C. July 24, 2020) (holding plaintiffs sufficiently alleged a misappropriation-of-trade-secrets claim where they utilized network firewalls, password protections, and security credentials; limited employees' access to information on a need-to-know basis; revoked employee authorization after termination; controlled physical access to offices; and required employees to execute nondisclosure agreements); Arko Plumbing Corp. v. Rudd, 230 So.3d 520, 529–30 (Fla. Dist. Ct. App. 2017) (holding that maintaining customer pricing information in a password-protected file and limiting access to two employees were "the sorts of reasonable efforts to maintain secrecy required by [Florida's] trade secret statute").

180. *See, e.g.*, Capsonic Grp., Inc. v. Plas-Met Corp., 361 N.E.2d 41, 44 (Ill. Ct. App. 1977) (holding plaintiff failed to demonstrate the existence of a protectible trade secret where it failed to secure engineering drawings under lock and key).

181. *See, e.g.*, Yellowfin Yachts, Inc. v. Barker Boatworks, LLC, 898 F.3d 1279, 1299–1301 (11th Cir. 2018) (finding plaintiff failed to take reasonable steps to secure customer information where defendant was "encouraged . . . to store [the] information on a personal laptop and phone" even though plaintiff otherwise limited employee access to the information and maintained it on a password-protected computer system).

182. *See, e.g.*, Pearl Ins. Grp. LLC, v. Baker, No. 0:18-cv-02353-JMC, 2018 WL 4103333, at *4 (D.S.C. Aug. 29, 2018) (finding plaintiff took reasonable security measures where it "require[ed] employees to sign confidentiality provisions . . . , promulgat[ed] privacy and confidentiality provisions in its employee handbook, password-protect[ed] its computer systems and communications systems, and br[ought] prompt enforcement actions to protect its rights"); Mont. Silversmiths, Inc. v. Taylor Brands, LLC, 850 F. Supp. 2d 1172, 1179 (D. Mont. 2012) (finding that, at the motion-to-dismiss stage, plaintiff sufficiently pled it took reasonable precautions to protect its trade secrets where its employee handbook contained a section reminding employees of their confidentiality obligations); Brightview Grp., LP v. Teeters, 441 F. Supp. 3d 115, 131 (D. Md. 2020) (granting preliminary injunction and finding plaintiff was likely to succeed in establishing it took reasonable security measures to protect its underwritings where it required all employees to sign and acknowledge its handbook, which included a confidentiality policy, and "restrict[ed] access to the underwritings to 125 out of its 4,300 employees").

183. *See, e.g.*, Lowndes Prods., Inc. v. Brower, 259 S.C. 322, 330, 191 S.E.2d 761, 765 (1972) ("No signs were posted in the plant to remind employees of the alleged secrecy of Lowndes' operations."); Vt. Microsystems, Inc. v. Autodesk, Inc., 88 F.3d 142, 150 (2d Cir. 1996) (finding plaintiff took reasonable steps to protect its trade secrets where it issued periodic

As to departing employees, exit interviews should be conducted where employees are once again reminded of their duties,[184] and employers should attempt to ensure that all confidential information, whether in physical or electronic form, is returned or deleted.[185]

Employers should also exercise caution when interacting with third parties. Nonemployee visitors should be required to sign in[186] and wear a badge or other form of identification[187] and, preferably, escorted by a company employee while onsite.[188] A company should also consider limiting the scope of facility tours by designating areas that are "off-limits,"[189] banning electronic device usage,[190] and refusing to answer specific questions.[191] Once again, these suggestions are not intended to be exhaustive or mandatory by

reminders to employees about the need to keep information confidential); Pressure Sci., Inc. v. Kramer, 413 F. Supp. 618, 627–28 (D. Conn. 1976) (denying trade-secret protection where plaintiff failed to set forth a written policy advising employees that the company considered its information confidential).

184. *See, e.g.*, *Lowndes*, 259 S.C. at 330, 191 S.E.2d at 765 (noting that employees were not admonished concerning the secrecy of Lowndes' trade secrets upon termination); Gillis Associated Indus., Inc. v. Cari-All, Inc., 564 N.E.2d 881, 886 (Ill. Ct. App. 1990) (concluding information did not qualify as trade secret in part because plaintiff failed to conduct "entrance and exit interviews imparting the importance of confidentiality").

185. *See, e.g.*, Abrasic 90 Inc. v. Weldcote Metals, Inc., 364 F. Supp. 3d 888, 900 (N.D. Ill. 2019) (denying preliminary injunction where plaintiff failed to instruct its departing employees to delete or return confidential information); *Yellowfin Yachts*, 898 F.3d at 1299–1300 (finding plaintiff failed to engage in reasonable efforts to secure customer information where defendant was never asked to delete such information from his personal devices after leaving the company).

186. *See, e.g.*, *Lowndes*, 259 S.C. at 330, 191 S.E.2d at 765 ("Plant security at Lowndes was, at best, minimal. There was no 'sign-in' system or badge system."); USM Corp. v. Marson Fastener Corp., 393 N.E.2d 895, 899 (Mass. 1979) ("Visitors to the Shelton plant were always logged in and waited in a reception room which was separated from the production area by an opaque partition.").

187. *See, e.g.*, Leonard v. State, 767 S.W.2d 171, 177 (Tex. Ct. App. 1988) ("Visitors were subjected to sign-in procedures and were provided escorts and special identification badges.").

188. *See, e.g.*, La Calhene, Inc. v. Spolyar, 938 F. Supp. 523, 530 (W.D. Wis. 1996) ("At the Rush City plant, visitors were not permitted to move through the building without escort.").

189. *See, e.g.*, John-Manville Corp. v. Guardian Indus. Corp., 586 F. Supp. 1034, 1071 (E.D. Mich. 1983) ("The corporation as a whole followed a policy of requiring prior approval for plant visitors, as well as the specification of certain areas as off-limits.").

190. *See, e.g.*, United States v. Roberts, No. 3:08-CR-175, 2010 WL 1010000, at *1 (E.D. Tenn. Mar. 17, 2010) ("[A] sign at the entrance gate announced that cameras were not allowed in the facility."); Inner-Tite Corp. v. Brozowski, No. 20100156, 2010 WL 3038330, at *3 (Mass. Super. Ct. Apr. 14, 2010) ("To prevent its manufacturing processes from being photographed, Inner-Tite maintains a company policy prohibiting the use of cameras in the building, including the use of cell phones for transmitting or recording pictures.").

191. *See, e.g.*, Nucor Corp. v. Bell, No. 2:06-CV-02972-DCN, 2008 WL 9894350, at *4 (D.S.C. Mar. 14, 2008) (questioning whether Nucor took reasonable steps to protect its confidential information when it did not prohibit employees from answering questions).

any means as there's no one-size-fits-all solution to protecting confidential information.

V. CONCLUSION

In today's knowledge-based economy, NDAs provide employers with a powerful tool to safeguard their CBI from rivals by extending the scope of legal protection beyond that afforded by trade-secret law.[192] Moreover, from a broader perspective, the enforcement of properly tailored NDAs helps further confidentiality law's dual aims of maintaining commercial morality and fostering innovation.[193] Yet despite whatever laudable attributes NDAs may have, South Carolina employers and their counsel face an uphill battle in crafting them to withstand judicial scrutiny. This is because courts must balance the employer's need to protect its CBI against the employee's right to use his or her knowledge, training, and experience in future employment. Although NDAs are not subject to the same judicial hostility that plagues noncompete agreements, whenever an NDA encroaches on the employee's recognized right to mobility, South Carolina courts will not hesitate to strike down such an agreement.

In review, South Carolina courts employ a two-step analysis when evaluating an NDA. First, a reviewing court determines whether the NDA's plain language covers publicly available information or the employee's general skills or knowledge. If it does, the agreement will be subject to the same temporal and geographic restrictions as a noncompete. If it doesn't, the agreement must only be tailored to protect a legitimate interest of the employer and not inhibit the employee's ability to earn a living. In all practicality, an NDA will be doomed if it's found to be overbroad at the first step given that an NDA is unlikely to include a geographical restriction in today's digital age, where information can be transmitted anywhere in the world with a single click.

On top of synthesizing the relevant case law on NDAs, this Note has also sought to provide clarity and guidance to employers seeking to ensure that their NDAs satisfy the above standard by discussing what to be aware of, what to include, and perhaps most importantly, what to avoid when drafting an NDA. Although these considerations are not intended to be all encompassing, heeding them will go a long way in ensuring that an NDA will remain enforceable in South Carolina.

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192. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. g. (AM. LAW. INST. 1995).

193. *See* discussion *supra* note 5.