

# Can You Keep a Secret? Protecting Company Trade Secrets from a Wandering Workforce

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**Littler**

**ACC** Association of  
Corporate Counsel  
— CHARLOTTE —

# Presented by



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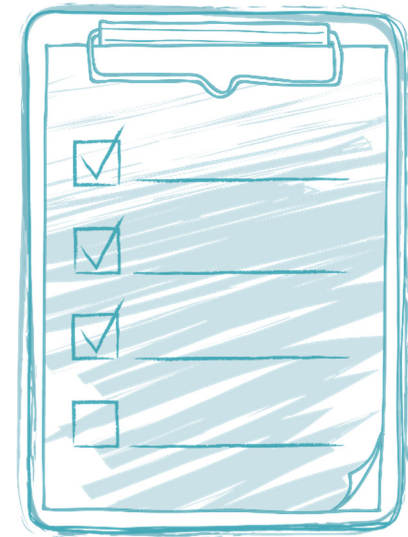


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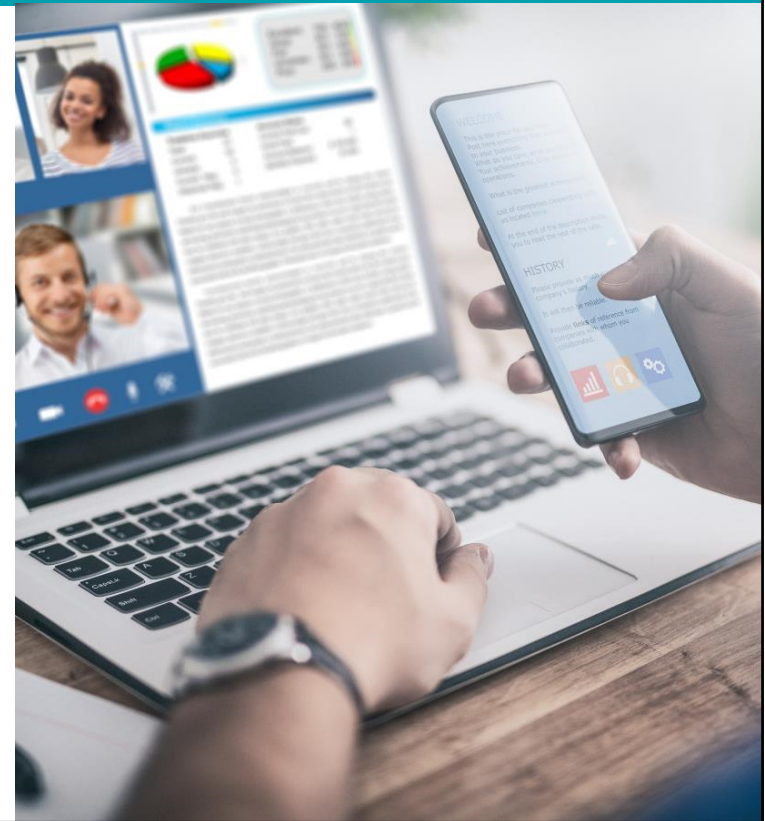
# Agenda

- What is a Trade Secret?
- Reasonable Measures to Protect Secrecy
- Technological Security Measures, including some ideas tailored for a wandering workforce
- Traditional Measures: Restrictive Covenants and Employee Policies



# Why Should I Care about Trade Secrets?

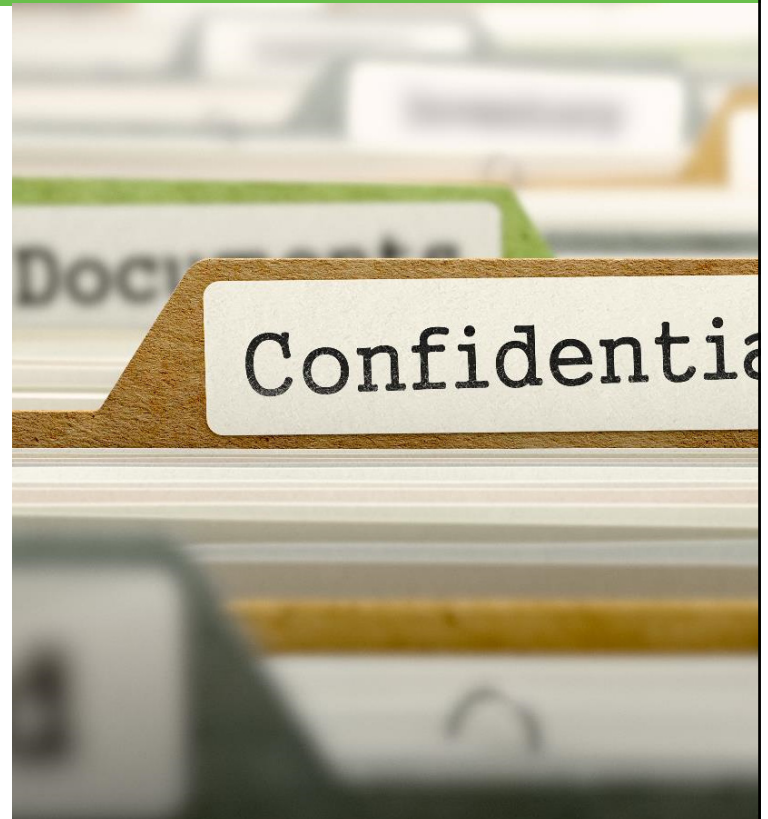
- COVID-19 Pandemic
- Decentralization of Employees and Information
- Scarcity of Case Law
- Remote-work is Here to Stay



# Federal Statutory Baseline

## Defend Trade Secrets Act (2016)

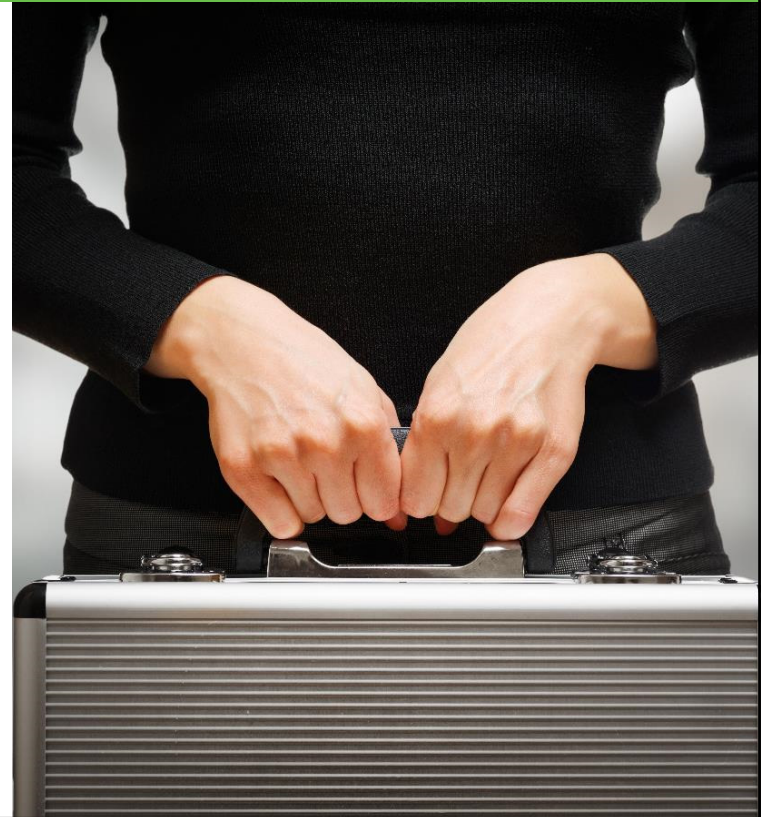
- Ownership of a Trade Secret
- Actual or Threatened Misappropriation or Unjust Enrichment or Actual Loss



# Federal Statutory Baseline

## What is a Trade Secret?

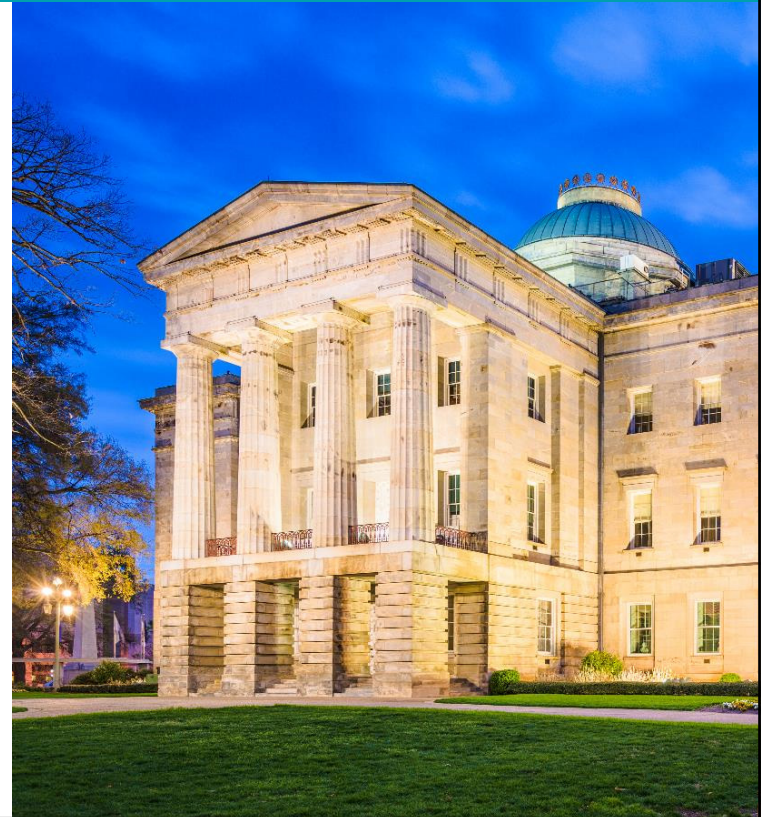
- All forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if
  - the owner thereof has taken reasonable measures to keep such information secret; and
  - the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information



# Sister State Statutes

## North Carolina Trade Secrets Protection Act

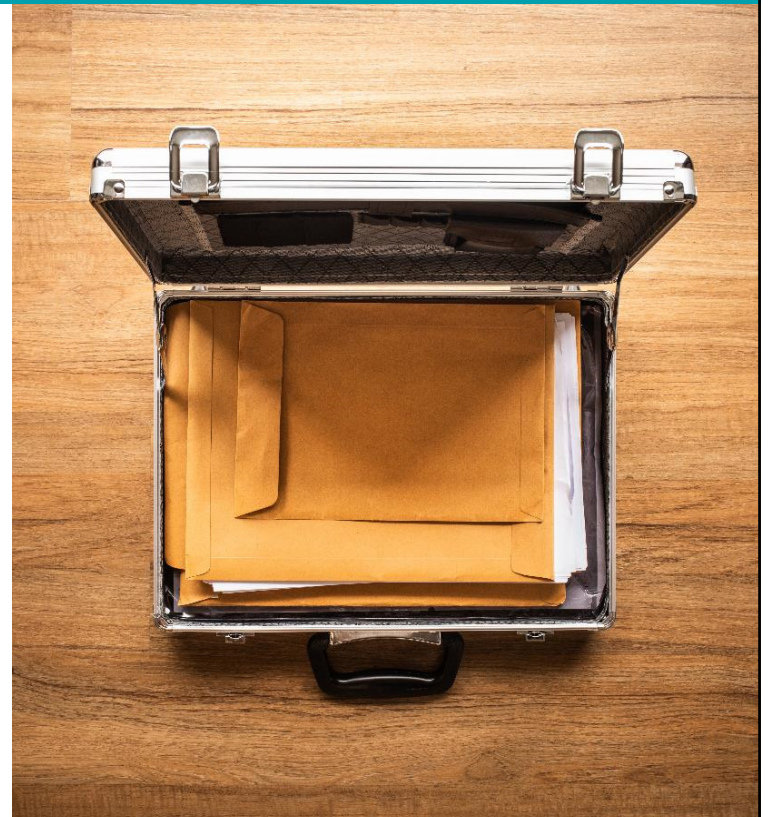
- Ownership of a Trade Secret
- Misappropriation



# Sister State Statutes: NCTSPA

## What Constitutes a Trade Secret?

- Business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
  - Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
  - Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
- The existence of a trade secret shall not be negated merely because the information comprising the trade secret has also been developed, used, or owned independently by more than one person, or licensed to other persons.



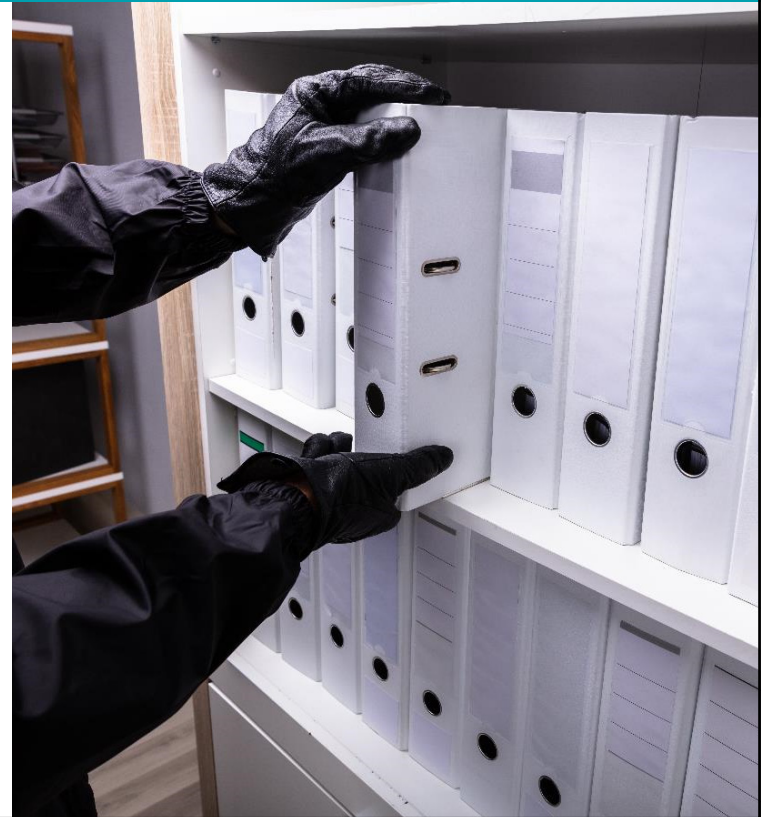


# Sister State Statutes: NCTSPA

## What Constitutes Misappropriation?

- Acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret.
- Threatened misappropriation?

*TSG Finishing, LLC v. Bollinger*, 238 N.C.App. 586, 767 S.E.2d 870 (2014)



## Statutory Baseline: Key Takeaways

Wide array of business information and data could be a trade secret, if:

1. The Company takes reasonable measures to protect the secrecy, and
2. The information derives independent value by not being generally known and not being readily ascertainable through lawful means (i.e., by being a secret)

Be aware of potential distinctions between your state's statute and the DTSA

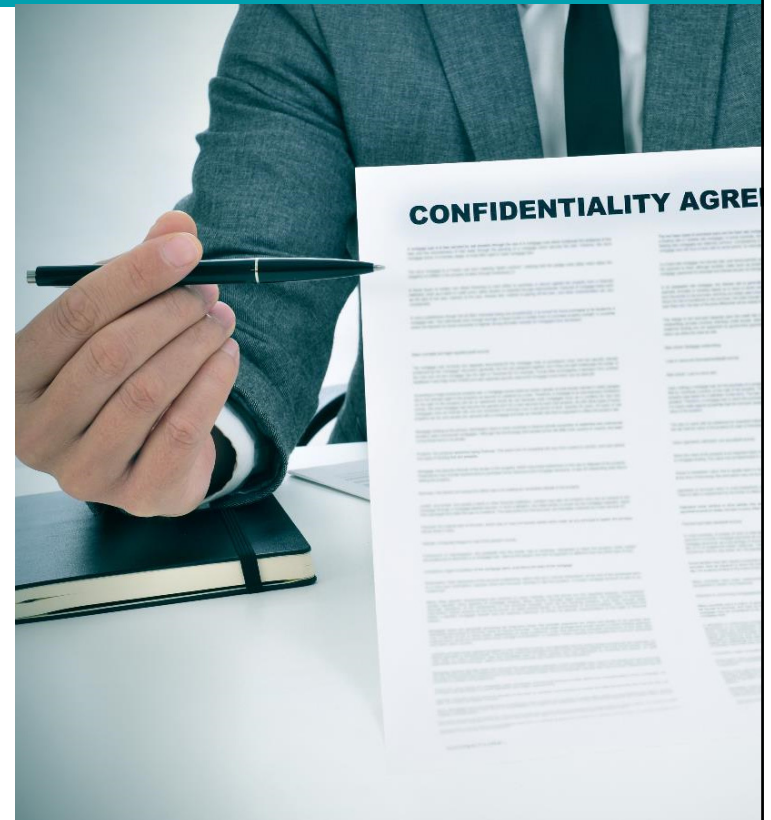
# Reasonable Measures

- One size does not fit all
- Industry, type of information, size of company, geographic location
- Added consideration: is your workforce wandering?



## Reasonable Measures: Traditional Methods

- Confidentiality agreements
- Non-competition agreements
- Confidentiality Policies
- Offboarding and Post-employment Methods
- Technological security measures



# Technological Security Measures for the Wandering Worker

“The files are in the computer?!”

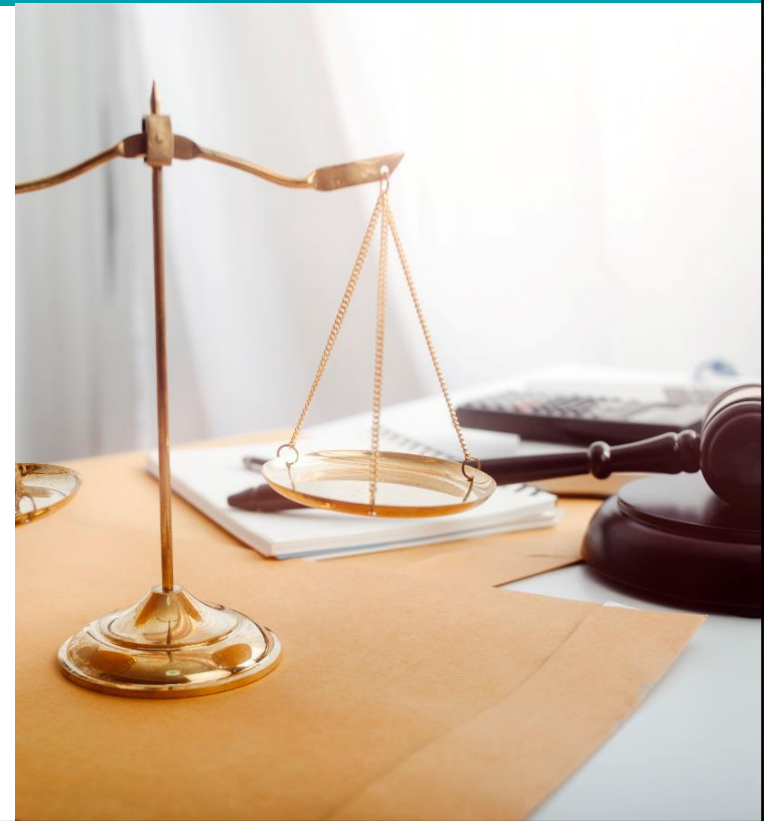
- Hansel

- Remote-work policies
- Device security
- Network security
- Dataflow controls



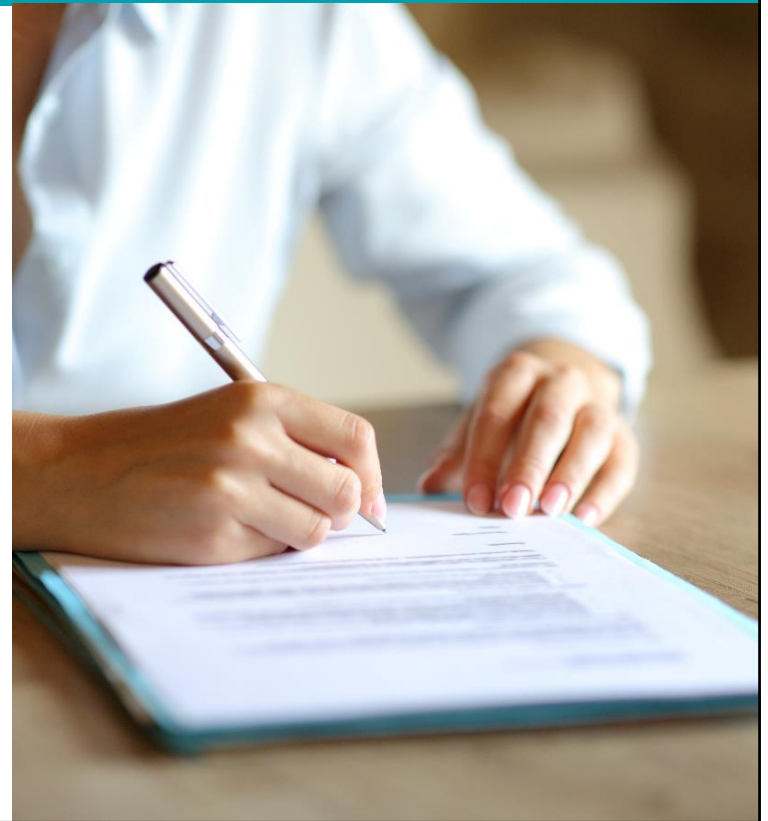
# The Balancing Act

- Defend Trade Secrets Act requires “reasonable” measures
- NC Trade Secrets Protection Act requires “reasonable” measures “under the circumstances”
- Balance the needs of the business against the risk



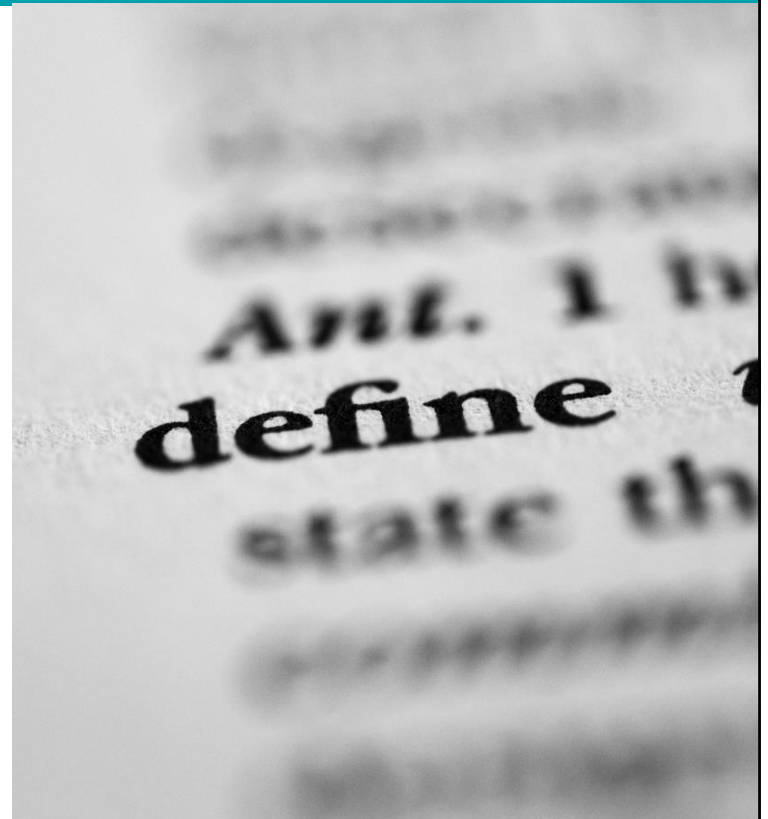
## If It Ain't Broke – Remember the Other Traditional Measures

- Restrictive Covenants
- Confidentiality Policies



# Restrictive Covenants: Confidentiality Agreements

- Clearly define what the Company considers to be confidential information
- Supported by consideration
- Adequate time to review
- Acceptance and acknowledgement





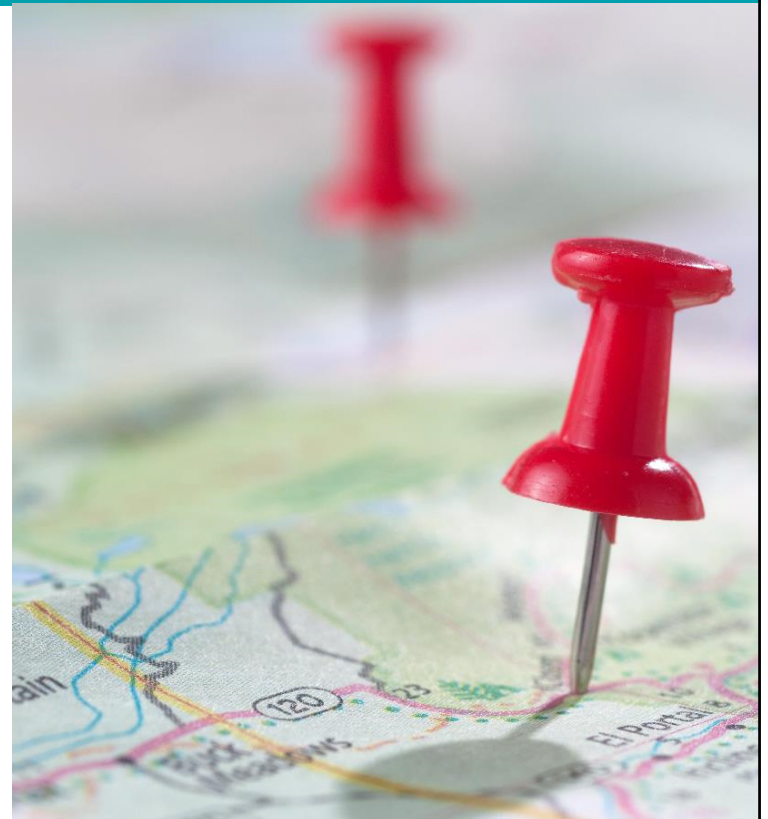
# Restrictive Covenants: Non-Competes

- Governed by State Law
- Reasonableness Test
- Scope of Activities
- Time and Geography
- Executive Order 14033 (July 9, 2021)



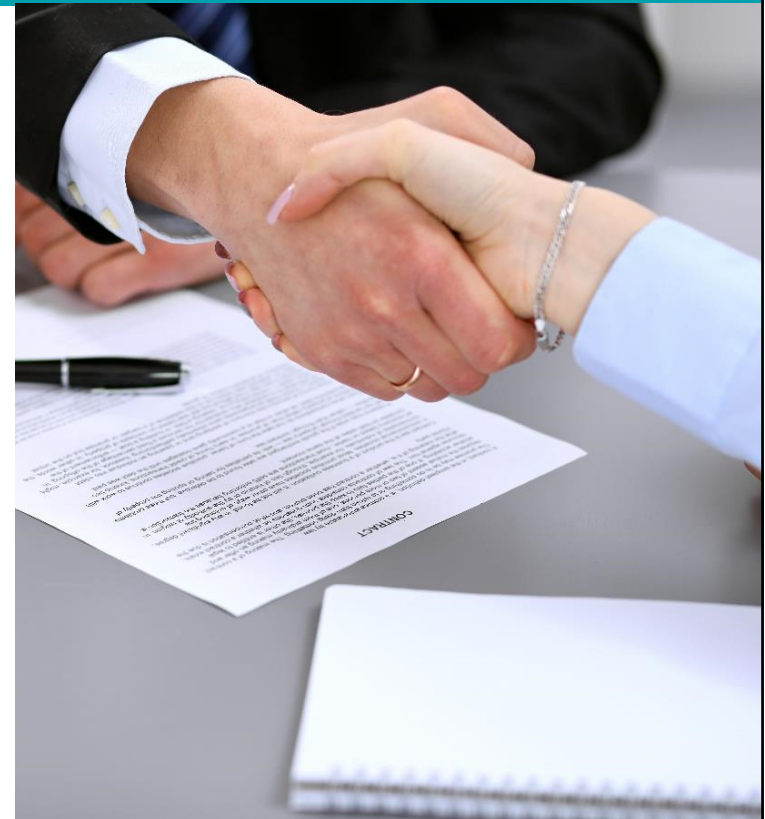
## Non-Competes: Practical Tips

- Tailored to the position
- Geography vs. Customer
- Duration
- Be careful about looking back  
*Sterling Title Company v. Martin*,  
266 N.C.App. 593, 599, 831 S.E.2d  
627, 633 (2019)
- Scope of activities
- Consideration!!!



# Non-Competes: Practical Tips

- Choice of law provisions:
  - Things to consider when selecting the agreement's choice of law?
  - Is it really enforceable?
- How about venue/forum clauses?



# Policies

- Regularly revisit and update the policies
- Require employee acknowledgment
- Promise not to misappropriate, and promise to return/destroy upon demand
- How to deal with third parties?
- Frequent training



## Reasonable Measures: Key Takeaways

- The most critical component for trade secrets
- Traditional methods: restrictive covenants, confidentiality policies, technological security measures
- The complication of the wandering worker
- Tailor, tailor, tailor!

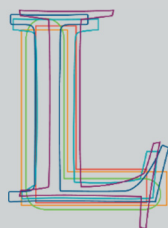
## But What Does it All Mean?

- Wide array of business information could be a trade secret, if:
  - Reasonable measures are taken to protective the secrecy of the information, and
  - The information derives independent economic value by virtue of its status as a secret
- Often among the most valuable assets owned by a Company
- Interdepartmental effort
- Reasonable measures
- Impact of an increasingly wandering workforce
- Balance



# Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.



# Thank You!

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