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Despite recent scrutiny, carefully-considered non-competes logical choice in many situations

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Last weekend, the *New York Times* published an article titled "How Noncompete Clauses Keep Workers Locked In." The article focused on low and middle level workers who were sued or had a hard time finding new jobs because they had signed non-compete agreements with their former employers. One point made by the article is that when used with personnel who do not have significant executive, research and development (R&D), or sales responsibilities, non-competes provide little benefit for employers, can cause difficulties for employees (including limiting their mobility and ability to make higher wages), and hurt the economy.

In many cases, non-competes are necessary to keep former employees from competing unfairly with employers after leaving the company.

Employers should keep in mind, however, that non-compete agreements are generally disfavored by the courts, and most states impose strict limitations on their enforcement. In the Carolinas, non-competes are generally upheld only if they are:

- Necessary to protect a legitimate business interest of the employer (for example, to protect intellectual property or significant customer relationships);
- Reasonably limited as to time and place;
- Not unduly restrictive;
- Reasonable from a public policy standpoint; and
- Supported by valuable consideration (for example, a job offer, promotion, or raise offered at the time of signature).

A covenant that fails to meet any one of these five criteria will likely not be enforced by a South Carolina or North Carolina court. In addition, some state legislatures have enacted, or are considering enacting, statutes imposing additional limitations on non-competes. For example, California does not permit non-competes in the employment context. In Illinois, a new

law prohibits non-competes for low-wage workers in the private sector. Additional information on state-specific limitations can be found in a *New York Times* article from last year titled "To Compete Better, States Are Trying to Curb Noncompete Pacts."

Sometimes employers can meet their needs with a less burdensome restriction than a non-compete, such as a non-disclosure or non-solicitation agreement. A non-disclosure agreement typically prohibits improper disclosure or use of confidential business information learned during employment. Non-solicitation agreements typically prohibit soliciting employees, customers, or suppliers of the employer for a specified period after employment. Both agreements are subject to some limitations, but are generally easier to enforce, and often just as effective, as non-compete agreements. When using a non-compete, however, it is important to include reasonable and carefully-considered restrictions to increase the likelihood they will be considered fair and enforceable in court.
