

2021

## Non-Competition Agreements Under Vietnamese Law: Protection of Trade Secrets and Free Choice of Employment as Two Sides of the Same Coin

Nguyen The Duc Tam

Le Nguyen Hong Nhung

Follow this and additional works at: <https://idealexchange.uakron.edu/akronlawreview>



Part of the [International Law Commons](#), and the [International Trade Law Commons](#)

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

---

### Recommended Citation

The Duc Tam, Nguyen and Hong Nhung, Le Nguyen (2021) "Non-Competition Agreements Under Vietnamese Law: Protection of Trade Secrets and Free Choice of Employment as Two Sides of the Same Coin," *Akron Law Review*: Vol. 54: Iss. 5, Article 3.

Available at: <https://idealexchange.uakron.edu/akronlawreview/vol54/iss5/3>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact [mjon@uakron.edu](mailto:mjon@uakron.edu), [uapress@uakron.edu](mailto:uapress@uakron.edu).

**NON-COMPETITION AGREEMENTS UNDER VIETNAMESE  
LAW:  
PROTECTION OF TRADE SECRETS AND FREE CHOICE OF  
EMPLOYMENT AS TWO SIDES OF THE SAME COIN**

*Nguyen The Duc Tam<sup>1</sup> & Le Nguyen Hong Nhung<sup>2</sup>*

I.	Introduction .....	857
II.	The Protection of Trade Secrets Under Vietnamese Law.....	858
	A. Intellectual Property Law.....	858
	B. Employment Law.....	859
III.	The Current Legal Status of Noncompetes in Vietnamese Law .....	861
	A. Statutory Law.....	861
	B. Case Law.....	862
IV.	The Legal Standard for Noncompetes .....	864
V.	Conclusion.....	867

I. INTRODUCTION

When it comes to non-competition agreements,<sup>3</sup> employers and employees in Vietnam increasingly engage in intense negotiation and

---

1 Nguyen The Duc Tam is a Lecturer at the Faculty of Law, University of Economics and Law, Vietnam National University, Ho Chi Minh City, Vietnam. He earned his LL.B. and B.B.A. from the Ho Chi Minh City University of Law; LL.M. from the University of Paris II Panthéon-Assas. He can be reached via email at tamntd@uel.edu.vn. His ORCID iD is <https://orcid.org/0000-0003-3469-5464>.

The authors are immensely grateful to Assoc. Prof. Patrick H. Gaughan for his valuable comments on earlier versions of this article. Any errors that remain are solely the authors'.

2 Le Nguyen Hong Nhung is an LL.M. Candidate at the University of Paris I Panthéon-Sorbonne. She earned her LL.B. from the University of Economics and Law, Vietnam National University, Ho Chi Minh City, Vietnam. Her ORCID iD is <https://orcid.org/0000-0001-7887-9797>.

3. *Noncompetition covenant*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining noncompetition agreement as a "promise, usually in a sale-of-business, partnership, or employment contract, not to engage in the same type of business for a stated time in the same market as the buyer, partner, or employer.") In this article, we focus on noncompetes in employment contracts.

debate.<sup>4</sup> Employers worry about losing one of their most valuable assets—trade secrets. Employees worry about losing the freedom to pursue their most desirable jobs or even their livelihoods. Neither the employers nor employees want to lose their legitimate rights. However, uncertainty about the enforceability of noncompetes unnecessarily undermines further cooperation and mutual trust. Employers are reluctant to share their trade secrets with their employees, while employees are hesitant to commit fully to the employment relationship.

In this article, we argue that noncompetes should be enforceable in Vietnam, provided that they are necessary to protect an employer’s trade secret(s). Besides the introduction and conclusion, this article consists of three main parts. In Part II, we briefly present the protection of trade secrets under Vietnamese law. In Part III, however, we find that the attitude of Vietnamese law towards noncompetes is ambiguous. We also prove that the ambiguity regarding the legal status of noncompetes in Vietnamese law is the result of a lack of express provisions in existing statutes and inconsistency in case law. In Part IV, we propose a solution: a legal standard for noncompetes that respects the legitimate interests of both employers and employees. Vietnamese Courts can uniformly apply it; the National Assembly is welcome to codify it.

## II. THE PROTECTION OF TRADE SECRETS UNDER VIETNAMESE LAW

### A. Intellectual Property Law

The Law on Intellectual Property defines “trade secrets” as “information obtained from activities of financial or intellectual investment, which has not been disclosed and can be useful in business.”<sup>5</sup> Information is protectable as a trade secret if it fulfills the following three conditions:

---

4. See, e.g., Bich N. Nguyen, *Dieu Khoan Khong Canh Tranh Trong Hop Dong NDA [Non-Competition Clause in NDA]*, SAIGON TIMES (July 18, 2018), <https://www.thesaigontimes.vn/td/275063/dieu-khoan-khong-can-h-tranh-trong-hop-dong-nda.html> [<https://perma.cc/R9HU-YJH7>] (Viet.); Thuan Q. Dinh, *Tranh Chap NDA, Xu Sao Cho Tron [NDA Disputes: How to Handle Them?]*, SAIGON TIMES (July 20, 2018), <https://www.thesaigontimes.vn/275441/Tranh-chap-NDA-xu-sao-cho-tron.html> [<https://perma.cc/WSH9-P38C>] (Viet.); Duy Lac & Phuoc H. Nguyen, *Boi Roi Quanh Cam Ket Khong Lam Viec Cho Doi Thu [Confusion About Noncompetes]*, SAIGON TIMES (Aug. 26, 2019), <https://www.thesaigontimes.vn/293252/boi-roi-quanh-cam-ket-khong-lam-viec-cho-doi-thu.html> [<https://perma.cc/5LU9-2B4B>] (Viet.).

5. *Luat So Huu Tri Tue [Law on Intellectual Property]*, No. 50/2005/QH11, art. 4 (July 1, 2006) (Viet.). An unofficial translation is available at <https://www.wipo.int/edocs/lexdocs/laws/en/vn/vn063en.pdf> [<https://perma.cc/8K3J-BXJD>].

- (1) It is neither common knowledge nor easily obtained.
- (2) When being used in business activities, it renders advantages to its holder over those who do not have or use it.
- (3) It is kept confidential by its owner<sup>6</sup> with necessary protection measures so that it is neither disclosable nor easily accessible.<sup>7</sup>

The Law on Intellectual Property provides general protection for trade secrets. Notably, Article 127 of this Law prohibits the acts of accessing or acquiring information about trade secrets by taking acts against secret-keeping measures as well as the acts of disclosing or using information about trade secrets without permission of the trade secret owners.<sup>8</sup> In case of infringement, the Court will provide the owner of trade secrets with civil remedies against the perpetrator.<sup>9</sup> Therefore, under the Law on Intellectual Property, the employee has the general duty not to access, acquire, disclose, or use information about trade secrets without permission of the owner/employer.

#### *B. Employment Law*

The Labor Code contains specific provisions on the protection of trade secrets in employment. Accordingly, if an employee performs work related to trade secrets, the employer has the right to negotiate with the employee for the protection of those trade secrets. This includes the measures and duration of the protection of the trade secrets, the employee benefits, and the damages in case of employee infringement.<sup>10</sup>

Moreover, the employer can exercise other rights to protect his trade secrets, regardless of whether the employee performs work related to such trade secrets. The employer may issue internal labor regulations, which

---

6. *Id.* art. 121. The owners of trade secrets are organizations or individuals that have lawfully acquired such trade secrets and keep them confidential.

7. *Id.* art. 84.

8. *Id.* art. 127.

9. *Id.* art. 202. These civil remedies include (1) the termination of infringement; (2) public apology and rectification; (3) specific performance of civil obligations; (4) payment of damages; and (5) the destruction, distribution, or use for non-commercial purposes of goods, materials, and equipment used for the production or trading of infringing goods, provided that such destruction, distribution, or use does not affect the rights of intellectual property right holders. *Id.*

10. *Bo Luat Lao Dong* [Labor Code] (2013), Art. 23 (Viet.). An unofficial translation is available at <https://www.ilo.org/dyn/natlex/docs/MONOGRAPH/91650/114939/F224084256/VNM91650.pdf> [<https://perma.cc/8PZP-JSVS>].

can include the protection of trade secrets.<sup>11</sup> If the employee misappropriates the trade secrets, the employer has the right to dismiss the employee and claim damages.<sup>12</sup>

The case of *Mr. L v. Company V*<sup>13</sup> illustrates the employer's right to dismiss due to the employee's non-compliance with the employer's trade secret protection regulations.<sup>14</sup> On October 12, 2015, Mr. L signed a 12-month employment contract to work as the head of the Security and Quality Assurance Department of Company V. In January 2018, Company V dismissed Mr. L because, along with other reasons, he installed a camera inside his work room. On January 25, 2018, Mr. L initiated a lawsuit against Company V, claiming that the company unlawfully dismissed him.

On May 29, 2019, the trial court, the People's Court of District 1 (Ho Chi Minh City), ruled in favor of Mr. L.<sup>15</sup> On appeal, Company V submitted its internal protection of trade secrets regulations. These regulations prohibited the use of any video recording devices within company offices. On October 22, 2019, the People's Court of Ho Chi Minh City held that Mr. L infringed the regulations, and Company V lawfully dismissed him.<sup>16</sup> Hence, the Labor Code offers enhanced protection to employers who possess trade secrets against the misappropriation of those trade secrets by current and former employees.

---

11. *Id.* Art. 119. For example, the employer may prohibit unauthorized employees from entering restricted areas.

12. *Id.* Art. 126, 130.

13. Judgment no. 936/2019/LD-PT, People's Court of Ho Chi Minh City, Oct. 22, 2019. The names and other details of the involved parties are redacted in accordance with Resolution no. 03/2017/NQ-HDTP on the publication of judgments and judicial decisions on the e-portal of the Supreme People's Court.

14. *See also* Judgment no. 01/2013/LD-ST, People's Court of District X (Ho Chi Minh City), Jan. 22, 2013 (ruling that the employee was liable to pay the employer the amount of VND 218,694,000 (USD 10,500) because the employee spent work time and used some information from the employer to incorporate a new company). *But see* Huong T. T. Le & Hang H. B. Nguyen, *Nghia Vu Bao Ve Bi Mat Kinh Doanh Trong Quan He Lao Dong [Obligation to Protect Trade Secrets in Employment Relationship]*, J. LEGAL SCI. at 49, 55–56 (2015) (Viet.) (citing Judgment no. 20/LDST, People's Court of Ho Chi Minh City, Mar. 17, 2005, which found that the employee disclosed some information from the employer to a third party, but the employer wrongfully dismissed the employee because such information did not qualify as trade secrets).

15. Judgment no. 10/2019/LD-ST, People's Court of District 1 (Ho Chi Minh City), May 29, 2019.

16. *Supra* note 11.

### III. THE CURRENT LEGAL STATUS OF NONCOMPETES IN VIETNAMESE LAW

#### A. Statutory Law

The legal status of noncompetes is ambiguous because Vietnamese law has no express provision on noncompetes. Indeed, Vietnamese law honors the freedom of contract.<sup>17</sup> Nevertheless, it is subject to limitations. Agreements must infringe neither statutory prohibitions nor social ethics,<sup>18</sup> which leads to the ultimate question of whether Vietnamese law bans noncompetes.

In support of noncompetes, employers may invoke the protection of trade secrets.<sup>19</sup> Because the Law on Intellectual Property safeguards trade secrets,<sup>20</sup> the owner of such trade secrets has the right to implement necessary measures to secure them. Moreover, under the Labor Code, if an employee performs work related to trade secrets, the employer has the right to negotiate with the employee for the protection of the trade secrets.<sup>21</sup> Therefore, employers have the right to use noncompetes as measures to protect their trade secrets.

In contrast, employees may rely on their free choice of employment.<sup>22</sup> The Constitution recognizes the citizens' right to work and to choose their occupations, employment, and workplaces.<sup>23</sup> The Labor

---

17. *Bo Luat Dan Su* [Civil Code] (2017), Art. 3 (Viet.). An unofficial translation is available at <https://www.wipo.int/edocs/lexdocs/laws/en/vn/vn079en.pdf> [<https://perma.cc/4H3Q-4UKV>]. Persons establish, exercise, and terminate their civil rights and obligations on the basis of freely and voluntarily entering into commitments and agreements. Commitments and agreements that do not violate statutory prohibitions and are not contrary to social ethics shall be binding on contracting parties and must be respected by other persons. *See, e.g.*, Judgment no. 151/2018/DS-PT, People's Court of Ha Noi, June 25–26, 2018; Judgment no. 04/2019/HNGD-PT, People's Court of Lam Dong, Feb. 18, 2019; Judgment no. 64/2019/KDTM-PT, People's Court of Ha Noi, June 18, 2019.

18. *Bo Luat Dan Su* [Civil Code] (2017), Art. 123 (Viet.). Statutory prohibitions are provisions in statutes which do not permit persons to perform certain acts. Social ethics are common standards of conduct in social life, which are recognized and respected by the community.

19. Nguyen, *supra* note 2.

20. *Luat So Huu Tri Tue* [Law on Intellectual Property] No. 50/2005/QH11, art. 6, 84, 121, 127 (July 1, 2006) (Viet.).

21. *Bo Luat Lao Dong* [Labor Code] (2013), Art. 23 (Viet.).

22. Lac & Nguyen, *supra* note 2 (citing a 2006 report of the Labor Division of the Supreme People's Court that noncompetes restrict the employees' free choice of employment).

23. HIEN PHAP [CONSTITUTION] art. 35 (2013) (Viet.).

Code stipulates that employees have the right to work, to choose their jobs or occupations freely,<sup>24</sup> and the right to work for any employer not prohibited by law.<sup>25</sup> The Law on Employment also prescribes that the first principle of employment is to ensure the employees' right to work and to choose jobs and workplaces freely.<sup>26</sup> Thus, the Law on Employment prohibits acts that obstruct or prejudice the legitimate rights and interests of employees or employers.<sup>27</sup> According to employees, noncompetes restrict the employees' free choice of employment, so they violate the first principle of employment and should be unenforceable.

### B. Case Law

Noncompetes have been prevalent in Vietnam for a long time,<sup>28</sup> but until 2017, they were rarely tested by judicial interpretation and jurisprudence.<sup>29</sup> Unfortunately, more frequent tests of noncompetes by Vietnamese Courts has created more questions than answers. In the last two years, two tribunals of the same Court – the People's Court of Ho Chi Minh City – relied on different statutes to deliver two contradictory judgments. While the first enforced noncompetes,<sup>30</sup> the second nullified them.<sup>31</sup>

---

The Universal Declaration of Human Rights (UDHR) is universally regarded as the foundation of international human rights law. Article 23(1) of the UDHR recognizes “the right to work, to free choice of employment” as “equal and inalienable rights of all members of the human family.” G.A. Res. 217 (III) A, Universal Declaration of Human Rights A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

24. *Bo Luat Lao Dong* [Labor Code] (2013), Art. 5 (Viet.).

25. *Id.* Art. 10.

26. *Luat Viec Lam* [Law on Employment] No. 38/2013/QH13, art. 4 (Jan. 1, 2015) (Viet.). An unofficial translation is available at <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/97048/114981/F-2129581250/VNM97048%20Eng.pdf> [<https://perma.cc/HL75-CKTZ>].

27. *Id.* Art. 9.

28. Dinh, *supra* note 2.

29. Lac & Nguyen, *supra* note 2.

*But see* Chien Q. Ngo, *Gop Y Sua Doi Bo Luat Dan Su: Che Dinh Nao Cho Cac Nghia Vu Tiep Tuc Ton Tai Sau Khi Hop Dong Cham Dut?* [Suggestions to Amend the Civil Code: Continuing Obligations After Termination of Contract], J. LEGIS. STUD. (2014), <http://lapphap.vn/Pages/tintuc/tinchitiet.aspx?tintucid=207781> [<https://perma.cc/Y8M2-BV7Y>] (Viet.); Le & Nguyen, *supra* note 12, at 52–53 (citing Judgment no. 09/2010/LD-ST, People's Court of Duc Hoa District (Long An Province), Dec. 10, 2010, which enforced noncompetes based on the freedom of contract, but also raising questions about the employee's consent and free choice of employment).

30. Decision no. 755/2018/QD-PQTT, People's Court of Ho Chi Minh City, June 12, 2018.

31. Judgment no. 420/2019/LD-PT, People's Court of Ho Chi Minh City, May 15, 2019.

The first case is *Company X v. Ms. T*.<sup>32</sup> On October 10, 2015, Ms. T signed a 12-month employment contract to work as the head of the Recruitment Department of Company X. On October 21, 2015, she signed a noncompete, in which she committed not to engage in any competition against Company X for 12 months after leaving Company X. The noncompete failed to state any additional compensation for Ms. T.

On November 1, 2016, Ms. T signed another 12-month employment contract. However, on 18 November 2016, she quit and then immediately started working for another company. For this reason, on October 2, 2017, Company X filed a claim at the Vietnam International Arbitration Centre<sup>33</sup> against Ms. T for her breach of the noncompete.<sup>34</sup> On February 19, 2018, the arbitral tribunal issued the final award in favor of Company X, holding Ms. T liable to pay VND 205,197,300 (USD 9,000).<sup>35</sup>

In response, she submitted a petition to the People's Court of Ho Chi Minh City to challenge the arbitral award. Among other arguments, she pleaded that the noncompete was void due to its violation of the Law on Employment. On June 12, 2018, the People's Court of Ho Chi Minh City refused her petition, thus upholding the award.<sup>36</sup> The Court held that the noncompete was enforceable. In support of its ruling, the Court relied on Article 4 of the (old) 2005 Civil Code on the freedom of contract. Nonetheless, the Court provided no further discussion on the two exceptions prescribed by this Article: that an agreement should be void if it infringes (1) the statutory prohibition, or (2) the social ethics. By doing so, the Court failed to respond to the petitioner's argument that the noncompete violated the Law on Employment. In its simple view, Ms. T voluntarily signed the noncompete, so she was bound by it.

The second case is *Company U v. Mr. B*.<sup>37</sup> From 2012 to 2017, Mr. B worked for Company U as a designer. On January 29, 2016, he signed a noncompete in which he committed not to work for competitors of Company U. The noncompete failed to state any additional compensation for Mr. B. On February 1, 2016, Mr. B and Company U signed an indefinite-term employment contract.<sup>38</sup> However, on August 31, 2017, Mr. B left his job at Company U. On November 1, 2017, Mr. B started to

---

32. *Supra* note 28.

33. Vietnam International Arbitration Centre is a prominent arbitration institution in Vietnam.

34. The noncompete contained an arbitration agreement.

35. Award no. 75/17 HCM, Vietnam International Arbitration Centre, Feb. 19, 2018.

36. *Supra* note 28.

37. *Supra* note 29.

38. Under Article 22 of the Labor Code, there are three types of employment contracts: indefinite-term (permanent) employment contracts, definite-term (fixed term) employment contracts, and seasonal or work-specific employment contracts. There is no at-will employment in Vietnam.

work for Company P – according to Company U – one of its competitors. In 2018, Company U initiated a lawsuit against Mr. B, claiming that he violated the noncompete.

On November 30, 2018, the trial court, the People’s Court of District G (Ho Chi Minh City), ruled in favor of Mr. B on the following two grounds.<sup>39</sup> First, Company P and Company U were not competitors. Second, the noncompete was unenforceable due to its non-compliance with the Constitution,<sup>40</sup> the Labor Code,<sup>41</sup> and the Law on Employment.<sup>42</sup> Company U appealed the trial judgment. On May 15, 2019, on appeal, the People’s Court of Ho Chi Minh City approved the lower Court’s reasoning and upheld the judgment.<sup>43</sup> The Court did not mention the employer’s right to protect trade secrets.

The ambiguity in both the statutory law and case law on noncompetes undermines the legitimate interests of both employers and employees. Thus, this article proposes an unambiguous test to solve this problem for Vietnamese Courts.

#### IV. THE LEGAL STANDARD FOR NONCOMPETES

The protection of trade secrets is a compelling argument for the use of noncompetes.<sup>44</sup> Employers who possess trade secrets face the “hold-up” problem. *Ex-ante*, the employer is eager to share trade secrets with the employee to improve their productivity. But *ex-post*, the employee can use the disclosure of such trade secrets as intimidation against the employer to demand a higher compensation (equivalent to or less than the value of the trade secrets). In recognition of this potential problem, employers unilaterally refrain from sharing trade secrets unless legal measures, such as noncompetes, are available.<sup>45</sup>

The Law on Intellectual Property already contains general prohibitions against unlawful acquisition and disclosure of trade secrets.<sup>46</sup> However, these general protection measures are insufficient to provide the

39. Judgment no. 34/2018/LD-ST, People’s Court of District G (Ho Chi Minh City), Nov. 30, 2018.

40. HIEN PHAP [CONSTITUTION] art. 35 (2013) (Viet.).

41. *Bo Luat Lao Dong* [Labor Code] (2013), Art. 5, 10 (Viet.).

42. *Luat Viec Lam* [Law on Employment] No. 38/2013/QH13, art. 4, 9 (Jan. 1, 2015) (Viet.).

43. *Supra* note 29.

44. U.S. DEP’T. TREASURY, *Non-Compete Contracts: Economic Effects and Policy Implications* (2016) at 9, <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf> [<https://perma.cc/P2M4-XBC5>].

45. *Id.* at 7.

46. *Luat So Huu Tri Tue* [Law on Intellectual Property] No. 50/2005/QH11, art. 6, 84, 121, 127 (July 1, 2006) (Viet.).

necessary certainty for companies to deploy their trade secrets in Vietnam. Many employers expect to encounter enormous difficulty in proving that their former employees, especially those currently working for competitors, have violated the traditional non-disclosure agreements.<sup>47</sup> Therefore, noncompetes remain indispensable for the protection of trade secrets. Logically then, in at least some situations, noncompetes should be considered permissible measures to protect trade secrets.

However, noncompetes may interfere with employees' constitutional right to work and to choose their occupations, employment, and workplaces.<sup>48</sup> Therefore, Vietnamese law cannot ignore the potential abuse of noncompetes in restricting employees' free choice of employment. For this reason, we propose that employers must satisfy the following five-element test to create legally enforceable noncompetes under Vietnamese law.

First, the employer must have a protectable trade secret. The prerequisite for the employer's measures to protect trade secrets – including noncompetes – is that the employer has a trade secret.<sup>49</sup>

Second, the employer must prove that the employee performs work related to the trade secret. In other words, the employee must have access to the trade secret because of his formal job duties or other work-related reasons.<sup>50</sup> Nevertheless, the employer must avoid the overuse of noncompetes against employees whose jobs are manifestly extraneous to any trade secrets.<sup>51</sup>

Third, the employer must sufficiently inform the employee about the noncompete before the employee signs it. In case the employer wants to grant the employee access to the trade secret at the beginning of the employment relationship, the employer must inform the employee about the noncompete before the employee signs the employment contract. According to the Labor Code, the employer must notify the employee about the essential information in the employment contract before the employee signs it.<sup>52</sup> The essential information includes, among other

47. Timothy K. Sendek, *Customer Lists As Trade Secrets*, NAT'L L. REV. (Dec. 30, 2009), <https://www.natlawreview.com/article/customer-lists-trade-secrets> [<https://perma.cc/7LEZ-X4R2>].

48. HIEN PHAP [CONSTITUTION] art. 35 (2013) (Viet.).

49. *Bo Luat Lao Dong* [Labor Code] (2013), Art. 23 (Viet.).

50. Accidental access to the trade secret by an unexpected employee while working falls into the category of "other work-related reasons." However, the employer should implement necessary measures to ensure that the trade secret is neither disclosable nor easily accessible to minimize the risk of losing the trade secret.

51. For these employees, the general protection of trade secrets under the Law on Intellectual Property and the Labor Code provides sufficient security for the employer. *See supra* Part II.

52. *Bo Luat Lao Dong* [Labor Code] (2013), Art. 19 (Viet.).

things, the employer's measures to protect trade secrets. Because we consider noncompetes as measures to protect trade secrets, the employer must notify the employee about the requirement to sign a noncompete before the employee signs the employment contract.

In case the employer wants to grant the employee access to the trade secret after the employment relationship has started, the employer must inform the employee about the noncompete at least three working days in advance. According to the Labor Code, during the performance of the employment contract, any party who wishes to amend contractual clauses must notify the other party of the specific amendments at least three working days in advance. If the two parties reach an agreement, the contract amendment shall be in the form of an addendum to the employment contract, or it will be a new employment contract. If the two parties fail to reach an agreement, they must continue to perform the original employment contract.<sup>53</sup> The formation of the noncompete during employment must follow this procedure.

Fourth, the noncompete must be reasonably limited in scope. The noncompete scope should be narrow to protect trade secrets and not unduly prejudice the free choice of employment. The reasonableness of noncompetes depends on the specific circumstance of each case. Non-exhaustive factors for consideration include (1) the nature and scope of the employer's business; (2) the nature of the trade secret; and (3) the nature of the employee's work.<sup>54</sup> The noncompete must not prevent the employee from working for non-competitors, *i.e.*, firms that do not operate in the same relevant market<sup>55</sup> as the employer. Some countries,

---

The employer shall provide the employee with information about the job, workplace, working conditions, working hours, rest time, occupational safety and hygiene, wage, forms of wage payment, social insurance, health insurance, regulations on trade secrets, and other issues directly related to the formation of the employment contract as requested by the employee.

53. *Id.* Art. 35.

54. See, e.g., *Multi-Country Survey on Covenants Not to Compete*, ASS'N. CORP. COUNSEL, at 6–7, 16, 69, 83, 93, 108, 113, (2018), <https://www.gtlaw.com/en/-/media/files/insights/alerts/2018/3/gtnoncompeteeuroinfoak.pdf> [<https://perma.cc/ZNJ2-AHWJ>]; Grace Yang, *China Employee Non-Compete Agreements: The Legal Basics*, CHINA L. BLOG (Oct. 31, 2019), <https://www.chinalawblog.com/2019/10/china-employee-non-compete-agreements-the-legal-basics.html> [<https://perma.cc/2SWR-SBET>].

55. *Luat Canh Tranh* [Law on Competition], No. 23/2018/QH14, art. 3 (July 1, 2019) (Viet.). Relevant market means the market of the products or services that are interchangeable because of their characteristics, use, and prices, in a specific geographical area which has similar conditions of competition and is considerably different from neighboring geographical areas.

such as China,<sup>56</sup> Germany,<sup>57</sup> and Spain,<sup>58</sup> adopt a maximum two-year term limit, which should serve as a reference point for Vietnam.

Fifth, the employer must offer separate consideration to the employee. The Labor Code requires the employer to negotiate with the employee on employment benefits in exchange for signing the noncompete.<sup>59</sup> During the noncompete term, the employer restricts the employee's free choice of employment. The employee loses the opportunity to pursue his most desirable jobs, which usually leads to lower wages (or even unemployment).<sup>60</sup> Thus, the employer must compensate the employee for such opportunity loss.

For instance, under Chinese law, the compensation for a noncompete must be no less than 30 percent of the employee's wages (or the applicable minimum wage if it is higher).<sup>61</sup> Similarly, under German law, during the noncompete term, such compensation must be at least 50 percent of the employee's wages.<sup>62</sup> These provisions should also serve as a reference point for Vietnam.<sup>63</sup>

## V. CONCLUSION

The protection of trade secrets and the free choice of employment represent the competing interests of employers and employees in noncompetes. They are two sides of the same coin. Nevertheless, the law should never be a coin-tossing game. The current uncertainty regarding the enforceability of noncompetes in Vietnam is detrimental to both

---

56. Laodong Hetong Fa (劳动合同法) [Labor Contract Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008), art. 23, 24 (China).

57. Judge Mario Eylert, Fed. Lab. Ct. Ger, Non-Competition Clauses in Labour Contracts (Sept. 4, 2006), [https://www.ilo.org/wcmsp5/groups/public/—ed\\_dialogue/—dialogue/documents/meetingdocument/wcms\\_159962.pdf](https://www.ilo.org/wcmsp5/groups/public/—ed_dialogue/—dialogue/documents/meetingdocument/wcms_159962.pdf) [<https://perma.cc/PZA5-QVDN>], at 3.

58. Judge Antonio M. Valverde et al., Sup. Ct. Spain, Non-Competition Clauses in Labour Contracts (Sept. 4, 2006), [https://www.ilo.org/wcmsp5/groups/public/—ed\\_dialogue/—dialogue/documents/meetingdocument/wcms\\_159971.pdf](https://www.ilo.org/wcmsp5/groups/public/—ed_dialogue/—dialogue/documents/meetingdocument/wcms_159971.pdf) [<https://perma.cc/6X6N-794X>], at 3.

59. *Bo Luat Lao Dong* [Labor Code] (2013), Art. 23 (Viet.).

60. Matt Marx, *The Firm Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOC. REV. 695, 705 (2011).

61. *China Issues New Judicial Interpretation on Non-compete Covenants and Various Employment Issues*, MAYER BROWN JSM (Feb. 5, 2013), <https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2013/02/china-issues-new-judicial-interpretation-on-noncom/files/get-the-full-update/fileattachment/130205-hkgprc-employment.pdf> [<https://perma.cc/4RW6-LNNW>]; Yang, *supra* note 52.

62. Eylert, *supra* note 55.

63. Currently, the Governmental Decree No. 90/2019/ND-CP specifies the regulatory minimum wages in Vietnam. The monthly minimum wages range from VND 3,070,000 (USD 132) to VND 4,420,000 (USD 190), depending on the region. Employees who have vocational training must be paid at least seven percent higher than the applicable minimum wages.

employers and employees. In response, the present article proposes a clear and practical legal standard for noncompetes in Vietnam. It is time to bring the ambiguity to an end.