

11-1-2022

Banning Noncompetes in Virginia

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Recommended Citation

Christopher J. Sullivan & Justin A. Ritter, *Banning Noncompetes in Virginia*, 57 U. Rich. L. Rev. 235 (2022).
Available at: <https://scholarship.richmond.edu/lawreview/vol57/iss1/12>

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BANNING NONCOMPETES IN VIRGINIA

Christopher J. Sullivan *
Justin A. Ritter **

ABSTRACT

The past decade has seen a nationwide wave of reform in noncompete law, specifically the limitation of noncompete agreements. Since 2016, ten states—including Virginia in 2020—banned the use of noncompete agreements against certain “low-wage” employees. In order to stay ahead of this curve and ensure Virginia remains and grows as one of the top states to do business, this Article suggests that Virginia—like its neighbor, the District of Columbia, initially did in 2021—pass a complete ban of all noncompete agreements in the employment context. Such a ban would make Virginia a lucrative destination for entrepreneurs and startups by maximizing the job and employee market and keeping the best business opportunities for employers and employees alike in-state. The Article forecasts this effect by examining the rise of California’s Silicon Valley, where employee noncompete agreements are banned, and the converse decline of innovation in Michigan since 1985, when the state accidentally repealed its noncompete ban. Virginia would specifically benefit from a ban of employee noncompetes because its current noncompete law is inadequate. This Article argues that Virginia courts’ longstanding three-prong test weighing legitimate business interest, undue hardship, and public policy is dangerously unpredictable—so much so that the Supreme Court of Virginia once upheld and struck down the exact same noncompete agreement in two different cases—resulting in

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legal guesswork and unfair bargaining power between employer and employee. This Article also suggests that Virginia’s 2020 “low-wage” ban insufficiently addresses the issues at hand and even further adds to the burden of deciphering the law. While some may claim employee noncompete agreements are necessary to protect legitimate business interests and advance the freedom of contract, this Article responds that such business interests are already adequately protected by other, less problematic provisions—namely, confidentiality and nonsolicitation agreements—and that the freedom of contract is not any less valuable than the freedom of trade, which employee noncompete agreements severely restrain. Finally, this Article proposes model legislation to aid the Virginia General Assembly, and other jurisdictions who may follow suit, in passing such a ban.

TABLE OF CONTENTS

INTRODUCTION.....	238
I. BRIEF HISTORY OF NONCOMPETE LAW IN THE UNITED STATES	239
A. <i>The Original Bans: North Dakota, California, and Oklahoma</i>	239
B. <i>The New Wave: Jimmy John’s and the Ban of Low-Wage Noncompete Agreements</i>	241
C. <i>The First in 116 Years: The District of Columbia Bans Noncompetes</i>	244
D. <i>Noncompete Law in Virginia</i>	246
II. WHY VIRGINIA SHOULD BAN EMPLOYEE NONCOMPETE AGREEMENTS.....	252
A. <i>Banning Employee Noncompete Agreements Would Strengthen Virginia’s Economy and Job Market</i>	253
B. <i>Virginia’s Current Noncompete Law Is Inadequate</i>	260
III. ADDRESSING COUNTERARGUMENTS	266
A. <i>“Banning Employee Noncompete Agreements Leaves Legitimate Business Interests Vulnerable”</i>	266
B. <i>“What About the Freedom of Contract?”</i>	270

IV. MODEL LEGISLATION.....271

CONCLUSION274

INTRODUCTION

Virginia's entrepreneurial and general business ecosystem have evolved considerably since the turn of the century. In recent years, Virginia has been consistently ranked as one of the top states to do business, and at times has been ranked number one.¹ Despite such success, Virginia, together with its sister states, have dealt with its set of challenges: 9/11 and its aftermath, the 2008 recession, the COVID-19 pandemic, and most recently rampant inflation, supply chain issues, and certain technology-centric employee talent shortages. To remain competitive, and arguably at or near the top as the best state to do business, Virginia must be proactive in its laws and not reactive to what may come in the future.

This Article suggests one small measure where Virginia can be proactive in its laws to remain at or near the top—a universal ban of noncompete agreements in the employment context. Noncompete agreements are contracts limiting one party's competitive activities against the economic interests of another party—within a specified market, geographic scope, and time period—after a business relationship between the parties terminates. Such relationships after which noncompete agreements have been enforced include that of partners of a partnership, members of a limited liability company, or shareholders of a corporation; buyer and seller of a business acquisition or asset purchase; or—the focus of this Article—employer and employee. This Article argues that employee noncompete agreements frustrate and stifle innovation, job creation, and thus related anticipated state income and related local tax receipts. The authors of this Article believe that noncompete agreements in the employment context are arbitrary, inherently unfair to the employee, and do little to protect legitimate business interests given that alternative protections currently and should continue to exist (nonsolicitation agreements and confidentiality agreements, for example).

Universally banning noncompete agreements in the employment context is not a fix-all solution, but rather one of many

1. Scott Cohn, *Virginia Is Back as America's Top State for Business in 2021*, CNBC, <https://www.cnbc.com/amp/2021/07/13/virginia-is-back-as-americas-top-state-for-business.html> [https://perma.cc/WZJ8-AFTL] (July 13, 2021, 11:31 AM) (ranking Virginia first in CNBC's America's Top State for Business study, Virginia's fifth time at number one since the study began in 2007).

options to consider given the current economic climate of the Commonwealth and the United States at large.

Part I of this Article provides a brief history and survey of the varying noncompete laws across the fifty states and the District of Columbia. Specifically, it explains the noncompete laws of Oklahoma, North Dakota, and California, the three states that historically banned noncompete agreements; the past decade's wave of noncompete reform across a majority of states, namely noncompete bans for low-wage employees passed by Virginia and others; the District of Columbia's trailblazing general ban of employee noncompetes, effective October, 1, 2022; and a closer examination into the evolution of noncompete law in Virginia. Part II then explains the two central reasons why Virginia should pass its own categorical ban on employee noncompete agreements: the growth it would bring to Virginia's economy and job market, evidenced by case studies into the respective growth and decline of nonenforcing and enforcing jurisdictions; and the dangerous unpredictability of Virginia's current noncompete law, inadequately addressed by Virginia's most recent legislative reform. Part III of this Article then addresses what the authors expect to be the two most common counterarguments against an employee noncompete ban: risking employer's legitimate business interests and the freedom of contract. Finally, Part IV suggests model legislation effectuating a ban of employee noncompete agreements for the Virginia General Assembly to adopt in its next legislative session, drafted in such a manner where it could and should be replicated in other states.

I. BRIEF HISTORY OF NONCOMPETE LAW IN THE UNITED STATES

A. *The Original Bans: North Dakota, California, and Oklahoma*

Forty-seven out of fifty states currently enforce employee noncompete agreements, to varying extents.² The three exceptional states that have banned employee noncompete agreements are

2. See generally RUSSELL BECK, BECK REED RIDEN LLP, *EMPLOYEE NONCOMPETES: A STATE-BY-STATE SURVEY* (2022), <https://beckreedriden.com/wp-content/uploads/2022/08/Noncompetes-50-State-Survey-Chart-20220817.pdf> [<https://perma.cc/8P5C-HDLR>].

Oklahoma,³ North Dakota,⁴ and—the state which has garnered the most attention from scholars in the area of noncompete law⁵—California.⁶ Yet do not be quick to assume that these states passed relatively recent legislation to effectuate such bans. California did not, as one may initially expect, ban employee noncompete agreements as an intentional catalyst or reaction to the boom of Silicon Valley and the technology industry. No, noncompete agreements have been banned in California since 1872—just twenty-two years after it had become a state.⁷ Likewise, Oklahoma and North Dakota have banned noncompete agreements since 1890 and 1865—respectively seventeen and twenty-four years *before* either became a state.⁸ Notably, Michigan was once the fourth jurisdiction in this group, banning noncompete agreements in 1905, but it repealed its ban in 1985⁹—making it a particularly interesting case study when considering a noncompete ban in Virginia.¹⁰

The initial bans in these three jurisdictions were very broad. Indeed, each read essentially as the same single sentence: “Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind . . . is to that extent void.”¹¹ Overtime, each jurisdiction amended their bans to include express exceptions in which noncompete agreements could be enforced. These exceptions include the sale of the goodwill of a business¹² and the noncompetition of partners against a partnership, members against a limited liability company, and/or share-

3. OKLA. STAT. tit. 15, §§ 217, 219A (2022).

4. N.D. CENT. CODE § 9-08-06 (2022).

5. *See, e.g., infra* Section II.A.1.

6. CAL. BUS. & PROF. CODE § 16600 (Deering 2022).

7. CAL. CIV. CODE § 1673 (Deering 1872); *see* Samuel Shipley, *List of U.S. States' Dates of Admission to the Union*, BRITANNICA, <https://www.britannica.com/topic/list-of-U-S-states-by-date-of-admission-to-the-Union-2130026> [<https://perma.cc/DG3N-PGA8>] (Feb. 11, 2020).

8. OKLA. STAT. ch. 17, § 886 (1890); TERR. D. REV. CODE 1877, CIV. CODE, § 959 (1877); Shipley, *supra* note 7.

9. MICH. COMP. LAWS § 445.761 (1905), *repealed by* Michigan Antitrust Reform Act (MARA), *id.* § 445.774a (2022).

10. *See infra* Section II.A.2.

11. CAL. CIV. CODE § 1673 (Deering 1872); *see also* OKLA. STAT. ch. 17, § 886 (1890) (“Every contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind . . . is to that extent void.”); TERR. D. REV. CODE 1877, CIV. CODE, § 959 (1877) (“Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind . . . is to that extent void.”).

12. CAL. BUS. & PROF. CODE § 16601; OKLA. STAT. tit. 15, § 218; N.D. CENT. CODE § 9-08-06(1).

holders against a corporation.¹³ However, despite over 100 years of social, political, and economic change, these three states otherwise maintain their ban of noncompete agreements to this day.¹⁴

B. *The New Wave: Jimmy John's and the Ban of Low-Wage Noncompete Agreements*

As for the other states that do enforce noncompete agreements, their various noncompete laws and policies have gradually and uniquely evolved overtime, yet a recent and rapid wave of reform has emerged over the past ten years.¹⁵ Since 2011, twenty-eight states and the District of Columbia have changed their noncompete laws to some extent.¹⁶ Some have codified per se unreasonable noncompete requirements.¹⁷ Others, including Virginia,¹⁸ have implemented certain notice requirements to employees of the presence of a noncompete clause.¹⁹ Others have carved out exceptions banning the use of noncompete agreements in particular fields. Connecticut, Florida, Illinois, Indiana, Iowa, Kentucky, New Hampshire, New Mexico, Oregon, Rhode Island, Tennessee, and West Virginia have banned or at least limited noncompetes for physicians, nurses, and/or other healthcare employees.²⁰ In 2015, Hawaii banned the use of noncompete agreements in its technology industry.²¹

One of the stronger trends in recent years has been the banning of noncompetes against certain low-wage employees. Employee noncompete agreements came under nationwide scrutiny in 2014 following the discovery that the sandwich chain, Jimmy John's, had been including noncompete clauses in the employment agree-

13. CAL. BUS. & PROF. CODE §§ 16602–02.5; OKLA. STAT. tit. 15, § 219; N.D. CENT. CODE § 9-08-06(2).

14. CAL. BUS. & PROF. CODE § 16600 (Deering 2022); OKLA. STAT. tit. 15, § 217 (2022); N.D. CENT. CODE § 9-08-06 (2022).

15. See generally Russell Beck, *Curious Which States Have Changed Their Noncompete Laws in the Last Decade? (More than Half)*, FAIR COMPETITION L. (July 12, 2022), <https://faircompetitionlaw.com/2022/07/12/curious-which-states-have-changed-their-noncompete-laws-in-the-last-decade-more-than-half/> [<https://perma.cc/JW7D-BMV6>].

16. *Id.*

17. *See id.*

18. VA. CODE ANN. § 40.1-28.7:8 (2021); *see infra* Section I.D.3.

19. *See* Beck, *supra* note 15.

20. *See id.*

21. HAW. REV. STAT. § 480-4(d) (2022).

ments for its sandwich makers.²² The contract, in relevant part, required the following:

Employee covenants and agrees that, during his or her employment with Employer and for a period of two (2) years after either the effective date of termination of his or her employment for any reason, whether voluntary or involuntary and whether by Employer or Employee, or the date on which Employee begins to comply with this paragraph, whichever is later, he or she will not have any direct or indirect interest in or perform services for (whether as an owner, partner, investor, director, officer, representative, manager, employee, principal, agent, advisor, or consultant) any business which derives more than ten percent (10%) of its revenue from selling submarine, hero-type, deli-style, pita and/or wrapped or rolled sandwiches and is located within three miles of either (1) [address of applicable Jimmy John's restaurant] or (2) any such other JIMMY JOHN'S® Sandwich Shop operated by [Jimmy John's Franchise, LLC], one of its authorized franchisees, or any of [its] affiliates.²³

In other words, the Jimmy John's contract provided that a sixteen-year-old high school student earning minimum wage as a sandwich maker at a Jimmy John's location near their home, for two years after leaving said job, could not accept another minimum wage job at a Subway—or any other restaurant, grocery store, or other business selling a sufficient amount of sandwiches—within three miles, not just of *the* Jimmy John's at which the student worked, but of *any* Jimmy John's in the country. There are over 2,000 Jimmy John's locations, allowing this noncompete clause to cover a geographic scope of 6,000 square miles across 44 states and the District of Columbia.²⁴

Jimmy John's received heavy criticism and removed the clause from its employment agreements following a settlement agreement in Illinois state court.²⁵ But they were just the tip of the iceberg. In 2016, the Obama Administration published a report finding rampant abuse of noncompete clauses in low-wage employee

22. Dave Jamieson, *Jimmy John's Makes Low-Wage Workers Sign 'Oppressive' Noncompete Agreements*, HUFFPOST, https://www.huffingtonpost.com/2014/10/13/jimmy-johns-non-compete_n_5978180.html [perm.cc/27F5-HQJU] (Oct. 15, 2014).

23. First Amended Class Action Complaint at 59–60, *Brunner v. Liautaud*, No. 14-C-5509 (N.D. Ill. Sept. 19, 2014).

24. Jamieson, *supra* note 22.

25. Daniel Wiessner, *Jimmy John's Settles Illinois Lawsuit Over Non-Compete Agreements*, REUTERS, <https://www.reuters.com/article/us-jimmyjohns-settlement/jimmy-johns-settles-illinois-lawsuit-over-non-compete-agreements-idUSKBN13W2JA> [https://perma.cc/JR4M-Y3KU] (Dec. 7, 2016, 1:55 PM).

contracts.²⁶ The reports revealed that nearly one in five U.S. employees—and one in six U.S. employees without a college degree—were bound by a noncompete agreement.²⁷ The Obama Administration subsequently issued a Call to Action for the states to review their noncompete laws and policies, stating:

While the primary rationale of non-competes is to prevent workers from transferring trade secrets to rival companies, a considerable proportion come at the expense of workers, entrepreneurship, and the broader economy. Researchers have found that states that strictly enforce non-compete agreements have lower wage growth and lower mobility than states that do not enforce them. . . .

. . . .
 . . . Even in states that choose to enforce non-competes, we have heard from experts that only in rare cases is a non-compete the best option for an employer to use, over and above the host of other legal frameworks – including trade secrets protections, non-solicitation agreements, and non-disclosure agreements. As states move to ensure free labor market competition, non-compete reform should be considered as one important tool.²⁸

In the years that followed, ten states passed legislation banning enforcement of noncompete agreements with low-wage employees, though with various thresholds for determining “low-wage.”²⁹ Virginia was one such state.³⁰

26. See generally THE WHITE HOUSE, NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES (2016), https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf [<https://perma.cc/9SEL-GN3X>].

27. *Id.* at 3; see also Steven Greenhouse, *Noncompete Clauses Increasingly Pop Up in Array of Jobs*, N.Y. TIMES, <https://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html> [<https://perma.cc/87LQ-MWSW>] (June 8, 2014).

28. THE WHITE HOUSE, STATE CALL TO ACTION TO NON-COMPETE AGREEMENTS (2016), <https://obamawhitehouse.archives.gov/sites/default/files/competition/noncompetes-calltoaction-final.pdf> [<https://perma.cc/AN4Q-MA24>].

29. These ten states are Illinois, Maine, Maryland, Massachusetts, Nevada, New Hampshire, Oregon, Rhode Island, Virginia, and Washington. Russell Beck, *“Low-Wage” Employees Are Now Exempt From 10 Noncompete Laws. Who Are These Employees and Where Are They Exempt?*, FAIR COMPETITION L., <https://faircompetitionlaw.com/2021/06/19/low-wage-employees-are-now-exempt-from-10-noncompete-laws-who-are-these-employees-and-where-are-they-exempt/#fn1> [<https://perma.cc/DF9L-XGYQ>] (June 19, 2021).

30. VA. CODE ANN. § 40.1-28.7:8 (2021); see *infra* Section I.D.3.

C. *The First in 116 Years: The District of Columbia Bans Noncompetes*

Despite the past decade's wave of noncompete reform, no jurisdiction had joined North Dakota, California, and Oklahoma in banning employee noncompete agreements in general—until 2021. On January 11, 2021, D.C. Act 23-563, the Ban on Non-Compete Agreements Amendment Act of 2020, was signed into law, prohibiting any private District of Columbia employer from requiring a noncompete agreement with any District of Columbia employee—with very limited exceptions.³¹ It was the first categorical ban of noncompete agreements since Michigan in 1905.³² In its report supporting the bill, the Council of the District of Columbia Committee on Labor and Workforce Development stated that “non-competes are fundamentally anti-competitive.”³³ It explained how banning employee noncompete agreements would help fuel the economy by increasing employee job mobility as well as strengthening the pool of job candidates, thus benefitting employees and employers alike:

If a worker covered by a non-compete has a new idea for a company, they may be unable to start their business here in the District because of the non-compete, and could be forced to move out of the region. Banning non-compete clauses therefore will help workers improve their lives, help companies secure better talent, and foster a stronger start-up culture.³⁴

Originally, the District of Columbia attempted to join the ten other jurisdictions banning noncompete agreements for low-wage employees.³⁵ A prior version of Council Bill 23-0494 limited the ban to employees who earn less than or equal to three times the minimum wage.³⁶ Only eight of the thirteen District of Columbia

31. 68 D.C. Reg. 782 (Jan. 11, 2021). Those exceptions were volunteers, religious leaders, medical providers earning at least \$250,000 per year, and babysitters. *Id.*

32. MICH. COMP. LAWS § 445.761 (1905), *repealed by* Michigan Antitrust Reform Act (MARA), *id.* § 445.774a (2022).

33. COMM. ON LAB. & WORKFORCE DEV., COUNCIL OF D.C., REPORT ON B23-0494: THE BAN ON NON-COMPETE AGREEMENTS ACT OF 2020, at 2 (2020), https://lims.dccouncil.gov/downloads/LIMS/43373/Committee_Report/B23-0494-Committee_Report2.pdf [<https://perma.cc/2WKJ-GL9N>].

34. *Id.*

35. Ban on Non-Compete Agreements Amendment Act of 2019, B. 23-0494 (D.C. 2019), <https://lims.dccouncil.gov/downloads/LIMS/43373/Introduction/B23-0494-Introduction.pdf> [<https://perma.cc/NAQ4-9QZC>].

36. *Id.*

council members supported the bill,³⁷ but not because it went too far—because it did not go far enough. The revised version of the bill banning all employee noncompete agreements was approved *unanimously* by the Council (with the exception of one recusal).³⁸ The Committee on Labor and Workforce Development explained how the half-measure of banning noncompete agreements just for low-wage employees would result in administrative expense and uncertainty for employers and would fail to address the concerns of restricted job mobility and applicant pools that noncompete agreements raise for high-salary positions:

It is simpler, fairer, more practical, and more enforceable to have a complete ban on non-competes. Non-competes are used across various wage tiers, and non-competes are harmful to workers at all salary levels, as well as to the local economy. If an average hourly wage was set as the threshold, employers of salaried workers would have to record those employees' hours of work and regularly calculate the hourly wages earned to ensure that they comply with the law. The DC Chamber of Commerce objected to this administrative burden for businesses that relied on salaried workers. At the same time, many professions where non-competes are the most harmful, such as the medical profession, would likely be above any such wage threshold. Further, all workers, even those earning a higher salary, should be entitled to change jobs.³⁹

Learning from the legislative history of the noncompete bans in North Dakota, Oklahoma, and California, the District of Columbia preemptively excluded certain restrictive covenants from its ban—namely, confidentiality agreements and sale of business agreements.⁴⁰

Nonetheless, the ban met backlash for still being overly broad.⁴¹ The Committee on Labor and Workforce Development met with business leaders and, while remaining adamant of its disfavor of

37. *See id.*

38. *B23-0494 - Ban on Non-Compete Agreements Amendment Act of 2019*, COUNCIL OF D.C., <https://lms.dccouncil.gov/Legislation/B23-0494> [perma.cc/5A2L-64RP] (navigate to “Dec 15, 2020” and click “View Voting Details”).

39. COMM. ON LAB. & WORKFORCE DEV., *supra* note 33, at 2–3.

40. 68 D.C. Reg. 782 (Jan. 15, 2021).

41. *See* COMM. ON LAB. & WORKFORCE DEV., COUNCIL OF D.C., REPORT ON B24-256, THE NON-COMPETE CLARIFICATION AMENDMENT ACT OF 2022, at 2 (2022), https://lms.dccouncil.gov/downloads/LIMS/47234/Committee_Report/B24-0256-Committee_Report1.pdf [https://perma.cc/C356-VJ4K]; *D.C. Council Amends Non-Compete Law After Backlash – What Employers Need to Know Before October 1*, FISHER PHILLIPS, <https://www.fisherphillips.com/news-insights/dc-council-amends-non-compete-law-after-backlash-what-employers-need-to-know-before-october-1.html> [https://perma.cc/Z75B-TVKK] (Sept. 13, 2022).

noncompete agreements, compromised “[i]n the spirit of comity”⁴² to “clarify”⁴³ the district’s noncompete ban. Most notably, the District of Columbia has since excluded “highly compensated employees” from its ban—an almost inverse policy to those of the jurisdictions that have banned noncompetes for low-wage employees.⁴⁴ In the District of Columbia, noncompete agreements are once again enforceable against employees who earn at least \$150,000 per year, effective October 1, 2022.⁴⁵

D. *Noncompete Law in Virginia*

1. Virginia’s Three-Pronged Test

Virginia enforces noncompete agreements,⁴⁶ though it has historically disfavored them⁴⁷—especially over the past twenty years.⁴⁸ Throughout the commonwealth’s history, it has recognized the importance of allowing businesses to protect their interests and has accepted that noncompete agreements serve as a valuable tool to provide “business stability insurance.”⁴⁹ That said, Virginia courts will refuse to enforce a noncompete agreement if it constitutes an unreasonable restraint on trade.⁵⁰ Virginia has evaluated the reasonableness of noncompete agreements using the same three considerations since 1956:

- (1) Is the restraint, from the standpoint of the employer, reasonable in the sense that it is no greater than is necessary to protect the employer in some legitimate business interest?
- (2) From the standpoint of the employee, is the restraint reasonable in the sense that it is not unduly harsh and oppressive in curtailing his legitimate

42. COMM. ON LAB. & WORKFORCE DEV., *supra* note 41, at 2.

43. 69 D.C. Reg. 9910 (Aug. 5, 2022).

44. *Id.*

45. *Id.* The exception allowing noncompete agreements for medical providers earning at least \$250,000 per year still remains. *Id.*

46. See generally Ann R. Bergan, Kenneth E. Chadwick, Hugh T. Harrison II & Barrett E. Pope, Note, *Employee Covenants Not To Compete: Where Does Virginia Stand?*, 15 U. RICH. L. REV. 105 (1980); Robert A. Hill, *Covenants Not-To-Compete: Are They Enforceable in Virginia?*, 16 VA. BAR ASS’N J. 4 (1990).

47. Bergan et al., *supra* note 46, at 106.

48. See *infra* notes 65–69 and accompanying text.

49. Bergan et al., *supra* note 46, at 106, 108.

50. *Id.* at 106.

efforts to earn a livelihood? (3) Is the restraint reasonable from the standpoint of a sound public policy?⁵¹

First, the restraint must be no greater than necessary to protect a legitimate business interest. When determining the presence of a legitimate business interest, Virginia courts look to the nature of the employer's business as well as the role the employee played in the business.⁵² The burden is on the employer to "show special circumstances which make it unfair for him to bear all the risks of placing the employee in a position in which a later breach of confidence might be costly."⁵³ Historically, Virginia has enforced noncompete agreements for the sake of two areas it has deemed legitimate business interests: customer lists and trade secrets.⁵⁴

Second, the restraint must not unduly obstruct the employee from earning a living. It is under this prong that Virginia courts have scrutinized the reasonableness of a noncompete agreement's scope, with respect to time, territory, and activity.⁵⁵ If a noncompete agreement has a lengthy duration, wide geographic "black-out" area, or defines "competition" in broad terms, it unreasonably limits the employee's options to sustain a livelihood.⁵⁶ Virginia imposes no bright-lines for determining unreasonable scope, such as a particular length of time or mile radius.⁵⁷ The best guidance employees, employers, and practitioners have to evaluate current noncompete agreements is to compare them with the ones previously evaluated by the courts.⁵⁸

51. *Meissel v. Finley*, 198 Va. 577, 580, 95 S.E.2d 186, 188 (1956) (quoting *Welcome Wagon, Inc. v. Morris*, 224 F.2d 693, 698 (4th Cir. 1955)).

52. *See, e.g., Paramount Termite Control Co. v. Rector*, 238 Va. 171, 174, 380 S.E.2d 922, 924 (1989); *Stoneman v. Wilson*, 169 Va. 239, 247, 192 S.E. 816, 819 (1937) (citing *Brandenburger v. Martin*, 225 Ill. App. 439 (1922)).

53. Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 651 (1960).

54. *See, e.g., Paramount Termite Control*, 238 Va. at 175, 380 S.E.2d at 925–26; *Foti v. Cook*, 220 Va. 800, 805–06, 263 S.E.2d 430, 433 (1980); *Stoneman*, 169 Va. at 245–46, 192 S.E. at 818–19.

55. *See, e.g., Paramount Termite Control*, 238 Va. at 175, 380 S.E.2d at 925–26; *Grant v. Carotek, Inc.*, 737 F.2d 410, 412 (4th Cir. 1984); *Power Distrib., Inc. v. Emergency Power Eng'g, Inc.*, 569 F. Supp. 54, 54–55 (E.D. Va. 1983); *Roanoke Eng'g Sales Co., Inc. v. Rosenbaum*, 223 Va. 548, 290 S.E.2d 882 (1982); *Richardson v. Paxton Co.*, 203 Va. 790, 127 S.E.2d 113 (1962).

56. *See cases cited supra* note 55.

57. *See Foti*, 220 Va. At 805, 263 S.E.2d at 433.

58. *See generally* VA. CONTINUING LEGAL EDUC., COVENANTS NOT TO COMPETE AND THE DUTY OF LOYALTY IN VIRGINIA (2012).

Third, the restraint must be reasonable with respect to a balance of public policy. While protecting legitimate business interests is an important goal of public policy, “[d]iametrically opposed to the freedom of contract is the freedom of trade.”⁵⁹ Virginia balances the interests of both to ensure healthy competition as well as economic growth, an ultimate benefit both to employee and employer.⁶⁰

2. The Supreme Court of Virginia’s Love-Hate History with Noncompete Agreements

By the 1990s, the Supreme Court of Virginia was consistently upholding noncompete agreements of varying levels of restriction.⁶¹ In *Blue Ridge Anesthesia and Critical Care, Inc. v. Gidick*, the court upheld a noncompete agreement with a duration of three years.⁶² In *New River Media Group, Inc. v. Knighton*, the court upheld a noncompete agreement with a geographic scope of sixty miles.⁶³

Regardless of one’s agreement with these decisions, they at least brought about a relative amount of certainty to the common-law boundaries of noncompete agreements in Virginia.⁶⁴ At the turn of the millennium, however, the court so turned its opinion of

59. Hill, *supra* note 46, at 8.

60. *Id.*; see also *Worrie v. Boze*, 191 Va. 916, 928, 62 S.E.2d 876, 882 (1951) (“Freedom to contract must not be unreasonably abridged. Neither must the right to protect by reasonable restrictions that which a man by industry, skill, and good judgment has built up be denied.” (citing *Granger v. Craven*, 199 N.W. 10, 12 (1924))).

61. See, e.g., *Paramount Termite Control Co. v. Rector*, 238 Va. 171, 380 S.E.2d 922 (1989); *Blue Ridge Anesthesia & Critical Care Inc. v. Gidick*, 239 Va. 369, 389 S.E.2d 467 (1990); *Therapy Servs. Inc. v. Crystal City Nursing Ctr. Inc.*, 239 Va. 385, 389 S.E.2d 710 (1990); *New River Media Grp. Inc. v. Knighton*, 245 Va. 367, 429 S.E.2d 25 (1993); *Rash v. Hilb, Rogal & Hamilton Co.*, 251 Va. 281, 467 S.E.2d 791 (1996); *Advanced Marine Enters. Inc. v. PRC Inc.*, 256 Va. 106, 501 S.E.2d 148 (1998).

62. *Blue Ridge Anesthesia & Critical Care Inc.*, 239 Va. at 370–71, 389 S.E.2d at 468, 470; see also *Paramount Termite Control*, 238 Va. at 172–73, 176, 380 S.E.2d at 924, 926 (upholding a noncompete agreement with a duration of two years).

63. *New River Media Grp. Inc.*, 245 Va. at 368, 370, 429 S.E.2d at 25, 26–27. For perspective, a sixty air-mile radius around Richmond, Virginia, would cover as far north as Fredericksburg, as far east as Newport News, as far west as Charlottesville, and nearly as far south as the southern border of Virginia. See *Draw a Circle*, MAP DEVS., <https://www.mapdevelopers.com/draw-circle-tool.php> [https://perma.cc/5YR9-TRFV] (enter “Richmond, VA” into the “Address” field and “60” into the “Radius” field; select “Miles”; and click “New Circle”).

64. Gregory J. Haley & Scott C. Ford, *In Search of Whales, Not Minnows: Casting the Noncompete Net After Omnplex*, 54 VA. LAW. 28, 28–29 (2006).

noncompete agreements.⁶⁵ In *Simmons v. Miller*, the court deemed unenforceable a noncompete agreement with, among other problematic restrictions, a duration of three years—the same duration as the noncompete agreement previously upheld in *Blue Ridge Anesthesia*.⁶⁶ In *Motion Control Systems, Inc. v. East*, the court affirmed the trial court’s ruling that a noncompete agreement was unenforceable solely because it vaguely prohibited competition in “any business similar to the type of business” of the employer.⁶⁷ The fact that the noncompete agreement also covered a 100-mile radius⁶⁸ was not identified as problematic by the trial court and not addressed by the Supreme Court of Virginia.⁶⁹

In *Omniplex World Services Corp. v. US Investigations Services, Inc.*, the court, by a four-to-three vote, held unenforceable a noncompete agreement for a low-level administrative employee.⁷⁰ The agreement had a duration of one year starting, *not* from the employee’s termination date, but from the employee’s start date.⁷¹ In other words, so long as the employee worked for the employer for more than one year, there would be no noncompete restriction upon termination.⁷² The noncompete agreement also restricted the employee from working for a competitor, *not* in general service to any of that competitor’s customers, but just in service to one particular client of the employer: a confidential government agency.⁷³ Finally, the noncompete agreement also only applied to employment in which the employee would have the same level of security clearance with the competitor as she had with her original

65. See *Simmons v. Miller*, 261 Va. 561, 580–82, 544 S.E.2d 666, 678 (2001); *Motion Control Sys., Inc. v. East*, 262 Va. 33, 35–36, 38, 546 S.E.2d 424, 425–26 (2001); *Modern Env’ts, Inc. v. Stinnett*, 263 Va. 491, 493–96, 561 S.E.2d 694, 695–96 (2002); *Parr v. Alderwoods Grp., Inc.*, 268 Va. 461, 464, 466, 468, 604 S.E.2d 431, 433–35 (2004).

66. Compare *Simmons*, 261 Va. at 580–82, 544 S.E.2d at 678 (holding that a noncompete agreement with a duration of three years was not enforceable), with *Blue Ridge Anesthesia & Critical Care Inc.*, 239 Va. at 370–71, 374, 389 S.E.2d at 468, 470 (holding that a noncompete agreement with a duration of three years was enforceable).

67. 262 Va. at 35–38, 546 S.E.2d at 425–26.

68. For perspective, a 100 air-mile radius around Richmond, Virginia, would cover as far north as Washington, D.C., as far east as Virginia Beach, as far west as Lynchburg, and nearly as far south as Durham, North Carolina. See *Draw a Circle*, MAP DEVS., <https://www.mapdevelopers.com/draw-circle-tool.php> [<https://perma.cc/5YR9-TRFV>] (enter “Richmond, VA” into the “Address” field and “100” into the “Radius” field; select “Miles”; and click “New Circle”).

69. *Motion Control Sys.*, 262 Va. at 36–38, 546 S.E.2d at 425–26.

70. 270 Va. 246, 250, 618 S.E.2d 340, 343 (2005).

71. *Id.* at 248, 618 S.E.2d at 341.

72. *Id.*

73. *Id.*

employer.⁷⁴ Nonetheless, the court held that the noncompete agreement was unenforceable because it prohibited “support of any kind” to the particular client and thus did not limit its restriction to “competing directly” with the employer.⁷⁵

The *Omniplex* court ruled that any noncompete agreement “must be evaluated on its own merits, balancing the provisions of the contract with the circumstances of the businesses and employees involved.”⁷⁶ Gregory J. Haley and Scott C. Ford theorized that this ruling gave rise to a phenomenon they coined as “Omniplexity,” in which the court gave weight to “intangible factors” outside legitimate business interest, undue hardship, and public policy.⁷⁷ One such factor is on which side of the “villain/victim” dichotomy the employee lies in the facts of any given case.⁷⁸ In *Omniplex*, for example, the employee was low-level, had applied to the competitor before agreeing to work for the employer, and had the requisite security clearance prior to taking either job.⁷⁹ This was a much more sympathetic employee before the court than those, for instance, in *Advanced Marine Enterprises Inc. v. PRC Inc.*, a case in which the court upheld a noncompete agreement that was violated when an entire department of employees secretly plotted to resign from their employer en masse and take their business to the employer’s competitor.⁸⁰ The *Omniplex* decision made clear that the Supreme Court of Virginia evaluates the enforceability of noncompete agreements on case-by-case, totality of the circumstances basis. As discussed below, this has led to surprising, unpredictable results in the court’s enforcement of noncompete agreements.

74. *Id.*

75. *Id.* at 249–50, 618 S.E.2d at 342–43. This argument is colloquially known as the “Janitor Rule,” referring to unenforceable noncompete agreements that are so overly broad in the type of services restricted that the employee could not even work for a competitor as its janitor. See *The Janitor Rule Mops Up Another Non-Compete Agreement*, OTTINGER EMP. LAWS. (July 4, 2018), <https://www.ottingerlaw.com/blog/the-janitor-rule-mops-up-another-non-compete-agreement/> [<https://perma.cc/7QB9-9UTG>].

76. *Omniplex*, 270 Va at 249, 618 S.E.2d at 342.

77. Haley & Ford, *supra* note 64, at 30.

78. *Id.*

79. *Id.*; *Omniplex*, 270 Va. at 247–48, 618 S.E.2d at 341.

80. Haley & Ford, *supra* note 64, at 29; *Advanced Marine Enters. Inc. v. PRC Inc.*, 256 Va. 106, 501 S.E.2d 148 (1998).

3. Virginia's Recent Legislative Reform

Virginia has contributed to the recent wave of legislative reform over the past decade.⁸¹ On April 9, 2020, Governor Ralph Northam signed Senate Bill 480 into law, adding new section 40.1-28.7:8 to the Code of Virginia.⁸² The section follows the nationwide trend of banning noncompete agreements for low-wage employees.⁸³ Virginia provides the following—rather onerous⁸⁴—definition for a “[l]ow-wage employee” exempt from noncompete agreements:

An employee whose average weekly earnings, calculated by dividing the employee's earnings during the period of 52 weeks immediately preceding the date of termination of employment by 52, or if an employee worked fewer than 52 weeks, by the number of weeks that the employee was actually paid during the 52-week period, are less than the average weekly wage of the Commonwealth as determined pursuant to subsection B of § 65.2-500.⁸⁵

Section 65.2-500(B) provides that Virginia's average weekly wage is calculated as follows:

On or before January 1 of each year, the total wages, excluding wages of United States government employees, reported on contribution reports to the Virginia Employment Commission for the 12-month period ending the preceding June 30 shall be divided by the average monthly number of insured workers (determined by dividing the total insured workers reported for that 12-month period by 12). The average annual wage thus obtained shall be divided by 52 and the average weekly wage thus determined rounded to the nearest dollar. The average weekly wage as so determined shall be applicable for the full period during which income benefits are payable, when the date of occurrence of injury or of disablement in the case of disease falls within the year commencing with the July 1 following the date of determination.⁸⁶

In simpler terms, a “low-wage employee” in Virginia is currently considered one who makes less than \$1,105 per week, or \$57,460

81. See VA. CODE ANN. § 40.1-28.7:8 (2021).

82. 2020 Va. Acts ch. 949 (codified at VA. CODE ANN. § 40.1-28.7:7 (2021)).

83. See Beck, *supra* note 29.

84. See *infra* Section II.B.2.

85. VA. CODE ANN. § 40.1-28.7:8(A) (2021).

86. *Id.* § 65.2-500(B) (Cum Supp. 2022).

per year.⁸⁷ However, these figures are subject to constant change due to Virginia's variable definition.⁸⁸

Section 40.1-28.7:8(B) states, "No employer shall enter into, enforce, or threaten to enforce a covenant not to compete with any low-wage employee."⁸⁹ Any employer that violates Section 40.1-28.7:8(B) faces a \$10,000 penalty per violation, in addition to the reasonable attorney fees of the employee.⁹⁰

In an attempt to address the lopsided bargaining power inherent in low-wage employee agreements, Virginia also now requires an employer to post a copy or summary of Section 40.1-28.7:8 anywhere other state- or federal-mandated employee notices must be posted.⁹¹ Failure to post adequate notice of the low-wage noncompete ban results in a written warning for the first violation, a \$250 penalty for the second violation, and a penalty up to \$1,000 for the third and each subsequent violation.⁹²

II. WHY VIRGINIA SHOULD BAN EMPLOYEE NONCOMPETE AGREEMENTS

Virginia should categorically ban employee noncompete agreements for two reasons. First, whatever short-term benefits noncompete agreements may—unnecessarily⁹³—provide local businesses, they are outweighed by the negative effects on employees' freedom of trade and the growth of a local economy in general. The growth, stagnation, and decline of other relevant jurisdictions demonstrate how a ban of employee noncompete agreements would see an overall economic surge for Virginia.

Second, current Virginia law inadequately addresses the negative consequences of noncompete agreements. It results in an unpredictable minefield for employees and employers to aimlessly navigate, whereas a general, simple ban of employee noncompete agreements would remove all uncertainty.

87. *Virginia Average Weekly Earnings of All Employees: Total Private*, YCHARTS (Oct. 19, 2022), https://ycharts.com/indicators/virginia_average_weekly_earnings_of_all_employees_total_private_unadjusted [<https://perma.cc/6MYG-ZJRN>].

88. VA. CODE ANN. §§ 40.1-28.7:8(A), 65.2-500(B) (2021 & Cum. Supp. 2022).

89. *Id.* § 40.1-28.7:8(B) (2021).

90. *Id.* § 40.1-28.7:8(E)–(F) (2021).

91. *Id.* § 40.1-28.7:8(G) (2021).

92. *Id.*

93. *See infra* Section III.A.

A. *Banning Employee Noncompete Agreements Would Strengthen Virginia's Economy and Job Market*

Employee noncompete agreements have been shown to depress wages, inhibit entrepreneurship, and deplete job markets.⁹⁴ Conversely, banning noncompete agreements have been shown to increase employee earning power up to 21%.⁹⁵ A ban would likewise improve employee mobility. By 2021, Hawaii saw an increase in technology employee mobility of 11% following its 2015 ban of noncompetes for those workers.⁹⁶ While some may claim noncompete agreements are critical to protecting the legitimate business interests of employers,⁹⁷ “it is not even clear that enforcing employee covenants not to compete generates social benefits in excess of its social costs.”⁹⁸ Noncompete agreements deter economic growth by hindering competition, reducing job mobility, declining innovation, preventing the creation of new businesses, and encouraging investor migration.⁹⁹ Additionally, a 2010 study found that noncompete agreements actually *reduce* an employee’s incentive to “invest in their work performance” for their current employer.¹⁰⁰ Of the employees bound by noncompete agreements who leave their employer, a 2012 study found that 25% had to change industries, resulting in “reduced compensation, atrophy of their skills, and estrangement from their professional networks.”¹⁰¹

Two case studies demonstrate how banning noncompetes, and subsequently increasing the earning power and mobility of employees, can benefit a regions economy in general. First, one can look to the meteoric rise of the technology industry in California’s

94. See generally Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Non-Compete Agreements*, 68 MGMT. SCI. 143 (2021).

95. *Id.*

96. David J. Balan, *Labor Non-Compete Agreements: Tool for Economic Efficiency, or Means to Extract Value from Workers?* 3 (Jan. 20, 2021) (working paper) (on file with the Washington Center for Equitable Growth).

97. See *infra* Section III.A.

98. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 371 (2003).

99. See generally On Amir & Orly Lobel, *Driving Performance: A Growth Theory of Non-compete Law*, 16 STAN. TECH. L. REV. 833 (2013).

100. On Amir & Orly Lobel, *Innovation Motivation: Behavioral Effects of Post-Employment Restrictions* 35 (Univ. of Cal. San Diego Legal Studies Paper No. 10-32, 2010).

101. Matt Marx & Lee Fleming, *Non-Compete Agreements: Barriers to Entry...and Exit?*, in 12 NAT'L BUREAU ECON. RSCH., INNOVATION POLICY & ECONOMY 39, 48 (Josh Lenner & Scott Stern eds., 2012).

Silicon Valley, a region that does not enforce noncompete agreements. Second, one can look to the innovation decline in Michigan after that jurisdiction repealed its noncompete ban in 1985.

1. The Rise of California

It is no secret that California's Silicon Valley has been the hub of United States technology companies for the past several decades, serving as the home of companies like Google, Twitter, Zoom, Uber, and many others.¹⁰² Yet with employee noncompete agreements banned in California since 1872,¹⁰³ it can be difficult to examine just how significant a role the ban played in California's economic growth. The best way, as many scholars have done, is to compare Silicon Valley with other regions who have never had such a ban in place. When doing so, one finds, "relative to regions that enforce non-compete covenants, an increase in the local supply of [venture capitalists] in states that restrict the enforcement of noncompetes has significantly stronger positive effects on the number of patents, the number of firm starts, and the employment rate than it does in states that do enforce noncompetes."¹⁰⁴

AnnaLee Saxenian made such a comparison between the rise of Silicon Valley and the ultimate decline of the technological hub of Boston around Massachusetts Route 128.¹⁰⁵ Saxenian attributed the difference to culture.¹⁰⁶ Whereas Silicon Valley had a culture of openness, risk-seeking, employee mobility, and horizontal growth, Route 128 had a culture of secrecy, risk aversion, traditional corporate structure, and vertical growth.¹⁰⁷ Subsequently, the former saw high levels of employee mobility and knowledge spillover that lead to collective growth in knowledge and innovation.¹⁰⁸ In contrast, the latter saw little knowledge

102. Grace Maral Burnett, *ANALYSIS: Silicon Valley M&A, Investments Climbed Higher in 2021*, BL (May 18, 2022, 8:41 AM), https://news.bloomberglaw.com/bloomberglaw-analysis/analysis-8?utm_medium=pr&utm_source=prnewswire [<https://perma.cc/4KHG-VC7E>].

103. CAL. BUS. & PROF. CODE § 16600 (2022).

104. Amir & Lobel, *supra* note 99, at 860 (citing Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 MGMT. SCI. 425, 430, 436–37 (2011)).

105. See generally ANNALEE SAXENIAN, *REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128* (1994).

106. *Id.* at 111–17.

107. *Id.* at 20–27, 59–78.

108. *Id.* at 20–27.

spillover and companies subsequently struggling to innovate and adapt to changing market conditions outside their area of experience.¹⁰⁹

In an article that has since been cited by numerous noncompete law scholars, Ronald J. Gilson responded to Saxenian and explained that the cultures of Silicon Valley and Route 128 were not the cause of their respective growth and decline, but they were rather just symptoms of the true cause: the areas' differing legal infrastructures.¹¹⁰ More specifically, Gilson attributed the different cultures and economies of Silicon Valley and Route 128 to the fact that employee noncompete agreements were banned in the former and not the latter.¹¹¹ As Gilson explained, "the legal rules governing employee mobility are a causal antecedent of Saxenian's construction of a Silicon Valley business culture that supports job hopping and a Route 128 business culture that discourages it. The legal rules are one of the poles around which the shape of the business is formed."¹¹²

It is of course unlikely the case that California's noncompete ban is the root of all of Silicon Valley's success. Gilson himself stated as much. He acknowledged that California's noncompete ban was by no means an intentional change to boost the economy.¹¹³ He accordingly cautioned other jurisdictions against hastily adopting a noncompete ban with the hope of it solely lighting the match to a boom in its respective technology industry.¹¹⁴ Rather, he advised other jurisdictions to consider the needs distinct to their locale, economies, and communities before altering their respective employment laws.¹¹⁵

However, the balancing of needs to which Gilson referred involved the benefits of knowledge spillover from employee mobility with the "reciprocal reduction in the incentive for intellectual property investment that results from the dilution of employers' property rights."¹¹⁶ In other words, Gilson feared that

109. *Id.* at 59–78.

110. Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 578 (1999).

111. *Id.*

112. *Id.*

113. *Id.* at 627–28.

114. *Id.*

115. *Id.*

116. *Id.* at 627.

banning employee noncompete agreements comes at the loss of intellectual property protection and the industry-wide benefits it provides.¹¹⁷ He claimed that this was a sacrifice Silicon Valley was willing to make, but one that not all regions should.¹¹⁸ Such a sacrifice, however, is not necessary. As explained in greater detail below,¹¹⁹ noncompete agreements protect interests divisible from those protected by intellectual property. Banning employee noncompete agreements in Virginia will in no way interfere with an employers' ability to nonetheless protect its patents, trade secrets, customer lists, trademarks, and copyrights through confidentiality agreements, nonsolicitation agreements, registrations, and licenses.

Jason Wood expanded on the studies of Saxenian and Gilson—comparing not just Silicon Valley and Route 128, but Austin, Texas, and the Research Triangle Park of North Carolina as well—to conclude that the presence of a noncompete ban may not have as much predictive value as Gilson first suggested.¹²⁰ He explained that, despite Silicon Valley's unparalleled growth, these other regions have been enjoying their own degree of economic success, despite the enforcement of noncompete agreements.¹²¹ Each region has benefitted from nearby networks of renowned technology universities and companies as well as venture capital investors.¹²² Jonathan M. Barnett and Ted Sichelman likewise suggested alternative explanations for Silicon Valley's success, including warm weather, luck, and leadership in general-purpose technologies like microprocessors.¹²³

This Article does not claim that a ban of employee noncompete agreements in Virginia will serve as a cure-all for its economy and instantly transform it into the next Silicon Valley. If it were that easy, it would hardly have taken this long for other jurisdictions to catch on. No, other measures surely factor into a region's technological and economic growth beyond restrict covenants, such

117. *Id.* at 627–28.

118. *Id.*

119. *See infra* Section III.A.

120. Jason S. Wood, *A Comparison of the Enforceability of Covenants Not to Compete and Recent Economic Histories of Four High Technology Regions*, 5 VA. J.L. & TECH. 14, 44 (2000).

121. *Id.* at 58.

122. *Id.* at 37–43.

123. Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 U. CHI. L. REV. 953, 1001 (2020).

as the presence and cultivation of a strong angel investor community, favorable zoning laws, friendly local and statewide laws, and a strong technology talent base.

However, this Article does posit that California's ban of employee noncompete agreements has contributed to its undeniable success. While Wood pointed out that regions like Route 128, Austin, Texas, and the Research Triangle Park of North Carolina have enjoyed their own amounts of economic success, he cannot dispute that Silicon Valley far and away leads the technology industry.¹²⁴ The changes Wood witnessed were more likely attributable to a nationwide transition into a technology-heavy economy. Yet despite signs that the rest of the country is catching up, it remains true that the technology boom began, and remains spearheaded by, Silicon Valley. California's ban of employee noncompete agreements likely contributed to the technology industry's rise, or at the very least did not hinder it. And while Barnett and Sichelman casted doubt on the noncompete ban's connection with Silicon Valley's success, one should be more skeptical of the significantly more attenuated principles of *weather* and *luck* as alternative explanations. Accordingly, this Article believes likewise banning employee noncompete agreements in Virginia will accelerate its economic growth and allow it to catch up to Silicon Valley's success ahead of other jurisdictions.

2. The Fall of Michigan

With North Dakota, California, and Oklahoma first banning noncompete agreements in the nineteenth century,¹²⁵ there is unfortunately no reliable before-and-after comparisons to be made in an effort to analyze the impact those bans had on their respective economies. Also, while the 2021 ban in the District of Columbia will surely prove to be a fascinating case study for the years to come, it did not come into effect until October 2022 (on account of the backlash and subsequent amendments),¹²⁶ and there is therefore insufficient data to analyze its results at this time. However, while we do not have a relevant case study to examine the positive impact banning noncompete agreements may have, we

124. *Id.* at 58; Burnett, *supra* note 102.

125. CAL. CIV. CODE § 1673 (Deering 1872); OKLA. STAT. ch. 17, § 886 (1890); TERR. D. REV. CODE 1877, CIV. CODE, § 959 (1877).

126. 69 D.C. Reg. 9910 (Aug. 5, 2022).

do have the opposite: a case study suggesting the negative impact of repealing a noncompete ban. Michigan was previously the fourth U.S. jurisdiction to ban noncompete agreements.¹²⁷ In 1985, Michigan repealed its eighty-year-old ban.¹²⁸

In 2009, the Harvard Business School Department of Research conducted a study comparing the inventor market in Michigan both before and after 1985.¹²⁹ The study discussed how, shortly after the 1905 ban, Michigan's auto industry boomed, similarly to the technology industry in Silicon Valley, with 500 new firms by 1915.¹³⁰ By examining the U.S. Patent and Trademark Office's patent database and comparing changes in inventor mobility from pre- and post-1985 Michigan with the corresponding data of states that did not enforce noncompete laws—and controlling for the overall downturn of Michigan's essential automobile industry as a result of foreign competition—the study “identifies non-compete enforcement as a critical institutional determinant of employee mobility.”¹³¹ It found an 8.1% drop in mobility among employees outside automobile firms, a 15.4% drop in mobility for employees with human capital specific to automobile firms, and a 16.2% drop in mobility for “highly tech-nologically specialized” employees.¹³² The study accordingly concluded, “[t]he effects, both statistically and economically significant, support Gilson's (1999) argument that the ‘high-velocity labor market’ of Silicon Valley can be significantly attributed to California's long-standing proscription of non-compete agreements.”¹³³

127. MICH. COMP. LAWS § 445.761 (1905).

128. Michigan Antitrust Reform Act (MARA), *id.* § 445.774a (2022).

129. See generally Matt Marx, Deborah Strumsky & Lee Fleming, *Mobility, Skills, and the Michigan Non-Compete Experiment*, 55 MGMT. SCI. 875 (2009).

130. *Id.* at 877.

131. *Id.* at 879, 881, 887.

132. *Id.* at 887.

133. *Id.* (citing Gilson, *supra* note 110). Barnett and Sichelman criticized this study for mistaking correlation with causation: “Even if the results in these studies were somehow correct, none of these studies can show causation between noncompete enforcement and their findings of reduced innovation” Barnett & Sichelman, *supra* note 123, at 1023. However, as explained with regard to similar criticisms about attributing California's noncompete ban to the rise of Silicon Valley, this Article does not posit that noncompete enforcement is the sole explanation for a region's innovation and economic success, but it does suggest that a lack of noncompete enforcement at least positively contributes. Moreover, as Barnett and Sichelman concede, the Michigan study took efforts to rule out other variables, such as foreign competition in the auto industry. Marx et al., *supra* note 129, at 881; Barnett & Sichelman, *supra* note 123, at 1023.

The study further posited that restrictions on job mobility may have led prospective employees to migrate to less restrictive regions: “That specialists are more immobilized by noncompetes than other inventors within a region suggests that they may seek career opportunities outside an enforcing state. . . . [S]uch incentives and behavior might help explain an agglomeration of talent in non-enforcing areas such as Silicon Valley.”¹³⁴

In witnessing the negative impact repealing its noncompete ban had on Michigan’s inventor scene, one may wonder why the state legislature decided to repeal its ban. The answer: *it never did*. Michigan’s noncompete ban was repealed as part of the Michigan Antitrust Reform Act (“MARA”), which was modeled after the Uniform State Antitrust Act of 1895.¹³⁵ As the study noted, “more than [twenty] pages of legislative analysis of MARA by both House and Senate subcommittees do not mention noncompetes as a motivation for the bill.”¹³⁶ A Michigan labor attorney who examined the act contemporaneous with its passing reported to the study that “there was no buildup, discussion, or debate [T]his appeared to be a rather uniform reaction . . . I have never been able to identify any awareness . . . that this was a conscious or intentional act.”¹³⁷

In other words, Michigan unintentionally—unknowingly—repealed its noncompete ban as a part of sweeping antitrust reform. And according to this study, it is paying a price—a price on which regions with noncompete bans like Silicon Valley are currently cashing in¹³⁸ and a price of which jurisdictions with new

134. Marx et al., *supra* note 129, at 887. In an attempt to undermine this study, Barnett and Sichelman pointed out that Michigan’s repeal of its noncompete ban contained a savings clause that kept all noncompete agreements entered into prior to the repeal unenforceable. Barnett & Sichelman, *supra* note 123, at 1022. “As a result,” they argued, “one would expect that the number of employees in Michigan actually subject to enforceable noncompetes would be quite low for a considerable period following MARA’s passage.” *Id.* at 1022–23. While that may be true, Barnett and Sichelman fail to account for the decades of new noncompete agreements that have followed since this repeal. The study did not merely look to changes in Michigan immediately following the ban’s repeal. It observed inventors spanning from 1975 up until 2006—over twenty years after Michigan’s repeal. Marx et al., *supra* note 129, at 879. As noncompete agreements typically only last a few years at most, the Michigan study’s sample size covers far more than the noncompete agreements entered into immediately prior to or after the repeal.

135. Marx et al., *supra* note 129, at 877.

136. *Id.*

137. *Id.*

138. See Chelsea A. Master, Note, *Michigan’s Non-Compete Debate: Balancing Employer and Employee Interests*, 15 AVE MARIE L. REV. 191, 204 (2017) (“[C]ompanies in states where

noncompete bans, like the District of Columbia and potentially Virginia, could be taking advantage.

B. *Virginia's Current Noncompete Law Is Inadequate*

One may look unfavorably upon employee noncompete agreements, as Virginia courts have,¹³⁹ yet still believe that a categorical ban of them is not a solution. Instead, one may believe the current common law voiding unreasonable noncompete agreements is a sufficient safeguard of employee interests, or one may believe Virginia adequately addressed any shortcomings in its common law with its new low-wage employee ban and notice requirements.¹⁴⁰ This Section serves to dispel those beliefs and affirm the need for a categorical ban of employee noncompete agreements in Virginia.

1. Virginia's Noncompete Common Law Is Unpredictable

Virginia's current common law rules for the enforceability of noncompete agreements are wildly unpredictable, leaving employers and the even more disadvantaged employees in a constant state of uncertainty about their rights and obligations. As explained above, an employee noncompete agreement is currently enforceable in Virginia so long as it satisfies three common law considerations: (1) it is necessary for a legitimate business interest of the employer; (2) it is not unduly burdensome on the employee's efforts to earn a livelihood; and (3) it does not violate public policy.¹⁴¹ Despite these three black-letter principles, however, Virginia employment law experts warn, "[T]he application of those principles to particular factual settings continues to produce surprises [N]oncompete agreements, seemingly simple and straightforward on the surface, pose a trap for the unwary client and attorney."¹⁴²

non-competes are unenforceable (such as Google and Apple located in Silicon Valley, California) are willing to relocate individuals with specialized expertise. As a result, instead of being bound by a non-compete clause, an employee with specialized skills is more likely to move to a state where noncompete clauses are unenforceable, such as California." (citations omitted)).

139. See *supra* notes 46–48 and accompanying text.

140. VA. CODE ANN. § 40.1-28.7:8 (2021).

141. See *supra* Section I.D.1.

142. VA. CONTINUING LEGAL EDUC., *supra* note 58, at II-1.

To illustrate the unpredictability of Virginia's noncompete common law, compare two Supreme Court of Virginia cases: *Paramount Termite Control Co. v. Rector*¹⁴³ and *Home Paramount Pest Control Cos. v. Shaffer*.¹⁴⁴ The court upheld the noncompete agreement at issue in the former and voided the noncompete agreement at issue in the latter.¹⁴⁵

The noncompete agreement at issue in *Paramount Termite Control* read as follows:

The Employee will not engage . . . in the carrying on or conducting the business of pest control, fumigating, and termite control . . . in any county or counties in the state in which Employee works in which the Employee was assigned during the two (2) years next preceding the termination of the Employment Agreement and for a period of two (2) years from and after the date upon which he shall cease for any reason whatsoever to be an employee of PARAMOUNT.¹⁴⁶

The noncompete agreement at issue in *Home Paramount Pest Control* read as follows:

The Employee will not engage . . . in the carrying on or conducting the business of exterminating, pest control, termite control and/or fumigation services . . . in any city, cities, county or counties in the state(s) in which the Employee works and/or in which the Employee was assigned during the two (2) years next preceding the termination of the Employment Agreement and for a period of two (2) years from and after the date upon which he/she shall cease for any reason whatsoever to be an employee of [Home Paramount].¹⁴⁷

Yes, the noncompete agreements in each case are virtually identical. They address the same duration, geographic scope, and type of employment. As the plaintiff names would suggest, the noncompete agreements are even from the same employer: Paramount Termite Control Co., Inc. was a former name of Home Paramount Pest Control Cos., Inc.¹⁴⁸

143. 238 Va. 171, 380 S.E.2d 922 (1989).

144. 282 Va. 412, 718 S.E.2d 762 (2011).

145. Compare *Paramount Termite Control*, 238 Va. at 176, 380 S.E.2d at 926, with *Home Paramount Pest Control*, 282 Va. at 419, 718 S.E.2d at 765.

146. *Paramount Termite Control*, 238 Va. at 172–73, 380 S.E.2d at 924.

147. *Home Paramount Pest Control*, 282 Va. at 414–15, 718 S.E.2d at 763 (alteration in original).

148. See *Business Entity Search*, COMMONWEALTH OF VA. STATE CORP. COMM'N CLERK'S INFO. SYS., <https://cis.scc.virginia.gov/EntitySearch/Index> [<https://perma.cc/2HUX-2TUR>] (enter "Paramount Termite Control Co." in the "Entity Name" field and click "Search").

The *Paramount Termite Control* court held that the noncompete agreement was necessary to protect a legitimate business interest, was not unduly burdensome, and did not violate public policy.¹⁴⁹ Twenty-two years later, the *Home Paramount Pest Control* court held that the noncompete was overly broad with respect to the scope of employment, barring any employment in the pest control business whatsoever, and was therefore unenforceable.¹⁵⁰

The court acknowledged that it approved the same language in a contract by the same company, but it responded that *stare decisis* “is not an inexorable command” and “was never meant to prevent a careful evolution of the law.”¹⁵¹ The *Home Paramount Pest Control* court overruled *Paramount Termite Control*, stating, “One condition warranting a departure from precedent is where the law has changed in the interval between the earlier precedent and the case before us.”¹⁵²

However, as Justice Elizabeth A. McClanahan rightfully pointed out in her *Home Paramount Pest Control* dissent, the law never so changed.¹⁵³ The three-prong test is the same today as it was in 2011 and the same as it was in 1989.¹⁵⁴ The facts were the same. The law was the same. What changed to result in a different outcome? The Court.

Home Paramount Pest Control was the first Supreme Court of Virginia case substantively ruling on noncompete law since *Omniplex*.¹⁵⁵ *Omniplex* was decided by a four-to-three vote.¹⁵⁶ By 2011, just two justices from the *Omniplex* court remained on the bench—one of whom joined the dissent in that case.¹⁵⁷ While Kevin E. Martingayle argued that the *Home Paramount Pest Control* case was not the seismic shift of Virginia noncompete law some scholars

149. *Paramount Termite Control*, 238 Va. at 175–76, 380 S.E.2d at 925.

150. *Home Paramount Pest Control*, 282 Va. at 419, 718 S.E.2d at 765.

151. *Id.* at 419, 718 S.E.2d at 766.

152. *Id.*

153. *Id.* at 420–21, 718 S.E.2d at 766–67 (McClanahan, J., dissenting).

154. *Id.*; see *supra* Section I.D.1.

155. Kevin E. Martingayle, *Non-Competition Agreements in the Aftermath of Home Paramount Pest Control v. Shaffer*, 47 U. RICH. L. REV. 457, 463 (2012). While the court did hear a noncompete case in 2007, it was decided on procedural grounds. See *Parikh v. Family Care Ctr., Inc.*, 273 Va. 284, 291, 641 S.E.2d 98, 101 (2007) (holding that failure to practice medicine in Virginia precludes any legitimacy in enforcing an unlawful noncompete agreement).

156. Martingayle, *supra* note 155, at 463.

157. *Id.*

were making it out to be—that it was instead a mere continuation of Virginia’s disfavor of noncompete agreements that has persisted since the turn of the century¹⁵⁸—he still admits: “*With significant turnover on the court*, there was no accurate way to predict what the court would do in the new *Home Paramount* decision.”¹⁵⁹ “Omniplexity” was in action: the outcome of this noncompete case depended on the intangible factor that is the personal makeup of the court.¹⁶⁰

This is dangerous. As Justice McClanahan warned, “[W]ere judicial opinions ‘to be the private opinion of the judge, people would then live in society, without exactly knowing the nature of their obligations.’”¹⁶¹ Fickle principles that result in varying outcomes dependent on the subjective views of arbiters—so much so that the same noncompete agreement can be held enforceable or unenforceable depending on its day in court—leave employees and employers alike uncertain about how to proceed. Moreover, wherever the law is unclear, it is the already disadvantaged who suffer most.¹⁶²

The Supreme Court of Virginia has not made a substantive ruling on noncompete law in the last few years,¹⁶³ but the confusion surrounding noncompete agreements is likely to mount. An already unpredictable legal precedent is likely to become even more tumultuous in the wake of the COVID-19 pandemic’s shockwaves through Virginia employment law. For example, Dean E. Lhospital discussed the quandary many noncompete agreements found themselves in with the necessity of telemedicine during the pandemic.¹⁶⁴ Specifically, the question of a reasonable

158. *Id.* at 457–58.

159. *Id.* at 463 (emphasis added).

160. Haley & Ford, *supra* note 64, at 30.

161. *Home Paramount Pest Control Cos. v. Shaffer*, 282 Va. 412, 421, 718 S.E.2d 762, 767 (2011) (McClanahan, J., dissenting) (quoting 1 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *SPIRIT OF LAWS* 165 (J.V. Prichard ed., Thomas Nugent trans., G. Bell & Sons, Ltd. 1914) (1752)).

162. *See infra* Section III.B.

163. The Supreme Court of Virginia has only heard two noncompete cases since *Home Paramount Pest Control*, both in the years shortly thereafter. *See Preferred Sys. Sols., Inc. v. GP Consulting, LLC*, 284 Va. 382, 732 S.E.2d 676 (2012) (upholding a noncompete agreement as a reasonable restraint on trade); *Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 747 S.E.2d 804 (2013) (reversed and remanded trial court demurrer on procedural grounds).

164. *See generally* Dean E. Lhospital, *Expansion of Telemedicine During COVID-19 and the Issue of Non-Compete Agreements*, 69 VA. LAW. 18 (2021).

geographic scope within a noncompete agreement, once a relatively simple inquiry when the medical provider and patient were in the same location, is now a muddled mess.¹⁶⁵ Where is the medical provider practicing? From where they are located? From where the patient is receiving treatment? Both? Neither? Virginia non-compete law is not prepared to resolve this conundrum, yet this change in how we perceive employment demands immediate clarification: “Historically, there is a certain lag-time between the emergence of a new technology and when the courts can digest and assimilate the development and settle into any kind of post-prandial ease. Right now, courts are just opening their menus. Physicians and employers are already asking for the check.”¹⁶⁶ This change in Virginia employment is not unique to the medical profession, nor is it going away with the COVID-19 pandemic; remote employment is here to stay.¹⁶⁷ It is just one instance of a change in Virginia’s socioeconomic climate that its common noncompete law was not prepared to address. Virginia should not allow such uncertainty to continue and should instead outright ban employee noncompete agreements.

2. Virginia’s Recent Noncompete Legislation Is Insufficient

One may recognize the uncertainty in Virginia’s noncompete common law, as well as the abuses that result, yet nonetheless believe that those concerns were adequately addressed by Virginia’s recent noncompete legislative reform.¹⁶⁸ However, the new legislation banning “low-wage employee” noncompete agreements and adding notice requirements only further muddies the waters of Virginia’s noncompete law and insufficiently addresses the negative impact of noncompetes on Virginia’s job market as a whole.

Section 40.1-28.7:8 of the Code of Virginia merely replaces one confounding question for another: instead of asking “Is this noncompete unenforceable because it unreasonably restrains trade?” we are now asking “Is this person considered a low-wage employee?”¹⁶⁹ The answer remains a moving target, with Virginia

165. *Id.* at 20.

166. *Id.*

167. *See id.* at 18, 20.

168. *See supra* Section I.D.3.

169. *See* VA. CODE ANN. § 40.1-28.7:8 (2021).

instilling a complicated calculation with variable figures to determine whether someone is exempt from noncompete agreements.¹⁷⁰ An employee who does not immediately meet the requirements for a “low-wage employee” on their start date could even become a “low-wage employee” over the course of employment under Virginia’s metric, and vice versa.¹⁷¹

This disadvantages employees by merely continuing the uncertainty about to which obligations employers can and cannot bind them. The new notice requirements do little to resolve this.¹⁷² Noncompete agreements are often presented on or before the first day of employment, and eighty-eight percent of employees do not negotiate them.¹⁷³ When faced with the risk of losing a job opportunity by contesting a noncompete agreement an employer may or may not be able to enforce, most just take the job security and sign the dotted line.¹⁷⁴

The uncertainty of who is a “low-wage employee” also disadvantages employers by levying a hefty penalty for any miscalculations. Entering into, enforcing, or even threatening to enforce a noncompete agreement with an employee who at the time turned out to be “low-wage” results in a \$10,000 penalty *per violation*.¹⁷⁵ Put another way, a start-up company who simultaneously distributes to its ten employees a uniform employment agreement containing a noncompete clause could be immediately on the hook for as much as \$100,000. Such a fatal effect should not have such a variable cause.

One solution may be to retain Virginia’s low-wage employee ban but redefine what constitutes “low-wage.” Indeed, of the ten states that have passed similar bans, Virginia is the only one to use an average wage calculation as its metric; the others either set concrete thresholds or use federal standards like the federal poverty level.¹⁷⁶ However, no matter what metric is used, restricting a noncompete ban to just “low-wage employees” is a half-measure solu-

170. *See id.* §§ 40.1-28.7:8(A), 65.2-500(B) (2021 & Cum. Supp. 2022).

171. *See id.* § 40.1-28.7:8(A) (2021).

172. *See id.* § 40.1-28.7:8(G) (2021).

173. COUNCIL OF D.C. COMM. ON LAB. & WORKFORCE DEV., *supra* note 33, at 3 & n.11 (citing ALEXANDER J.S. COLVIN & HEIDI SHIERHOLZ, ECON. POL’Y INST., NONCOMPETE AGREEMENTS (2019)).

174. *See id.*

175. § 40.1-28.7:8(E) (2021).

176. Beck, *supra* note 29.

tion that creates more burdens than it resolves. The District of Columbia recognized this when it rejected its “low-wage” ban—based on a metric of three times the minimum wage—for a “simpler, fairer, more practical, and more enforceable” complete ban.¹⁷⁷

Moreover, any “low-wage employee” noncompete ban only scratches the surface. Employee noncompete agreements are widespread across all industries, hindering the wages, entrepreneurship, and job market at all salary ranges.¹⁷⁸ Indeed, noncompetes are most common among higher-wage employees: forty-five percent of respondents to a 2016 survey with at least a college degree said they were bound by a noncompete.¹⁷⁹ Enforcing noncompete agreements for higher-wage employees could have adverse effects on the region’s general economy, as it could encourage (or in some cases force) employees to migrate to other regions.¹⁸⁰ The issues of unpredictable common law, unfair bargaining power, and stagnation of growth do not go away after enough zeroes are added to a paycheck. The truly adequate solution to these issues is to ban employee noncompete agreements entirely.

III. ADDRESSING COUNTERARGUMENTS

If the recent legislative history in the District of Columbia is any sign,¹⁸¹ some—namely, employers—will push back on the idea of a general ban on employee noncompete agreements. This Section serves to address what this Article anticipates as the two most common counterarguments to the ban by preemptively alleviating the concerns that spawn them.

A. *“Banning Employee Noncompete Agreements Leaves Legitimate Business Interests Vulnerable”*

Employers will likely push back on the idea of banning employee noncompete agreements out of fear that such a ban will eliminate

177. COUNCIL OF D.C. COMM. ON LAB. & WORKFORCE DEV., *supra* note 33, at 2.

178. *See generally* Balan, *supra* note 96, at 3–4; Greenhouse, *supra* note 27.

179. COMM. ON LAB. & WORKFORCE DEV., *supra* note 33, at 5 (citing COLVIN & SHIERHOLZ, *supra* note 173).

180. Marx et al., *supra* note 128, at 887.

181. *See supra* Section I.C; COMM. ON LAB. & WORKFORCE DEV., *supra* note 41, at 1–2.

a crucial tool to protect their legitimate business interests. They will likely worry that they would otherwise have nothing to stop an employee from working for them, gaining valuable knowledge and experience from the employer's resources, then suddenly quitting and immediately taking what they gained to the competitor across the street.

Before giving such a hypothetical credence, an employer should first consider what exactly are the legitimate business interests they fear jeopardizing with this rogue employee. Most likely, these legitimate business interests are the employer's intellectual property. Employers worry that rogue employees will learn their trade secrets and disclose them to a competitor. They worry that rogue employees will learn about their customers and take those customers with them when they leave. These worries align with what Virginia has historically identified as legitimate business interests when upholding noncompete agreements.¹⁸²

Yet noncompete agreements are unnecessary to protect these interests; employers will still be able to adequately protect them despite a noncompete ban.¹⁸³ If an employer wants to prevent an employee from disclosing their trade secrets, they can require the employee to sign a confidentiality agreement.¹⁸⁴ If an employer wants to prevent an employee from stealing away their customers, or even other employees, they can require the employee to sign a nonsolicitation agreement. The ban this Article proposes expressly excludes such confidentiality and nonsolicitation agreements from its scope.¹⁸⁵ While a noncompete agreement likewise restricts a rogue employee's ability to disclose trade secrets or solicit customers—by restricting an employee's ability to compete *at all*—“[c]ovenants not to compete are effective in the same sense that burning down a house to eliminate termites is effective: the problem is eliminated but the collateral damage from the solution is

182. See cases cited *supra* note 54 and accompanying text.

183. See generally Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Non-competition Agreements*, 52 WM. & MARY L. REV. 873 (2010).

184. Confidentiality agreements are just one of several other ways employers can protect their intellectual property other than noncompete agreements, such as bolstering their security measures or protecting through federal registration. See, e.g., Andrew Riley & Robert A. Hall, *Three Strategies for Small Businesses to Protect Their Intellectual Property*, 66 VA LAW. 32 (2017).

185. See *infra* Part IV.

worse than the problem itself.”¹⁸⁶ Banning employee noncompete agreements would eliminate their disadvantages without sacrificing their advantages, as they are all sufficiently addressed already by alternative, less problematic contract provisions.

Alan J. Meese recently argued that these “less restrictive alternatives” are “less effective, more costly to administer, or both.”¹⁸⁷ Attacking confidentiality agreements specifically, Meese claimed they

would require the original employer continually to expend resources monitoring ex-employees, wherever employed, to determine whether they have disclosed such information. If a breach occurs, the former employer will have to sue a former employee who may deny wrongdoing. Such lawsuits are not costless, and courts are imperfect arbiters of conflicting testimony that may reflect good-faith disagreements about the source of particular knowledge.¹⁸⁸

However, all of Meese’s criticisms could be levied, in equal or even greater measure, against noncompete agreements. An employer would also need to continually monitor former employees to ensure they are not working for a competitor within the noncompete agreement’s scope. Upon such a discovery, an employer would still need to sue the former employee, who may challenge the noncompete agreement’s enforceability—a legal question that has led to much more “imperfect” arbitration and “good-faith” disagreement.¹⁸⁹

186. Christopher Mack, Note, *Postemployment Noncompete Agreements: Why Utah Should Depart from the Majority*, 2015 UTAH L. REV. 1201, 1209 (quoting Todd M. Malynn, *The End of Judicially Created Restraints on Competition*, COMPETITION, Spring 2009, at 43).

187. Alan J. Meese, *Don’t Abolish Employee Noncompete Agreements*, 57 WAKE FOREST L. REV. 631, 691–92 (2022).

188. *Id.* at 694–95.

189. See *supra* Section III.B.1. Meese also criticizes the efficacy of confidentiality agreements, explaining that a former employee may be judgment proof and that injunctive relief may not arrive until after the former employee had already disclosed the employee’s trade secrets. Meese, *supra* note 187, at 695. Again, these criticisms are not unique to confidentiality agreements. The judgment proof criticism persists regardless of whether a former employee violates a confidentiality agreement or a noncompete agreement. With respect to the prior disclosure criticism, the issue at hand is not whether confidentiality agreements adequately protect trade secrets as a standalone matter, but whether they protect trade secrets at least as well as noncompete agreements. They do. It is an equally likely scenario that a former employee has disclosed trade secrets to a competitor before the former employer realized that such a relationship existed in violation of a noncompete agreement. The existence of a noncompete agreement over a confidentiality agreement does nothing to address the concerns Meese raises.

Finally, a lasting response to those employers who are worried about employees leaving them for competitors absent a noncompete agreement: treat your employees well then. An employer who harbors loyalty among their employees through fair wages, quality working conditions, and other positive incentives is much more conducive to all interests than a contractually obligated loyalty with the threat of litigation.¹⁹⁰

This response also does not mean to suggest—as Meese claimed it does—that employers should merely offer raises in salary to prevent employee defection.¹⁹¹ Meese argued such a claim fails to account for the disadvantage employers face in salary “bidding wars” with competitors because of the employer already incurring costs of training the employee.¹⁹² However, “treat your employees well” does not stop at payroll. Employers can further retain employees with quality working conditions, company morale, a compelling company mission or vision, and non-wage employee benefits, including equity incentive plans or pension plans.¹⁹³ Meese’s argument also fails to address the external costs facing employees and competitors that could balance out such “bidding wars.” Moving and reorientation costs of employees, as well as onboarding costs of competitors, could deter defection. If an employer can foster a relationship with employees convincing them of a bright present, and the possibility of an even brighter future, they can dissuade employees from believing the “cash” is any greener on the other side.

Meese also raised the concern that a noncompete ban could result in larger firms freely plucking employees away from smaller firms such as startups.¹⁹⁴ However, Meese assumes that employees will always prefer larger firms over smaller ones. He fails to consider that some employees may be drawn to the much higher upside potential of incentive equity from startups over similar equity incentives from established companies. Again, salary is not the only factor in choosing an employer. An employee may be incentivized to join a promising startup early at the potential for

190. See *supra* note 100 and accompanying text.

191. Meese, *supra* note 187, at 695.

192. *Id.*

193. This Article suggests that forfeiture provisions for such profit-sharing and pension plans upon working for a competitor should be excluded from the proposed employee noncompete ban. See *infra* note 211 and accompanying text.

194. See Meese, *supra* note 187, at 708.

equity returns far exceeding what equity they would receive from a successful, though relatively stagnant, large company.

B. *“What About the Freedom of Contract?”*

Another counterargument to the proposed ban on employee noncompete agreements is that it infringes on the longstanding freedom of contract. Rather than have Virginia pass a sweeping ban on all employee noncompete agreements, some may argue that private parties should instead be allowed to decide the fairness and benefits of such an agreement themselves through each given contract. If an employee thinks an offered noncompete agreement is legally enforceable against them and agrees to it in exchange for employment, that employee should justifiably be bound. Others, such as Meese, argue that “[i]n a well-functioning market,” employees could benefit from negotiation over noncompete agreements by asking for additional compensation in exchange for accepting the term.¹⁹⁵ “These wage demands will induce employers to internalize the prospective costs that the [noncompete] provision imposes on such employees. As a result, employers would only adopt such provisions if the benefits, e.g., higher productivity resulting from enhanced training, exceeded the employee’s anticipate costs, reflected in higher wages.”¹⁹⁶ In other words, noncompete agreements are the product of bargaining parties achieving a compromise with optimal benefits of both.

However, it is hardly ever the case that a noncompete agreement’s scope is certain to be enforceable in Virginia, and studies do not support such a “well-functioning market” in which employees are in position to ever contest them. As explained above, employees—as well as employers and even attorneys—struggle to know with any certainty whether a noncompete agreement would be enforced by a court.¹⁹⁷ A 2012 study also reported that less than 10% of employees bound by a noncompete agreement reviewed it with an attorney before signing, and almost half of them were time-pressured to sign or told the noncompete agreement was a *nonnegotiable* condition for employment.¹⁹⁸

195. *Id.* at 666 (citing Barnett & Sichelman, *supra* note 123, at 1036).

196. *Id.* at 666–67 (citing Barnett & Sichelman, *supra* note 123, at 1037–38).

197. *See supra* Section III.B.1.

198. Marx & Fleming, *supra* note 101, at 59.

Take the Jimmy John's noncompete agreement for example.¹⁹⁹ A Virginia court would likely hold a noncompete with such broad scope on duration, territory, and type of services unenforceable. However, out of all the current and former Jimmy John's employees across the country, just two challenged the noncompete agreement in court.²⁰⁰ The rest likely did not have the sophistication, bargaining power, will, or resources to challenge their employer. "For every covenant that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations [T]he mobility of untold numbers of employees is restricted by the intimidation of restrictions whose severity no court would sanction."²⁰¹ This lopsided power dynamic is exacerbated by the fact that Virginia has provided no clear guidance on which noncompetes are and are not enforceable.²⁰² When Virginia's best practice to review the enforceability of noncompete agreements is to compare them with those adjudicated in the past—yet a case like *Home Paramount Pest Control*, which seems like a slam-dunk based on said practice, reaches an opposite result²⁰³—who are the jobseekers that will challenge the noncompete agreements offered by prospective employers?

While the freedom of contract is an important principle that should be respected, so too is the freedom of trade.²⁰⁴ As Virginia itself has recognized by including a public policy consideration in all noncompete cases, a balance of these competing freedoms is crucial to optimizing the rights of all parties involved.²⁰⁵ To say it is fair to bind employees to the noncompete agreements they sign is to ignore the drastic difference in bargaining power and access to litigation between employer and employee.

IV. MODEL LEGISLATION

To aid the Virginia General Assembly, as well as other jurisdictions who may follow suit, this Part proposes model

199. See *supra* notes 23–25 and accompanying text.

200. See First Amended Class Action Complaint, *supra* note 23, at 8–9.

201. Blake, *supra* note 53, at 682–83.

202. See *supra* Section III.B.1.

203. See *supra* notes 143–50 and accompanying text.

204. See Hill, *supra* note 46, at 8 (“Diametrically opposed to the freedom of contract is the freedom of trade.”).

205. See *supra* notes 59–60 and accompanying text.

legislation adopting a ban of employee noncompete agreements. This Article takes various insights from the evolution of the noncompete bans of California, Oklahoma, North Dakota, and the District of Columbia.²⁰⁶ Whereas those jurisdictions engaged in backlash and backpedaling due to initial bans that were overly broad, this Article hopes to propose model legislation synthesizing those legislative histories into a fair, simple, and clear ban that preemptively addresses any concerns the opponents of such a ban could raise. Accordingly, this Article proposes the following legislation, with a specific recommendation that the Virginia General Assembly repeal Section 40.1-28.7:8 of the Code of Virginia with the following legislation in its place:

- A. Subject to the limitations contained within subsection B below, all noncompete restrictions against employees and independent contractors within Virginia (or are otherwise subject to Virginia law), whether entered into before, during, or after the enactment of this act, are hereby invalid per se within the Commonwealth of Virginia.
- B. Notwithstanding subsection A above, subsection A shall not apply to the following:
 - i. Noncompete agreements reasonably related to a sale or purchase of a business, regardless of the form of such sale or purchase. For the avoidance of doubt, this subsection B(i) applies to, among other forms, the sale or purchase of the goodwill of a business, a controlling ownership interest of a business, or all or substantially all of the assets of a business.²⁰⁷
 - ii. Noncompete agreements reasonably related to the dissociation of a partner from a partnership (including limited partnerships and limited liability partnerships), the termination of a member's interest in a limited liability company (including professional limited liability companies), or termination of a shareholder's interest in a corporation.²⁰⁸
 - iii. Nonsolicitation restrictions prohibiting an employee or independent contractor from soliciting a subject employer's employees or customers.²⁰⁹

206. *See supra* Sections I.A, I.C.

207. Similar exceptions have been added to the noncompete bans in California, Oklahoma, and North Dakota. *See* CAL. BUS. & PROF. CODE §§ 16602–02.5; OKLA. STAT. tit. 15, § 219; N.D. CENT. CODE § 9-08-06(2).

208. A similar exception has been added to the noncompete ban in Oklahoma. *See* OKLA STAT. tit. 15, § 219B.

209. A similar exception has been added to the noncompete ban in California. *See* CAL. BUS. & PROF. CODE §§ 16606–07.

- iv. Confidentiality restrictions restricting an employee or independent contractor from disclosing certain employer confidential information to anyone other than the employer and/or employer's agents (such as, but not limited to, trade secrets, customer lists, or pricing formulas).
 - v. Noncompete restrictions against an employee or independent contractor reasonably related to a bona fide agreement between a business entity and one or more of its investors, of which the employee or independent contractor evidences their consent through a signed writing.²¹⁰
 - vi. Noncompete restrictions against an employee in which the sole remedy for the employee's breach of such restrictions is the forfeiture of the employee's benefits under a pension plan or profit-sharing plan with an employer.²¹¹
- C. For the avoidance of doubt, the exceptions described in subsection B above shall be subject to the then current case law governing the validity of such restrictions, together with any other then applicable statutory law(s) affecting the validity of such restrictions.²¹²

210. This Article preemptively recognizes the legitimate business interests not only of employers who seek noncompete agreements for their employees, but also of potential investors of the employers, especially in cases when the employer is a startup. Investors likely want assurance before investing that key employees of a company in which they seek to back will not leave and compete with the company shortly after the investment. This exception provides potential investors a safeguard in which they can condition their investment on an employee's enforceable agreement not to compete. Legislators should consider further drafting this legislation to specify certain "key" employees that investors may bind to a noncompete—for similar policy reasons for and by similar means as the recent low-wage noncompete bans by multiple states. *See supra* note 29 and accompanying text. However, legislators should do so with the shortcomings of such employee definitions—such as those of Virginia's low-wage noncompete ban—in mind. *See supra* Section II.B.2.

211. This exception would codify the federal preemption of state law by the Employee Retirement Income Security Act of 1974 ("ERISA"). *See generally* 29 U.S.C. §§ 1001–1461. Even with respect to California's noncompete ban, the Ninth Circuit has held that ERISA preemptively upholds the validity of noncompete forfeiture provisions in employee benefit plans. *Hummel v. S.E. Rykoff & Co.*, 634 F.2d 446, 450 (9th Cir. 1980); *Lojek v. Thomas*, 716 F.2d 675, 678–80 (9th Cir. 1983); *Clark v. Lauren Young TireCenter Profit Sharing Tr.*, 816 F.2d 480, 481–82 (9th Cir. 1987). While the authors of this Article find employee noncompete agreements outright prohibiting an employee from working to be an unfair restraint on the freedom of trade, they do find noncompete forfeiture provisions of post-employment benefits to be a reasonable cost that employees could be made to pay in order to accept a job opportunity with a competitor.

212. For purposes of Virginia, this subsection keeps Virginia's common law and three-prong test for reasonable noncompete agreements intact. Despite the test's shortcomings highlighted *supra* Section II.B.1, it is not entirely without value in reasonably balancing the interests of employers and employees with respect to enforceable noncompete agreements. That said, Virginia should view this Article as a call, and this subsection as an opportunity,

- D. Any employee or independent contractor that successfully defends any action by any given employer as a result of subsection A above, shall be entitled to the recovery of such employee's or independent contractor's reasonably incurred attorneys' fees and court costs associated with such defense. Moreover, a court may award additional damages and/or penalties against any employer who intentionally violates subsection A above.²¹³

CONCLUSION

Given the above, the authors of this Article believe that the time is now to make proactive, progressive changes to Virginia's noncompete laws in the form of banning employee noncompete agreements. We should not wait for the next event or economic wave to occur before we react. By then, think of what could have been in place had we acted sooner. Every little change for the better counts; why not universally ban noncompetes within employment context now? What we are suggesting above is a simple way to keep Virginia competitive, and further enhance its standing, on a state-by-state basis, come whatever what may as Virginia moves forward.

to clarify its common law reasonableness requirements, or better yet, codify clear geographic or durational limits, as other states have recently done. *See generally* Beck, *supra* note 15.

213. The matter of enforcement of this ban and penalties for employers who violate it is a complex discussion outside the immediate scope of this Article. The authors believe that certain requirements and penalties of past bans are unduly harsh and burdensome on employers. *See, e.g.*, VA. CODE ANN. § 40.1-28.7:8(E)–(F) (2021) (imposing on employers a \$10,000 penalty per violation of Virginia's low-wage non-compete ban, in addition to the reasonable attorney fees of the employee); *id.* § 40.1-28.7:8(G) (2021) (requiring employers to post a copy of Virginia's low-wage noncompete ban or a summary thereof anywhere other employee notices are required and penalizing employers up to \$1,000 for failing to do so); 69 D.C. Reg. 9910 (Aug. 5, 2022) (penalizing employers with fines up to \$3,000 for violating the District of Columbia's noncompete ban). At a minimum, this model legislation imposes recovery of reasonable attorneys' fees and court costs for successful defenses against unenforceable employee noncompete agreements as a deterrent for employers from attempting to enter into such agreements with employees. However, the authors of this Article recognize the need to protect less sophisticated employees who may not be aware of their rights and ability to challenge such agreements. This Article accordingly advises state legislatures like the Virginia General Assembly to consider additional enforcement measures, such as (1) requiring a conspicuous notice of the noncompete ban on all employment agreements and policies, or (2) extending recovery of attorneys' fees to employees who retain counsel in sending a demand letter to rescind a previously imposed noncompete agreement, without the need of a successful defense in court.