

Andrew S. Berns Quoted In NJBIZ Article, "New Balance - What an FTC crackdown on non-compete agreements and licensing rules would mean for New Jersey"

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By Daniel J. Munoz

President Joe Biden is asking the Federal Trade Commission to ban or limit non-compete clauses, which prevent millions of workers across the nation from going to work for their employers' rivals. The move was hailed by labor rights groups who contend that the provisions limit opportunities for many workers, especially lower paid employees. But business groups contend that the agreements are vital to protect their interests, stay competitive in the market and not unfairly lose out to direct industry competitors.

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As for licensure, Andrew Berns, an employment law partner at Denville's Einhorn Barbarito Frost & Botwinick, said the existing state requirements are a "bureaucratic hassle ... which often simply raise funds for the state without any benefit to the workers and are unnecessary for many positions in which you simply pay for a license to perform a service without having to demonstrate any competency or a particular skill."

As Biden put it, "if you want to braid hair and you move from one state to another, sometimes you have to do a six-month apprenticeship, even though you've been in the business for a long, long time."

It's unclear how far the FTC will go on both issues. But Biden's newly confirmed chair – Lina Khan – has previously argued in favor of federal rules limiting the use of non-compete clauses. In a 2019 article in the University of Chicago Law Review, Khan wrote that the agreements often forced upon workers can "deter [them] from switching employers, weakening workers' credible threat of exit, and

diminishing their bargaining power.”

“By reducing the set of employment options available to workers, employers can suppress wages,” she continued.

California, North Dakota and Oklahoma already ban the non-compete agreements and Montana limits their use. In New Jersey Assembly Bill 1650 would reign in how and when employers could use the provisions. It was introduced in January 2020 but only advanced in one Assembly committee this February.

The bill would also make non-compete agreements unenforceable for employees who were laid off, and for seasonal and temporary employees, independent contractors, low-wage earners, anyone under 18 and anyone who’s been employed at a company for less than a year. Allowable non-compete agreements would be limited to one year, rather than the current two years. The primary sponsors for both the Senate and Assembly versions of the measure were not available for comment.

New Jersey courts tend to discourage non-compete provisions. But they are generally upheld as long as they protect an employer’s legitimate interests, impose no undue hardship on an employee and are in the public interest. “Legitimate restrictive covenants or non-competes with reasonable time and distance provisions with a legitimate business purpose, in my experience, are considered enforceable documents by the courts,” Berns said. But he contended that many competitive industries “should allow workers the unrestricted right to move among companies if they so choose.”

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