

Andrew S. Berns Quoted In NJBIZ Article, "Restrictive Covenants In The COVID Era."

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By: *Gabrielle Saulsbery*

Pandemic-related unemployment raises questions about the enforceability of non-compete agreements

Of the approximately 100,000 people who remain out of work in New Jersey due to the COVID pandemic, around 20,000 are likely bound by non-compete agreements according to "Noncompete Agreements in the U.S. Labor Force," a paper published in the Journal of Law & Economics in 2019.

With unemployment finally starting to decline, people are looking at the contracts they signed with their prior employer, and some are taken off guard by what they find.

"You'd be shocked at how many people I talk to that don't remember what they signed and never kept copies of it.

When the job is ending, they're reminded what they signed," Einhorn Barbarito Frost & Botwinick employment law partner Andy Berns said. "It's really important for people to be aware of a non-compete at the time of the hire and how it may impact them at the end of the employment."

New Jersey courts tend to disfavor non-competes, but they're enforceable as long as they protect an employer's legitimate interests, impose no undue hardship on an employee, and are in the public interest. In the ongoing pandemic and post-pandemic market, the last factor is of note.

"One could certainly argue in the time of the pandemic that it's in the public interest for people to be able to find suitable employment," Berns said. "Since that's a goal of society it may give courts more

latitude to strike the requirements of a restrictive covenant in order to satisfy public interest.”

Non-competes are one of three types of restrictive covenants employees might sign, along with non-solicitation agreements and non-disclosure agreements. Berns said he believes New Jersey courts are going to be more critical of restrictive covenants moving forward and more likely to modify them through blue penciling, where a court voids some portions of a contract and finds other parts enforceable, modifying the contract to make it less restrictive.

“In my opinion, the courts [will make] it clear that there is a public interest in keeping people employed when unemployment is so high,” Berns said.

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