

**FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580**

In the Matter of)
Planned Companies)
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_____)

**Complaint and Request for Investigation, Injunction, and Other Relief
Submitted by
Local 32BJ, Service Employees International Union**

BACKGROUND

A. Planned Companies' Efforts to Undermine Its Workers' Bargaining Power and Abuse Its Dominance.

1. Planned Companies employs more than 3,000 mostly low-wage building services workers across the Northeast and Mid-Atlantic. Planned is a labor market middleman. It directly employs workers whom it then staffs to buildings where they perform concierge, security, custodial, maintenance, and other services. Like other labor market intermediaries—including subcontractors, labor brokers, and staffing agencies—Planned profits off the difference between the amounts it charges its client buildings for its employees' work and the amounts it pays those employees.

2. Planned pays wages for most workers that are barely above minimum wage without any decent benefits. Even though Planned's employees work long hours performing difficult but essential work for buildings in America's biggest cities, and even though those workers form close bonds with the building residents they serve, far too many of its workers are barely able to make ends meet.

3. Planned is one of the largest and most powerful building services contractors in the region, and it has considerable labor market power. In many cities it employs 30% or more of the building services labor force. For example, in Northern New Jersey, Planned employs approximately 30% of all contracted and in-house doormen and concierges and approximately 20% of all contracted and in-house porters and cleaners. Planned employs around 50% of some categories of contracted building services labor. In Northern New Jersey, it employs approximately 48% of all contracted doormen and concierges.

4. If Planned were competing fairly, it would have to pay its workers more or treat them better to keep them working for Planned. The threat that those workers would find employment elsewhere should be especially serious for workers who have developed experience and relationships within a certain building. If Planned were playing by the rules,

those workers could be hired away by an employer who would pay them more for performing the same work.

5. But Planned keeps its workers trapped in their jobs while staving off competitive pressures to improve wages and benefits by imposing a contractual restraint on its building clients that obstructs them from hiring, directly or indirectly, Planned's employees who have worked in the building. No matter how much a building may value the work of its Planned security guards, custodians, or other workers, and no matter how much the building may dislike contracting with Planned, a building is effectively prevented from hiring those workers or bringing in a different contractor to employ them. This means that Planned's workers are trapped working for Planned even if their skills and experience working in a building are worth substantially more to that building than Planned pays.

6. This state of affairs is directly contradictory to Planned's recruitment materials. Planned tells job applicants that it offers "not just a job, but a career."¹ But it does not disclose its restraint to applicants or tell them that when they are placed with a building they will be effectively stuck in their jobs with Planned, no matter how much value they provide. In other words, Planned's workers do not ever have the opportunity to negotiate over the restraint that keeps them trapped in their jobs for Planned.

7. While Planned and other labor market middlemen may have legitimate interests in protecting their investments in training and recruiting employees, Planned provides minimal training to its employees. It imposes its restraint not to protect its investment in its workers but rather to undermine the bargaining power of its low-wage workers, to keep both buildings and workers captive to Planned, and to prevent competing contractors from hiring the most experienced workers.

8. For the reasons stated in this complaint, Planned's conduct is both an unfair method of competition and an unfair and deceptive practice under § 5 of the FTC Act, 15 U.S.C. § 45.

B. Planned's Conduct Is Illustrative of Unfair Methods of Competition that Employers Use in the Fissured Workplace to Undermine Worker Power

9. Planned's conduct is one instance of a systemic problem that the FTC should confront through its enforcement, investigative, and rulemaking authorities.

10. Employers in a variety of industries too often abuse their dominant position by using noncompete agreements and contractual no-hire provisions to keep workers trapped in their jobs, undermining worker bargaining power and driving down wages.²

¹ See <https://www.plannedcompanies.com/careers/>

² The FTC has acknowledged the insidious nature of non-compete agreements in the labor market. Federal Trade Commission, "Non-Competes in the Workplace: Examining Antitrust

11. Restraints on workers' right to move between jobs in search of better treatment and higher wages (and on employers' right to compete for the best workers) arise in several contexts beyond the traditional non-compete agreement that some employers include in contracts with their workers.

12. Similar restraints also arise in agreements between and among potential employers. No-hire and no-poach agreements amount to an agreement among employers not to compete for each other's workers. The FTC and DOJ have instructed that no-hire and no-poach agreements may violate the antitrust laws and be criminally prosecuted.³

13. No-poach and no-hire agreements are not always the product of smoked-filled backrooms. They are also a fixture of written contracts between and among employers, especially in the context of so-called "fissured workplaces," where workers are directly employed by labor market intermediaries like Planned.

14. Firms across the fissured workplace frequently use no-hire or conversion fee agreements to interfere with workers' mobility between employers to seek out higher wages and better treatment.⁴ As a consequence, employees of labor market intermediaries, are frequently trapped in temporary or precarious work, without decent benefits and wages and without the opportunity for meaningful professional advancement.

15. This case is a powerful example of the harm caused to workers and competition by no-hire or other restraints in a fissured workplace. The restraint is particularly troubling because of the close bonds that buildings and their tenants often form with building services employees. When Planned's contracts with buildings terminate, the

and Consumer Protection Issues," January 9, 2020, <https://www.ftc.gov/news-events/events-calendar/non-competes-workplace-examiningantitrust-consumer-protection-issues>. See also Starr, Evan and Prescott, J.J. and Bishara, Norman D. (2020), *Noncompetes in the U.S. Labor Force*, U of Michigan Law & Econ Research Paper No. 18-013. <http://dx.doi.org/10.2139/ssrn.2625714>; EconoFact, "The Chilling Effect of Non-Compete Agreements," May 20, 2018, <https://econofact.org/the-chilling-effect-of-noncompete-agreements>

³ DOJ & FTC, *Antitrust Guidance for Human Resources Professionals*, Oct. 2016, <https://www.justice.gov/atr/file/903511/download>.

⁴ See, e.g., Rachel Abrams, *Why Aren't Paychecks Growing? A Burger-Joint Clause* Jane R. Flanagan, *Fissured Opportunity: How Staffing Agencies Stifle Labor Market Competition and Keep Workers "Temp"*, 20 J. L. Society 247, 249 (2020); David H. Seligman, *Having Their Cake and Eating it Too*, Harv. Labor and Worklife Program, June 2018, https://lwp.law.harvard.edu/files/lwp/files/webpage_materials_papers_seligman_june_13_2018.pdf.

restraint effectively prevents buildings from hiring those workers on for permanent employment or retaining them through another intermediary agency.

16. In this way, the restraint harms workers, and it limits competition among employers. It effectively removes from the pool of potential employees the workers who are the most qualified to perform the work and by obstructing Planned's clients from retaining a different building services contractor who could pay the building's preferred workers more even while charging the building less.

17. Fissured workplace no-hire agreements are unfair and deceptive because they are typically not disclosed to workers when they begin employment. One of the purported justifications for non-compete agreements is that workers can negotiate over them and could in theory bargain for consideration in the form of higher wages in exchange for giving up the right to seek employment with a competitor business. That purported justification—a fiction for most workers who are required to sign non-compete agreements—is especially farcical in cases like this one because Planned's workers are not even presented with the restraint at issue.

PARTIES

18. Local 32 BJ, Service Employees International Union ("32 BJ") submits this complaint to petition the FTC on behalf of Planned employees.

19. 32 BJ is an affiliate union of the Service Employees International Union with more than 175,000 members, primarily located in Northeast. 32BJ members work for private employers, the public sector, and companies receiving government contracts and include cleaners, property maintenance workers, doormen, security officers, window cleaners, building engineers, and airport, school and food service workers.

20. Planned, a subsidiary of FirstService Corporation, is a New Jersey-based building services company that operates through three divisions: Planned Building Services (PBS), Planned Lifestyle Services (PLS), and Planned Security Services (PSS). PBS provides cleaning and maintenance services at residential and commercial buildings; PLS provides doorman and concierge services at residential buildings; and PSS provides security guard services at residential and commercial buildings. Planned contracts with more than 1,000 properties throughout the Northeast, Mid-Atlantic, San Francisco, and the South.

STATEMENT OF FACTS

A. Planned's Broad No-Hire Contract

21. Planned routinely includes a restrictive covenant or restraint in its contracts with client buildings that obstructs its clients and any of those clients' future contractors, including Planned competitors, from hiring Planned employees for six months after the

termination of Planned's contract with the client or six months after the employee leaves the employment of Planned.

22. The restraint imposes a penalty on buildings who violate it by requiring them to pay three months of average compensation for every worker hired on by the building from Planned. The penalty amounts to a "bondage fee," keeping Planned's workers trapped in their jobs.

23. Below is an excerpt of Planned's standard restrictive covenant clause, from Planned Building Services' November 2018 proposal to perform janitorial and maintenance services at the Horizon House cooperative housing complex in Fort Lee, NJ.

RESTRICTIVE COVENANT

The Owner and its affiliates or subsidiaries in the State of New Jersey, and any person or entity retained by the Owner to replace PBS agree to refrain from directly or indirectly soliciting or employing our employees to work for them in a similar job classification for six (6) months after either the termination of this Agreement or such employee voluntarily or involuntarily leaves our employment at the Property.

Should this covenant be violated, Owner shall pay PBS three (3) months' average earnings per employee as compensatory damages for the loss of each such employee. All costs, including attorney's fees and court costs, in collecting this payment, shall be borne by the Owner.

24. The same restrictive covenant clause was included in Planned Building Services' August 2020 proposal to perform janitorial and maintenance services at the James Monroe condominium in Jersey City, NJ.

25. Recent testimony from a hearing before the National Labor Relations Board (NLRB) regarding an unfair labor practice charge brought by SEIU 32BJ against Adamas Building Services, a Planned competitor, confirms that this language or substantially similar language is standard in Planned's contracts for buildings in New York, New Jersey, and elsewhere.

26. The extreme breadth of the covenant underlines its unfair nature. It applies not just to the building owner, but also to its "affiliates or subsidiaries." Real estate developers often own many buildings through separate LLCs. The restrictive covenant obstructs workers from gaining employment at any of these buildings, even though the worker may not even know the two buildings are affiliated.

27. The restraint also applies to "any person or entity retained by the Owner to replace PBS." A contractor that replaces Planned may have dozens of accounts around the region. Yet the covenant would interfere with a worker's employment at any of these accounts.

28. Finally, the covenant is effective not only during the course of Planned's contract, but for "six months after either the termination of this Agreement or such

employee voluntarily or involuntarily leaves our employment at the Property.” When Planned loses an account, it can choose to offer workers transfers to other accounts. But if Planned does not make such an offer or the worker does not accept, Planned still interferes with the worker’s employment for six months, long after Planned has lost the account and the worker’s services. The covenant even covers workers after Planned terminates them—meaning after Planned has surrendered any purported investment in training or recruitment.

29. Planned has not denied that this restraint is enforced against buildings that seek to hire Planned employees directly. To the contrary, testimony and documentary evidence from an NLRB hearing confirm that buildings are reticent to hire former Planned employees because of this covenant, no matter how much experience those workers have in a building or the relationships they may have with its tenants.

30. Building services workers are not fungible. Existing staff with experience working in a building—known in the industry as “incumbent” workers—provide substantial value to a building. A Planned competitor has testified, “[I]t behooves me to hire [incumbent staff] because I’m saving on the training. They know the facility. They know what is expected. . . . [T]hey can help train our—our incoming staff.”

31. The longer a Planned worker works a building, the more valuable they become to the building because of the relationships and experience they develop on the job. This experience is not cultivated through investments made by Planned in worker training but through workers’ own investments in their development of skills specific to a certain building. Those skills and experiences should give workers more bargaining power. Even if a worker never explicitly considers going to work directly for a building, the threat that a building could hire a worker directly—cutting out the middleman—would force Planned to pay workers more and treat them better.

32. The contract does not only interfere with buildings’ efforts to hire Planned’s workers, it also interferes with buildings’ efforts to contract with a different contractor that could hire those workers. It expressly covers “any person or entity retained by the Owner” to replace Planned. Such language impedes buildings from retaining different contractors to replace Planned because in doing so, the building would be unable to benefit from incumbent workers.

33. If Planned were competing fairly, it would pay its incumbent workers enough to prevent them from working directly for the building or another contractor, charge its building clients a competitive price, and provide them with sufficiently good service to prevent them from hiring another contractor to take over their building services from Planned. In other words, Planned would compete by paying its workers more and charging its customers less.

34. Instead, Planned competes by keeping both its workers and building clients captive through a restrictive covenant that effectively means that Planned can be the only provider of valuable incumbent labor.

B. The Absence of Any Legitimate Justification for Planned's Restraint

35. The restraint and its bondage fee are not justified by any legitimate need Planned may have to protect its investment in recruitment or training. Planned invests little time or resources in hiring and training new service employees.

36. In February and March 2020, Local 32BJ conducted a survey of Planned building services workers in New Jersey and New York and found that 36% (24 of 66 respondents) received no training. For the Planned employees who do receive formal training, it consists primarily of on-the-job training that involves shadowing another building services employee for half of a day or one day.

37. Planned employees develop important skills and experiences working for a building, but they develop those skills and experience through their work, not through formal training provided by Planned.

38. Planned's restraint is also unrelated to the protection of trade secrets, an oft-cited justification for non-compete agreements. Planned's building services employees do not have access to trade secrets. To the extent that Planned's employees have access to non-public information that helps them perform their jobs effectively, it is information they personally acquire through their work in buildings, not information that is in any way proprietary to Planned.

39. Finally, Planned's restraint does not protect any meaningful investment by Planned in recruiting, hiring, and placing employees with buildings. Many Planned workers apply to work for Planned at specific buildings through online job postings on standard online hiring platforms.

C. Planned's Below-Market Benefits and Wages

40. The restraint at issue allows Planned to retain employees even while paying them below market wages because it deprives those employees of the opportunity to use their skill, training, and experience within a building to bargain for higher wages from a building or contractor that replaces Planned or even from searching for work at a different building with the same ownership.

41. In 2020, Planned paid residential cleaners in northern New Jersey as low as minimum wage or \$11 an hour. According to data provided by Planned, only about 10% of Planned's service employees at certain locations in New Jersey and New York are enrolled in the company's health plan. Low plan enrollment may be the result of the high cost of employee premiums and deductibles.

42. Planned's competitors pay better. Delta Building Services, ABM, and Able Services all employ residential cleaners in Bergen County and pay those cleaners a minimum

of \$16.00 an hour, while providing all employees with fully employer-paid family health coverage (*i.e.*, a health plan with no employee premium contributions).

43. Building service workers in New York who are employed directly by building owners earn as much as \$28 per hour, with employer-paid family health insurance, a pension, and other benefits.

44. This data aligns with a broader market-wide trend. Workers employed directly for a building earn substantially higher wages than those contracted through a middleman. For example, data regarding concierge wages in New York suggests that the median hourly wage for all concierge workers, both those who work directly for a building and those who are contracted through a third party, is \$23.30. Those who are contracted out earn a median wage of \$20.68. In other words, contracted building services workers earn substantially less than direct-hire workers, but even the average contracted worker earns substantially more than many Planned building services workers.

45. Were it not for Planned's restraint, valuable incumbent employees could obtain higher wages or benefits by working directly for buildings or even by working for Planned's competitors. Those competitors would compete with Planned by offering better services to buildings or even by charging a lower price while still paying Planned's incumbent workers more than Planned pays to ensure that the competitor could provide buildings with the building's preferred workers. This arrangement would be preferable to both Planned's clients and to Planned's workers.

46. Because of the illegal restraint, contracting with Planned is the only way buildings can continue to benefit from incumbent employees, but the premium that buildings may pay for incumbent employees is recouped entirely by Planned through the profits it makes off each hour that its employees work, and not by the workers who provide that value, developed through their own on-the-job training and relationships, who are paid substantially less than other employers offer to similar workers.

D. Planned's Market Power

47. Planned is a large and powerful employer. According to a 32BJ-conducted survey, Planned is the largest employer of building service workers in the New Jersey residential real estate industry. From 2018 through 2021, Local 32BJ surveyed over 240 residential buildings and complexes. It surveyed buildings with concierge service in Hudson County as well as the cities of Edgewater, Fort Lee, Cliffside Park, and Newark, New Jersey.

48. The survey concluded that Planned employs approximately 31% (369 of 1,181) of all contracted and in-house doorpersons and concierges in the geographical area. It employs approximately 20% (177 of 873) of all contracted and in-house porters and cleaners. It employs an even greater share of the contracted labor force. It employs approximately 48% of all contracted doorpersons and concierges and 37% of contracted porters and cleaners in Northern New Jersey.

CLAIMS

49. Section 5 of the FTC Act prohibits unfair methods of competition and unfair and deceptive acts and practices. 15 U.S.C. § 45. Planned's restraint is an unfair method of competition, and it is both unfair and deceptive.

CLAIM ONE: Unfair Method of Competition, 15 U.S.C. § 45(a)(1)

50. Planned's no-hire agreement is an unfair method of competition because it violates the Sherman Act, 15 U.S.C. §§ 1, *et seq.*, the Clayton Act, 15 U.S.C. §§ 12, *et seq.*, and because it contravenes the spirit of American antitrust laws.

51. Planned's restraint is *per se* unlawful because it is a horizontal agreement among competitors not to compete. Planned's restraint is a non-compete agreement affecting workers' mobility, but those workers have never had an opportunity to assent, reject, or negotiate over the restraint.

52. Planned and its clients are competitors for the labor of building services workers like Planned's employees. The restraint is a horizontal agreement that prohibits buildings from hiring on building services workers, thereby undermining competition for labor, reducing worker bargaining power, and suppressing wages.

53. Were Planned concerned about the threat that a building could hire one of its employees for wages that would substantially exceed Planned's wages, Planned would face competitive pressure to increase wages or otherwise treat its workers better to keep them. Instead, through its restraint, Planned obstructs workers from going to work for buildings.

54. The restraint is especially harmful because buildings are one of Planned's principal labor market competitors. Once they have developed on-the-job training and relationships with building tenants—training and experience that they form on the job, without any meaningful investment by Planned—Planned's employees are especially valuable to buildings. The restraint obstructs buildings from hiring them. While Planned may have legitimate interests in protecting investments made in training and recruitment, the burdens its restraint places on workers' bargaining power far exceed its minimal investment.

55. While naked and horizontal agreements not to compete are subject to *per se* treatment under the antitrust laws, restraints on competition may be subject to the rule of reason if they are "vertical," because they are entered into between firms at different levels of the distribution or production chain, or if they are "ancillary," because they are necessary to a legitimate procompetitive arrangement.

56. The Planned restraint is not immune from *per se* treatment, however, merely because it is included in Planned's building services contract with building clients. Courts have explained that a restraint is not ancillary if the "organic connection between the restraint and the cooperative needs of the enterprise that would allow us to call the restraint

a merely ancillary one is missing.” *Gen. Leaseways, Inc. v. Nat’l Truck Leasing Assoc.*, 744 F.2d 588, 595 (7th Cir. 1984) (Posner, J.); *see also, e.g., Major League Baseball Props., Inc. v. Salvino*, 542 F.3d 290, 339 (2d Cir. 2008) (Sotomayor, J., concurring) (“The [ancillary restraints] doctrine recognizes that a restraint that is unnecessary to achieve a joint venture’s efficiency-enhancing benefits may not be justified based on those benefits. Accordingly, a challenged restraint must have a reasonable procompetitive justification, related to the efficiency-enhancing purposes of the joint venture, before that restraint will be analyzed as part of the venture.”).

57. In this case, there is no plausible connection between the restraint and the purported procompetitive purposes of Planned’s agreement with building services clients. Because the restraint stretches six months beyond the expiration of a contract between Planned and its building clients, at which point Planned would have substantially recouped all of any plausible investment in training and recruitment, its purpose is plainly to reduce competition for building services workers, and not to further the procompetitive purposes of its arrangement with building services workers. Moreover, after the expiration of a contract with building services client, Planned has no legitimate purpose in preventing workers from working for a competitor, even within the building where Planned had contracted their labor. Finally, the restraint at issue obstructs a Planned competitor from hiring Planned’s workers to work in a *different* building than the one in which the employee worked if Planned’s building client decides to contract with that competitor. The only possible purpose of that restraint could be to reduce worker bargaining power and undermine competition in the building services market.

58. Even if a restraint is plausibly ancillary, to be subject to the rule of reason it must (1) hold the promise of procompetitive benefits and (2) be necessary to those procompetitive benefits. Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 1908b (2d. ed. 2000). Even if Planned had a legitimate interest in protecting its investment in recruiting and training workers, the penalty assessed for converting a worker to a direct hire from a Planned employee substantially exceeds Planned’s actual investment, which is minimal. The purpose and effect of Planned’s restraint is not to protect its own investment, but rather to keep workers trapped in jobs for below-market wages and to interfere with employers’ efforts to hire those workers and cutting out Planned.

59. Not only is the restraint *unnecessary* to any efficiency-enhancing benefit created by Planned’s contracts with buildings; it in fact *undermines* competition in the market for building services workers. Absent the restraint, Planned’s competitors could compete by offering lower prices or better service for buildings and higher wages for valuable incumbent workers to attract them away from Planned. This competition would be better for workers and better for buildings.

60. Even if the restraint would otherwise be subject to the rule of reason because it is considered vertical or ancillary, its “demonstrable economic effect[s]” justify *per se* treatment. *Cont’l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977). The restraint does not encourage investment by Planned in recruitment or training, and it is not founded on

any legitimate protection of trade secrets. It does, however, sharply reduce the bargaining power of essential building services workers who earn substantially less working for Planned than they do working directly for buildings or for other building services contractors. The FTC should declare that the restraint here is subject to *per se* treatment.

61. For the foregoing reasons, the *per se* rule is appropriate for Planned's conduct. But even if the FTC chose to analyze the restraint under the rule of reason, it would still be found to violate the antitrust laws. If the rule of reason applied, the market in this case should be defined as the market for incumbent building services workers for a particular building. Planned dominates that market, preventing workers from seeking out higher wages and buildings from relying on competitor contractors or direct hire.

62. To address the restraint under the rule of reason, the FTC should weigh the potential benefits to workers of the restraint against the harms caused by the restraint. The restraint does not provide benefits to workers. It is not designed to encourage or protect investments by Planned in recruiting, hiring, or investing in building services employees who are principally trained on the job without any investment by Planned.

63. Even if the FTC were to weigh the harms to Planned's workers against benefits in the consumer market for building services, Planned's restraint would fail the rule of reason. Planned holds both workers and buildings captive with its restraint and unfairly competes with competitor building service companies by effectively preventing them from employing incumbent workers for higher wages *and* lower prices or better services for clients. Planned can maintain low wages, inadequate services, and higher prices than it would otherwise be able to charge because the restraint effectively prohibits buildings from benefitting from valuable incumbent workers

64. Even the market is defined to cover building services employees generally, Planned's market power is evident in its ongoing exploitation of the harmful restraint and in its extraordinary market share in various geographies in the Northeast, especially in Northern New Jersey.

65. Combined with the restraint's suppression of competition among employers for workers' services, the restraint violates the "rule of reason," even if the market is defined broadly to include both incumbent and new building services employees.

66. Finally, Planned's conduct denies its workers the fundamental right to sell their labor in a fair competitive market, and it does so without offering them any benefit that would not be available to them absent Planned's illegal restraint. This conduct should be a *per se* unfair method of competition under the FTC Act even if it receives rule of reason treatment under the Sherman Act, *F.T.C. v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) (noting that Commission "has power under Section 5 to arrest trade restraints in their incipiency without proof that they amount to an outright violation"), and even if it does not constitute a technical violation of that Sherman Act under existing case law, *Fed. Trade Comm'n v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394 (1953). As explained here, Planned's conduct

violates the Sherman Act and should be deemed a *per se* violation of that statute. But even if it did not, the Commission should still declare Planned's conduct a *per se* unfair method of competition.

CLAIM TWO: Unfair Act or Practice, 15 U.S.C. § 45(a)

67. A trade practice is unfair if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” 15 U.S.C. § 45(n). In determining whether a trade practice is unfair, the Commission is expected to consider “established public policies.”

68. Planned's restraint is illegal in many of the states in which Planned operates. State law in New Jersey and New York, two of Planned's largest markets, prohibits covenants not to compete in the employment context unless they are reasonable and are justified by the legitimate interests of the employer. *See, e.g., BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 387, 712 N.E.2d 1220, 1222 (1999); *Solari Industries v. Malady*, 55 N.J. 571, 585, 264 A.2d 53 (1970). In New York, cognizable employer interests include the “(1) protection of trade secrets, (2) protection of confidential customer information, (3) protection of the employer's client base, and (4) protection against irreparable harm where the employee's services are unique or extraordinary.” *Oliver Wyman v. Eielson*, 282 F. Supp. 3d 684, 694 (S.D.N.Y. 2017) (quotations and citations omitted). In New Jersey, “[i]n cases where the employer's interests do not rise to the level of a proprietary interest deserving of judicial protection, a court will conclude that a restrictive agreement merely stifles competition and therefore is unenforceable.” *Ingersoll-Rand Co. v. Ciavatta*, 542 A.2d 879, 892 (N.J. 1988).

69. Planned has no legitimate proprietary interest to justify the restraint. Planned employees do not have access to trade secrets or customer lists. And Planned is merely providing staffing services that other contractors could provide or that Planned's employees could provide directly. The fact that competitors could so easily function and benefit from incumbent workers without Planned is the motivation for Planned's restraint.

70. Planned's restraint is also not justified by any procompetitive purpose or effect. As explained above, Planned's restraint sharply reduces worker bargaining power. Residential and commercial building owners change service contractors frequently, and it is not uncommon for residential buildings to “in-source” building services, terminating an agreement with a service contractor and hiring the service employees directly. In such cases, Planned's restraint creates a significant barrier to employees securing a new job in the very building in which the employees work and have developed expertise and relationships or in another building owned by the same building owner.

71. Also as explained above, especially because building employees develop connections with building tenants over time, Planned staff who have worked in the same building for an extended period are attractive potential employees to buildings that, were it not for the no-hire provision, would otherwise offer them permanent employment.

72. Such employment would also provide substantially higher wages and better benefits than those paid by Planned. At minimum, the possibility of Planned employees being directly hired by the buildings where they work would provide those workers with additional bargaining power in their relationship with Planned.

73. Furthermore, also as explained above, by interfering with its competitors' and clients' efforts to retaining Planned's incumbent workforce, Planned also harms its competitors and former clients by depriving them of access to an experienced workforce

74. The restraint is also purposefully broad. For example, the restrictive covenant not only applies to buildings that contract with Planned and any agencies with which those buildings contract, it also applies to *all affiliates* of the client building. Many companies employ service workers directly at some buildings while contracting with a service contractor like Planned at others. In such cases, Planned's restrictive covenant may prevent an employee at one building within an investor's portfolio from obtaining direct employment at another building within that same investor's portfolio or at any building where the successor contract provides services.

75. The fact that the restraint is entered into between employers does not immunize it from state non-compete law. As state courts have reasoned, “[w]hile a covenant not to compete is typically made between an employer and its employees, it is possible, as illustrated in this case, that a restrictive covenant may be made between employers that acts as a covenant not to compete on the employees.” *Heyde Companies, Inc. v. Dove Healthcare*, 654 N.W.2d 830, 834 (Wis. 2002). Indeed, the fact that a restraint is entered into between employers without a worker's knowledge provides additional support for the argument that it is unreasonable and invalid. *Id.* at (“No-hire provision[s] agreed to by employers that restrict[] the employment opportunities of employees without their knowledge and consent constitute[] an unreasonable restraint of trade.”); *see also Pittsburgh Logistics Sys., Inc. v. Beemac Trucking, LLC*, 249 A.3d 918, 936 (Pa. 2021) (concluding that a fissured workplace no-hire agreement was unenforceable in part because “[t]he no-hire provision impairs the employment opportunities and job mobility of PLS employees, who are not parties to the contract, without their knowledge or consent and without providing consideration in exchange for this impairment”).

76. For all of these reasons, the restraint violates state non-compete law and is an unfair practice under § 5 of the FTC Act.

CLAIM THREE: Deceptive Act or Practice, 15 U.S.C. § 45(a)

77. A practice is deceptive under § 5 if it involves a material representation, omission, or practice that is likely to mislead. *See e.g., Matter of Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984).

78. In recruiting workers for employment with Planned, Planned suggests that potential employees will be able to develop marketable skills that they will give them access

to new employment opportunities. Planned states, for example, that Planned offers “a career” and “not just a job.”

79. Planned does not inform workers, however, that its restraint interferes with their ability to work for the employers who will find their skillset and experience the most valuable. Thus, Planned does not provide workers with a job opportunity that provides meaningful bargaining power or opportunities for advancement.

80. Planned’s representations about the work opportunities it provides applicants are deceptive because Planned does not disclose the restrictive covenant.

81. While the workers affected by that contract are not parties to the contract, they are nevertheless harmed by Planned’s repeated and persistent use of an illegal contractual term that undermines their bargaining power and about which they had no meaningful opportunity to bargain because they were not made aware of the contract when they signed up to work for Planned.

PRAYER FOR INVESTIGATION, INJUNCTION, AND OTHER RELIEF

82. 32BJ requests the Commission investigate Planned and find its use of restrictive covenants constitute unfair methods of competition and unfair and deceptive business practices under Section 5 of the FTC Act.

83. 32 BJ further requests the Commission to:

a. Enjoin Planned from entering into agreements that contain restraints designed to prevent clients from directly hiring its current or former employees or from contracting with entities who employ those workers;

b. Provide such other relief as the Commission finds necessary and appropriate.

Respectfully Submitted,

/s/ David H. Seligman

David H. Seligman

Valerie Collins

Towards Justice

PO Box 371680, PMB 44465

Denver, CO 80237-5680

Tel: (720) 441-2236

Fax: (303) 957-2289

david@towardsjustice.org

Counsel for 32BJ