



October 4, 2023

Wage and Hour Division
United States Department of Labor
c/o Principal Deputy Administrator Jessica Looman
200 Constitution Avenue NW
Washington, DC 20210

Dear Principal Deputy Administrator Looman,

Employer-driven debt is a growing problem in the United States, with employers increasingly shifting the financial responsibility for training, equipment, and even profits onto their workers in the form of restrictive debt obligations. Like non-compete agreements, employer-driven debt often limits workers' opportunities to leave their current employer. One category of employer-driven debt is stay-or-pay contracts, which reduce worker mobility through the threat of financial penalties upon early resignation or termination. These contracts are becoming more prevalent, particularly among low-wage workers. A number of federal agencies have authority to regulate these agreements, including the Department of Labor ("DOL", "Department").¹ The Fair Labor Standards Act ("FLSA") is directly applicable when an obligation to repay operates as an unlawful "kick-back" to an employer or when it prevents an employee from receiving their statutorily-mandated minimum or overtime wage "free and clear" of obligations to repay it.

We appreciate DOL's recent actions to combat exploitative and illegal stay-or-pay contracts. We write this letter to urge the Wage and Hour Division ("WHD") to issue an Administrator's Interpretation or another form of subregulatory guidance that explains to employers and employees how stay-or-pay contracts may result in violations of the FLSA's prohibition on employer "kick-backs" and requirement that minimum and overtime wage payments be made "free and clear" of conditions and obligations to repay.

I. Stay-or-pay contracts are a problem that the Wage and Hour Division should continue to address.

A. As the Department has recognized, stay-or-pay contracts are increasingly prevalent, especially among low-wage workers.

Stay-or-pay contracts include arrangements like liquidated damages provisions, training repayment agreement provisions ("TRAPs"), open-ended damages, equipment loans, dispute resolution costs, and other agreements under which workers are forced to agree to pay an amount of money to their employer in the event that they leave their job – voluntarily or, in many cases, involuntarily – before a certain amount of time has passed. For example, a TRAP requires that an employee reimburse, in a lump sum, their employer for some or all of their

¹ For example, stay-or-pay contracts may be subject to the Consumer Financial Protection Act's prohibitions on unfair, deceptive, or abusive acts and practices in consumer financial products or services because of the debt obligations they create. 12 U.S.C. § 5531(a). Additionally, the Federal Trade Commission and the Department of Transportation may have jurisdiction to regulate such agreements under their unfair methods of competition or unfair or deceptive acts and practices authorities in their respective organic statutes. 49 U.S.C. § 41712(a); 15 U.S.C. § 45(a). The Department of Health and Human Services may also have the authority to regulate such practices as part of its regulation of healthcare facilities that receive Medicare patients. 42 U.S.C. § 1395x(e)(9); *see also* 42 C.F.R. § 482.1(a)(1)(ii) ("The Secretary may impose additional requirements if they are found necessary in the interest of the health and safety of the individuals who are furnished services in hospitals."); *see generally* American Economic Liberties Project letter to White House Competition Council, (May 30, 2023), <http://www.economicliberties.us/wp-content/uploads/2023/05/2022-05-30-Competition-Council-Noncompetes-Letter.pdf> (outlining various authorities that agencies may have to regulate non-compete agreements).

on-the-job training (which itself is often “of dubious quality or necessity”²) in the event that the employee quits or is terminated within a set period of time (often between two and five years).

The exact prevalence of stay-or-pay contracts is difficult to measure, but the available evidence indicates that they are widespread, particularly among low-wage workers. The Student Borrower Protection Center (“SBPC”) “estimates that major employers rely upon TRAPs in segments of the U.S. labor market that collectively employ more than a third of all private-sector workers,”³ and that TRAPs have become commonplace for a wide range of job positions, including truckers, nurses, mechanics, salespeople, paramedics, flight attendants, bank workers, repairmen, and social workers.⁴ Estimates of the prevalence of other forms of stay-or-pay contracts are difficult to find, but documented instances of their use by well-known employers indicates that it is a large and growing problem.⁵

Restrictive employment contracts like stay-or-pay contracts produce relatively more negative impacts on women and workers of color than on other groups. TRAPs, for example, are more common in industries that disproportionately employ women and people of color.⁶ Relatedly, the Federal Trade Commission cited research in its proposed regulation on non-compete clauses (which also prohibited some de facto non-compete clauses like stay-or-pay contracts) that suggested that the effect of the rule's prohibitions would close racial and gender wage gaps by 3.6 to 9.1 percent.⁷ Women and people of color are also more likely to be low-wage workers,⁸ who are most negatively impacted by stay-or-pay practices.

Payments required by stay-or-pay contracts can be exorbitant. For example, Sinclair Broadcast Group, the largest broadcasting company in the United States, requires employees who leave before their contract expires to repay the company more than 40 percent of their annual salary in liquidated damages.⁹ DOL recently filed suit against an employer whose stay-or-pay contract attempted to recoup the entire amount of an employee’s gross earnings over his tenure.¹⁰

B. *Stay-or-pay contracts can deprive low-wage workers of collecting a minimum wage in violation of the Fair Labor Standards Act.*

As explained in detail below, when an employer collects on a stay-or-pay contract – either through paycheck deductions or a post-employment debt collection – it can drive an employee’s effective wage for her final workweek below the statutorily required minimum. This can constitute a violation of FLSA’s minimum wage and overtime requirements.

² Student Borrower Protection Center, *Trapped at Work* 5, (Jul. 2022), https://protectborrowers.org/wp-content/uploads/2022/07/Trapped-at-Work_Final.pdf (hereinafter “*Trapped at Work*”).

³ *Trapped at Work* at 14.

⁴ *Id.* quoting Jonathan F. Harris, *Unconscionability in Contracting for Worker Training*, 72 Ala. L. Rev. 723, 741 (2021).

⁵ For example: HCA, MedStar Health, Schneider Trucking, Petsmart, and Wells Fargo. *See id.*

⁶ *Trapped at Work* at 8.

⁷ Federal Trade Commission, *Non-Compete Clause Proposed Rule*, 88 Fed. Reg. 3482, 3488 (Jan. 19, 2023).

⁸ Economic Policy Institute, *Workers of color are far more likely to be paid poverty-level wages than white workers*, (Jun. 21, 2018),

<https://www.epi.org/blog/workers-of-color-are-far-more-likely-to-be-paid-poverty-level-wages-than-white-workers/>;

Pew Research Center, *More women than men earn the federal minimum wage*, (May 5, 2014),

<https://www.pewresearch.org/short-reads/2014/05/05/more-women-than-men-earn-the-federal-minimum-wage/>.

⁹ Jordyn Holman, Rebecca Greenfield & Gerry Smith, *Sinclair Employees Say Their Contracts Make It Too Expensive to Quit*, (Apr. 3, 2018),

<https://www.bloomberg.com/news/articles/2018-04-03/sinclair-employees-say-their-contracts-make-it-too-expensive-to-quit>.

¹⁰ *Complaint, Su v. Advanced Care Staffing, LLC*, case no. 1:23-cv-02119 at 2 (E.D.N.Y. Mar 20, 2023),

<https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/2023/03/23-481-NAT.Su%20v.%20Advanced%20Care%20Staffing%20%26%20Sam%20Klein%20complaint.pdf> (hereinafter “*DOL Complaint*”).

Consider a simple example. Assume an employee earns \$20 per hour, works 40 hours per week, is paid weekly, signed a \$5000 stay-or-pay contract, and is fired after four weeks. In the final week, the employee grossed $40 * \$20 = \800 . The FLSA minimum wage for the worker is \$7.25, which means that the worker's gross pay is in excess of the federal minimum of $\$7.25 * 40 = \290 weekly.

However, if the employee is forced to repay the \$5000 amount after her employment ends, the employee's effective pay for the final pay period is $\$800 - \$5000 = -\$4200$, which is \$4490 below the statutory minimum.

Additionally, the FLSA requires that minimum wage and overtime pay be paid "unconditionally" and "free and clear" of obligations to repay it. In the scenario above, even before the employee's termination or resignation, the debt obligation created by the stay-or-pay contract looms over the worker's paycheck and can attach if the worker leaves or is fired in the current work week. This conditionality of wage payment can constitute a FLSA "free and clear" violation in each week of employment.

C. Stay-or-pay contracts reduce competition in the labor market, immobilizing and harming workers.

President Biden recently underscored his administration's commitment to a fair and competitive economy and warned against excessive concentration. His executive order on Promoting Competition in the American Economy highlighted the monopsony power that employers exert over labor markets through dominant market positions and unfair practices.¹¹ The order directed all agencies to "consider using their authorities to" combat these harms.¹²

stay-or-pay contracts can operate as de facto non-compete agreements and produce the anticompetitive effects against which the President warned. They have negative consequences for workers because they immobilize workers, leading to lower wages and worse working conditions. These contracts reduce employee mobility by increasing the consequences of quitting or being fired. Rather than trading their labor on the free market, employees are penalized if they decide to leave for a new opportunity – a penalty that many low-wage (and even relatively higher-wage) workers cannot afford to pay.¹³ Even if such a contract is not enforced, the fact that it exists can pressure workers into staying in their job.¹⁴ In fact, some employers actively reference the existence of the contract in reply to worker concerns about job conditions.¹⁵

As the Consumer Financial Protection Bureau ("CFPB") explained in a recent report on employer-driven debt, workers are often rushed into signing up for de facto non-compete contracts and debt loads because they are presented as conditions of employment.¹⁶ Additionally, employers misrepresent the value and nature of the contracts that workers are required to sign: whereas workers are made to believe that the contracts and debt are necessary to achieve career mobility and higher earnings,¹⁷ employers instead use the contracts as tools to reduce outside employment options.

¹¹ The White House, Executive Order on Promoting Competition in the American Economy, (Jul. 09, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

¹² *Id.* § 5(a).

¹³ Zoe Salzman, Liquidated Damages Clauses in Employment Agreements 34 ABA J. Lab. Emp. Law 1 236, 239 (2020), https://www.americanbar.org/content/dam/aba/publications/aba_journal_of_labor_employment_law/v34/number-2/liquidated-damages-clauses.pdf; Consumer Financial Protection Bureau, Issue Spotlight: Consumer risks posed by employer-driven debt, (Jul. 20, 2023), <https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-consumer-risks-posed-by-employer-driven-debt/full-report> (hereinafter "CFPB Report").

¹⁴ CFPB Report.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

This diminished opportunity to exit prevents workers from negotiating with their employer for higher wages and better or safer working conditions. For example, the labor union National Nurses United (“NNU”) explained that “when employers hold nurses hostage as debtors, it makes it difficult for nurses to speak out about unsafe working conditions and to advocate for their patients to ensure they receive safe and effective nursing care.” NNU offered the example of “nurses . . . being required to work in units that had dangerously low nurse-to-patient ratios” but “feeling constrained [by their TRAPs] in their ability to complain or leave.”¹⁸ Another example is PetSmart, which used TRAPs to retain pet groomers in unsafe conditions.¹⁹

As now-CFPB Director Rohit Chopra and now-FTC Chair Lina Khan explained in a 2020 article, labor market restraints that reduce the “set of employment options available to workers . . . can suppress wages.”²⁰ Stay-or-pay contracts in trucking, for example, help trucking companies keep wages low by trapping new truckers in poor quality jobs and threatening them with demands for repayment if they seek better employment opportunities.²¹

Consider one example of how HCA, the largest for-profit health system in the country, has used TRAPs to immobilize workers and reduce their bargaining power:²²

Newly hired new graduate RNs seeking employment at HCA Healthcare’s Mission Hospital in Asheville, NC and a number of other HCA Healthcare hospitals are required to sign a [TRAP] with HCA Healthcare subsidiary HealthTrust, a health care industry supply chain management company . . . Under the contract, HealthTrust requires newly graduated nurses—who are fully licensed and working as RNs in HCA Healthcare hospitals—to complete the company-run StarRN program to receive so-called nursing coursework. Under the contract, these newly graduated nurses are required to take out a \$10,000 promissory note for program costs and must for years accept suppressed wages that are frequently lower than other RNs working in the same job but outside the StarRN program. Additionally, as temporary employees these nurses do not receive benefits. After completing the program, nurses are required to work full-time for HCA Healthcare for two years or else they must repay the promissory note. RNs working at Mission Hospital who are in the StarRN program make a set rate of \$24 an hour, potentially depressing wage growth, while the hourly median wage for RNs in the state is \$32.13.²³

In the case of TRAPs, the training that workers are on the hook for is often of poor quality or is simply not offered. Former PetSmart employees, for example, claimed that the training provided by the company’s

¹⁸ National Nurses United comment on Consumer Financial Protection Bureau Request for Information, (Sept. 23, 2022), <https://www.regulations.gov/comment/CFPB-2022-0038-0048>; *see also* Shannon Pettypiece, ‘*Indentured servitude*’: Nurses hit with hefty debt when trying to leave hospitals, NBC News, (Mar. 12, 2023), <https://www.nbcnews.com/politics/economics/indentured-servitude-nurses-hit-hefty-debt-trying-leave-hospitals-rcna74204> (quoting a regulatory policy specialist at National Nurses United who stated, “[h]aving that debt hanging over them means that nurses have a harder time advocating for safe conditions for themselves and their patients”).

¹⁹ Trapped at Work at 22 (explaining that pet “[g]roomers unable to cover the cost of quitting are likely to remain trapped in a job with poor working conditions” and that “PetSmart has additionally faced more than \$85,000 in fines by the Occupational Safety and Health Administration and state regulators for the unsafe working conditions”).

²⁰ Rohit Chopra & Lina M. Khan, The Case for “Unfair Methods of Competition” Rulemaking, 87 U. Chi. L. Rev. 357, 373 (2020).

²¹ Trapped at Work at 18.

²² HCA recently announced that it would stop using TRAPs after intense media and regulatory scrutiny. SBPC, *First Major Healthcare Company Commits to Stop Using TRAPs to Keep Nurses From Leaving Jobs*, (May 10, 2023), <https://protectborrowers.org/first-major-healthcare-company-commits-to-stop-using-traps-to-keep-nurses-from-leaving-jobs/>.

²³ Trapped at Work at 18 quoting National Nurses United, Comment Submitted on Federal Trade Commission and Department of Justice Merger Enforcement No. FTC-2022-0003 (Apr. 21, 2022), <https://www.regulations.gov/comment/FTC-2022-0003-1831>.

Grooming Academy (the purported value of which the worker must agree to a repay upon early separation) is poor, and they reported seeing unprepared trainees rushed to stores, which heightened the risk of pet injury.²⁴ Former trainees at CRST, a trucking company, reported that, after advertising “paid” training and requiring the trainees to sign TRAPs worth more than \$6,000, the company provided very little actual training at necessary job skills like reversing their truck and failed to prepare trainees to earn their commercial driver’s license.²⁵ Other employers actually specify that the so-called training that is the subject of their TRAP is simply the on-the-job knowledge that a worker receives through working.²⁶ A Roosevelt Institute report explained that employers may have an incentive to reduce training quality and “underprovide skills training” because useful training may increase the mobility of their workers.²⁷

D. Stay-or-pay contracts can harm workers even before an employer attempts to enforce them, highlighting the need for clear guidance about their validity under the Fair Labor Standards Act.

Plaintiffs suing over their employers’ use of stay-or-pay contracts have encountered procedural barriers in the courts. For example, a court found that plaintiffs did not have standing to sue under FLSA because their employer had not yet deducted from their paycheck or otherwise successfully collected on the debt.²⁸

However, as explained above, many of the harms that stay-or-pays can impose on workers stem from the chilling effect they have on workers’ ability and willingness to pursue better working conditions within or outside of their place of employment. This chilling effect can occur far before an employer attempts to collect payment on a stay-or-pay contract.

Additionally, as the Sixth Circuit noted in a 2017 case about a draw scheme for commissions, an as-yet-unenforced written policy can have real impacts on individual workers, which led the court to conclude that the plaintiffs sufficiently pleaded their FLSA claim:

Even if defendants never demanded repayment in practice, an employee may believe he owes a debt to the company for which he could be made responsible at a later date. Incurring a debt, or even believing that one has incurred a debt, has far-reaching practical implications for individuals. It could affect the way an individual saves money or applies for loans. An individual might feel obligated to report that debt when filling out job applications, credit applications, court documents, or other financial records that require self-reporting of existing liabilities.²⁹

Clear guidance from WHD about when these stay-or-pay contracts may violate the FLSA could help protect workers from pre-enforcement harms, increasing their mobility and encouraging them to pursue better job opportunities, even if their employer threatens them with enforcement of their stay-or-pay contract.

E. Courts have addressed stay-or-pay contracts under the Fair Labor Standards Act in differing and often flawed ways, underscoring the need for a Wage and Hour Division interpretation.

²⁴ Trapped at Work at 22 citing Sophie Nieto-Muñoz & Alex Napoliello, *Groomed then Gone*, NJ.com, (Sept. 20, 2018), <https://projects.nj.com/investigations/petsmart/>.

²⁵ Trapped at Work at 18.

²⁶ CFPB Report.

²⁷ See Suresh Naidu & Aaron Sojourner, Employer Power and Employee Skills: Understanding Workforce Training Programs in the Context of Labor Market Power 34, ROOSEVELT INST. (Dec. 2020), https://rooseveltinstitute.org/wpcontent/uploads/2020/12/RI_EmployerPowerEmployeeSkills_Report_202012.pdf.

²⁸ *Bland v. Edward D. Jones & Co., L.P.*, 375 F. Supp. 3d 962, 977 (N.D. Ill. 2019).

²⁹ *Stein v. HHGREGG, Inc.*, 873 F.3d 523 (6th Cir. 2017) quoting *Mich. Ass'n of Governmental Emps. v. Mich. Dep't of Corr.*, 992 F.2d 82, 86 (6th Cir. 1993) (“[s]imply because a [policy] has never been applied does not mean that the employee has not been affected by the policy”).

Several courts have considered employees' stay-or-pay contracts – TRAPs, specifically – under the requirements of the FLSA. However, these courts have come to their conclusions based on differing – and flawed – reasoning.

In 2002, the Seventh Circuit Court of Appeals issued a decision that has erroneously become the basis for subsequent decisions on the applicability of the FLSA to TRAPs. In *Heder v. City of Two Rivers*, a plaintiff firefighter sued over, among other things, a TRAP in which he agreed to pay liquidated damages if he quit or was terminated within the first three years of employment.³⁰ When the plaintiff left after two years to join another fire department, the city claimed that he owed \$7,600, made deductions that brought the employee's final three paychecks to \$0, and demanded repayment for the residual amount.³¹ The district court found that this practice violated the FLSA because “[a]n employer may not reduce a worker's wage below the statutory minimum to collect a debt to the employer.”³² It separately found that the TRAP amounted to an illegal non-compete agreement under a Wisconsin state law.³³

The city appealed the district court's ruling regarding the TRAP, but only on the court's finding under Wisconsin law.³⁴ The Seventh Circuit vacated the district court's ruling on Wisconsin law grounds, but importantly *did not* consider the TRAP under the FLSA because it noted that the defendant had already “concede[d]” that the plaintiff was “entitled to keep any compensation that the FLSA specifies as a statutory floor below which no contract may go.”³⁵

In 2010, the Ninth Circuit considered a similar case in *Gordon v. City of Oakland*.³⁶ A plaintiff police officer alleged that her five-year TRAP was violative of the FLSA because the city demanded repayment of the value of her training when she resigned.³⁷ Instead of conducting its own analysis based on the text of the FLSA and its regulations, the Ninth Circuit explained that the Seventh Circuit's reasoning in *Heder* was “persuasive” and “applicable.”³⁸ The Ninth Circuit failed to recognize that the Seventh Circuit's decision applied Wisconsin law – *not* the FLSA – in its consideration of the TRAP. The court found in favor of the defendant and determined that the TRAP did not violate the FLSA because it characterized the arrangement as a “voluntarily accepted loan,” without citing to any such carveout within the FLSA or its regulations.³⁹

District courts around the country have cited *Gordon* and its flawed interpretation of *Heder* as persuasive authority as they have grappled with cases involving stay-or-pay contracts. District courts in Illinois,⁴⁰

³⁰ *Heder v. City of Two Rivers*, 149 F. Supp. 2d 677 (E.D. Wis. 2001), *vacated sub nom. Heder v. City of Two Rivers, Wisconsin*, 295 F.3d 777 (7th Cir. 2002).

³¹ *Id.* at 682, 694.

³² *Id.* at 695.

³³ *Id.* at 691-2.

³⁴ *Heder v. City of Two Rivers, Wisconsin*, 295 F.3d 777 (7th Cir. 2002).

³⁵ *Id.* at 778.

³⁶ *Gordon v. City of Oakland*, 627 F.3d 1092 (9th Cir. 2010).

³⁷ *Id.* at 1094.

³⁸ *Id.* at 1095-6.

³⁹ *Id.* at 1096.

⁴⁰ *Bland v. Edward D. Jones & Co., L.P.*, 375 F. Supp. 3d 962, 977 (N.D. Ill. 2019) (following *Heder* to find that the value of the training was a loan that the employer was entitled to collect on as long as the employee's paychecks were facially above the statutorily required wage).

Louisiana,⁴¹ New York,⁴² and Wisconsin⁴³ have all cited *Heder and Gordon* for the proposition that collecting on stay-or-pay contracts of varying designs does not violate the FLSA's prohibition on employer kick-backs.

A 2015 district court in North Carolina recognized the problem with other courts' reliance on *Heder and Gordon*.⁴⁴ In *Ketner v. BB&T*, former bank employees alleged that their TRAP violated the anti-kick-back regulations of the FLSA.⁴⁵ In ruling against the defendant's motion to dismiss, the court explicitly criticized the defendant's reliance on *Heder and Gordon*, explaining that *Heder* never actually established the proposition for which so many courts had cited the case.⁴⁶ The court rejected BB&T's contention that the arrangement was a "voluntarily accepted loan."⁴⁷ Instead, the *Ketner* court declined to follow *Heder and Gordon* in part because, unlike in those cases, the *Ketner* defendant's training was employer-specific and not recognized beyond BB&T.⁴⁸ Additionally, the *Ketner* court explained that the TRAP payment at issue was much larger than those in *Heder and Gordon*. A 2023 decision in Massachusetts followed *Ketner* in its dismissal of *Gordon* and found that the plaintiffs had stated a FLSA claim for defendants' attempt to collect on a TRAP.⁴⁹

Due to this apparent confusion in the courts, the DOL should clearly articulate the relevant analysis that guides the agency in its enforcement of FLSA's prohibition against kick-backs and requirement that wages be paid free and clear, and how they should apply to stay-or-pay contracts.

F. *The Department and private plaintiffs have brought new litigation against stay-or-pay contracts that violate the Fair Labor Standards Act.*

We applaud the DOL for recently issuing a complaint charging a healthcare staffing agency with violating the FLSA due to its use of a stay-or-pay contract to prevent an employee from leaving his position because of his concerns over patient safety.⁵⁰ The complaint, which the DOL brought in part because the employee may have been barred from court by a mandatory arbitration agreement, explained that the staffing agency attempted to recoup practically all of the employee's gross earnings under the stay-or-pay contract, pulling his effective income to zero. The DOL characterized this arrangement as an illegal "kick-back" of the employee's wages that amounted to a minimum wage and overtime violation in the final pay period of employment. Arguing in the alternative, the DOL asserted that the demand for repayment in the event of early separation constituted a violation in every week of employment because the agency failed to pay the statutorily mandated wage "free and clear" of future obligations to repay it.

Private plaintiffs have also recently brought suits challenging employers' use of stay-or-pay contracts as violative of the FLSA. For example, several law firms and nonprofit organizations, including Towards Justice

⁴¹ *Carver v. Cap. Area Transit Sys.*, No. CV 21-281-RLB, 2022 WL 1123786, at *5 (M.D. La. Apr. 14, 2022) (interpreting *Heder and Gordon* to require employers to pay minimum wage and overtime pay but then allow them to collect on stay-or-pay debt as normal credit).

⁴² *Park v. FDM Grp. (Holdings) PLC*, 2017 WL 946298, at *4 (S.D.N.Y. Mar. 9, 2017) (holding that a "termination fee" which required a payment if an individual left within a certain amount of time after the completion of her training did not violate the FLSA).

⁴³ *Milford v. Roehl Transp., Inc.*, No. 22-CV-0879-BHL, 2023 WL 2503495, at *4 (E.D. Wis. Mar. 14, 2023) (noting, "[a]s *Heder* explained, while an employer may not withhold wages such that they fall below the statutory minimum, it may seek recoupment of costs pursuant to a contract").

⁴⁴ *Ketner v. Branch Banking & Tr. Co.*, 143 F. Supp. 3d 370 (M.D.N.C. 2015).

⁴⁵ *Id.* at 383.

⁴⁶ *Id.*

⁴⁷ Memorandum in Support of Defendant's Motion to Dismiss 13, *Ketner et. al. v. BB&T*, case no. 1:14-cv-967-LCB-LPA (M.D.N.C. Jan. 12, 2015).

⁴⁸ *Ketner*, 143 F. Supp. 3d at 383-4; see also *McClain v. Cape Air*, No. 22-CV-10649-DJC, 2023 WL 3587284, at *7 (D. Mass. May 22, 2023) (declining to accept *Heder* and its progeny as standing "for the proposition that all kickback claims involving a training repayment provision fail to state a plausible claim").

⁴⁹ *McClain*, 2023 WL 3587284, at *7.

⁵⁰ DOL Complaint at 8.

and SBPC, filed a lawsuit in April 2023 on behalf of customers of a coding bootcamp, alleging that their TRAP violated the FLSA.⁵¹ After the training period, the students' agreement required them to work for the defendant's clients making less-than-market-rate pay. If the students stopped client work before meeting the defendant's billable hours requirement, they were required to reimburse the defendant up to \$24,000 as a penalty for leaving. The complaint explained:

The TRAP also violates the Fair Labor Standards Act, because it functions as an unlawful kickback of wages to [the defendant] that brings employees' wages well below minimum wage – indeed, into negative numbers – if they leave their jobs before the Service Commitment Period is complete. Moreover, it means that Smoothstack is not paying employee wages unconditionally or “free and clear,” as the FLSA requires. Rather, employees are paid only on the condition that they do not quit. If they do quit, the TRAP requires them to pay back their earned wages and then some.⁵²

II. The Wage and Hour Division has the authority to issue guidance clarifying the relationship between stay-or-pay agreements and the Fair Labor Standards Act.

A. The Department of Labor has the authority to issue subregulatory guidance.

Issuing subregulatory guidance as requested in this memorandum is well within the Department's scope of authority. Agencies can issue and modify guidance documents, which include agency policies, opinions, recommendations (such as bulletins, circulars, letters, instructional memoranda, manuals, enforcement policies, alerts, and FAQs), and – in the case of the WHD – Administrator's Interpretations, Field Assistance Bulletins, and others. Such guidance documents, and changes to them, are exempt from the Administrative Procedure Act's notice and comment requirements under the law's exception for “interpretive rules, general statements of policy, or rules of agency organization, procedure or practice.”⁵³

WHD has issued numerous Administrator's Interpretations, many of which clarify how certain contexts and situations affect employee and employer rights and obligations under the FLSA.⁵⁴ For example, an Administrator's Interpretation in 2015 detailed the Division's view of how it would distinguish between employees and independent contractors for the purposes of FLSA enforcement.⁵⁵ The letter incorporated the statutory text and relevant case law in its justification of the Division's approach. In 2016, the WHD issued an Administrator's Interpretation that conducted a similar analysis for the Division's approach to joint employer determinations under the FLSA.⁵⁶

The Administrator's Interpretation or other type of guidance document proposed in this memorandum would be an appropriate exercise of the agency's authority to issue subregulatory guidance.

B. New guidance would help employees vindicate their rights under the Fair Labor Standards Act.

Issuing the guidance proposed in this memorandum should facilitate employees' ability to vindicate their rights in court and put employers on notice about their responsibilities under the FLSA.

⁵¹ See generally Complaint, *O'Brien v. Smoothstack, Inc.*, case no. 1:23-cv-00491, (E.D. Va. Apr. 13, 2023), <https://protectborrowers.org/wp-content/uploads/2023/04/FILED-Smoothstack-Complaint-and-Exhibits.pdf>.

⁵² *Id.* at 6.

⁵³ 5 U.S.C. § 553(b)(A).

⁵⁴ Wage and Hour Division, Administrator Interpretation Letter - Fair Labor Standards Act, (Accessed: Apr. 24, 2023), <https://www.dol.gov/agencies/whd/opinion-letters/administrator-interpretation/flsa>.

⁵⁵ This interpretation was withdrawn in 2017. Wage and Hour Division, FLSA 2015-1: The Application of the Fair Labor Standards Act's “Suffer or Permit” Standard in the Identification of Employees Who Are Misclassified as Independent Contractors, (Jul. 15, 2015), https://www.blr.com/html_email/ai2015-1.pdf.

⁵⁶ This interpretation was withdrawn in 2017. Wage and Hour Division, FLSA 2016-1: Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act, (Jan. 20, 2016), https://www.hallrender.com/wp-content/uploads/2016/01/DOL_Joint_Employment_1_20_16.pdf.

One feature of the FLSA is that the statute includes a private right of action, as well as fee-shifting provisions, to encourage employees to bring their own suits to enforce the law.⁵⁷ Though a good feature in general, it also means that the Department of Labor is not always in a position to explain its understanding of the statute during judicial proceedings. A private plaintiff can, however, refer to an agency guidance document for guidance on how to apply the law. And such guidance written to clarify an agency's interpretation of its own regulation is generally afforded deference by reviewing courts.⁵⁸

In all cases,⁵⁹ a guidance document that explains the Department's perspective on how the FLSA applies to stay-or-pay contracts will be helpful to employers when deciding how to structure their recruitment and retention practices.

III. The guidance document should clarify that collecting on most stay-or-pay contracts may be prohibited by the Fair Labor Standards Act's prohibition on "kick-backs" and requirement that statutorily-required wages be paid "free and clear."

The WHD should issue an Administrator's Interpretation or other type of guidance document explaining the following:

- A. *The Fair Labor Standards Act protects employees' rights to "free and clear" minimum wage and overtime pay without kick-backs to their employer.*

Congress passed the FLSA to help eradicate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."⁶⁰ Sections 6 and 15(a)(2) of the Act make it unlawful for employers to fail to pay employees a minimum wage.⁶¹ Sections 7 and 15(a)(2) make it unlawful for employers to fail to pay employees time-and-a-half pay for hours worked in excess of 40 hours in a week.⁶² An employee may not waive or abridge their rights under the Act, including through "contractual understandings."⁶³

Long-standing FLSA regulations clarify that employers are required to pay the statutorily required wages in a manner that is "free and clear" from conditions or demands for future repayment.⁶⁴ The regulations also prohibit an employer from taking a "kick-back," "directly or indirectly[,]" from the total wages paid to workers, if doing so would cause the resulting wages to be less than what is required by Sections 6, 7, and 15(a)(2) of the Act.⁶⁵ The current, long-standing regulations state:

§ 531.35 "Free and clear" payment: "kickbacks."

Whether in cash or in facilities, "wages" cannot be considered to have been paid by the employer and received by the employee unless they are paid **finally and unconditionally** or "**free and clear.**" The wage requirements of the Act will not be met where the employee "kicks-back" **directly or indirectly to the employer** or to another person **for the employer's benefit** the whole or part of the wage delivered to the employee. This is true whether the "kick-back" is made in cash or in other than cash. For example, if it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are

⁵⁷ 29 U.S.C. § 216(b).

⁵⁸ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); see also *Kisor v. Wilkie*, No. 18-15, 2019 U.S. LEXIS 4397 (June 26, 2019).

⁵⁹ Including those in which private plaintiffs are barred from pursuing claims by mandatory arbitration agreements.

⁶⁰ 29 U.S.C. § 202(a).

⁶¹ 29 U.S.C. §§ 215(a)(2), 206.

⁶² 29 U.S.C. §§ 215(a)(2), 207.

⁶³ *Mayhue's Super Liquor Stores, Inc. v. Hodgson*, 464 F.2d 1196, 1198 n.1 (5th Cir. 1972) citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945).

⁶⁴ 29 C.F.R. § 531.35; 32 Fed. Reg. 13575.

⁶⁵ *Id.*

specifically required for the performance of the employer's particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act...⁶⁶

B. Kick-backs are expenses for the employer's benefit that tend to shift business expenses onto employees.

Courts have understood “kick-back” to be an arrangement that “tend[s] to shift part of the employer’s business expense to the employees,” which is “illegal to the extent that it reduce[s] an employee’s wage below the statutory minimum.”⁶⁷ The inquiry requires that the expense be “for the employer’s benefit”⁶⁸ and hinges on “the nature of the expenses themselves and whether they are of the type that should be borne by the employer rather than the employee.”⁶⁹

If an expense is incidental first to the needs of the employer rather than those of the employee, then requiring the employee to cover the cost of the expense is impermissible under the FLSA to the extent that it would reduce wages below the statutory minimum.⁷⁰ Another way to phrase this distinction is whether, absent the employee making the expenditure, the employer would incur the expense because it is integral to the employer’s business.⁷¹ Requiring the employee to agree to cover the expense as a condition of employment is also indicative of kick-back status.⁷²

The paradigmatic example available in the case law is whether an employer’s failure to reimburse an employee for the cost of operating her personal vehicle for a food delivery business constitutes a kick-back. Courts have routinely found that it does, because employees must have and use a personal car as a condition of their employment and, absent the employee’s use of their personal vehicle, the employer would need to cover the cost of a vehicle for its delivery business anyway.⁷³

C. Demands for payment on most stay-or-pay contracts are likely employer kick-backs.

Most forms of stay-or-pay contracts are designed to “shift part of the employer’s cost of doing business.”⁷⁴ Due to the contracts’ very nature, efforts to collect on stay-or-pay contracts are efforts to require employees to cover employers’ business expenses of recruitment, training, retention, and even lost profits. These costs are expenses inherent in employing workers.

For example, TRAPs, which require employees to cover the cost of their own on-the-job training, tend to shift business expenses. All firms that employ workers provide *some* type of training, as it is intrinsic to the very concept of employment. Employees subject to TRAPs are also covering the common business expenses

⁶⁶ Emphasis added.

⁶⁷ *Mayhue's Super Liquor Stores, Inc.*, 464 F.2d at 1198 (finding that an agreement that requires an employee to repay their employer any shortages in cash register money, regardless of the reason for the shortage, violated the FLSA when it caused net wages to dip below minimums because such losses are business expenses “to be expected where cashier employees handle a large number of transactions”).

⁶⁸ 29 C.F.R. § 531.35.

⁶⁹ *Benton v. Deli Mgmt., Inc.*, 396 F. Supp. 3d 1261, 1273 (N.D. Ga. 2019) (distinguishing between personal delivery vehicle expenses associated with a delivery business, which an employer would need to make in order to conduct its business, and employees’ street clothes, which it would not).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 898 (9th Cir. 2013) (requiring the employer to reimburse for travel and immigration expenses incurred before the employment relationship began because these expenses were “essential for the ... employment relationship to come to fruition”).

⁷³ See, e.g., *Perrin v. Papa John's Int'l, Inc.*, 114 F. Supp. 3d 707 (E.D. Mo. 2015); *Graham v. The Word Enters. Perry, LLC*, No. 18-cv-0167, 2018 WL 3036313, *4 (E.D. Mich. Jun. 19, 2018); *Ke v. Saigon Grill, Inc.*, 595 F.Supp.2d 240, 258 (S.D.N.Y. 2008); *Waters v. Pizzeza to You, LLC*, 538 F. Supp. 3d 785, 791 (S.D. Ohio 2021).

⁷⁴ *Mayhue's Super Liquor Stores, Inc.*, 464 F.2d at 1199.

of employee recruitment and retention, as the training programs underlying TRAPs are often misleadingly advertised as “free” or “paid” training as a method of attracting new applicants,⁷⁵ and the required repayment upon early departure serves the crucial business function of retaining employees.⁷⁶ Without TRAPs, an employer would presumably need to spend more money on recruitment and retention (in the form of higher wages and better working conditions) and training (which employers effectively concede is crucial to their business by requiring it as a condition of employment).

Similar principles apply to other forms of stay-or-pay contracts. Stay-or-pay contracts for “liquidated damages” often explicitly state that they are meant to cover very common business expenses like training and recruitment of a replacement.⁷⁷ Stay-or-pay contracts that require employees to cover the cost of “lost profits” (or even “lost goodwill”) incurred by an employer⁷⁸ when an employee departs similarly tend to shift the common business expenses associated with employee turnover.⁷⁹

Stay-or-pay contracts routinely serve to cover expenses that an employer would otherwise need to cover because they are inherent in operating a business that has employees.⁸⁰ Just as cash register shortages are inherent in operating a business in which cashier employees handle a large number of transactions and delivery vehicle expenses are inherent in operating a food delivery business, and are therefore business expenses meant to be borne by the employer,⁸¹ so too are recruitment, training, onboarding, retention, and lost profits inherent in operating a business at all.

D. Collecting a kick-back post-employment has the same legal effect as a paycheck deduction, resulting in an illegal kick-back in the final workweek.

29 C.F.R. § 531.35 prohibits an employer from paying a facially valid paycheck and then seeking collection of a kick-back payment after-the-fact. This is because money is fungible. “[I]here is no legal difference between deducting a cost directly from the worker’s wages and shifting a cost, which they could not deduct, for the employee to bear.”⁸² The FLSA’s prohibition on kick-backs cannot be avoided by simply requiring employees to pay sums after receiving their minimum wage.

Collecting such a post-employment kick-back payment to satisfy a stay-or-pay contract would count as a FLSA violation in the final workweek. The FLSA’s minimum wage and overtime guarantees operate across

⁷⁵ See, e.g., Trapped at Work at 17, 20-21 (trucking company advertising “paid” training and PetSmart advertising its Grooming Academy as “FREE Paid Training”).

⁷⁶ Trapped At Work at 16 (“The use of TRAPs has been shown to diminish worker exit from employment among firms that utilize these contract terms. For example, in 2017, Mitchell Hoffman and Stephen V. Burks conducted a singlefirm study that found that a trucking company’s use of two types of TRAPs, with twelve-month and eighteenmonth post-training employment requirements, led to a 15 percent reduction in employees quitting and significantly increased firm profits from training.”) citing Mitchell Hoffman & Stephen V. Burks, Training Contracts, Employee Turnover, and the Returns from Firm-Sponsored General Training 1 (Nat’l Bureau of Econ. Rsch, Working Paper No. 23247, Mar. 2017) (internal quotations omitted).

⁷⁷ SBPC comment to the Federal Trade Commission on the Proposed Rule on Non-Competes 8, (Apr. 19, 2023), <https://protectborrowers.org/wp-content/uploads/2023/04/FINAL-SBPC-FTC-Non-Compete-NPRM-Comment.pdf>.

⁷⁸ DOL Complaint at 10.

⁷⁹ See generally Heather Boushey & Sarah Jane Glynn, The Are Significant Business Costs to Replacing Employees, Center for American Progress (Nov. 16, 2012), <https://www.americanprogress.org/article/there-are-significant-business-costs-to-replacing-employees/>.

⁸⁰ *Benton v. Deli Mgmt., Inc.*, 396 F. Supp. 3d at 1274.

⁸¹ *Mayhue's Super Liquor Stores, Inc.*, 464 F.2d at 1198.

⁸² *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1236 (11th Cir. 2002).

“any workweek.”⁸³ Courts have focused on FLSA compliance within the *first* workweek when considering employees’ *pre*-employment expenses.⁸⁴ Because a stay-or-pay contract’s financial penalties only attach upon termination or resignation – post-employment – the proper unit of analysis for purposes of ascertaining stay-or-pay contract compliance with the FLSA’s anti-kick-back requirement is the employee’s final workweek.

E. *Stay-or-pay contracts can prevent “free and clear” payment of minimum and overtime wages obligations in each workweek that is subject to conditional deduction.*

In addition to triggering potential kick-back claims in the final workweek when an employer attempts to collect, stay-or-pay contracts create looming debt obligations over each workweek in which the debt obligation *could* be enforced. Under DOL regulations, “‘wages’ cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally.”⁸⁵ In each workweek during the term of an stay-or-pay contract, an employer purports to reserve the right to claw back the value of the stay-or-pay contract from a worker if they fail to remain employed through the week. Thus, the wage “cannot be considered to have been paid by the employer and received by the employee” during the period that the stay-or-pay contract was in effect.⁸⁶

Even if a stay-or-pay contract is not enforced, its presence can cause a FLSA violation. Even when an employer does not actually enforce a challenged policy, it is appropriate to “focus[] upon the language of a written policy rather than its actual implementation, because ‘[s]imply because a [policy] has never been applied does not mean that the employee has not been affected by the policy.’”⁸⁷ Indeed, the entire purpose of an as-yet unenforced stay-or-pay contract *is* to have an effect on the employee: to prevent them from leaving their current employment for fear of financial penalty. The conditional kick-back embedded in the stay-or-pay contract is the mechanism by which the employer achieves this objective.

F. *Stay-or-pay contracts generally do not fit a narrow exception for advances or loans extended from employers to employees.*

Historical DOL guidance, including a 1984 opinion letter and the current Field Operations Handbook, asserts that there exists a narrow exception to the FLSA’s requirements for employers to collect on the principal of loans or cash advances made to employees.⁸⁸ The guidance does not make reference to statutory or regulatory

⁸³ 29 U.S.C. §§ 206, 207 (applying to employees in “any workweek”); 29 C.F.R. § 778.104 (explaining that “[t]he Act takes a single workweek as its standard”); *Arriaga*, 305 F.3d at 1237 (11th Cir. 2002) (explaining that “[c]ompliance with the FLSA is measured by the workweek”).

⁸⁴ *See, e.g., Arriaga*, 305 F.3d at 1237; *Marshall v. Root’s Rest.*, 667 F.2d 559, 560 (6th Cir. 1982).

⁸⁵ 29 C.F.R. § 531.35.

⁸⁶ *Id.*

⁸⁷ *Stein*, 873 F.3d at 534 (quoting *Mich. Ass’n of Governmental Emps. v. Mich. Dep’t of Corr.*, 992 F.2d 82, 86 (6th Cir. 1993)); *see also Davis v. Colonial Freight Sys., Inc.*, No. 16 Civ. 674, 2017 U.S. Dist. LEXIS 221275, at *17 (E.D. Tenn. Nov. 22, 2017) (“[W]hether Plaintiff ever reimbursed Defendants for the stipend he received is irrelevant, because the policy as written violates the FLSA by continuing to hold employees responsible for wages already delivered.”); *see also Thomas v. County of Fairfax, Virginia*, 803 F. Supp. 1142 (E.D. Va. 1992) (finding that a written, but unenforced, policy that permitted a reduction in pay for hours worked weighed against an overtime exemption based on the salary basis test because the relevant regulation provided that an “employee is not salaried if his or her salary is ‘subject to reduction’” and did not “require an employee to show any *actual* reduction”).

⁸⁸ DOL, Field Operations Handbook 30c10(b), (Accessed: Jun. 22, 2023), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch30.pdf (explaining that “[w]hile loans and cash advances made by an employer are not facilities the principal may be deducted from the employee’s wages even where such a deduction cuts into the minimum wage or overtime due under the FLSA.”) (hereinafter “DOL Handbook”); *see also* DOL, Opinion Letter FLSA-834 (Oct. 11, 1984), https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/legacy/ol_1984-10-11_a.pdf (affirming DOL’s “longstanding position that where an employer makes a loan or an advance of wages to an employee, the principal may be deducted from the employee’s earnings even if such a deduction cuts into the minimum wage or overtime pay due the

authority that supports this exception, but does assert that this loan repayment exception is the DOL's "longstanding position."⁸⁹ As described above, courts that have considered the validity of TRAPs under the FLSA have also acknowledged, without statutory or regulatory support, that this loan exception exists.⁹⁰ Even courts declining to follow *Gordon* and its progeny have done so.⁹¹

Whatever narrow loan exception does exist might more precisely be interpreted as the inverse of the kick-back analysis outlined above. In other words, if a demand for repayment is based on an agreement that primarily benefits the employer, shifting business expenses onto employees, then it is a kick-back and therefore disallowed if collection would drive wages below statutory minimums. If it primarily benefits the employee, then it may be a bona fide loan or cash advance that can be collected on. Stay-or-pay contracts are, as explained above, generally incident first to the employer's needs and therefore fall into the kick-back category. Regardless, the loan "exception" is narrow and whether something amounts to a kick-back or an advance or loan is a fact-specific inquiry that turns on whether the employee or employer is the primary beneficiary.

The scenarios described in the 1984 opinion letter help illustrate this point. The letter outlines a cash wage advance scheme, a tuition reimbursement program for courses at a third-party institution, and a monthly child care allowance. The first and third scenarios described in the letter are clearly not kick-backs (and may instead be characterized as loans or advances) because they primarily benefit the employee. A cash wage advance benefits the employee by providing upfront funds for personal expenses. Because repayment of the advance was mandatory regardless of the employee's tenure at the company, it would not produce the immobilizing effects that a stay-or-pay contract's conditionality would. The benefit to the employer, then, was small and certainly did not outweigh that to the employee. The childcare allowance was similarly not a kick-back because it was primarily a monthly allowance for a personal expense: child care. The second scenario, in which an employer paid tuition to a third-party and attempted to collect from an employee that ended employment early *may* qualify for the exception because it is arguably a bona fide loan for the benefit of the employee in which the payment made is voluntarily assigned by the employee to a third-party. However, whether the primary purpose of the agreement was to enable the employee to further their higher education or to restrict the mobility of the employer's workforce would be a determination best left for a court.

G. The Fair Labor Standards Act's requirements are but one source of liability for employers considering the use of stay-or-pay contracts.

Of course, the FLSA is not the only law that may protect workers from the negative consequences of stay-or-pay contracts. Several federal agencies including the Federal Trade Commission, the Department of Health and Human Services, the Department of Transportation, and the Consumer Financial Protection Bureau, to name a few, have statutory authority to investigate and regulate these arrangements.⁹² Additionally,

employee under FLSA.") (hereinafter "1984 Opinion Letter"); DOL, Compliance Assistance FLSA2004-17NA (Oct. 6, 2004) (citing to the 1984 opinion letter).

⁸⁹ 1984 Opinion Letter.

⁹⁰ *Gordon*, 627 F.3d at 1096 (deciding that a TRAP was a "voluntarily accepted loan" and therefore efforts to collect did not violate the FLSA).

⁹¹ *Ketner*, 143 F. Supp. 3d at 384 (denying a motion to dismiss, finding that "factual development of this case will determine whether the costs of training for the LDP is a bona fide loan as asserted by BB & T or a kick-back of salary as alleged by Ketner").

⁹² See *supra* note 1.

state laws and common law on wage and hour requirements⁹³ and contract unconscionability⁹⁴ may also be applicable and more protective than the FLSA. Employers should carefully consider the intent and potential impact before instituting any stay-or-pay scheme.

IV. Conclusion

As stay-or-pay contracts become more prevalent among low-wage employers, the DOL should clarify how it plans to enforce the FLSA's requirements. The guidance should focus on whether the stay-or-pay contract constitutes a kick-back or prevents wages from being paid "free and clear." If so, the employer may not make deductions or demands for repayment to the extent that it would reduce the employee's wage below the statutory minimum in the final workweek.

While we are heartened by the DOL's decision to bring an enforcement action against a particularly egregious arrangement, an Administrator's Interpretation or other appropriate guidance could help more employees vindicate their rights and inform employers of their obligations under the law.

We look forward to collaborating with you on this policy proposal and developing others, and welcome any questions or feedback.

Sincerely,

Governing for Impact
Student Borrower Protection Center
Towards Justice
American Economic Liberties Project
Action Center on Race and the Economy
Center for Law and Social Policy
Demand Progress Education Fund
Economic Policy Institute
Institute for Local Self-Reliance
Jobs With Justice
Missouri Workers Center
National Employment Law Project
National Employment Lawyers Association
National Institute for Workers' Rights
National Organization for Women
National Women's Law Center
North Carolina Justice Center
Open Markets Institute
People's Parity Project
Workplace Fairness

⁹³ State wage and hour law that is more protective than the FLSA. *See* Complaint, *Scully v. PetSmart LLC*, case no. — (Sup. Ct. Cal. San Mateo Jul. 2022), https://towardsjustice.org/wp-content/uploads/2022/07/PetSmart-complaint_file-1.pdf (based on state wage law requiring indemnification of an employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, regardless of whether those expenses pull the employee's wages under the statutory minimum).

⁹⁴ *See Smoothstack v. Davtyan*, Nos. GV21010149, GV21015875 (Va. Gen. Dist. Ct.) (unconscionability); *See Heder v. City of Two Rivers*, 149 F. Supp. 2d 677, 694 (E.D. Wis. 2001), vacated sub nom. *Heder v. City of Two Rivers, Wisconsin*, 295 F.3d 777 (7th Cir. 2002); *Med+Plus*, 726 N.E.2d at 693 (finding amount to be repaid a penalty intended to prevent employee from leaving, rather than recoupment of training expenses, because it bore no relation to employer's unrecovered training costs).