



STUDENT BORROWER
PROTECTION CENTER



**National Labor Relations Board
Proposed Action Memorandum
November 28, 2023**

Invoking the National Labor Relations Act to target stay-or-pay contracts that violate workers' labor rights

I. Introduction

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. This memorandum shows how stay-or-pay contracts violate the National Labor Relations Act (NLRA or Act) and calls on the General Counsel of the National Labor Relations Board (NLRB GC) to issue a memorandum clarifying that stay-or-pay contracts are at least as chilling to protected concerted activity as traditional non-competes and instructing the NLRB Regional Offices to submit to the NLRB Division of Advice cases involving stay-or-pay contracts and seek make-whole relief for affected employees.

Stay-or-pay contracts that require a worker to pay when they resign or are terminated have an inherent chilling effect on workers' concerted activity to improve working conditions. These contracts include Training Repayment Agreement Provisions (TRAPs), liquidated damages provisions, open-ended damages, equipment loans, dispute resolution costs, and other contracts under which workers are forced to agree to pay an amount of money to their employer in the event that they leave their job or they are fired. Stay-or-pay contracts, like non-compete provisions, dissuade workers from quitting through economic force. But stay-or-pay contracts can be even more pernicious than traditional non-competes "because preventing workers from working for a competitor may be less onerous to workers than requiring them to pay the employer a substantial sum to quit."¹

As the *New York Times Magazine* recently reported, stay-or-pay contracts "are a mechanism by which job mobility is halted" and have been used with greater frequency in recent years.² These contracts effectively preclude workers from concertedly quitting or threatening to quit to obtain leverage for improving working conditions. In addition, the contracts dissuade workers from: soliciting coworkers to work for another employer as part of an organizing campaign; concertedly seeking or accepting employment with another employer to obtain better working conditions; and being paid to organize another employer's employees.³ Likewise, the contracts chill workers from union organizing or acting for "mutual aid and protection"⁴ in the workplace because of a fear of termination that would trigger the stay-or-pay contract's debt repayment obligations, in addition to the loss of income from termination. As the Consumer Financial Protection Bureau has found, these sorts of "employer-driven debts are inextricably linked to a worker's employment,

¹ Jonathan F. Harris, *Unconscionability in Contracting for Worker Training*, 72 ALA. L. REV. 723, 726 (2021).

² Robin Kaiser-Schatzlein, *Pay Thousands to Quit Your Job? Some Employers Say So*, N.Y. TIMES (Nov. 20, 2023), <https://www.nytimes.com/2023/11/20/magazine/stay-pay-employer-contract.html?smid=nytcore-ios-share&referringSource=articleShare>.

³ Cf. NAT'L LAB. RELS. BD., MEMORANDUM GC 23-08 ON NON-COMPETE AGREEMENTS THAT VIOLATE THE NATIONAL LABOR RELATIONS ACT 3-4 (May 30, 2023) (describing how non-compete provisions have these effects on concerted activity to improve labor conditions).

⁴ 29 U.S.C. § 157.

and the worker's ability to repay the debt is controlled by the issuer of the debt itself."⁵ This new form of dependency on one's employer recalls images of the company store and indentured servitude, and restrains workers from exercising their right to act with their coworkers to improve the terms and conditions of work.

II. Justification

A. *Training Repayment Agreement Provisions (TRAPs)*

In recent years, employers have dramatically expanded their use of stay-or-pay contracts that force workers to pay if their employment ends within a set period of time—either voluntarily or involuntarily.⁶ For example, TRAPs require an employee or trainee to pay the employer a fixed or pro rata sum if the employee received on-the-job training and quits work or is fired within a set period of time.⁷ The repayment sums often far exceed the value of any training. Though even when the cost is determined to be “reasonable,” TRAPs frequently have the effect of economically trapping workers in their jobs.

Though TRAPs began with highly paid workers in the 1980s and 1990s,⁸ TRAPs are much more prevalent now among entry-level workers, including those in the transportation, cosmetology and aesthetics, health care, retail, technology, and finance sectors.⁹ One 2022 report estimated that major employers rely on TRAPs in sectors that collectively employ over a third of all private-sector workers in the U.S.¹⁰ A 2020 Cornell Survey Research Institute study reported that approximately one in ten workers reported having been bound by a TRAP.¹¹ TRAPs are now especially prevalent among firms owned by private equity, including retail chains like PetSmart.¹²

For example, trucking companies such as CRST and CR England have commercial drivers' license schools that use TRAPs with repayment amounts over \$6,000 and up to two-year repayment windows.¹³ The trucking sector has high worker turnover—nine out of ten truckers leave their jobs within a year due to grueling working conditions—meaning that TRAP repayments provide a revenue source for the companies.¹⁴

⁵ CONSUMER FIN. PROT. BUREAU, CONSUMER RISKS POSED BY EMPLOYER-DRIVEN DEBT (July 20, 2023), <https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-consumer-risks-posed-by-employer-driven-debt/full-report/>.

⁶ See Jonathan F. Harris, Comment Letter to FTC on Proposed Rule on Non-Compete Clauses (Apr. 19, 2023), <https://protectborrowers.org/wp-content/uploads/2023/04/Harris-FTC-Non-compete-proposed-rule-comment.pdf>.

⁷ Harris, *supra* note 1, at 724.

⁸ See Harris, *supra* note 1, at 741; Anthony W. Kraus, *Repayment Agreements for Employee Training Costs*, 44 LAB. L.J. 49, 52 (1993).

⁹ See JONATHAN F. HARRIS & CHRIS HICKS, TRAPPED AT WORK: HOW BIG BUSINESS USES STUDENT DEBT TO RESTRICT WORKER MOBILITY 3 (2022), https://protectborrowers.org/wp-content/uploads/2022/07/Trapped-at-Work_Final.pdf.

¹⁰ *Id.* at 14.

¹¹ See Diane Bartz, *More U.S. Companies Charging Employees for Job Training if They Quit*, REUTERS (Oct. 17, 2022), <https://www.reuters.com/world/us/more-us-companies-charging-employees-job-training-if-they-quit-2022-10-17/>.

¹² See UNITED FOR RESPECT, GREED UNLEASHED: PETSMART, BC PARTNERS, AND WHAT HAPPENS WHEN PRIVATE EQUITY PREYS ON WORKERS AND PETS 2 (2021), <https://united4respect.org/wp-content/uploads/2021/09/Greed-Unleashed-Report.pdf> [<https://perma.cc/KBY8-ER6T>] (noting that private equity company BC Partners purchased PetSmart in 2015); William Louch, *PetSmart Workers Ask Retailer's Private-Equity Owner for Coronavirus Protections*, WALL ST. J. (July 8, 2020), <https://www.wsj.com/articles/petsmart-workers-ask-retailers-private-equity-owner-for-coronavirus-protections-11594235984> [<https://perma.cc/U36Y-Z3RZ>].

¹³ Int'l Bhd. of Teamsters, Comment Letter on Request for Information Regarding Employer-Driven Debt 6 (Sept. 23, 2022), <https://www.regulations.gov/comment/CFPB-2022-0038-0055> [<https://perma.cc/2VPK-UUFK>].

¹⁴ See *id.*

TRAPs are also quite common among aesthetics and cosmetology workers.¹⁵ Simran Bal, a fully licensed esthetician with no need for additional training, was sued by her former employer to enforce a TRAP for training in “Sugaring, Dermaplaning, Lash & Brow Tint, Lash & Brow Lift, Henna, Chemical Peels, Hydrafacials, Microneedling, [and] Facials.”¹⁶ Bal was required to work for two years to avoid paying a \$5,000 TRAP debt.¹⁷ But she said she received only three training sessions that were not worth anything close to \$5,000.¹⁸ She was able to defeat the TRAP lawsuit against her, but only because she never received a full training as promised.¹⁹

TRAPs are especially prevalent in sectors experiencing staffing shortages, which have only increased since the COVID-19 pandemic. Health care is one of these sectors. A 2022 survey of registered nurses reported that new graduate nurses were much more commonly bound by TRAPs than their older coworkers, with close to half having signed TRAPs.²⁰ All together, over 50 percent of the nurses said they had signed a TRAP when they were required to undergo a training program.²¹ And close to 40 percent of the nurses who had signed TRAPs reported that the repayment amount exceeded \$10,000, with almost 20 percent saying that their TRAP debt exceeded \$15,000.²² In addition, dozens of nurses responded that they refrained from joining a union or becoming active in a union because of a TRAP debt.²³

One nurse’s story reveals the mobility restricting and anti-union effects of TRAPs. Jessica Van Briggie began her nursing career at Centinela Hospital in Southern California.²⁴ During onboarding, Centinela had a staffing agency complete the hiring process, and the agency’s representative told Jessica that she had to work for the staffing agency—not the hospital—for two years or pay \$15,000 if she left early.²⁵ Jessica’s training started with two weeks of classroom time, then orientation.²⁶ But her trainer was also a new nurse and, despite being in training, Jessica was frequently assigned to care for high need patients.²⁷ Jessica began skipping breaks because she felt that if she left, her patients would suffer.²⁸

Eventually, Jessica asked about ending her contract early because of fatigue, low staffing, and ethical concerns.²⁹ The staffing agency told her that she would have to pay the entire \$15,000 if she left.³⁰ Jessica did not have the money, so she worked through unbearable conditions to get to the end of her contract.³¹

¹⁵ See, e.g., Press Release, Nat’l Lab. Rels. Bd., Region 9—Cincinnati Issues Complaint Alleging Unlawful Non-Compete and Training Repayment Agreement Provisions (TRAPs) (Sept. 7, 2023), <https://www.nlr.gov/news-outreach/region-09-cincinnati/region-9-cincinnati-issues-complaint-alleging-unlawful-non-competitions> [<https://perma.cc/4XQV-HRHZ>] (alleging aesthetics employer used TRAPs requiring repayments up to \$60,000, in violation of federal labor law).

¹⁶ *Oh Sweet, LLC v. Bal*, No. 22-CIV-05745-KCX (Kings Cnty. Dist. Ct. Sept. 6, 2022) (complaint and defendant’s exhibits on file with author).

¹⁷ *Id.* (defendant’s opening statement and exhibits on file with author).

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ Nat’l Nurses United, Comment Letter on Request for Information Regarding Employer-Driven Debt 9–11 (Sept. 23, 2022), <https://www.regulations.gov/comment/CFPB-2022-0038-0048> [<https://perma.cc/N6SB-WXXP>] (finding that 44.8 percent of the nurses with between one and five years’ experience were bound by TRAPs, compared to 24.3 percent of the nurses with 11 to 20 years’ experience).

²¹ *Id.* at 8.

²² *Id.* at 11.

²³ *Id.* at 100.

²⁴ *See id.* at 58–63.

²⁵ *See id.*

²⁶ *See id.*

²⁷ *See id.*

²⁸ *See id.*

²⁹ *See id.*

³⁰ *See id.*

³¹ *See id.*

Moreover, though Centinela was unionized, the staffing agency was not, so Jessica did not have access to union grievance procedures or other union protections.³² Adding insult to injury, the so-called “training” she received did not allow her to get a better job at the end of her contract; she had to obtain a bachelor of nursing degree to do that, at her own expense.³³

Another nurse, Neil Rudis at UCHealth in Aurora, Colorado, explained exactly how his TRAP chilled him and his colleagues from considering a union: “[u]nionizing was not even on my mind when under [the TRAP] contract. There was no chance, because of all the rumors. If you even talked about it, you would get fired instantaneously, and you would owe them payment for the program.”³⁴ In contrast, a nurse bound by a TRAP at another hospital, HCA Mission Health, reported that after winning her union, she felt confident in advocating with her coworkers for better conditions, whereas she did not before the union.³⁵ And union organizers have reported that new graduate nurses under TRAPs refused to talk about unions because of fear of triggering the TRAPs’ repayment requirements.³⁶

B. *Other Stay-or-Pay Contracts*

Other novel contracts restricting worker mobility are proliferating, perhaps in anticipation of state and federal action banning or severely limiting traditional non-compete provisions.³⁷ These include employer-driven debt contracts that require departing employees to pay liquidated damages as “quit fees” or even non-liquidated damages for sums equating to a company’s cost of hiring a replacement employee or lost profits from the employee’s departure.

For example, health care workers at Concentra have reported feeling trapped in their jobs by a contract provision that requires employees to give four months’ notice before quitting or pay a fee that is the equivalent to their salary for the balance of that four month period.³⁸ Meanwhile, the employer need give only two weeks’ notice to terminate under the contract and has no reciprocal payment obligation to the terminated employee, such as severance pay.³⁹

In another example of stay-or-pay contracts, three pending lawsuits allege that Advanced Care Staffing, LLC (ACS), a health care staffing agency that recruits workers from overseas, requires foreign-educated nurses to sign contracts requiring a three-year commitment or else payment of an unspecified amount equivalent to the company’s projected future profits, attorneys’ fees, and arbitration costs.⁴⁰ According to a U.S. Department of Labor complaint, “ACS has demanded in arbitration amounts that may well require [the employee] to

³² See *id.* at 14.

³³ See *id.*

³⁴ See *id.* at 83.

³⁵ See *id.* at 35.

³⁶ See *id.*

³⁷ See, e.g., Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3510 (proposed Jan. 8, 2023) (to be codified at 16 C.F.R. pt. 910) (Federal Trade Commission proposed rule banning non-compete provisions and “de-facto” non-competes); Will Kishman, *The Non-Compete Landscape in 2023: What Employers Should Know About Changes in Non-Compete Law from the FTC, NLRB, Antitrust Claims and New State Laws*, EMPLOYMENT LAW WORLDVIEW (Sept. 28, 2023), <https://www.employmentlawworldview.com/the-non-compete-landscape-in-2023-what-employers-should-know-about-changes-in-non-compete-law-from-the-ftc-nlr-antitrust-claims-and-new-state-laws-us/#:~:text=There%20are%20now%20five%20states,for%20certain%20sales%20of%20businesses> (noting that five states have banned traditional non-competes as of September 2023: California, Colorado, Minnesota, North Dakota and Oklahoma).

³⁸ See Josh Eidelson and Zachary Mider, *Giving Four Months’ Notice or Paying to Quit Has These Workers Feeling Trapped*, BLOOMBERG (Jan. 26, 2023, 2:00 AM), <https://www.bloomberg.com/news/articles/2023-01-26/concentra-health-employees-feel-trapped-at-work#xj4y7vzkg>.

³⁹ See *id.*

⁴⁰ See Complaint, *Su v. Advanced Care Staffing, LLC*, No. 23-cv-2119 (E.D.N.Y. Mar. 20, 2023); Complaint, *Vidal v. Advanced Care Staffing, LLC*, No. 1:22-cv-05535 (E.D.N.Y. Sept. 16, 2022); Complaint, *Miclat v. Advanced Care Staffing, LLC*, No. 1:23-cv-05296 (E.D.N.Y. Jul. 12, 2023).

surrender all the wages ACS ever paid [the employee] during his employment, plus even more, all to satisfy ACS's claim of future profits. ACS's threats also deter employees from leaving their jobs, no matter the working conditions."⁴¹

Indeed, many stay-or-pay contracts exploit immigrant workers and their lack of knowledge about the immigration process to trap workers in bad jobs.⁴² One major hospital system, UPMC, has allegedly obtained foreign-educated nurses through Health Carousel LLC, a staffing agency whose contract with nurses included liquidated damages of \$20,000 if the nurse did not complete 6,240 hours of service.⁴³ The nurses soon found out that it would be far more difficult than they initially understood to reach that 6,240 hour threshold because the abundant mandatory overtime they worked did not count toward the threshold, nor did the first three months of shifts.⁴⁴ Meanwhile, the nurses faced grueling working conditions at well-below-market wages.⁴⁵ One worker became depressed and felt "basically trapped," especially because she feared potential immigration consequences if she left her position at the staffing agency.⁴⁶

The COVID-19 pandemic has accelerated employers' use of stay-or-pay contracts to retain workers. It is true that employers are needy for workers at the moment, but this is no excuse to lock workers into their jobs through contract measures. Rather, employers can look to successful models of employee retention through improved work cultures and hours—as well as other incentives to stay like longevity bonuses⁴⁷—in lieu of punishments for departing. The default at-will employment rule in the United States already harms workers more than employers because of workers' dependence on employers for their livelihood.⁴⁸ But with stay-or-pay contracts, employers are trying to make that rule operate in one direction only. In other words, stay-or-pay contracts make it such that employers may still terminate workers at will, but employees cannot afford to freely exercise their reciprocal right to quit at will.

Stay-or-pay contracts also implicate Thirteenth Amendment concerns of forced labor through indentured servitude, debt peonage, and debt servitude.⁴⁹ As Jonathan Harris has written, the Thirteenth Amendment

⁴¹ Complaint, *Su v. Advanced Care Staffing, LLC*, No. 23-cv-2119, at 2 (E.D.N.Y. Mar. 20, 2023).

⁴² See *Governing for Impact*, Department of Labor Proposed Action Memorandum (Nov. 15, 2023), <https://governingforimpact.org/wp-content/uploads/2023/11/DOL-ETA-Stay-Or-Pay-Memo.pdf>.

⁴³ See Josh Eidelson, *Nurses Who Faced Lawsuits for Quitting Are Fighting Back*, BLOOMBERG BUSINESSWEEK (Feb. 2, 2022, 2:00 AM), <https://www.bloomberg.com/news/features/2022-02-02/underpaid-contract-nurses-who-faced-fines-lawsuits-for-quitting-fight-back>.

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ *Id.*

⁴⁷ See NAT'L LAB. RELS. BD., MEMORANDUM GC 23-08, *supra* note 3, at 5.

⁴⁸ See Jonathan F. Harris, *Consumer Law as Work Law*, 112 CALIF. L. REV. ___, 27 (forthcoming 2024), <https://ssrn.com/abstract=4172535> (citing Aditi Bagchi, *Lowering the Stakes of the Employment Contract*, 102 B.U. L. REV. 1185, 1202–07 (2022) (explaining how employers in the U.S. wield extensive control over their employees' lives because of their provision of health care, making the U.S. different than most other industrialized countries); Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51, 69–71 (2017) (proposing delinking employment from social welfare benefits like health care, unemployment insurance, and worker compensation); Juliet P. Stumpf, *Getting to Work: Why Nobody Cares About E-Verify (and Why They Should)*, 2 U.C. IRVINE L. REV. 381, 390 (2012) (citing 8 U.S.C. § 1182(a)(9)(B)) (explaining that, when an employer ends the employment of a noncitizen in the U.S. on an employment visa, the worker becomes unlawfully present and subject to deportation)) (“[A] worker is generally dependent on their employer for their livelihood, which includes income, health care, old-age care, immigration status, and other needs. This makes the worker more dependent on the firm than the firm is on any individual worker.”); Matthew T. Bodie, *The Best Way Out Is Always Through: Changing the Employment At-Will Default Rule to Protect Personal Autonomy*, 2017 U. ILL. L. REV. 223, 224–32 (2017).

⁴⁹ U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”). See also Erin McCormick, “Indentured Servitude”: Low Pay and Grueling Conditions Fueling US Truck Driver Shortage, GUARDIAN (Nov. 22, 2021),

“which prohibits slavery, involuntary servitude, and debt peonage, provides a justification to give greater scrutiny to TRA[P]s—that can bind workers to their jobs—than to ordinary contracts.”⁵⁰ Indeed, a federal judge has compared a TRAP’s \$200,000 repayment scheme to indentured servitude and found that the employer’s primary incentive in using stay-or-pay contracts was to keep employees from leaving, rather than to recoup training expenditures.⁵¹

III. Current State

Section 7 of the NLRA protects employees’ “right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁵² A violation of Section 7 is an Unfair Labor Practice (ULP).⁵³ This protection applies regardless of whether the employer is unionized.

The current General Counsel of the NLRB, Jennifer Abruzzo, has taken the position in a May 2023 memo that “[n]on-compete provisions are overbroad, that is, they reasonably tend to chill employees in the exercise of Section 7 rights, when the provisions could reasonably be construed by employees to deny them the ability to quit or change jobs by cutting off their access to other employment opportunities that they are qualified for based on their experience, aptitudes, and preferences as to type and location of work.”⁵⁴ In other words, most non-competes violate the NLRA because the law protects workers who act together to improve working conditions and restricting their mobility tends to chill such activity.

The GC’s theory is even more applicable to stay-or-pay contracts than to traditional non-competes because, whereas the latter *indirectly* restrict worker mobility by precluding alternate employment, stay-or-pay contracts *directly* restrict worker mobility by requiring a worker to pay regardless of whether they obtain another job or whether their new job is in a similar field to their previous one. Therefore, stay-or-pay contracts are also a form of non-competes, as the Federal Trade Commission (FTC) recognized by calling many TRAPs “de-facto” non-competes in its proposed rule banning non-competes.⁵⁵ In fact, the GC’s May 2023 memo cited the FTC proposed rule to explain how mobility-restricting clauses like non-competes can violate statutes beyond the NLRA, such as the FTC Act and the Thirteenth Amendment.⁵⁶

<https://www.theguardian.com/business/2021/nov/22/indentured-servitude-low-pay-and-grueling-conditions-fueling-u-s-truck-driver-shortage> [https://perma.cc/SX54-SRFF].

⁵⁰ See Harris, *supra* note 1, at 729 (citing Maria L. Ontiveros, “Liquidated Damages” in *Guest Worker Contracts: Involuntary Servitude, Debt Peonage or Valid Contract Clause?*, 19 NEV. L.J. 413, 416 (2018); Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 418–20 (2011) (describing the contractual coercion of Black workers post-Civil War and the genesis of legislation and caselaw prohibiting debt peonage)).

⁵¹ See *Heartland Sec. Corp. v. Gerstenblatt*, No. 99 CIV. 3694 WHP, 2000 WL 303274, at *7 (S.D.N.Y. Mar. 22, 2000).

⁵² 29 U.S.C. § 157.

⁵³ 29 U.S.C. § 158(a)(1).

⁵⁴ NAT’L LAB. RELS. BD., MEMORANDUM GC 23-08, *supra* note 3, at 2.

⁵⁵ See Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 8, 2023) (to be codified at 16 C.F.R. pt. 910). The FTC had not issued a final rule as of November 2023. See also, NAT’L LAB. RELS. BD., MEMORANDUM GC 23-08, *supra* note 3, at 5 (“[S]pecial investments in training employees are unlikely to ever justify an overbroad non-compete provision because U.S. law generally protects employee mobility, and employers may protect training investments by less restrictive means, for example, by offering a longevity bonus.”).

⁵⁶ See NAT’L LAB. RELS. BD., MEMORANDUM GC 23-08, *supra* note 3, at 3, n.14.

The GC's five theories on how non-competes violate Section 7⁵⁷ equally apply to stay-or-pay contracts. "First, they chill employees from concertedly threatening to resign to demand better working conditions;"⁵⁸ "[s]econd, they chill employees from carrying out concerted threats to resign or otherwise concertedly resigning to secure improved working conditions;"⁵⁹ "[t]hird, they chill employees from concertedly seeking or accepting employment with a local competitor to obtain better working conditions;"⁶⁰ "[f]ourth, they chill employees from soliciting their co-workers to go work for a local competitor as part of a broader course of protected concerted activity;"⁶¹ and "[f]inally, they chill employees from seeking employment, at least in part, to specifically engage in protected activity with other workers at an employer's workplace."⁶² In all of these instances, employees lose leverage to collectively improve working conditions because a stay-or-pay contract chills their ability to threaten to quit as an option.

Indeed, the GC believes that at least some stay-or-pay contracts constitute unlawful non-competes, as shown by a Complaint that NLRB Region 13 filed against Juvly Aesthetics on September 1, 2023.⁶³ The Complaint, authorized by the GC, alleges that an aesthetics employer violated Section 7 of the NLRA by imposing non-competes and TRAPs and demanding training repayments of up to \$60,000. The TRAP charges in the Complaint and other potential complaints will be cases of first impression before the NLRB, assuming they reach the full Board.⁶⁴

Juvly Aesthetics's October 27, 2023 motion to dismiss the complaint argued that there was no on-point precedent signaling that its non-compete policy violates the Act.⁶⁵ In her May 2023 memo, the GC acknowledged that there was no extant NLRB precedent clearly stating that Section 7 protects employees' rights to collectively quit.⁶⁶ However, the GC memo correctly stated that "such a right follows logically from settled Board law, Section 7 principles, and the Act's purposes."⁶⁷ Notably, Juvly Aesthetics's motion to dismiss fails to specifically argue for the TRAPs' lawfulness.⁶⁸

⁵⁷ See NAT'L LAB. RELS. BD., MEMORANDUM GC 23-08, *supra* note 3, at 3–4.

⁵⁸ *Id.* at 3 (citing *Morgan Corp.*, 371 NLRB No. 142, slip op. at 3–4 (2022) (ruling that employee who complained to supervisor about coworker's raise and said that he and two other coworkers were threatening to quit because of it was engaged in protected concerted advocacy for higher wages)).

⁵⁹ *Id.*

⁶⁰ *Id.* at 4 (citing *Laurus Technical Institute*, 360 NLRB 1155, 1164-66 (2014) (finding that employee's inquiry with competitor about job opportunities on behalf of coworkers was protected concerted activity and not unprotected "disloyalty")).

⁶¹ *Id.* (citing *M.J. Mechanical Services*, 325 NLRB 1098, 1098, 1106 (1998) (holding that union organizers were protected in telling their coworkers about the benefits of belonging to a union and referring them to the union hall, even where it caused one employee to join the union, which then assigned the employee to work for a union contractor), *enforced mem.*, 194 F.3d 174 (D.C. Cir. 1999)).

⁶² *Id.* (citing *M. J. Mechanical Services*, 324 NLRB 812, 812-14 (1997), *enforced mem.*, 172 F.3d 920 (D.C. Cir. 1998)).

⁶³ See *Region 9-Cincinnati Issues Complaint Alleging Unlawful Non-Compete and Training Repayment Agreement Provisions (TRAPs)*, NAT'L LAB. RELS. BD. (Sept. 7, 2023),

<https://www.nlr.gov/news-outreach/region-09-cincinnati/region-9-cincinnati-issues-complaint-alleging-unlawful-non->

⁶⁴ An Administrative Law Judge (ALJ) must first hold a hearing and issue a decision and recommended order, and that order must be appealed, prior to any Board review. The ALJ's decision and recommended order, if not appealed, becomes the order of the Board but is not binding legal precedent.

⁶⁵ See *Juvly Aesthetics*, NLRB Case 09-CA-300239 (Respondent's Motion to Dismiss Complaint Oct. 27, 2023), <https://www.nlr.gov/case/09-CA-300239>.

⁶⁶ See NAT'L LAB. RELS. BD., MEMORANDUM GC 23-08, *supra* note 3, at 3.

⁶⁷ *Id.* (citing *Crescent Wharf & Warehouse Co.*, 104 NLRB 860, 861-62 (1953) (finding that voluntary resignation, by letter, of six employees dissatisfied with their employer's refusal to increase their wages was unprotected where there was "no basis for inferring that the letter was a device selected by the . . . employees to enforce demands upon [the employer]")).

⁶⁸ See *Juvly Aesthetics*, NLRB Case 09-CA-300239 (Respondent's Motion to Dismiss Complaint Oct. 27, 2023), <https://www.nlr.gov/case/09-CA-300239>.

In addition to the arguments articulated in the GC memo, stay-or-pay contracts violate Section 7 because, if the stay-or-pay contract applies even if the employer fires the worker—which many do—the contract chills any concerted activity that could result in termination. In other words, an employee will be less likely to act collectively or to organize a union because they would face not only the loss of income from a retaliatory termination but also the stay-or-pay contract’s repayment obligation. This additional risk was demonstrated by the nurses’ experiences described above in Part II.A.

An August 2023 NLRB decision provides even greater support for the argument that written policies like stay-or-pay contracts violate the NLRA than when the GC wrote her May 2023 memo. The decision, *Stericycle, Inc.*,⁶⁹ makes it easier for a worker to prove that their employer’s written policies have a chilling effect on employees’ ability to act concertedly, in violation of Section 7. Essentially, the policy need have only a *reasonable tendency* to chill employees from exercising their rights, and the perspective should be that of an employee “economically dependent” on the employer—most employees bound by stay-or-pay contracts—rather than the vaguer “reasonable” employee as under the prior standard.⁷⁰ “[E]ven if a contrary, noncoercive interpretation of the rule is also reasonable,” the written policy would still violate the Act.⁷¹

The *Stericycle* decision returns to the standard in effect before the Trump NLRB created a categorical approach that declared some employer policies always lawful and which was more difficult for workers to satisfy. Though the policy at issue in *Stericycle* was not a stay-or-pay contract or non-compete, the decision equally applies to those contracts. NLRB Region 13 has already embraced this analysis, relying heavily on the *Stericycle* “reasonable tendency to chill” language in its opposition to Juvly Aesthetics’s motion to dismiss the ULP complaint.⁷²

Although the *Stericycle* decision does state that, “an employer can rebut the presumption that a rule is unlawful by proving that it advances legitimate and substantial business interests that cannot be achieved by a more narrowly tailored rule,”⁷³ recoupment of training costs is not a legitimate business interest sufficient to justify a non-compete.⁷⁴ And while, the May 2023 GC memo did acknowledge that there could be some narrowly tailored non-competes that would not violate Section 7, such as those limited to protecting proprietary or trade secret information,⁷⁵ TRAPs are almost always less narrowly tailored even than non-competes, because they apply regardless of geography and subsequent employment. More importantly, under the previous standard that *Stericycle* returns to, the NLRB and NLRB administrative law judges routinely found that employer policies that were on the fence violated Section 7. Therefore, employers should fail in arguing that employee immobility is a “legitimate and substantial business interest,” let alone that a stay-or-pay contract would be the most narrowly tailored way to achieve such an interest. Indeed, stay-or-pay contracts are almost always less narrowly tailored even than non-competes, because they apply regardless of geography and subsequent employment (or lack thereof).

Importantly, for employees working for more than one entity in which one of the entities requires a stay-or-pay contract, a new NLRB final rule will make joint employer liability easier to satisfy, holding both entities liable for Section 7 violations.⁷⁶ The rule, issued on October 27, 2023, and effective February 26, 2024, “considers the alleged joint employers’ authority to control essential terms and conditions of

⁶⁹ 372 NLRB No. 113 (Aug. 2, 2023).

⁷⁰ *See id.* at *3.

⁷¹ *Id.*

⁷² Juvly Aesthetics, NLRB Case 09-CA-300239 (Opposition to Respondent’s Motion to Dismiss Complaint Nov. 20, 2023), <https://www.nlr.gov/case/09-CA-300239>.

⁷³ 372 NLRB No. 113, at *2.

⁷⁴ *See, e.g.*, Restatement of Employment Law § 8.07 cmt. f (Am. L. Inst. 2015) (noting, however, that such a training investment interest may justify a repayment obligation).

⁷⁵ *See* NAT’L LAB. RELS. BD., MEMORANDUM GC 23-08, *supra* note 3, at 4–5.

⁷⁶ *See* Standard for Determining Joint Employer Status, 88 Fed. Reg. 73,946 (Oct. 27, 2023) (to be codified at 29 C.F.R. pt. 103), <https://public-inspection.federalregister.gov/2023-23573.pdf>.

employment, *whether or not such control is exercised*, and without regard to *whether any such exercise of control is direct or indirect.*⁷⁷ The prior NLRB rule, in contrast, made it harder to establish joint employer liability because it required not only the *authority* to control but also *actual* “substantial direct and immediate control” over essential terms of conditions of employment.⁷⁸ The new rule means that a staffing agency that sends a worker to a client firm, such as the hospital described in Part II.A. above, could be held jointly liable with the client firm for a stay-or-pay contract that violates Section 7, regardless of which entity had the worker sign the contract.

IV. Proposed Action

The NLRB GC should issue a memorandum clarifying that stay-or-pay contracts violate Section 7 of the NLRA, just as she did in her May 2023 memo on non-compete provisions.⁷⁹ Stay-or-pay contracts are at least as chilling to concerted activity as non-competes.⁸⁰ Moreover, as articulated above in Part III., NLRB case law has only become more favorable to workers under written policies like stay-or-pay contracts since the GC’s May 2023 memo. In addition, just as she did in the May 2023 memo, the GC should instruct the NLRB Regional Offices to submit to the NLRB Division of Advice cases involving stay-or-pay contracts and seek make-whole relief for affected employees.⁸¹ In addition to including relief for specific employment opportunities that were lost, as the GC instructed in her May 2023 memo on non-competes, the make-whole relief should include: stay-or-pay debt amounts that the employee paid; additional fees or costs the employee paid; any amounts withheld from the employee’s paycheck to pay the debt; any harm to the employee’s consumer report (credit report) due to collection efforts to recover the debt; and other consequences.⁸² And just as with the instruction from the May 2023 memo, such relief should be sought “even absent additional conduct by the employer to enforce the provision,”⁸³ because the maintenance of such a stay-or-pay contract, even if not enforced, has a chilling effect on employees.⁸⁴ Last, just as she instructed in her May 2023 memo, the GC should instruct Regional Offices to seek evidence of the impact of stay-or-pay contracts on employees and, where applicable, “present at trial evidence of any adverse consequences,” including those consequences mentioned above.⁸⁵

In addition, the GC should clarify that the NLRA protects employees of all income levels from stay-or-pay contracts, not just low-wage workers. Indeed, Section 7 covers employees at all income levels. The GC’s May 2023 memo noted that “[i]t is unlikely an employer’s justification would be considered reasonable in common situations where overbroad non-compete provisions are imposed on low-wage or middle-wage workers who lack access to trade secrets or other protectable interests.”⁸⁶ However, the NLRB should not impose a salary threshold in a ruling on stay-or-pay contracts, nor could it.⁸⁷ In fact, stay-or-pay contracts like TRAPs began with high-wage employees⁸⁸ and can equally chill high-wage employees’ concerted activity, especially as more

⁷⁷ NLRB *Fact Sheet Joint-Employer Standard Final Rule*, NAT’L LAB. RELS. BD. (Oct. 27, 2023), <https://www.nlr.gov/sites/default/files/attachments/pages/node-9558/joint-employer-fact-sheet-2023.pdf> (emphasis in original).

⁷⁸ *Id.*

⁷⁹ See NAT’L LAB. RELS. BD., MEMORANDUM GC 23-08, *supra* note 3, at 1.

⁸⁰ See Harris, *supra* note 1, at 726.

⁸¹ See NAT’L LAB. RELS. BD., MEMORANDUM GC 23-08, *supra* note 3, at 6.

⁸² See *id.*

⁸³ *Id.*

⁸⁴ See Harris, *supra* note 1, at 753–54 (noting that, even with unenforceable TRAPs, there is still the *in terrorem* effect where “[m]any workers likely feel compelled to stay in their jobs through the entire TRA[P] repayment period or unquestioningly pay the employer the repayment amount.”)

⁸⁵ NAT’L LAB. RELS. BD., MEMORANDUM GC 23-08, *supra* note 3, at 6.

⁸⁶ See NAT’L LAB. RELS. BD., MEMORANDUM GC 23-08, *supra* note 3, at 5.

⁸⁷ Of course, managers are not protected by the NLRA.

⁸⁸ See Harris, *supra* note 1, at 741 (explaining that TRAPs “were mostly limited to higher-skill and higher-wage employees such as engineers, securities brokers, and airline pilots.”).

doctors, nurse practitioners, physician assistants, and technology employees act concertedly and attempt to organize unions.⁸⁹ The GC’s complaint against Juvly Aesthetics tacitly acknowledges this, as two of the three employees at issue were nurse practitioners whose average salaries in Ohio range from \$129,000 to \$160,000.⁹⁰ Additionally, a single standard for all employees, regardless of wages, is easier for employees to understand and harder for employers to manipulate.⁹¹ And a single standard for all employees is theoretically and doctrinally coherent.

Last, the GC should educate the public about the unlawfulness of stay-or-pay contracts and encourage employees to file ULP charges, especially employees in the sectors using stay-or-pay contracts most frequently: transportation and logistics, cosmetology and aesthetics, health care, retail, technology, and finance.⁹²

V. Conclusion

Stay-or-pay contracts are quickly turning workplaces into sources of devastating debt for workers. The NLRA likely prohibits most stay-or-pay contracts as unlawful restraints on employees’ protected concerted activity because the contracts effectively remove the threat of a group resignation as a bargaining tactic to improve the terms and conditions of work, as well as chill workers’ concerted activity due to the debt repayment-triggering consequences of a retaliatory termination. While there is no unequivocal extant NLRB precedent recognizing a NLRA Section 7 right to concertedly resign, as the GC wrote in her May 2023 memo, “such a right follows logically from settled Board law, Section 7 principles, and the Act’s purposes.”⁹³

Furthermore, NLRB case law has only enhanced Section 7 protections for workers since the GC May 2023 memo laid out the theory for how most non-competes violate Section 7. In addition, most stay-or-pay contracts even more directly chill concerted activity than do non-competes, as they require repayment regardless of where the employee works next and raise the stakes of retaliatory termination beyond the loss of income. Therefore, the NLRB GC should clarify in a memo that stay-or-pay contracts likely violate Section 7, just she has done with traditional non-compete provisions, and instruct the NLRB Regional Offices to submit

⁸⁹ See, e.g., Parker Purifoy, *Doctors Move Toward Unionization Amid Post-Pandemic Merger Wave*, BLOOMBERG LAW (Aug. 16, 2023), <https://news.bloomberglaw.com/daily-labor-report/doctors-move-toward-unionization-amid-post-pandemic-merger-wave>; Jordan Moreau, *Marvel VFX Workers Unanimously Vote to Unionize With LATSE*, VARIETY (Sept. 13, 2023), <https://variety.com/2023/artisans/news/marvel-union-special-effects-iatse-1235722298/>.

⁹⁰ *Harper Holdings, LLC d/b/a Juvly Aesthetics v. Cordero et al.*, NLRB Case Nos. 09-CA-300239, et al. (motion to dismiss filed Oct. 27, 2023), <https://www.nlr.gov/case/09-CA-300239>; Zip Recruiter, *Aesthetic Nurse Practitioner Salary in Ohio*, <https://www.ziprecruiter.com/Salaries/Aesthetic-Nurse-Practitioner-Salary--in-Ohio> (last visited Nov. 1, 2023) (noting \$129,082 average salary); Indeed.com, *Family Nurse Practitioner Salary in Ohio*, <https://www.indeed.com/career/family-nurse-practitioner/salaries/OH> (last visited Nov. 1, 2023) (listing \$160,429 average salary).

⁹¹ Consider, for example, how employers have manipulated the “salary threshold” test under the Fair Labor Standards Act to avoid paying overtime. Myriam Robinson-Puche, *Time is money...sometimes Some employers are using job title inflation to skimp workers on overtime*, MONEY SCOOP (Mar. 7, 2023), <https://www.morningbrew.com/money-scoop/stories/2023/03/07/time-is-money-sometimes>.

⁹² See HARRIS & HICKS, *supra* note 9, at 3.

⁹³ NAT’L LAB. RELS. BD., MEMORANDUM GC 23-08, *supra* note 3, at 3 (citing Crescent Wharf & Warehouse Co., 104 NLRB 860, 861–62 (1953) (holding that voluntary resignation, by letter, of six employees dissatisfied with their employer’s refusal to increase their wages was unprotected where there was “no basis for inferring that the letter was a device selected by the . . . employees to enforce demands upon [the employer]”); QIC Corp., 212 NLRB 63, 68 (1974) (finding that employees’ seeking employment at competitor of their employer was protected where “[t]he employees were bound by no contract to remain with the [employer] and, as a result, were free at any time they wished to exercise economic self-help and seek better paying jobs”).

to the NLRB Division of Advice cases involving stay-or-pay contracts and seek make-whole relief for affected employees.