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# STAY-OR-PAY

Federal Actions to End Modern-Day Indentured Servitude Across the Economy

December 2023

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## CONTRIBUTERS AND SUPPORTING ORGANIZATIONS

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# FOREWORD

# Foreword

American workers have unprecedented bargaining power in the workplace — exhibited through continued wage gains, a surge in workplace organizing, and expanded job opportunities for workers with all levels of education. In the face of more worker organizing and worker power after the pandemic, employers confronted growing challenges retaining workers for the same paltry wages that they had been paying for decades.

With corporate balance sheets flush from booming profits, this was the moment when corporations should have been making unprecedented investments in developing and retaining their existing workforce. Investments in worker retention, including on-the-job training and employer-paid continuing education was a hallmark of the mid-20th century U.S. labor market — the last prolonged period of sustained economic growth and surging worker power.

The following series of papers tells a different story: rather than ushering in a golden age of corporate investment in workers, the largest employers across the economy have turned to predatory "Stay-or-Pay" contracts. Stay-or-pay contracts are forced on workers as a condition of employment, allowing corporations to use the threat of debt collection or litigation to lock workers in place, limiting workers' mobility and bargaining power. When they do leave, workers are hit with a crushing financial penalty just because a worker had the audacity to quit their job.

Much like "junk fees," stay-or-pay contracts operate to pad profit margins not by developing a new product or improving services, but through deception and raw exercises of market power. For the vast majority of workers, the threat of debt, or even debt collection litigation brought by employers, becomes a form of modern-day indentured servitude — keeping them trapped in jobs with low wages and bad working conditions.

Stay-or-pay contracts take many forms. For example, last year the giant pet retailer PetSmart made headlines for threatening to stick low-wage pet groomers who quit with thousands of dollars of illegal training debt via a Training Repayment Agreement Provision, or "TRAP," buried in the fine print of its employment contracts. Other employers have included contract clauses that require workers to pay liquidated damages if they separate or pursue work at a rival or even clauses purporting to allow employers to sue for unspecified damages, including the "lost profits" that follow from losing a worker. Stay-or-pay contracts are proliferating across the economy, harming workers in the transportation, health care, retail, aviation, and tech industries.

For more than a year, our organizations have raised warnings about these contracts, prosecuting groundbreaking lawsuits on behalf of affected workers and calling on officials at every level to embrace a "whole-of-government" response to this threat.

There are early signs that federal officials are taking seriously the threat that TRAPs and other stay-or-pay contracts present to workers and the labor market. Last year, the Federal Trade Commission proposed a ban on these contracts where they operate as "de facto non-competes" — part of a broader effort to ban the use of non-compete agreements across the economy. Similarly, the National Labor Relations Board has signaled that it considers the use of TRAPs to be an unfair labor practice, bringing the first federal enforcement action against an employer for enforcing a TRAP against workers. The Consumer Financial Protection Bureau has also raised alarms about employer-driven debt, including TRAPs — suggesting that federal consumer financial law also protects workers where stay-or-pay contracts drive them into debt.

The Biden Administration should build on these early actions — making the fight against TRAPs and other stay-or-pay contracts a priority for the White House Competition Council, and instructing agencies across the federal government to aggressively regulate and enforce the law. The following papers offer a detailed set of recommendations to agencies across the federal government, all in pursuit of the same goal: to protect workers and honest businesses by driving the use of TRAPs and other stay-or-pay contracts out of the economy.

# ENFORCING THE FAIR LABOR STANDARDS ACT AGAINST EXPLOITATIVE STAY-OR-PAY CONTRACTS

*The following was originally sent as a letter to Principal Deputy Administrator Jessica Looman on October 4, 2023*

## 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.[1] 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").[2] 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.

# Stay-Or-Pay Contracts Are a Problem That the Wage and Hour Division Should Continue to Address

## 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 on-the-job training (which itself is often "of dubious quality or necessity"[3]) 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,"[4] 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.[5] 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.[6]

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.[7] 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.[8] Women and people of color are also more likely to be low-wage workers,[9] 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.[10] 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.[11]

## 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.

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.

## 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.[12] The order directed all agencies to "consider using their authorities to" combat these harms.[13]

Stay-or-pay contracts can operate as de facto non-compete agreements and produce the anti-competitive 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.[14] Even if such a contract is not enforced, the fact that it exists can pressure workers into staying in their job.[15] In fact, some employers actively reference the existence of the contract in reply to worker concerns about job conditions.[16]

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.[17] 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,[18] employers instead use the contracts as tools to reduce outside employment options.

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."[19] Another example is PetSmart, which used TRAPs to retain pet groomers in unsafe conditions.[20]

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."[21] 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.[22]

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:[23]

> 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.[24]

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 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.[25] 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.[26] 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.[27] 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.[28]

## 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.[29]

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.[30]

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.

## 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

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.[31] 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.[32] 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."[33] It separately found that the TRAP amounted to an illegal non-compete agreement under a Wisconsin state law.[34]

The city appealed the district court's ruling regarding the TRAP, but only on the court's finding under Wisconsin law.[35] 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."[36]

In 2010, the Ninth Circuit considered a similar case in *Gordon v. City of Oakland*.[37] 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.[38] 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."[39] 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.[40]

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,[41] Louisiana,[42] New York,[43] and Wisconsin[44] 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*.[45] In *Ketner v. BB&T*, former bank employees alleged that their TRAP violated the anti-kick-back regulations of the FLSA.[46] 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.[47] The court rejected BB&T's contention that the arrangement was a "voluntarily accepted loan."[48] 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.[49] 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.[50]

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.

## 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.[51] 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 and SBPC, filed a lawsuit in April 2023 on behalf of customers of a coding bootcamp, alleging that their TRAP violated the FLSA.[52] 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.[53]

# 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

## 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."[54]

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.[55] 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.[56] 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.[57]

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.

## 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.

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.[58] Though a good feature in general, it also means that the Department 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.[59]

In all cases,[60] 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.

# 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:

## 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."[61] Sections 6 and 15(a)(2) of the Act make it unlawful for employers to fail to pay employees a minimum wage.[62] 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.[63] An employee may not waive or abridge their rights under the Act, including through "contractual understandings."[64]

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.[65] 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.[66] The current, long-standing regulations state:

> <u>§ 531.35 "Free and clear" payment; "kickbacks."</u>
> 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

> 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…[67]

## 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."[68] The inquiry requires that the expense be "for the employer's benefit"[69] 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."[70]

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.[71] 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.[72] Requiring the employee to agree to cover the expense as a condition of employment is also indicative of kick-back status.[73]

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.[74]

## 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."[75] 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 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,[76] and the required repayment upon early departure serves the crucial business function of retaining employees.[77] 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.[78] Stay-or-pay contracts that require employees to cover the cost of "lost profits" (or even "lost goodwill") incurred by an employer[79] when an employee departs similarly tend to shift the common business expenses associated with employee turnover.[80]

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.[81] 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,[82] so too are recruitment, training, onboarding, retention, and lost profits inherent in operating a business at all.

## 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. "[T]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."[83] 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 "any workweek."[84] Courts have focused on FLSA compliance within the first workweek when considering employees' pre-employment expenses.[85] 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.

## 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."[86] 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.[87]

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.'"[88] 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.

## 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.[89] The guidance does not make reference to statutory or regulatory authority that supports this exception, but does assert that this loan repayment exception is the DOL's "longstanding position."[90] 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.[91] Even courts declining to follow Gordon and its progeny have done so.[92]

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.

## 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.[93] Additionally, state laws and common law on wage and hour requirements[94] and contract unconscionability[95] 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.

## 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

## Endnotes

1 This paper was authored by Reed Shaw.

2 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).

3 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").

4 Trapped at Work at 14.

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

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

7 Trapped at Work at 8.

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

9 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/.

10 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.

11 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").

12 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/.

13 *Id.* § 5(a).

14 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").

15 CFPB Report.

16 *Id.*

*17 Id.*

18 *Id.*

19 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").

20 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").

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

22 Trapped at Work at 18.

23 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/.

24 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.

25 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/.

26 Trapped at Work at 18.

27 CFPB Report.

28 *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.

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

30 *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").

31 *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).

32 *Id.* at 682, 694.

33 *Id.* at 695.

34 *Id.* at 691-2.

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

36 *Id.* at 778.

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

38 *Id.* at 1094.

39 *Id.* at 1095-6.

40 *Id.* at 1096.

41 *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).

42 *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).

43 *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).

44 *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").

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

46 *Id.* at 383.

47 *Id.*

48 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).

49 *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").

50 *McClain*, 2023 WL 3587284, at *7.

51 DOL Complaint at 8.

52 *See generally* Complaint, *O'Brien v. Smoothstacck, 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.

53 *Id.* at 6.

54 5 U.S.C. § 553(b)(A).

55 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.

56 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.

57 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.

58 29 U.S.C. § 216(b).

59 *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).

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

61 29 U.S.C. § 202(a).

62 29 U.S.C. §§ 215(a)(2), 206.

63 29 U.S.C. §§ 215(a)(2), 207.

64 *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).

65 29 C.F.R. § 531.35; 32 Fed. Reg. 13575.

66 *Id*.

67 Emphasis added.

68 *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").

69 29 C.F.R. § 531.35.

70 *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).

71 *Id.*

72 *Id.*

73 *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").

74 *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. Pizza to You, LLC*, 538 F. Supp. 3d 785, 791 (S.D. Ohio 2021).

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

76 *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").

77 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).

78 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.

79 DOL Complaint at 10.

80 *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/.

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

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

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

84 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").

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

86 29 C.F.R. § 531.35.

87 *Id*.

88 *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").

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

90 1984 Opinion Letter.

91 *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).

92 *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").

93 *See supra* note 1.

94 State wage and hour law that is more protective than the FLSA. *See* Complaint, *Scally v. PetSmart LLC*, case no. 22-cv-06210-YGR (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).

95 *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).

# INVOKING THE DEPARTMENT OF LABOR'S AUTHORITY UNDER THE IMMIGRATION AND NATIONALITY ACT TO BAN NON-COMPETE AND STAY-OR-PAY CONTRACTS AMONG FOREIGN-EDUCATED NURSES

## Introduction

Health systems and staffing agencies that hire foreign-educated nurses ("FENs") to the United States under employment-based visa categories commonly use restrictive employment contracts, like stay-or-pay agreements, to further constrain an already-vulnerable workforce.[1] Stay-or-pay contracts require a worker to pay what are often referred to in the industry as "breach fees"[2] if they resign or are terminated before a specific amount of time has passed. This looming financial penalty traps FENs in jobs with low wages and unsafe working conditions, and threatens patient health and safety. The proliferation of these contracts also harms domestically-trained nurses by suppressing their wages, inducing them to accept worse job conditions to compete with FENs, and by making FENs even more attractive to employers as a highly captive segment of the workforce.

This memorandum proposes that the Department of Labor ("DOL") update its regulations under the Immigration and Nationality Act ("INA"), which govern the permanent labor certification process, to prohibit employers from subjecting workers to restrictive employment contracts that would require them to pay their employer if they resign, are terminated, or attempt to find another job. This action would follow previous DOL action in similar contexts that sought to reduce the coercive effects of employer-driven debt on foreign workers.[3]

# Justification

## Stay-Or-Pay Contracts for Foreign-Educated Nurses

Restrictive employment contract provisions like traditional non-compete, breach, and liquidated damages[4] clauses and Training Repayment Agreement Provisions ("TRAPs")[5] – collectively, stay-or-pay contracts – are ubiquitous throughout the healthcare industry. Although the specifics of the arrangements vary, they all have the effect of immobilizing workers by imposing a financial penalty on them if they choose to leave (and, in some cases, if they are terminated). For example, up to 80 percent of certified registered nurse anesthetists are currently subject to traditional non-compete clauses.[6] In 2022, National Nurses United ("NNU") conducted a survey of registered nurses and found that about half of respondents were required to participate in a training or residency program during their career; 55 percent of the registered nurses working in hospitals who participated in such programs reported being required to repay their employer for the cost of their training if they departed the hospital before their employment contract expired.[7] TRAPs are often deployed at less desirable hospitals with unsafe working or patient care conditions, including at the largest for-profit healthcare system in the country, HCA Healthcare.[8] Indeed, TRAPs have become so ubiquitous in the healthcare sector that nurses who purposefully search for jobs that do not require TRAPs can struggle to find them.[9]

These employment practices are especially common among healthcare employers – primarily health systems and, increasingly, healthcare staffing agencies – that recruit FENs to work in the United States.[10] The prevalence of such practices is difficult to precisely quantify, in part because there is not a comprehensive database of the contracts under which workers with employment-based visas are hired.[11] However, according to a report supported by the MacArthur Foundation and another from the Department of Health and Human Services ("HHS"), it is standard industry practice to require FENs to commit to a single employer for 18 months to three years.[12] The contracts include breach fees that nurses must pay if they leave the employer, and employers have sued workers for as much as $100,000 upon their resignation.[13]

Stay-or-pay contracts among FENs are often accompanied by other dishonest and low-road employer practices. For example, some nurses are not told of the stay-or-pay commitment until after they have worked with an employer to apply for a visa, or even after they have moved to the United States.[14] Some employers place FENs in substandard housing upon arrival to the United States. Some healthcare staffing agencies also refuse to pay FENs when they are "benched" between assignments, permitting those employers to keep captive workers on standby without pay until positions become available, in conflict with the requirement that nursing green cards be made available only for workers in full-time and permanent employment.[15] When they do pay, agency employers using FENs are also more likely to pay nurses substantially less than nurses, foreign and domestic, that are hired directly by health systems.[16] This is in part because prevailing wage determination is often done at the time of agency recruitment, which can often be years before a FEN starts work – leaving their wage below the market rate.[17] For example, a Filipina nurse at Health Carousel, LLC, an international healthcare recruiting and staffing agency, learned upon starting her placement in Pennsylvania that she was paid much less than other nurses, earning only $25.50 per hour compared to more than $35 per hour. The nurse was troubled by the work, which she found to be brutal and often dangerous due to understaffing, and the healthcare staffing agency exerted intense control over her life – for example, by not allowing her to discuss working conditions with other staff or leave town without the agency's permission. When the nurse decided she needed to leave her job, the staffing agency invoked the contract she had signed in the Philippines and demanded $20,000, which she paid with money her boyfriend had been saving for years to buy a house.[18] Similar stories of exploitation by nurse staffing agencies are all-too-common.[19]

## Exploitation Enabled by Stay-Or-Pay Contracts

Stay-or-pay contracts for FENs further immobilize an already-vulnerable workforce. Due to the fact that they must acquire employer sponsorship to come to the country and that contractual provisions and employers sometimes dishonestly imply that there are potential immigration consequences for leaving a job,[20] FENs are already more likely than United States workers to feel tied to their employer.[21] FENs are typically recruited in their country of origin through carefully orchestrated events that offer potential workers an often-misleading glimpse of a luxurious lifestyle in the United States.[22] Recruiters make promises that go unfulfilled, and require investments or contractual commitments early in the process before the workers have a full picture of the conditions of their eventual United States-based placement, which can often be quite poor.[23] Add on top of this scheme a financial penalty for separating from their health system or staffing agency employer — either through resignation or termination — and dishonest threats of deportation, and FENs are subject to intense and often coercive pressure to remain with their employer.

These clauses limit employees' ability to exit a job, raising the stakes of termination or quitting, and depriving them of leverage to raise concerns about workplace conditions.[24] In many cases, the monetary sum that workers would have to pay out to their employer in the event of resignation or termination is prohibitively large. For example, the Department of Labor recently filed a complaint under the Fair Labor Standards Act, alleging that the liquidated damages provision utilized by a healthcare staffing agency would have required its FEN employee to repay all income that he grossed during the entirety of his employment, thus depriving him of the statutorily mandated minimum wage.[25] Even when such contractual provisions are not enforced, or are not legally enforceable,[26] they have an *in terrorem* effect, and their mere existence may pressure workers into staying in an otherwise unacceptable job.[27] In fact, some employers actively reference the existence of the contract in reply to worker concerns about job conditions.[28] Several FENs spoke with NBC News on the condition of anonymity to describe why they weren't able to quit unsafe jobs.[29] One described being unable to leave her job — at which she felt unsafe — after her employer threatened an $100,000 lawsuit.[30] Another FEN wanted to leave his job because he was being paid lower wages than his co-workers and unpaid overtime, but he would face a $45,000 penalty for breaking his five-year contract after one year. "It's this feeling of being in a cell and not being able to freely do what you want," explained the nurse.[31] Yet another nurse decided to return to their job after the hospital sent a post-resignation letter demanding that the nurse either pay the hospital $18,000 or return to work and complete the two-year/4,000 hour requirement.[32]

This pressure can make it difficult for FENs to speak up about low or unfair wages and unsafe working conditions, including discrimination. Employers of FENs reportedly mandate excessive overtime, place nurses in severely understaffed facilities, and fail to provide sufficient training.[33] As alluded to above, FENs are also commonly underpaid when compared to their domestic counterparts.[34] One study found that the likelihood of poor treatment of FENs compared to domestic nurses was higher for nurses from low-income countries (versus high-income countries) and for those recruited by staffing agencies (versus hired directly by a health system).[35]

Though not the focus of this memorandum, recent litigation under the forced labor prohibition in the Trafficking Victims Protection Act, summarized in an HHS report, illustrates that the exploitative pressure enabled by stay-or-pay contracts for FENs can potentially subject employers to civil and even criminal liability.[36] In one case, a New York federal district judge ruled in favor of a class of plaintiff nurses recruited from the Philippines on claims arising out of a contract utilized by a recruiting agency.[37] In that case, a Filipino-registered agency had recruited nurses in the Philippines for a job at a nursing home in New York. The nurses were required to sign a stay-or-pay contract that included a $25,000 liquidated damages clause, as well as a separate document requiring reimbursement of various recruitment costs. Upon the nurses' arrival in the United States, their contracts were assigned to a different nursing staffing agency, which assigned them to other nursing homes. After nearly one year at the nursing home, the lead plaintiff resigned because of understaffing and overworking. The defendants immediately sued the plaintiff and other nurses to enforce the liquidated damages provision, and to seek an additional $250,000 for "tortious interference with contract and prospective business relations."[38] The court found the liquidated damages provision to be an unenforceable penalty under New York state law.[39] Additionally, the court found that the $25,000 liquidated damages provision was sufficient to count as a threat of "serious harm" under the TVPA, in part because of the particular vulnerabilities of the nurses as "recent immigrants to the United States."[40]

In *Magtoles v. United Staffing Registry, Inc.*,[41] a staffing agency imposed a three-year liquidated damages provision and a non-compete clause on FENs. A plaintiff in the case explained that she attempted to quit because she was overworked and the conditions were not safe for her patients.[42] The court found that the liquidated damages provision violated the TVPA, noting that the threatened financial penalties fit within Congress' broad definition of serious harm under the forced labor prohibition, which includes instances "in which personas are held in a condition of servitude through nonviolent coercion."[43] The court cited the difficult work environment, plaintiffs' reliance on their employer for understanding of the contract, reluctance to complain to the United States embassy due to potential immigration consequences, and the plaintiffs' lack of bargaining power as particular vulnerabilities of the FENs.[44]

## Adverse Effects on Domestic Nurses

Restrictive employment contracts among FENs have negative impacts on domestically-trained workers. First, when healthcare employers have access to highly captive labor like FENs that is restricted by fears of immigration consequences and particular requirements about visa sponsorship and stay-or-pay contracts, they may be less likely to offer jobs to U.S.-trained nurses in the first place.[45]

Second, if employers are able to constrain FENs' demands for better wages and working conditions through stay-or-pay contract-enabled coercion, U.S.-trained workers may have to reduce their demands and accept poorer wages and conditions to compete for jobs. As the DOL asserted in its 2007 final rule that prohibited employers from accepting worker reimbursements for costs associated with labor certification:

> [a]n alien employee who reimburses his employer via deductions from his paycheck or a lump payment is effectively being paid a lower wage than agreed to by the employer on the labor certification. A U.S. worker is non-competitive with the alien worker unless he too accepts the actual lower wage. Therefore, the practice of aliens reimbursing employers for expenses the employer incurred in the labor certification process adversely affects the compensation of U.S. workers.[46]

Research shows that restrictive employment contracts like non-compete clauses and stay-or-pay contracts tend to suppress wages in the sectors in which they are common. Several studies demonstrate the connection between non-compete clauses and wage suppression, including one that found that decreasing non-compete clause enforceability from the approximate enforceability level of the fifth-strictest state to that of the fifth-most-lax state would increase workers' earnings by 3-4%.[47]

Stay-or-pay contracts like TRAPs and breach fees used to be concentrated exclusively among health systems and staffing agencies recruiting FENs,[48] but no longer. Now, due to the provisions' proven ability to restrain workers' opportunities in the employment-based visa realm, healthcare systems and staffing agencies use the same types of stay-or-pay contracts when hiring U.S.-trained workers.[49] U.S.-trained workers are compelled to accept these conditions, in part because employers can just turn to more exploitable foreign labor if U.S.-trained workers refuse. Additionally, despite regulations prohibiting the practice, many employers offer lower wages to FENs than to similarly educated or employed domestically-trained workers.[50] This can both encourage employers' use of FENs over domestically-trained nurses *and* reduce the ability of nurses to bargain for better wages.

Finally, this dynamic exacerbates the underlying problem that has made FENs so important: a shortage of domestic nursing labor.[51] If wages and conditions continue to deteriorate for workers in the U.S. — including deterioration associated with stay-or-pay contracts — fewer U.S.-trained nurses will seek or stay in these jobs, which will only heighten our dependence on FENs.

## Adverse Effects on Patient Safety and Health

Stay-or-pay contracts in nursing may also threaten patient health and safety in several ways. As NNU explained in a comment to the Consumer Financial Protection Bureau, "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."[52] In survey comments and interviews with NNU, registered nurses frequently reported "being required to work in units that had dangerously low nurse-to-patient ratios."[53] The employee in the DOL complaint referenced above, for example, wanted to quit primarily because of his concerns about patient safety, which he raised with his employer to no avail. He eventually "grew deeply concerned that he could not meet his ethical and professional responsibilities under [his employer's] working conditions, including a heavy patient load that he believed in good faith did not permit him to provide adequate patient care" and began suffering physical and mental health harms from his employment.[54] An SEIU regulatory comment identified the University of Pittsburgh Medical Center as a healthcare employer that has a "well-documented history of retaliating against workers" who speak up about workplace issues, but explained that workers would be less able to speak up about working conditions because of the stay-or-pay provisions in their employment contracts.[55]

Trapping workers in toxic working conditions can also contribute to burnout. Burnout and toxic work environments for medical workers has been found to increase rates of medical error.[56] A plaintiff nurse in one of the TVPA cases mentioned above explained in her deposition testimony that she resigned because “we were overworked and it is giving me almost every day anxiety whenever I go to work. It’s not safe for the patients. And I even question myself if I want to be a nurse because I cannot provide quality care for my patients.”[57] One FEN interviewed by NBC News, whose employer sued her for more than $100,000 when she resigned, described how she was often the only nurse for as many as 30 patients, which resulted in missed medications and patients’ falls.[58] Another explained that she quit because she was afraid her working conditions would cause her to accidentally harm a patient, but most of her colleagues remained in their jobs because of the debt scheme.[59]

# Current State

## Regulatory Framework for FENs

Most FENs come into the United States under the EB-3 employment-based visa, which is designed for skilled workers, professionals, and some other workers.[60] Employers that recruit workers under the EB-3 program must first request a prevailing wage determination from the DOL.[61] Then, they submit to the DOL an application for Permanent Employment Certification ("Form 9089").[62] As part of that application, they must attest to having taken steps to recruiting United States workers for the position, among other commitments.[63] The DOL will approve the application upon determining that the labor certification will not "adversely affect" U.S. workers.[64] Upon approval, the employer can then submit their immigrant petition to the Department of Homeland Security, attaching their DOL certification. The DHS will consider several factors when deciding whether to approve the immigrant petition, including whether the employer has demonstrated an ability to pay the immigrant a wage[65] and whether the immigrant in fact received the training or degrees required by the desired visa category.[66] Finally, the worker can apply for the visa at the U.S. consulate abroad.

There is an expedited process for professional nurses, called Schedule A, which is essentially a blanket determination by DOL that there are not sufficient workers in the United States for a particular occupation and that recruiting individuals for the occupation will not "adversely affect" U.S. workers. This allows the employer to go straight to DHS without submitting their application for permanent labor certification to the DOL.[67] While the employer must still make the same attestations (with the exception of verifying that they've attempted to recruit domestic workers for the position) and submit documentation of postsecondary degrees required for the Schedule A designation,[68] they do not have to wait for DOL certification before submitting the immigrant petition to DHS.

## Regulatory, Litigation, and Advocacy Efforts

There has been some enforcement and proposed regulation of similar restrictive employment clauses at other federal agencies, but no such regulation specifically regarding the employment-based visa system. For example, the FTC has proposed to ban traditional and some forms of de facto non-compete contracts in a forthcoming rule.[69] However, nonprofit entities are arguably exempt from the FTC Act, under which that rule was proposed. Almost half of all hospitals are technically not-for-profit.[70] Additionally, the DOL's recently-filed lawsuit referenced above was based on minimum wage and overtime requirements of the Fair Labor Standards Act ("FLSA").[71] However, even if the DOL had the resources to vigorously go after each instance in which anti-competitive contracts caused employers to violate the FLSA, many healthcare workers may earn too much to fall within the law's bare-minimum protections.

As explained above and in a recent HHS report, there has been private litigation against healthcare employers of FENs under the TVPA. Some plaintiffs have been successful. However, there is an obvious lack of disclosure about the use of the contracts, which is a barrier to filing an action in the first place. And, as at least one court noted,[72] the absence of an express DOL regulation concerning the types of permitted liquidated damages provisions is a gap in the regulatory scheme.

States have also entered the regulatory and litigation fray. In Illinois, lawmakers recently prohibited nursing staffing agencies from entering no-poaching agreements and charging nurses breach fees if they are hired for permanent positions at health system employers.[73] In 2022, the New York Attorney General's office settled with a health system that illegally charged FENs for resigning or being fired within the first three years of employment.[74] Similarly, in 2005, the New Jersey Attorney General's office settled with a nurse staffing agency, requiring the company to revise its employment agreements to eliminate a liquidated damages clause.[75]

Most recently, the nursing union NNU has led regulatory advocacy against stay-or-pay contracts in the healthcare sector. In response to an HHS request for information on forced labor in the public health supply chain, NNU relied heavily on research from Dr. Patricia Pittman to explain the unique and pervasive use of these exploitative contracts in employment-based visa recruiting.[76] In a comment in response to the CFPB's request for information on employer-driven debt practices, NNU detailed the results of its survey of registered nurses on the subject.[77] The comment explained how employer-driven debt arrangements like TRAPs create unsafe and unfair conditions for nurses and their patients, and identified other troublesome employer practices in the industry. NNU also submitted a comment on an FTC and DOJ merger enforcement request for information asking the agencies to consider the "emergence of coercive employment contracts, including nurse training repayment agreements."[78]

# Proposed Action

## Legal Authority

### 1. Statutory authority

Before the DOL approves an application for permanent labor certification, the INA requires that it first find that "there are not sufficient workers who are able, willing, qualified . . . at the place where the alien is to perform such skilled or unskilled labor" and that such certification "will not adversely affect the wages and working conditions of workers in the United States similarly employed."[79] It is upon this statutory basis that the DOL constructed the regulatory scheme that governs the employment visa process for various visa categories, including EB-3 (under which the vast majority of FENs enter the country).

The INA's first dictate – that "there are not sufficient workers" – requires the DOL to make a "good faith test" of U.S. worker availability.[80] Because requiring a case-by-case inquiry into the labor market conditions relevant to each employer's request for certification would be too resource-intensive for the agency, courts have upheld DOL regulations that allow employers to submit a tranche of documentation attesting that the employers have tested the market themselves.[81] Additionally, courts have approved of regulations, such as a prohibition on alien self-employment, promulgated to reinforce the efficacy of employer-driven labor market testing and ensure the integrity of the information collected by the agency.[82]

Prohibiting employers' use of restrictive employment contracts like non-competes and stay-or-pay contracts, and requiring documentation of compliance, would improve the integrity of employers' "good faith test" of the labor market. The degree to which a worker is dependent on an employer and restricted in their mobility with respect to that employer is one factor in a worker's "attractiveness" to an employer. Foreign workers on these visas are already more dependent on employers because of actual and perceived dependence created by the visa sponsorship process. If FENs are further immobilized by these types of contracts, that may incentivize an employer to temper their search for U.S. workers because foreign workers are all-the-more captive. This dynamic undermines the INA's mission of ensuring that foreign workers are recruited only if there are not sufficient workers in the United States.

The INA's second requirement — that labor certification approval not "adversely affect" U.S. workers — is a statutory condition common to a myriad of different visa programs. Although there is scant caselaw elucidating the meaning of "adversely affect" in the EB-3 context, courts have found that similar "adversely affect" language that governs other kinds of labor certifications endows DOL with significant discretion to strike the appropriate balance between ensuring an adequate labor supply and protecting the jobs of domestic workers.[83]

The Department can issue regulations under this statutory language to establish a baseline "acceptable" standard for working conditions for visa workers below which workers in the United States would be adversely affected.[84] Courts have approvingly cited regulations, implemented under the "adversely affected" language in the H-2A program, that require that foreign workers be provided with "housing, meals, equipment, and transportation."[85] Without such minimum conditions, workers on employment-based visas might be more attractive to employers than U.S. workers because of their exploitability as relatively more captive labor. According to one federal court, this would "adversely affect" workers in the United States, either by causing employers to hire through visa programs without making a good faith effort to hire domestically, or by forcing U.S. workers to accept worse working conditions or wages in order to compete with foreign labor.[86]

As previewed in Section II(C), the prohibitions and requirements recommended in this memorandum would help ensure that the employment of FENs does not "adversely affect" the wages and working conditions of workers in the United States. First, as explained above, permitting employers to impose restrictive employment agreements like stay-or-pay contracts and non-competes increases the immobility of already-captive workers, making them more exploitable by employers. This increases the likelihood that U.S. workers would have to assent to such restrictive conditions in order to compete for jobs – thus "adversely affecting" their working conditions in violation of the statute. This justification is similar to previous DOL analyses regarding the coercive effects of employer-driven debt in similar contexts.[87] Second, requiring FENs to take on debt loads – by signing stay-or-pay contracts – reduces the effective wage that employers are paying FENs, as the looming obligation to repay deprives them of a "free and clear" wage or an actual repayment causes them to have a negative wage in their final work week.[88] This may require workers in the United States to accept lower actual wages in order to compete with foreign labor. Third, non-competes have been shown to suppress wages by reducing labor market competition.[89] Allowing the proliferation of restrictive employment contracts would thus have the effect of "adversely affecting" U.S. worker wages.

### 2. Regulatory history

The DOL has issued several regulations modifying the permanent labor certification process that governs, among other categories, EB-3 visas, all of which are based on the statutory language cited above. The DOL has relied upon the statutory language described above to impose requirements on employers related to both workers' wages (e.g., that they are paid the local prevailing wage[90]) and working conditions (e.g., that the conditions be "normal to the occupation in the area and industry"[91]). For example, in 2004 the DOL revamped the certification process. The final regulation imposed myriad requirements, including that employers applying for certification for live-in domestic workers attest to the fact that they provide private room and board to the worker free-of-charge.[92]

In 2007, the DOL issued additional regulations governing the process for permanent labor certification, again based on the same statutory predicates. The new rules sought to "enhance program integrity and reduce the incentives and opportunities for fraud and abuse" in the system.[93] Among others, the final rule prohibited the sale, barter, or purchase of certifications and applications, and barred employers from permitting aliens to pay the costs of their own labor certification. Note how the DOL justified the latter restriction, still in effect today at 20 C.F.R. § 656.12, in the terms of the statute:

> *[p]ermanent labor certification is an employer-driven process; employers, not aliens, must file permanent labor certification applications. To the extent the alien beneficiary who is the subject of the labor certification application and, later, the immigrant petition, is financially involved in the application process directly or indirectly, this involvement casts suspicion on the integrity of the process and the existence of a bona fide job opportunity…*
>
> *…[a]n alien employee who reimburses his employer via deductions from his paycheck or a lump payment is effectively being paid a lower wage than agreed to by the employer on the labor certification. A U.S. worker is non-competitive with the alien worker unless he too accepts the actual lower wage. Therefore, the practice of aliens reimbursing employers for expenses the employer incurred in the labor certification process adversely affects the compensation of U.S. workers.*[94]

Although not specifically applicable to the EB-3 program or the permanent labor certification process, the DOL has also issued regulations based on similar job market test and "adversely affect" language on employers seeking certification for other visa categories. Those regulations, among other things, increased the wage requirements for agricultural workers to ensure that U.S. workers would not be adversely affected by competition;[95] required employers to cover inbound transportation and other costs;[96] and otherwise sought to reduce workers' indebtedness to their employers to prevent the creation of "conditions akin to **indentured servitude**, driving down wages and working conditions for all workers, foreign and domestic."[97]

These examples demonstrate how the DOL has interpreted the job market test and "adversely affect" language of the INA to authorize the agency to impose common-sense restrictions on alien employment meant to protect visa holders, from exploitation at the hand of employers, and U.S. workers, from unfair competitive pressures of having to compete with a vulnerable and exploitable workforce.

## Proposal: Issue a New Regulation via Notice-And-Comment Rulemaking That Requires Attestation and Documentation to Demonstrate That Employers Are Not Using Stay-Or-Pay Contracts to Immobilize FENs

The DOL should adopt the following regulatory changes to ensure that FENs are not subject to exploitative non-compete and stay-or-pay contracts. These proposals assume the continued existence of Schedule A for nursing professionals. If, for whatever reason, Schedule A is not in effect at the time of these reforms, proposal #3 below would be obsolete.[98]

1. Adding a new attestation to Form 9089 at 20 C.F.R. § 656.10(c)(11) that workers brought in under a permanent labor certification will not be subject to a charge if they are fired, resign, or attempt to find work with a different employer. This would fit the character of 20 C.F.R. § 656.10(c) attestations that ensure that employers conduct a bona fide job market test and that alien employment will not adversely affect U.S. workers, such as the §656.10(c)(6) assurance that the job is not open as a result of an organized labor action and the §656.10(c)(1)-(2) assurances that the job offer includes a prevailing wage. False attestations would be punishable under the agency's debarment procedures[99] and several federal statutes that prohibit making false statements to government agencies,[100] particularly in the context of visa misuse.[101]

2. Adding a subsection to 20 C.F.R. § 656.12 that explicitly forbids employers from attempting to impose or imposing a charge on workers if they are fired, resign, or attempt to find work with a different employer. This would fit neatly alongside the existing 20 C.F.R. § 656.12 prohibitions that ensure that certification does not circumvent a bona fide job market test and does not adversely affect U.S. workers, such as the §656.12(a) prohibition on selling or trading labor certifications and the §656.12(b) prohibition on foreign workers covering the costs of the labor certification process. Violations would again be punishable under the agency's debarment procedures[102] and various federal statutes.

3. Amending 20 C.F.R. § 656.15(a) to require employers seeking to use Schedule A to submit along with their application to DHS a copy of the employment contract that they plan to enter into with the

immigrant worker. Additionally, the regulation should require a copy of the Form 9089 and employment contract to be sent to DOL/ETA. This component would ensure that the DOL has access to this information, even if the employer's certification qualifies for Schedule A.

4. Adding a new subsection to 20 C.F.R. § 656.17(a) that requires employers to submit along with their Form 9089 a copy of the employment contract that they plan to use with the immigrant worker and amending 20 C.F.R. § 656.17(j) to prohibit stay-or-pay contracts.

Making comprehensive updates to general permanent labor certification regulations, as proposed in #1 and #2 above, Schedule A regulations, as proposed in #3 above, and the basic labor certification process, as proposed in #4 above, carries with it the benefits of ensuring regulatory consistency across occupational categories (e.g. healthcare staff, like nursing assistants, that may not qualify for Schedule A) and anticipating potential future changes to Schedule A.

## Conclusion

Employers' use of non-compete and stay-or-pay contracts to further constrain an already-vulnerable workforce has negative effects on workers in the United States, patients' health and safety, as well as on FENs themselves. The Department of Labor should take steps to reduce the use of restrictive employment contractors in this sector, which would protect FENs from exploitation and safeguard the wages and working conditions of American workers.

## Endnotes

1 This paper was authored by Reed Shaw.

2 Pittman PM et al. Nov 2007. U.S.-Based International Nurse Recruitment: Structure and Practices of a Burgeoning Industry 4. https://www.macfound.org/media/article_pdfs/nursing_code_researchreportyr1.pdf (hereinafter "Pittman report").

3 *See*, *e.g.*, Employment and Training Administration, Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. 78020, 78037 (implementing various changes, including requiring employers to cover certain expenses, to the H-2B visa program to reduce "conditions akin to indentured servitude, driving down wages and working conditions for all workers, foreign and domestic").

4 A liquidated damages provision includes a generalized financial penalty that accounts for broad claimed expenses like training, recruitment, and onboarding costs. Zoe Salzman, Liquidated Damages Clauses in Employment Agreements, https://www.americanbar.org/content/dam/aba/publications/aba_journal_of_labor_employment_law/v34/number-2/liquidated-damages-clauses.pdf (comparing liquidated damages clauses to non-compete agreements in their effects of preventing worker mobility).

5 A TRAP requires a worker who is fired or quits before a set period of time to pay the employer for the cost of on-the-job training received. *See* Student Borrower Protection Center, Trapped at Work 3, (July 2022), https://protectborrowers.org/wp-content/uploads/2022/07/Trapped-at-Work_Final.pdf (hereinafter "Trapped at Work report").

6 AANA, The Compete Clause and the Nurse Anesthetist: An Assessment of Knowledge, Perception, and Experience, (Accessed: May 31, 2023), https://www.aana.com/docs/default-source/aana-journal-web-documents-1/noncompete-clause-1015-pp329-335.pdf?sfvrsn=a4cd48b1_6.

7 National Nurses United comment on Consumer Financial Protection Bureau Request for Information 8, (Sept. 23, 2022), https://www.regulations.gov/comment/CFPB-2022-0038-0048 (hereinafter "NNU Comment").

8 Trapped at Work report at 15.

9 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"). Consider one example of how HCA uses TRAPs to immobilize workers and reduce their bargaining power:

> 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 [Training Repayment Agreement] 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.

HCA is not alone, of course: UCHealth, MedStar Health, and other health systems also use TRAPs, for which the payback amounts range from $5,000 to $50,000. Trapped at Work report 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; CFPB Report.

10 *See generally* Aurora Almendral, *A hidden system of exploitation underpins US hospitals' employment of foreign nurses*, (Oct. 2, 2023), https://qz.com/a-hidden-system-of-exploitation-underpins-us-hospitals-1850888315.

11 NNU Comment at 2.

12 Pittman Report at 21; Administration for Families and Children, Department of Health and Human Services, Federal Cases Involving Forced Labor of Health Professionals, (Feb. 17, 2023), https://www.acf.hhs.gov/sites/default/files/documents/otip/Federal%20Cases%20Involving%20Forced%20Labor%20of%20Health%20Professionals%20Information%20Memorandum.pdf (hereinafter "HHS Report").

13 Shannon Pettypiece, *Trapped at work: Immigrant health care workers can face harsh working conditions and $100,000 lawsuits for quitting*, NBC News, (Jun. 4, 2023), https://www.nbcnews.com/politics/economics/trapped-work-immigrant-health-care-workers-can-face-harsh-working-cond-rcna83979.

14 NNU Comment at 23.

15 *See*, *e.g.*, Third Amended Complaint at 33-46, *Carmen v. Health Carousel, LLC,* No. 1:20-CV-313, 2023 WL 5104066 (S.D. Ohio Aug. 9, 2023), https://s3.documentcloud.org/documents/21232582/health-carousel-amended-complaint.pdf.

16 Pittman report at 5.

17 *See*, *e.g.*, Third Amended Complaint at 24, *Carmen v. Health Carousel, LLC,* No. 1:20-CV-313, 2023 WL 5104066 (S.D. Ohio Aug. 9, 2023), https://s3.documentcloud.org/documents/21232582/health-carousel-amended-complaint.pdf.

18 Comment from Student Borrower Protection Center to the Federal Trade Commission 4, (Apr. 19, 2023), https://protectborrowers.org/wp-content/uploads/2023/04/FINAL-SBPC-FTC-Non-Compete-NPRM-Comment.pdf.

19 *See generally*, Shannon Pettypiece, *Trapped at work: Immigrant health care workers can face harsh working conditions and $100,000 lawsuits for quitting*, NBC News, (Jun. 4, 2023), https://www.nbcnews.com/politics/economics/trapped-work-immigrant-health-care-workers-can-face-harsh-working-cond-rcna83979; Aurora Almendral, *A hidden system of exploitation underpins US hospitals' employment of foreign nurses*, (Oct. 2, 2023), https://qz.com/a-hidden-system-of-exploitation-underpins-us-hospitals-1850888315.

20 *Carmen v. Health Carousel, LLC*, No. 1:20-CV-313, 2023 WL 5104066, at *15 (S.D. Ohio Aug. 9, 2023) (noting plaintiffs' fear of deportation).

21 There are ways for workers to transfer their visa to work for another employer, and the process was simplified by the American Competitiveness in the Twenty-First Century Act of 2000. But it is certainly not frictionless, so workers are more likely to feel stuck with their original sponsor employer.

22 *See* Aurora Almendral, *A hidden system of exploitation underpins US hospitals' employment of foreign nurses*, (Oct. 2, 2023), https://qz.com/a-hidden-system-of-exploitation-underpins-us-hospitals-1850888315.

23 *Id.*

24 National Labor Relations Board, NLRB General Counsel Issues Memo on Non-Compete Violating the National Labor Relations Act, (May 30, 2023), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-non-competes-violating-the-national (explaining that non-competes chill employees' ability to leave their jobs).

25 Complaint, *Department of Labor v. Advanced Care Staffing, LLC, et. al* at 8, (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").

26 Of course, the Immigration and Nationality Act is not the only law that may protect workers from the negative consequences of stay-or-pay contracts. State laws and common law on wage and hour requirements and contract unconscionability may also be applicable and more protective. *See*, *e.g.*, *See* Complaint, *Scally 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); *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). Stay-or-pay contracts may also 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); *see* Governing for Impact, et. al memo regarding stay-or-pay contract regulation at the Department of Transportation, (Oct. 19, 2023), https://governingforimpact.org/wp-content/uploads/2023/10/DOT-FAA-Stay-Or-Pay-Memo.pdf; 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).

27 CFPB Report; *see also 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) (in the context of an unenforced commission policy, explaining that unenforced policies or unenforceable debts can have significant practical effects on how people live: "[s]imply because a [policy] has never been applied does not mean that the employee has not been affected by the policy").

28 CFPB Report.

29 Shannon Pettypiece, *Trapped at work: Immigrant health care workers can face harsh working conditions and $100,000 lawsuits for quitting*, NBC News, (Jun. 4, 2023), https://www.nbcnews.com/politics/economics/trapped-work-immigrant-health-care-workers-can-face-harsh-working-cond-rcna83979.

30 *Id.*

31 *Id.*

32 CFPB Report.

33 NNU Comment at 24 quoting Pittman report.

34 Pittman Report at 5 (explaining that employers withhold pay from and underpay FENs); *See generally* Shannon Pettypiece, *Trapped at work: Immigrant health care workers can face harsh working conditions and $100,000 lawsuits for quitting*, NBC News, (Jun. 4, 2023), https://www.nbcnews.com/politics/economics/trapped-work-immigrant-health-care-workers-can-face-harsh-working-cond-rcna83979 (FENs "described being paid less than their American counterparts despite immigration laws that require they be paid the local prevailing wage").

35 NNU Comment at 25 citing 20 Baptiste, M." Workplace Discrimination: An Additional Stressor for Internationally Educated Nurses." OJIN: The Online Journal of Issues in Nursing Vol. 20 No. 3. (Aug. 18, 2015). DOI:10.3912/OJIN.Vol20No03PPT01.

36 HHS Report.

37 *Paguirigan v. Prompt Nursing Emp. Agency LLC*, No. 17-CV-1302 (NG) (JO), 2019 WL 4647648 (E.D.N.Y. Sept. 24, 2019), aff'd in part, appeal dismissed in part, 827 F. App'x 116 (2d Cir. 2020).

38 *Paguirigan v. Prompt Nursing Emp. Agency LLC*, 286 F. Supp. 3d 430, 435 (E.D.N.Y. 2017).

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40 *Id.* at *18.

41 No. 21-CV-1850 (KAM) (PK), 2021 WL 6197063 (E.D.N.Y. Dec. 30, 2021).

42 *Magtoles v. United Staffing Registry, Inc.*, No. 21CV1850KAMPK, 2023 WL 2710178, at *25 (E.D.N.Y. Mar. 30, 2023).

43 *Id.* at *27 quoting *Javier v. Beck*, No. 13-CV-2926 (WHP), 2014 WL 3058456, at *6 (S.D.N.Y. July 3, 2014).

44 *Id.*

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46 Employment and Training Administration, Department of Labor, Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity, 72 Fed. Reg. 27904, 27921 (May 17, 2007).

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49 Trapped at Work at 14 (explaining that healthcare employers began to use TRAPs amid the staffing challenges posed by the COVID-19 pandemic that began in 2020).

50 *See*, *e.g.*, Shannon Pettypiece, *Trapped at work: Immigrant health care workers can face harsh working conditions and $100,000 lawsuits for quitting*, NBC News, (Jun. 4, 2023), https://www.nbcnews.com/politics/economics/trapped-work-immigrant-health-care-workers-can-face-harsh-working-cond-rcna83979 (FENs "described being paid less than their American counterparts despite immigration laws that require they be paid the local prevailing wage").

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84 *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276, 1285 (11th Cir. 2016).

85 *Id.*

86 *Id.*

87 *See*, *e.g.*, Employment and Training Administration, Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. 78020, 78037 (implementing various changes, including requiring employers to cover certain expenses, to the H-2B visa program to reduce "conditions akin to indentured servitude, driving down wages and working conditions for all workers, foreign and domestic").

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100 *See*, *e.g.*, 18 U.S.C. § 1001.

101 *See*, *e.g.*, 18 U.S.C. § 1546.

102 *See generally* 20 C.F.R. § 656.31.

# INVOKING THE DEPARTMENT OF HEALTH AND HUMAN SERVICES' AUTHORITY TO BAN NON-COMPETES AND STAY-OR-PAY CONTRACTS

*The following was originally sent as a memorandum to the Department of Health and Human Services on behalf of the authors of this report and the American Federation of Teachers on November 2, 2023.*[1]

## Introduction

Today, many of the country's largest healthcare systems and staffing agencies engage in widespread, exploitative, and unfair practices that threaten patient care and conditions, diminish competition, and hamper our economy and economic growth. President Biden himself recognizes the danger that concentration and anti-competitive behavior pose, including in the healthcare sector, and issued an executive order on Promoting Competition in the American Economy that called for a whole of government approach to "ensure patients are not harmed" by such behavior.[2]

As healthcare systems look to concentrate their power within hospital markets, they've increasingly relied on their power within labor markets. Systems routinely use traditional non-compete clauses; these prohibit staff from working elsewhere in the healthcare industry for a pre-set period of time and within a certain geographic area after leaving their current job. Now, as the Biden Administration[3] and state lawmakers,[4] have cracked down on traditional non-compete clauses, healthcare systems are increasingly relying on new, nefarious contractual provisions: stay-or-pay contracts. They operate as de facto non-compete clauses,[5] intentionally designed to evade bans on traditional non-compete clauses while achieving the same outcome through different means. These contracts, often presented as a precondition for employment, require departing employees to pay their employer tens of thousands of dollars if they leave their job before an arbitrarily set date, and can include a host of other financial penalties. Throughout this memo, the term "non-compete clause" refers to both traditional and de facto non-compete clauses.

A number of federal agencies have clear statutory authority to regulate the use of non-compete clauses, including the Department of Health and Human Services ("HHS", "Department").[6] As needed to protect patient health and safety, the Social Security Act empowers the Secretary of HHS to impose Conditions of Participation ("CoPs") on facilities that serve Medicare and Medicaid patients. Traditional and de facto non-competes, which are particularly prevalent in the healthcare industry, have been shown to negatively affect patient health and safety – through interrupted patient care, reduced worker morale, and reduced ability of staff to advocate for safe patient conditions.[7]

This memorandum proposes that the Centers for Medicare and Medicaid Services ("CMS") promulgate, through notice-and-comment rulemaking, a regulation banning the use of traditional and de facto non-competes in healthcare worker employment arrangements.

# Justification

## Non-Compete Clauses in the Healthcare Sector

Non-compete clauses are ubiquitous throughout the healthcare industry. For example, up to 80 percent of certified registered nurse anesthetists are currently subject to traditional non-compete clauses.[8] In part due to the recent federal and state regulatory attention paid to traditional non-compete clauses, de facto non-compete clauses, which include stay-or-pay arrangements like Training Repayment Agreement Provisions ("TRAPs") and liquidated damages provisions,[9] have also become commonplace within the healthcare sector, particularly among healthcare professionals at the onset of their careers. A TRAP requires a worker who is fired or quits before a set period of time to pay the employer for the cost of on-the-job training. A liquidated damages provision is similar, but the financial penalty accounts for broader claimed expenses like recruitment and onboarding costs. In 2022, the National Nurses United ("NNU") conducted a survey of registered nurses and found that about half of respondents were required to participate in a training or residency program during their career, and 55 percent of the registered nurses working in hospitals who participated in such programs reported being required to repay their employer for the cost of their training if they departed the hospital before their employment contract expired.[10] TRAPs are often instituted at less desirable hospitals with unsafe working or patient care conditions, including at the largest for-profit healthcare system in the country, HCA Healthcare.[11] Indeed, TRAPs have become so ubiquitous in the healthcare sector that nurses who purposefully search for jobs that do not require TRAPs can struggle to find them.[12] Consider one example of how HCA uses TRAPs to immobilize workers and reduce their bargaining power:[13]

> Newly hired new graduate [registered nurses] seeking employment at HCA Healthcare's Mission Hospital in Asheville, NC and a number of other HCA Healthcare hospitals are required to sign a [Training Repayment Agreement] 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 [registered nurses] 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 [registered nurses] 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. [Registered nurses] 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 [registered nurses] in the state is $32.13.[14]

HCA is not alone, of course: UCHealth, MedStar Health, and other health systems also use TRAPs, for which the payback amounts range from $5,000 to $50,000.[15]

Cognizant of the increased regulatory and media scrutiny on the use of TRAPs in employment, some employers instead use restrictive debt clauses tied to sign-on and relocation bonuses. These arrangements function much the same way as other stay-or-pay contracts, by constraining the employment choices that workers have. If setting debt traps was not their purpose, employers could instead offer relocation bonuses that are not subject to repayment or improve retention and protect training investments by offering longevity bonuses.[16]

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.[17] 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,[18] employers instead use the contracts as tools to reduce outside employment options.

In a recent regulatory comment, the Student Borrower Protection Center identified other examples of stay-or-pay contracts in the healthcare sector.[19] When a doctor at Concentra, Inc. concluded that the job was a bad fit, he was unable to leave because his boss told him, "[w]e will make you pay" and "[t]he contract will be enforced."[20] The stay-or-pay provision of the contract required that he give four months notice to quit or pay a fee that was equivalent to his salary for the remainder of that time period, which amounted to tens of thousands of dollars. During the four month period, the doctor turned down multiple job offers. The contract also included non-compete, non-solicitation, and non-disclosure clauses.

One nurse from the Philippines at Health Carousel, LLC, an international healthcare recruiting and staffing agency, learned upon starting her placement in Pennsylvania that she was paid much less than other nurses, earning only $25.50 per hour compared to more than $35 per hour. The nurse was troubled by the work, which she found to be brutal and often dangerous due to understaffing, and the healthcare staffing agency exerted intense control over her life: not allowing her to discuss working conditions with other staff or leave town without the agency's permission. When the nurse decided she needed to leave her job, the staffing agency, invoking the contract she had signed in the Philippines, demanded $20,000, which she paid with money her boyfriend had been saving for years to buy a house.[21] Similar stories of exploitation by nurse staffing agencies are all-too-common.[22]

Restrictive employment contracts like traditional and de facto non-competes tend to produce relatively more negative impacts on women, workers of color, and workers with disabilities. These workers are generally more likely to be low-wage workers,[23] who are most negatively impacted by stay-or-pay practices. In healthcare specifically, Black women are disproportionately represented in the sector and are heavily concentrated in some of its lowest-wage and most hazardous jobs[24] – precisely the types of positions for which employers use restrictive employment contracts to constrain workers. Additionally, TRAPs in healthcare are most common among new nurses and foreign-born nurses, both of which are more likely to be workers of color and women.[25]

## Patient Safety and Health

Non-compete clauses like these threaten patient health and safety in several ways. Perhaps most obviously, as the American Medical Association's Code of Medical Ethics explains, traditional non-compete clauses that restrict the ability of departing staff to work in the healthcare industry within a certain geographic area can "disrupt continuity of care[] and may limit access to care."[26] A 2022 survey about the impacts of traditional non-compete clauses on patient care revealed that overwhelming majorities of the orthopedic surgeon respondents agreed that such clauses negatively affect patients.[27] Eighty percent of respondents agreed with this statement about traditional non-compete clauses: "I would have to abandon patients I had cared for over many years leaving their care to someone who did not know them or their surgical history as well," and 72.6 percent of respondents agreed with this statement: "My patients would have to drive a long distance to see me at my new practice after I left due to my non-compete clause." Congressional leaders have also taken note that "thoughtless enforcement" of non-compete clauses can interrupt patient care.[28]

The immobilizing effects that the clauses have on healthcare workers also lead to worse conditions for patients. These clauses limit employees' ability to exit a job, raising the stakes of termination or quitting, and depriving them of leverage to raise concerns about workplace conditions.[29] In many cases, the monetary sum that workers would have to pay out to their employer in the event of resignation or termination is prohibitively large. For example, the Department of Labor ("DOL") recently filed a complaint under the Fair Labor Standards Act ("FLSA"), alleging that the liquidated damages provision utilized by a healthcare staffing agency would have required its FEN employee to repay all income that he grossed during the entirety of his employment, thus depriving him of the statutorily mandated minimum wage.[30] Even where such contractual provisions are not enforced, or are not legally enforceable, they have an *in terrorem* effect, and their mere existence may pressure workers into staying in an otherwise unacceptable job.[31] For example, one nurse decided to return to their job after the hospital sent a post-resignation letter demanding that the nurse either pay the hospital $18,000 or return to work and complete the two-year/4,000 hour requirement.[32]

As NNU explained in a comment to the CFPB, “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.”[33] In survey comments and interviews with NNU, registered nurses frequently reported “being required to work in units that had dangerously low nurse-to-patient ratios.”[34] The employee in the DOL complaint referenced above, for example, wanted to quit largely because of concerns about patient safety, which he raised with his employer to no avail. He eventually “grew deeply concerned that he could not meet his ethical and professional responsibilities under [his employer’s] working conditions, including a heavy patient load that he believed in good faith did not permit him to provide adequate patient care” and began suffering physical and mental health harms from his employment.[35]An SEIU regulatory comment identified the University of Pittsburgh Medical Center as a healthcare employer that has a “well-documented history of retaliating against workers” who speak up about workplace issues, but explained that workers would be less able to speak up about working conditions because of the stay-or-pay provisions in their employment contracts.[36]

Trapping workers in toxic working conditions can also contribute to burnout. Burnout and toxic work environments for medical workers have been found to increase rates of medical error.[37]As one surgeon respondent put it in a survey about non-compete clauses in their field: “[s]urgeons who remain in unhealthy orthopaedic groups/practices cannot emotionally or psychologically be their best versions.”[38] One nurse interviewed by NBC News, who ended up quitting despite her $2,000 TRAP, reported that she “didn’t even have time to take a lunch break, [her] hair was falling out, the level of stress just wasn’t sustainable.”[39] Another explained that she quit because she was afraid her working conditions would cause her to accidentally harm a patient, but most of her colleagues remained in their jobs because of the debt scheme.

Finally, non-compete clauses can negatively impact patient safety and health through their effects on prices for healthcare services. A 2021 study examined the relationship between the enforceability of non-compete clauses in the healthcare industry, as modulated by state legislation, and healthcare prices. The authors found that increased enforceability of non-compete clauses is associated with increased final good prices.[40] Higher prices for healthcare leads to higher out-of-pocket costs for patients. This can exacerbate financial insecurity, which is linked to worse health outcomes.[41] While Medicare and Medicaid enrollees may be protected from such prices through their insurance programs, most privately insured and all uninsured patients are not, leaving millions unprotected when receiving care. Moreover, Medicare and Medicaid patients could nonetheless be affected if a privately insured or uninsured family member encounters higher healthcare prices, or because of “churning” between private health insurance, uninsured status, and the Medicare and Medicaid programs, based on income and other eligibility criteria.[42]

## Current State

Advocacy efforts around ending non-compete clauses in healthcare have accelerated in recent years in response to the increased use of such anti-competitive practices in the industry. Additionally, the decline of physician-owned practices means that more physicians practice as employees who are increasingly subject to restrictive covenants on their employment.

NNU has led regulatory advocacy against stay-or-pay contracts in the healthcare sector. As noted above, in a comment in response to the CFPB's request for information on employer-driven debt practices, the union detailed the results of its survey of registered nurses on the subject.[43] The comment explained how employer-driven debt arrangements like TRAPs create unsafe and unfair conditions for nurses and their patients, and identified other troublesome employer practices in the industry. NNU also submitted a comment on a Federal Trade Commission ("FTC") and Department of Justice ("DOJ") merger enforcement request for information asking the agencies to consider the "emergence of coercive employment contracts, including nurse training repayment agreements."[44]

Congressional leaders, too, have made calls for federal agencies to consider how anti-competitive employment contracts may run afoul of existing laws. For example, Senators Brown, Murray, and Warren sent a letter to the CFPB asking the Bureau to investigate and regulate TRAPs which, they explained, "raise significant concerns about consumer and worker protection."[45]

There has been some enforcement and potential regulation of non-compete clauses at other federal agencies, but no such regulation from CMS. For example, the FTC has proposed to ban traditional and some forms of de facto non-compete contracts in a forthcoming rule.[46] However, the FTC does not traditionally enforce antitrust laws against anti-competitive practices of most nonprofit entities. Almost half of all hospitals are technically not-for-profit.[47] Additionally, the DOL's recently filed lawsuit reference above was based on minimum wage and overtime laws.[48] However, even if the DOL had the resources to vigorously go after each instance in which anti-competitive contracts caused employers to violate the FLSA, many healthcare workers may earn too much to fall within the law's bare-minimum protections.

# Proposed Action

## Legal Authority

An HHS CoP regulation banning non-compete clauses for any worker in facilities that receive Medicare or Medicaid funds would be on firm legal footing, based on the applicable statute, regulatory history, and case law.

### 1. Statutory authority

HHS has the authority to make this change under Section 1861(e) of the Social Security Act. Section 1861(e) authorizes the Department to update its Medicare CoPs for hospitals as needed, granting broad authority to the Secretary to adopt "such other requirements" that they "find[] necessary in the interest of the health and safety of individuals who are furnished services in the institution."[49] Hospitals that receive Medicaid payments must also meet Medicare CoPs.[50]

Additionally, 42 U.S.C. § 1302(a) authorizes CMS to "publish such rules and regulations . . . as may be necessary to the efficient administration of the [agency's] functions." And 42 U.S.C. § 1395hh(a)(1) authorizes CMS to "prescribe such regulations as may be necessary to carry out the administration of the insurance programs" under the health insurance sections of the Social Security Act, as amended.

While the CoPs proposed in this memorandum do tend to benefit Medicare and Medicaid beneficiaries, the fact that they also protect the "interest of the health and safety of" non-Medicare or Medicaid patients provides yet another reason that CMS possesses the statutory authority to issue these regulations. CoP regulations are valid even if they tend to benefit patients that are not enrolled in Medicare or Medicaid more than those that are. There is no statutory limitation that requires a CoP to explicitly benefit Medicare or Medicaid patients. As stated above, HHS's authority to set facility-level policy stems from Section 1861(e)(9), which allows new CoPs that are "in the interest of the health and safety of *individuals who are furnished services in the institution*" (emphasis added). This gives HHS the authority to adopt CoPs that improve the health, safety, and well-being of hospital patients in general, without requiring a CoP to benefit Medicare patients explicitly. Further, Medicare CoPs apply on a facility-wide basis and thus extend to all patients, regardless of insurance status or payment source. Implementing regulations for prior CoPs on visitation rights, for instance, confirmed that these protections apply to all patients, regardless of payor.[51]

### 2. Scope of authority and regulatory history

Issuing CoPs for facilities that participate in the Medicare and Medicaid programs is a long-standing practice for HHS.[52] In fact, the first CoPs were developed and issued in 1966, mere months following the passage of the statute that authorized creation of the Medicare and Medicaid programs.[53] Since the 1960s, HHS has issued CoPs for participating facilities that define myriad requirements relating to governing bodies, medical staff, nursing services, and many other aspects of administration and care.[54]

Regulations implementing Medicare CoPs for hospitals have been in place since at least 1966 and updated regularly over time. CoPs have been revised in response to, for instance, new technological advances like telehealth,[55] a broader recognition of patient rights,[56] the need to modernize definitions of family,[57] and new organizational models like multi-hospital systems.[58] HHS has also routinely used its authority to issue COPs that relate to staffing issues and employee management generally.[59]

The Supreme Court recently considered the scope of the Secretary's authority to set Medicare CoPs in *Biden v. Missouri*.[60] In that case, several states challenged HHS's interim final rule imposing a CoP that required many healthcare workers in Medicare-participating facilities to receive the COVID-19 vaccine.[61] The states argued, and the dissenting justices agreed, that the scope of the Secretary's CoP authority was limited to "bureaucratic rules regarding the technical administration of Medicare and Medicaid."[62] Under that "narrower view," the vaccine mandate would fail.

The Court disagreed in a 5-4 decision, explaining that CoPs have always been more than technical rules. Instead, the Court pointed to a "host of conditions that address the safe and effective provision of healthcare, not simply sound accounting."[63] The Court found that the vaccine mandate "fit[] neatly within the language of the statute" in part because ensuring that medical providers avoid passing dangerous viruses to their patients "is consistent with the fundamental principle of the medical profession: first, do no harm."[64]

In a key passage, the Court addressed HHS's authority to impose conditions related to healthcare workers:

> Moreover, the Secretary routinely imposes [CoPs] that relate to the qualifications and duties of healthcare workers themselves. *See, e.g.,* §§ 482.42(c) (2)(iv) (requiring training of "hospital personnel and staff " on "infection prevention and control guidelines"), 483.60(a)(1)(ii) (qualified dieticians must have completed at least 900 hours of supervised practice), 482.26(b)–(c) (specifying personnel authorized to use radiologic equipment). And the Secretary has always justified these sorts of requirements by citing his authorities

> to protect patient health and safety. *See, e.g.*, §§ 482.1(a)(1)(ii), 483.1(a)(1)(ii), 416.1(a)(1). As these examples illustrate, the Secretary's role in administering Medicare and Medicaid goes far beyond that of a mere bookkeeper.[65]

Acknowledging that the vaccine mandate was unprecedented, the Court explained that HHSnever had to grapple with a "problem of this scale and scope before."[66]

Additional existing CoPs that the Supreme Court did not mention but also relate to either the qualifications and duties of healthcare workers or what hospitals can or must do as employers include:[67] 42 C.F.R. § 482.12(a)(6), which requires the hospital's governing body to "[e]nsure the criteria for selection [of medical staff] are individual character, competence, training, experience, and judgment;" and 42 C.F.R. § 482.23, which requires hospitals to have "adequate numbers of" nurses and enough staff to ensure "the immediate availability of a registered nurse for the care of any patient." [68]

### 3. Legal policy justification

A CoP rule that disallows or otherwise regulates non-compete clauses for healthcare workers would be well in line with the "conditions of participation that relate to the qualifications and duties of healthcare workers" that the Supreme Court identified as within the scope of the Secretary's CoP-setting authority "in the interest of the health and safety" of patients. There are several justifications that the Secretary could use in setting a CoP regulating these contracts. Generally, hospitals use these contracts to prevent workers from leaving instead of improving deteriorated working and patient conditions that threaten patient safety and health. Specifically:

- <u>Non-compete clauses can threaten the health and safety of patients by disrupting continuity of care and limiting patient access to familiar care.</u> As described in the Justification section, non-compete clauses that restrict workers from working in the healthcare industry in a particular geographic area and/or timeframe can cause patients to lose contact with the personnel that best knows their medical histories.

- <u>Non-compete clauses can threaten the health and safety of patients by preventing workers from speaking up about dangerous conditions that harm patient well-being.</u> Because of the heightened stakes of quitting or being fired,[69] healthcare workers may be more hesitant to advocate to ensure safe conditions for patients.[70] For example, a survey of nurses conducted by NNU identified "nurses [who] reported being required to work in units that had dangerously low nurse-to-patient ratios" but felt "constrained in their ability to complain or leave" because of their employer-created debts.[71] Research about unionization among nurses identifies worker voice as a factor that benefits patient safety.[72]

Surveys of physicians reveal that traditional non-compete clauses also have this effect. 60 percent of surgeon respondents in one survey agreed with this statement: "I would have to give substandard patient care because my non-compete prevents me from leaving my job and remaining in the area my family wishes to live."[73]

- Non-compete clauses can threaten the health and safety of patients by creating toxic work environments and increasing medical error. A hospital staffed with personnel who would prefer to not work for their employer - but are doing so under financial duress - may be less conducive to safe and healthy conditions for patients. As one surgeon respondent put it in a survey about non-compete clauses in their field: "[s]urgeons who remain in unhealthy orthopaedic groups/practices cannot emotionally or psychologically be their best versions."[74] Burnout and toxic work environments for medical workers has been found to increase rates of medical error.[75]

- De facto non-compete clauses like TRAPs are not necessary to maintain staffing levels. Employers might argue that doing away with stay-or-pay contracts like TRAPs will make them unable to retain adequate staffing levels to satisfy other CoPs that they must fulfill. However, coercive contractual arrangements are not the way to ensure retention. Health care professionals compelled to stay in unsafe working conditions through debt traps often leave as soon as the contract is over, if not sooner. Employers can retain workers by creating good jobs where they can care for their patients safely. Indeed, the largest for-profit healthcare system in the world announced recently that it would stop using TRAPs to retain its staff.[76]

- Non-compete clauses harm all patients through poorer health outcomes caused by financial insecurity. Non-compete clauses have been shown to increase healthcare prices. Increased healthcare prices causes financial insecurity linked to poorer health outcomes. This threatens the health and safety of uninsured patients and those whose insurance plans include cost-sharing. Further, increased healthcare prices affect the health and safety of Medicare and Medicaid beneficiaries because of financial instability within mixed-insurance status households and the significant rate of churn between Medicare, Medicaid, private insurance, and self-pay statuses.

The relationship between restrictive employment contracts and patient safety and health, explained above, could support a finding by the Secretary that banning traditional and de facto non-compete clauses is "necessary in the interest of the health and safety of individuals who are furnished services" in facilities that accept Medicare and Medicaid funding.[77] Such a regulation would be a natural addition to the "host of conditions that address the safe and effective provision of healthcare."[78]

In order to survive arbitrary and capricious review, such justifications would need to be based on empirical evidence from research and comments in the rulemaking record. For example, in proposing a CoP that required open visitation rights in Medicare facilities, HHS cited a study published in the Journal of the American Medical Association, which contained a literature review and anecdotal evidence about how open visitation "may help [patients] by providing a support system and shaping a more familiar environment as they engender trust in families, creating a better working relationship between hospital staff and family members."[79]

## Issue a New CoP via Notice-and-Comment Rulemaking

We recommend that HHS use standard notice-and-comment rulemaking procedures by issuing a notice of proposed rulemaking, accepting public comment for 60 days, and then issuing a final rule. A 60-day comment period is appropriate given the stakeholder interest that this proposal will generate, and is in line with past practice: the Obama administration provided a 60-day comment period on a 2010 proposal to update Medicare CoPs to provide equal visitation rights for LGBT families.[80] Because this rule will affect market dynamics and contract negotiations between physicians, hospitals, nurses, and other workers, we recommend an effective date that balances the need to quickly protect patients while providing time for stakeholders to operationalize adjustments as needed.[81]

The new CoP should prohibit a participating health care organization, or any parent, subsidiary, or third-party agent or company (including staffing agencies), from use of any contract or contract term that includes a non-compete clause or requires a health care worker to pay for a debt if the health care worker's employment or work relationship with a specific health care employer is terminated.

## Conclusion

Healthcare employers are deploying non-competes and stay-or-pay contracts to trap workers in poor working conditions that create risks to patient health and safety. HHS should use its CoP authority to issue regulations banning these practices among healthcare facility employers that accept Medicare and Medicaid funds.

## Endnotes

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59 *See*, *e.g.*, 42 C.F.R. § 482.12(a)(6), 482.23.

60 142 S. Ct. 647 (2022).

61 *Id.* at 651.

62 *Id.* at 652.

63 *Id.* at 652.

64 *Id.* at 652.

65 *Id.* at 653.

66 *Id.* at 652.

67 But are not limited to–there are many others.

68 It is also important to note, given the changing nature of the healthcare labor landscape, that these rules extend not just to employees, but to workers that work in the facilities due to other arrangements like contracting or volunteering. For example, the hospital CoPs that require adequate nursing services explicitly require that a director of nursing services of a Medicare hospital "must provide for the adequate supervision and evaluation of the clinical activities of all nursing personnel which occur within the responsibility of the nursing service, regardless of the mechanism through which those personnel are providing services (that is, hospital employee, contract, lease, other agreement, or volunteer)."

69 Many TRAPs, for example, require repayment upon early separation regardless of whether the employee quits or is fired. *See*, *e.g.*, Student Borrower Protection Center, Trapped at Work 23, (July 2022), https://protectborrowers.org/wp-content/uploads/2022/07/Trapped-at-Work_Final.pdf (explaining Chipotle's TRAP, which applied in cases of voluntary *and* involuntary termination).

70 *See* NNU Comment at 2 (explaining 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")); *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.").

71 *Id.*

72 Arindrajit Dube, et. al, Nurse Unions and Patient Outcomes, ILR Review 69(4) 828, (Aug. 2016), https://www.nationalnursesunited.org/sites/default/files/nnu/files/pdf/Nurse%20Unions%20and%20Patient%20Outcomes.pdf.

73 Orthopedic Survey at 10; *see also* Shannon Pettypiece, *Biden's push to ban noncompete agreements could have big implications for health care,* (Feb. 13, 2023), https://www.nbcnews.com/politics/economics/biden-ban-non-compete-agreements-health-care-industry-rcna70099 (Quoting an emergency medicine doctor that explained, "When you tie in a noncompete that says if I'm fired I can't work within a 100-mile radius, that means I'm going to have to take my kids out of school, move my entire family or I'm going to have to live in a hotel and not see my family when I'm working . . . [i]t has a real chilling effect on physicians' willingness to speak out about unethical or unfair practices."); *see also* https://www.regulations.gov/comment/FTC-2023-0007-14443 ("the combination of noncompete clauses with a lack of due process, is a powerful malignant force serving to intimidate physicians against speaking out for patient rights. The recent COVID-19 pandemic has provided multiple examples of physicians being fired, removed from the schedule, or otherwise relegated for speaking out about patient safety issues. The goal of noncompete clauses is to intimidate the emergency physician into unquestioning servitude to business interests. Given physicians' ethical obligation to patients, many continue to speak out for patient safety; however, knowing that they can be fired at will and then forced to relocate their family to another city or state can have a chilling effect on physicians advocacy for patients").

74 Orthopedic Survey at 9.

75 John Commins, *Workplace Culture Could Drive Physician Burnout, Medical Errors,* HealthLeaders, (Jul. 12, 2018), https://www.healthleadersmedia.com/clinical-care/workplace-culture-could-drive-physician-burnout-medical-errors; American Association of Critical-Care Nurses, *Well-Being, Work Environment Affect Medical Errors*, (May 4, 2021), https://www.aacn.org/newsroom/well-being-work-environment-affect-medical-errors; Alison Motluk, *Do doctors experiencing burnout make more errors?*, (Accessed: May 31, 2023), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6175626/.

76 Although that does not necessarily mean that the healthcare giant is giving up on employer-driven debt altogether – they could shift to prepaid signing bonuses with restrictive repayment terms. Sarah Falcone, *HCA Ends TRAPs Forcing Nurses To Repay Training Costs*, (May 19, 2023), https://nurse.org/articles/HCA-ends-nurse-training-repayment-contracts/.

77 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.").

78 *Biden*, 142 S. Ct. at 652.

79 75 Fed. Reg. 36612 (internal quotation omitted).

80 The proposed visitation rule was published on June 28, 2010 (with a 60-day comment period), and the final rule was published on November 19, 2010. See 75 Fed. Reg. at 70831; 75 Fed. Reg. 36610-15 (Jun. 28, 2010).

81 As a point of comparison, the Trump administration finalized a rule to require hospitals to publicly disclose negotiated rates. The proposed rule, issued in late July 2019, included an effective date of January 1, 2020, which was ultimately delayed in the final rule to January 1, 2021. See 84 Fed. Reg. 65524, 65585-86 (Nov. 27, 2019).

# INVOKING THE DEPARTMENT OF TRANSPORTATION'S SAFETY AUTHORITY TO BAN THE USE OF NON-COMPETE AND DE FACTO NON-COMPETE CLAUSES IN TRUCKING

## Introduction

The American trucking industry is characterized by poor pay and unsafe working conditions, both of which have contributed to high rates of driver turnover.[1] In an attempt to mitigate this challenge without offering better terms of employment, motor carriers use traditional and de facto non-compete clauses, including stay-or-pay contracts that require a departing worker to pay his employer a certain amount. Throughout this memo, the term "non-compete clause" refers to both traditional and de facto non-compete clauses. These provisions prevent drivers from pursuing better job opportunities and further suppress wages by decreasing competition for labor.

Non-compete clauses also create safety risk for drivers and the general public by increasing economic pressure on drivers and creating disincentives for drivers to speak up about their safety concerns. Heightened economic pressure: encourages unsafe driving behavior; discourages maintenance and repairs that are necessary for safety; and traps drivers in unsafe and sometimes violent working arrangements.

A number of federal agencies have authority to regulate these agreements, including the Department of Transportation ("DOT").[2] This memorandum proposes that the Federal Motor Carrier Safety Administration ("FMCSA") promulgate, through notice-and-comment rulemaking, a regulation banning the use of non-compete and de facto non-compete clauses in employment contracts for commercial motor vehicle drivers.

# Justification

## Non-Competes in Trucking

Since deregulation in the 1970s and 1980s, the trucking sector, which once offered solid, well-paying jobs with reasonable terms, has transformed into one with notoriously poor working conditions and terrible pay. Changes brought about by deregulation and declining unionization caused trucker pay to plummet and hours to lengthen, resulting in extremely high turnover rates. In 1980, big rig drivers affiliated with the Teamsters union made an average of more than $100,000 per year in 2022 dollars.[3] Most had predictable schedules, frequent nights at home, and were provided hotel rooms for nights spent on the road. As part of its efforts to curb inflation, the Carter administration removed regulatory barriers to entry to the industry, which triggered bankruptcies at legacy, unionized carriers.[4] Today, the average annual salary for truckers hovers just below $50,000.[5] Truckers routinely spend weeks away from home, lack health insurance, may be required to pay their own fuel costs and maintenance, and work more than 60 hours per week, with many of those hours left uncompensated because they are not paid for time spent waiting for loading or unloading; truckers are also excluded from the overtime provisions of the Fair Labor Standards Act.[6] As a result, the industry faces staggering turnover rates: in 2019, 91 percent of new drivers quit their jobs, moving to another company or out of the industry.[7] Turnover rates in some segments of the industry can reach 200%.[8] Further, industry estimates indicate that over 90 percent of new hires decide whether to quit or stay in their driving jobs within the first 6 months of work — a time period that often coincides with the contract term of stay-or-pay contracts discussed in this memorandum.[9]

Rather than increase pay or improve working conditions to attract and retain drivers, trucking companies have turned to non-compete clauses, in traditional and de facto forms, to limit drivers' mobility. Traditional non-competes, which restrict a driver who leaves a company from working in the logistics industry for a set period of time and within a certain geographic area, are common in the industry.[10] Driver advocates see these clauses as restricting wages of drivers and contributing to unsafe practices that force drivers out of the industry.[11] At least one in five American workers is subject to a traditional non-compete clause.[12] The exact proportion of commercial motor vehicle ("CMV") drivers restrained by non-compete clauses is difficult to estimate, but one study found that 21 percent of workers employed in transportation and material moving occupations within the transportation and warehousing sector are subject to such contractual provisions.[13]

Now, as the Biden Administration[14] and state lawmakers,[15] have cracked down on traditional non-compete clauses, transportation companies are increasingly relying on new, nefarious contractual provisions: stay-or-pay contracts.[16] These contracts operate as de facto non-compete clauses,[17] intentionally designed to evade bans on traditional non-compete clauses while achieving the same outcome through different means. These contracts require departing employees to pay their employer thousands dollars if they leave their job via termination or resignation before a specific date, and can include a host of other financial penalties.

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 associated debt loads because they are presented as conditions of employment.[18] The on-boarding process in the trucking industry, which commonly takes the form of a one- to four-day orientation conducted at one of the motor carrier's terminals, exacerbates the pressure put on workers. Workers may travel hundreds, if not thousands, of miles to attend a motor carrier's orientation on a one-way ticket arranged and paid for by the motor carrier. The contracts may be presented to the worker for the first time during the final hours of orientation and if the contract is not executed, the worker may need to pay for the return home. 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,[19] employers instead use the contracts as tools to reduce outside employment options.

One of the most common forms of stay-or-pay contracts in the trucking industry is the training repayment agreement provision ("TRAP"). TRAPs are a type of liquidated damages provision wherein the worker agrees to pay the employer for the employee's training expenses if the worker leaves or is terminated before a certain date.[20] Often the training is inaccurately valued in the TRAPs because of the dubious quality of the training and the failure to properly account for productive work performed by workers during the training, and the financial penalties imposed on drivers can be significant. The CFPB explained that one company charged drivers over $6,000 for attending its commercial driver's license school if they sought out a different employment opportunity, but the company only paid the driving school $1,400-$2,500 per driver.[21] One former trainee at CRST, a large privately-owned transportation company, explained that "calling the [training] program a 'training' might have even been a stretch," as it did not contain "real training in backing up" and "didn't really prep you for the" commercial driver's license test.[22] When his instructor quit, the trainee decided to move on from CRST and was immediately subjected to repeated calls from debt collection agencies attempting to collect more than $6,000 on behalf of CRST.[23]

The exact prevalence of TRAPs is difficult to quantify, but one survey revealed that nearly 10 percent of American workers are subject to these provisions,[24] and the Student Borrower Protection Center estimated that "major employers rely upon TRAPs in segments of the U.S. labor market that collectively employ more than one in three private-sector workers."[25] Although estimates of TRAPs' prevalence in trucking is unavailable, there are documented examples of their use at many of the largest trucking companies, including Swift Transportation School (an on-site training program for Knight-Swift Transportation Holdings Inc.), Schneider Trucking School (a training program for Schneider National), Prime Trucking School (a training program for Prime, Inc.), and Contract Freighters.[26]

Restrictive employment contracts like traditional and de facto non-competes tend to produce relatively more negative impacts on women, workers of color, and workers with disabilities. These workers are generally more likely to be low-wage workers,[27] who are most negatively impacted by stay-or-pay practices. TRAPs, for example, are more common in industries that disproportionately employ women and people of color.[28] Truck drivers, although mostly men, are more likely to be non-white than the average worker.[29]

## Driver and Public Safety

Traditional non-compete clauses and de facto non-compete clauses enforced by employer-driven debt increase economic pressure on drivers. This economic pressure can put drivers and the public at risk by creating incentives to drive unsafely, reducing the likelihood that trucks are properly maintained, and perpetuating unsafe work environments.

These clauses create economic pressure on drivers by raising the stakes of quitting or getting fired, thereby suppressing wages for drivers because carriers face little pressure to compete to retain talent.[30] Additionally, these contracts can directly reduce drivers' net compensation through demands for repayment on a stay-or-pay contract or for breaking a traditional non-compete clause. For example, as noted above, CRST enforces TRAPs of more than $6,500,[31] which is an enormous sum compared to the approximately $50,000 average annual salary of CRST drivers.[32] These debt obligations can follow drivers throughout their careers.

Economic pressure caused by these provisions can trap drivers in unsafe, toxic, and abusive, work environments. Because financial penalties created by de facto non-compete clauses apply to workers upon their resignation or, often, termination, they are strongly incentivized to remain, quietly in their jobs even when doing so means declining to report safety violations or enduring harassment or abuse. Trucking is an industry notorious for its harsh working conditions, and drivers' inability to speak up about risks to their personal safety for fear of retaliation or firing creates safety risks for drivers and the public.

With regard to abuse, the Biden Administration has acknowledged that the prevalence of sexual assault and harassment in the trucking industry[33] plays a role in dissuading women from helping fill what the administration sees as a labor shortage in trucking.[34] A disturbing episode documented in a SBPC report illustrates how de facto non-competes can perpetuate this crisis:

> One woman who was a student trainee at CRST reported being raped by her trainer at the beginning of her 10-month training program. When she reported the incident to the company, she was told "without corroborating evidence like a video, the company could not do anything." Her complaint went ignored. After being effectively terminated by CRST following the event, she received a bill for $9,000 due to her TRAP. When she later sued the company for multiple causes, the company settled for $5 million. The court case revealed a much wider problem. In a deposition for the case, Brooke Willey, vice president of human resources, stated that in 2018 and 2019, there were 150 to 200 sexual harassment claims involving CRST drivers.[35]

In many cases, drivers suffer harassment and abuse at the hands of their supervisor or training co-driver. According to one attorney working on a gender discrimination class action lawsuit against CRST in 2015, many members of the class "were made to understand that their passage–that is being able to move on to be driver and receive actual pay–was dependent on providing sexual favors."[36]

In addition to disturbing accounts of sexual violence, drivers reported other types of violence between workers. Friction between co-drivers during training periods has resulted in violent episodes, complete with threats of physical altercations, purposeful sleep deprivation, and even murder.[37] Traditional and de facto non-competes prevent drivers from speaking up about or leaving these kinds of unsafe situations.

Economic pressure of the type described above also creates incentives to drive unsafely,[38] particularly given truckers' pay structures. To attempt to make ends meet under such pressure, drivers may drive longer and faster than is safe or lawful, as they are frequently paid by the mile instead of by the hour.[39] As a result, on average, long-haul truck drivers work fifty percent more hours than the typical American worker.[40] There is a bevy of evidence that links poor driver pay to poor driver safety because of the pressure to drive unsafely.[41] For example, the Office of the Inspector General of the DOT found that similar economic pressure created by unpaid detention time increases crash rates.[42] Additional research in Australia led that country's parliament to eliminate mileage-based pay for drivers.[43] Suppressed wages and debt obligations created by non-competes serve to exacerbate this dynamic. Poor pay, made even poorer due to non-compete clauses, incentivizes drivers to violate posted speed limits and DOT safety regulations that aim to limit driver hours.

Now-President Todd Spencer of the Owner-Operator Independent Drivers Association ("OOIDA") explained in a 2010 statement to Congress the need for FMCSA to take a more active role in regulating the economic pressures that encourage unsafe driving behavior:

> Enforcement priorities that ignore the relationship between highway safety and the coercive demands of shippers, receivers, motor carriers and freight brokers upon drivers are impediments to our overall safety objectives. The demands and expectations of trucking stakeholders on drivers are far more influential on safety than any inspection scheme or schedule of fines that Congress or FMCSA may devise. Unless those economic issues are addressed, drivers who become disqualified from driving for violating hours-of-service rules and other safety regulations will simply be replaced by new, less experienced drivers, facing the same economic pressures. It is only by addressing underlying economic concerns that we will begin to see significant improvements to highway safety.[44]

Finally, economic pressure caused by non-compete clauses can reduce spending on maintenance and repairs, thereby decreasing safety. While the vast majority of drivers are employees of trucking companies, a sizable minority – between 9 and 15 percent, by some estimates – are "owner-operators," meaning that they own or lease their own vehicle and motor carriers classify them (accurately or not) as independent contractors.[45] This number is considerably higher in some pockets of the industry: approximately two-thirds of drivers hauling goods from U.S. seaports in California are classified as independent contractors.[46] While all carriers face economic trade-offs for investments in safety-related equipment and maintenance, these trade-offs are particularly problematic for owner-operators and small carriers, who are solely responsible for generating profits and maintenance of equipment.[47] Owner-operators are responsible for the cost of their own benefits, retirement savings, additional payroll taxes, as well as for a myriad of expenses associated with their truck,[48] including required maintenance and repairs.[49] The intense economic pressure that owner-operators face — drivers' expenses in a week can result in a negative paycheck — may prevent owner-operators from making these repairs and keeping up with this maintenance. These pressures are exacerbated by reduced wages and debt obligations caused by restrictive employment contractual provisions like non-compete clauses. Poorly maintained trucks can contribute to unsafe outcomes like vehicle failures and crashes.[50]

## Current State

Congress enacted the Motor Carrier Safety Improvement Act in 1999, which created the FMCSA in order to prevent commercial motor vehicle-related fatalities and injuries.[51] The Act was one in a series of statutes that focused on improving safety on the country's highways, including the Surface Transportation Assistance Act of 1982, the Motor Carrier Safety Act of 1984 ("MCSA"), and the Commercial Motor Vehicle Safety Act of 1986, among others. In particular, the laws sought to encourage the safe operation of large trucks, which have grown in size and weight since deregulation in the trucking industry, and harmonize safety regulations across states.[52]

The regulatory authorities possessed by the DOT are codified at 49 U.S.C. § 31131 *et seq*. The Secretary of Transportation delegates to the Administrator of the FMCSA, at 49 C.F.R. § 1.87(f), the authority to carry out safety statutes as they relate to commercial trucking. Congress enacted the safety provisions primarily discussed in this memorandum as part of the 1984 MCSA.[53]

49 U.S.C. § 31136(a) directs DOT to issue safety rules prescribing "minimum safety standards" that, "[a]t a minimum," ensure that:

- "commercial motor vehicles are maintained, equipped, loaded, and operated safely";
- "the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely…"; and
- "the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators."

Additionally, 49 U.S.C. § 31502(b)(1) empowers the DOT to "prescribe requirements for . . . qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier…[.]"

DOT has repeatedly used these authorities to issue regulations designed to safeguard drivers' and public safety. In 2010, the FMCSA issued a regulation under §31136(a)(1) and §31136(a)(2) prohibiting drivers from texting.[54] In 2011, the FMCSA issued a similar regulation restricting drivers' use of hand-held cellphones.[55] The rules' statutory authority sections were nearly identical, stating that the rules were "based primarily on 49 U.S.C. § 31136(a)(1), which requires regulations that ensure that CMVs are operated safely, and secondarily on §31136(a)(2), to the extent that drivers' use of hand-held mobile telephones [or texting] impacts their ability to operate CMVs safely."[56] In 2015, the FMCSA issued a rule, based in part on its authorities listed in 49 U.S.C. § 31136(a)(3) and (4), that specified processes that drivers must follow for medical examinations prior to beginning work.[57] In 2021, the

FMCSA issued a regulation based in part on 49 U.S.C. § 31136(a) that modified controlled substances and alcohol testing requirements for commercial vehicle drivers.[58] In 2020, the FMCSA made modifications to the agency's Hours of Service ("HOS") regulations based on its authority under 49 U.S.C. § 31502(b) and 49 U.S.C. § 31136(a).[59] Several other regulations issued under 49 U.S.C. § 31502(b) and 49 U.S.C. § 31136(a) regulate commercial motor vehicle safety with respect to topics like alcohol and drug use,[60] inspection of cargo,[61] and safe parts and equipment.[62]

The safety regulation perhaps most closely analogous to the regulation proposed in this memorandum was issued prior to the 1984 enactment of the MCSA. In 1968, the Interstate Commerce Commission ("ICC") (which then possessed regulatory authority over commercial motor vehicle safety) issued a rule, now codified at 49 C.F.R. § 392.6, which prohibits a motor carrier from devising schedules that would place pressure on drivers to drive faster than applicable speed limits.[63] Rather than directly prohibiting drivers from driving faster than the posted speed limits, this regulation recognizes that forces beyond the driver's control – in this case, a carrier's delivery schedule – can, in the words of the current statute, impose "responsibilities" on drivers that can "impair their ability to operate" their vehicle safely.[64] Although the current 49 U.S.C. § 31502(b) and 49 U.S.C. § 31136(a) did not yet exist, the statutory language under which the ICC issued this regulation closely resembled these current statutes. The then-extant statute directed the ICC to regulate motor carriers with respect to "safety of operation and equipment" and "establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation."[65] This language is very similar to that of 49 U.S.C. § 31502(b) (e.g. "prescribe requirements for . . . safety of operation and equipment of, a motor carrier…") and 49 U.S.C. § 31136(a) (e.g. "prescribe regulations on commercial motor vehicle safety" that "prescribe minimum safety standards" to ensure that "commercial motor vehicles are maintained, equipped, loaded, and operated safely"). The FMCSA continues to bring enforcement actions under the schedule-speed limit regulation to ensure that demands from carriers do not encourage unsafe driving behavior.[66] This demonstrates that this type of regulation is supportable under current statutory authority.

While FMCSA has yet to issue safety regulations regarding economic pressure caused by low compensation or exploitative employment contract terms, there are new efforts to address the intersection between these issues. The 2022 Bipartisan Infrastructure Law directed the FMCSA to commission research studying the impacts of various driver compensation methods on overall safety and driver retention rates.[67] The FMCSA announced in 2022 that it would also study the impact of unpaid detention time on CMV safety and operations.[68]

The infrastructure law also mandated the creation of a taskforce to study another type of employer-driven debt: predatory truck leasing and lease-purchase agreements.[69] The authorizing language explicitly directed the Truck Leasing Task Force to, at a minimum, examine truck leasing arrangements, including "whether [they] properly incentivize the safe operation of vehicles, including driver compliance with the hours of service regulations and laws governing speed and safety generally"[70] The task force must produce a report that includes, among other items, "recommendations relating to changes to laws (including regulations) . . . to promote fair leasing agreements" and "best practices relating to . . . preventing coercion and impacts on safety as described in" 49 U.S.C. § 31136.[71]

# Proposed Action

## Legal Authority

As stated above, 49 U.S.C. § 31136(a) directs the DOT to "prescribe regulations on commercial motor vehicle safety" that "prescribe minimum safety standards."[72] The statute identifies five goals that regulations under 49 U.S.C. § 31136(a) should accomplish "[a]t a minimum." Among these goals, the statute requires that the regulations ensure that "(1) commercial motor vehicles are maintained, equipped, loaded, **and operated safely**"; "(2) the responsibilities imposed on operators of commercial motor vehicles **do not impair their ability to operate the vehicles safely** ..." and "(4) the operation of commercial motor vehicles does not have a **deleterious effect on the physical condition** of the operators."[73] Additionally, 49 U.S.C. § 31502(b)(1) empowers the DOT to "prescribe requirements for . . . safety of operation and equipment of . . . a motor carrier..."

These statutory provisions authorize the proposed regulations because non-compete clauses create intense economic pressure on CMV drivers. As explained above, that economic pressure:

- discourages CMV drivers from speaking up about safety and abuse issues, permitting FMCSA regulation under 49 U.S.C. § 31136(a)(1) and 49 U.S.C. § 31502(b)(1), as well as 49 U.S.C. § 31136(a)(4) when that failure can result in physical harm to the driver; and
- imposes responsibilities on drivers that impair their ability to operate the vehicles safely, either through their driving more than is safe or lawful or, in the case of independent contractor drivers, through disincentivizing investment in safety equipment, maintenance, and repairs, permitting FMCSA regulation under 49 U.S.C. § 31136(a)(2) and, secondarily, may cause vehicles not to be operated safety, permitting regulation under 49 U.S.C. § 31136(a)(1) and 49 U.S.C. § 31502(b)(1).

In order to survive arbitrary and capricious judicial review, such justifications would need to be based on empirical and anecdotal evidence. In preparation for regulating non-compete clauses under its safety authority, in addition to providing the evidence cited in Section II(B) of this memorandum, the FMCSA could: ensure that current efforts to study commercial vehicle safety and compensation methods include study of these clauses;[74] direct the Truck Leasing Task Force to include consideration of these practices in its remit;[75] and/or commission new research and issue requests for information on these practices and their effects on safety.

## Issue a New Regulation via Notice-And-Comment Rulemaking

Under its regulatory authority regarding CMV safety, described above, the FMCSA should consider issuing, through notice-and-comment, a regulation that bans traditional and de facto non-compete clauses in employment and contractor agreements for CMV drivers. The FMCSA could draw on the language used by the FTC to define and prohibit such clauses.[76] Potential language (adapted from the FTC's non-compete clause rule):

> Non-compete clauses that bind drivers of commercial motor vehicles are prohibited. Non-compete clause is defined as a contractual term between a carrier and a driver that prevents the driver from seeking or accepting employment with a person, or operating a business, after the conclusion of the driver's contract with the carrier. The clauses have the effect of reducing the ability of workers to leave their jobs because they diminish the availability of outside opportunities. This term includes a contractual term that is a de facto non-compete clause because it has the same effects of reducing worker mobility by adding a financial penalty for workers' resignation or termination, effectively prohibiting the driver from seeking or accepting employment with another business or person or from operating a business. The following types of contractual terms, among others, may be de facto non-compete clauses:

- A non-disclosure agreement between a carrier and a driver that is written so broadly that it effectively precludes the driver from working in the same field after the conclusion of the driver's contract with the carrier.
- A no-poaching agreement that involves carriers agreeing not to hire each others' drivers.[77]
- A contractual term between a carrier (or its affiliate) and a driver that requires the driver to pay the carrier or a third-party entity liquidated damages, including training costs, if the driver's relationship with the carrier terminates within a specified time period.

The FMCSA could also incorporate language from various state-level efforts to regulate these types of employment contracts.[78]

## Conclusion

Trucking companies are deploying non-competes and stay-or-pay contracts to trap workers in unsafe working conditions with low wages. Restrictive employment contracts create economic pressure on drivers that creates risks to their safety and that of the public. The FMCSA should use its authority to regulate CMV safety to ban these practices.

## Endnotes

1 This paper was authored by Reed Shaw.

2 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. 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 under 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 regulation non-compete agreements).

3 Bob Woods, *Why driving big rig trucks is a job fewer Americans dream about doing,* CNBC, (Jul. 5, 2022), https://www.cnbc.com/2022/07/05/why-driving-big-rig-trucks-isnt-a-job-americans-want-to-do-anymore.html.

4 Rachel Premack, *How a little-known 1980 law slashed pay for millions of truck drivers and created big-box retail as we know it*, Business Insider, (Jul. 25, 2020), https://www.businessinsider.com/truck-driver-pay-motor-carrier-act-retail-2020-7 (explaining that "[f]rom 1980 to '86, some 4,000 trucking companies went bankrupt").

5 Bob Woods, *Why driving big rig trucks is a job fewer Americans dream about doing,* CNBC, (Jul. 5, 2022), https://www.cnbc.com/2022/07/05/why-driving-big-rig-trucks-isnt-a-job-americans-want-to-do-anymore.html.

6 *Id*; 29 U.S.C. § 213(b)(1).

7 Robin Kaiser-Schatzlein, *How Life as a Trucker Devolved Into a Dystopian Nightmare,* NYTimes, (Mar. 15, 2022), https://www.nytimes.com/2022/03/15/opinion/truckers-surveillance.html.

8 Trucker Desiree, *Is there a truck driver shortage?*, (Dec. 25, 2018), https://truckerdesiree.com/2018/12/25/is-there-a-truck-driver-shortage/.

9 American Shipper, Survey: 50% of trucking companies say most new drivers quit within 6 months, (Sept. 1, 2017), https://www.freightwaves.com/news/survey-50-of-trucking-companies-say-most-new-drivers-quit-within-6-months.

10 Comment from Owner-Operator Independent Drivers Association to the Federal Trade Commission on proposed Non-Compete Clause Rule, (Apr. 25, 2023), https://www.regulations.gov/comment/FTC-2023-0007-19806; Comment from American Trucking Associations to the Federal Trade Commission on proposed Non-Compete Clause Rule, (May 3, 2023), https://www.regulations.gov/comment/FTC-2023-0007-20857.

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# INVOKING THE DEPARTMENT OF TRANSPORTATION'S COMPETITION AUTHORITY TO BAN NON-COMPETES AND STAY-OR-PAY CONTRACTS IN THE AIRLINE SECTOR

# Introduction

Some regional airlines are deploying traditional and de facto non-compete clauses in airline pilot contracts to restrict competitors' access to a scarce and essential group of workers — and then selectively waiving those clauses in an effort to steer pilots toward privileged partner airlines.[1] By these airlines' own admission, the motive for doing so is to avoid having to compete in the tight labor market for airline pilots. For example, after filing several lawsuits to enforce pilot stay-or-pay agreements, Southern Airways CEO Stan Little, complaining that other airlines were luring away his pilots with signing bonuses and other benefits, explained that enforcing the stay-or-pay agreements "wouldn't be an issue at all" if "there weren't a pilot shortage."[2]

Several federal agencies have clear statutory authority to regulate the use of traditional and de facto non-compete agreements, including the Department of Transportation ("DOT").[3] Under the Fair Aviation Act ("FAA"), the Department possesses the authority to regulate unfair methods of competition ("UMCs") in the airline sector.[4] This memorandum proposes that the DOT invoke its UMC authority to: (1) investigate airlines deploying traditional and de facto non-compete clauses in pilot contracts and order a halt to such behavior; and, subsequently, (2) promulgate, through notice and comment rulemaking, a regulation banning the use of traditional and certain de facto non-competes in all airline pilot employment arrangements.

## Justification

Airlines frequently engage in widespread, exploitative, and unfair practices that threaten consumer protections, diminish competition, and hamper our economy and economic growth. Recognizing the danger that concentration and anti-competitive behavior pose, last year President Biden issued an executive order on Promoting Competition in the American Economy, directing the Department of Transportation to leverage its antitrust authorities to promulgate pro-competition regulations.[5]

Among those harmful practices are non-compete and de facto non-compete agreements, like stay-or-pay contracts or Training Repayment Agreement Provisions ("TRAPs"). Traditional non-compete agreements prohibit employees who leave their jobs from working elsewhere in the airline industry for a certain period of time and within a certain geographic area. As the Biden Administration and state lawmakers crack down on traditional non-compete agreements, employers are increasingly relying on new, nefarious contract provisions: stay-or-pay contracts and closely-related TRAPs.

These contracts operate as de facto non-compete agreements,[6] and often seek to achieve the same outcome as traditional non-compete agreements through different means. Typically presented as a precondition to employment, stay-or-pay contracts require departing employees to pay their employer liquidated damages, sometimes in the tens of thousands of dollars, if they leave their job within a certain period of time, and can include a host of other financial penalties. TRAPs frame such damages as debt incurred for obligatory and standard on-the-job training.

Some airlines use traditional and de facto non-competes to restrict pilots from leaving unsafe or under-compensated jobs. For example, pilots at Southern Airways have reported management pressuring new pilots to fly in poor weather conditions and discouraging employees from reporting maintenance and safety issues.[7] In their counter lawsuit against Southern's TRAP enforcement actions, pilots allege that Southern used the TRAPs they signed at the beginning of their employment to "intimidate" them into "staying in jobs they are desperate to leave."[8]

While traditional non-competes are not prevalent among all airlines,[9] certain smaller airlines, and especially regional airlines, do use them.[10] Notably, the Teamsters, representing pilots who have flown for Republic Air and Cape Air, are currently suing over contract provisions that include a one-year non-compete clause.[11]

De facto non-compete clauses, including stay-or-pay contracts, are more commonplace in the airline industry, especially among smaller or regional airlines. (Regional airlines, like Republic and Cape, often operate outsourced flights branded on behalf of major U.S. airlines, such as American Eagle, Delta Connection, and United Express. Regional airlines are ubiquitous in certain routes, airports, and even regions of the country. In fact, according to the Regional Airline Association, in 2021, 67% of all U.S. airports with scheduled passenger air service received their only service from regional airlines.[12]) For example:[13]

- This year, Southern Airways, a Florida-based commuter airline, filed at least 100 complaints against former pilots to enforce training stay-or-pay contracts of up to $20,000 (which was reduced based on how much they worked as captains before leaving).[14]
- In May, Republic Airways announced new pilot contracts requiring pilots to pay a $100,000 penalty if they leave the airline within three years,[15] a provision which the Teamsters are challenging in court.[16]
- Ameriflight required its pilots to sign stay-or-pay agreements that could result in penalties of up to $30,000 for training debts, depending on the training package offered.[17] In one particular case, Ameriflight attempted to enforce a stay-or-pay contract which resulted in a $20,000 training debt for a pilot who left before completing 12 months of "revenue flying" with the airline.[18] The training debt would decrease by $10,000 after 12 months and be discharged after 18 months.[19]
- Boutique Air, a commuter airline that offers charter services, has pursued a suit against a former pilot to enforce a stay-or-pay agreement requiring the pilot to pay $13,500 for the required training offered by the airline after he resigned about 3 months into his contract.[20] The contract the pilot signed puts pilots on the hook for up to $14,000 in training costs if they leave within 180 days of employment, and that amount incrementally decreases until it is excused after 24 months.[21]
- Executive Fliteways, a New York-based charter flight company, has defended its stay-or-pay contract which, in one instance, included a penalty of $18,000 plus interest.[22]
- Pilots sued Mesa Airlines, a regional airline based in Phoenix, Arizona, in 2017 over its stay-or-pay contract provision and pay scheme. Mesa Airlines required pilots to complete training and enter into a promissory note with the employer that required employees to pay the employer back for the required training if the employee quit or was fired from the company within 12 months. In one suit, a pilot purportedly owed Mesa Airlines $12,712 for the required training, $2,112 of which was outstanding when he left the company after 10 months. Because of this, the plaintiff pilot alleged, Mesa Airlines did not pay the pilot any wages for his final pay period, withholding about $1,000 in wages earned.[23]

Airlines appear to be imposing these clauses to avoid competing on even footing in the labor market for pilots. As noted above, Southern Airways CEO Little has admitted that his company's use of stay-or-pay agreements stemmed from concerns that competitors were attempting to attract Southern pilots with higher salaries and larger bonuses.[24] Tellingly, in recent pre-employment contracts Republic Airways has promised to waive its non-compete clause when pilots take a new job at one of three specific major airlines: American, Delta, or United — all partners that supply all of Republic Airlines' routes.[25] Because entry and mid-career pilots often must complete a certain number of training hours on smaller craft, more prevalent among regional airlines, before becoming eligible to fly at major carriers, the effect of Republic's non-compete and waiver scheme is to artificially deprive American, Delta, and United competitors of accessing a vital labor market on equal terms. Similarly, according to a recent complaint, Southern Airlines, pursuant to an agreement with North America's largest regional airline, SkyWest Airlines, leverages TRAPs to encourage pilots to seek subsequent employment at SkyWest rather than competitors.[26]

Traditional and de facto non-competes not only harm competition, but they also pose safety risks for both employees and travelers. When pilots are forced to stay in dangerous working conditions because of restraints on their employment, they are discouraged from reporting safety concerns or seeking employment elsewhere. In the Southern Airways complaint, pilots allege that Southern "require[s] pilots to fly planes with obvious mechanical issues, fail[s] to invest appropriate resources in repairs, pressure[s] pilots to fly in dangerous weather conditions, schedule[s] pilots to work long days with little sleep, and seek[s] to implement policies that punish pilots who are too fatigued to fly."[27] And as the FAA has recognized, safety and adequate pilot training in regional airlines — where stay-or-pay contracts, TRAPs, and non-competes are most prevalent — has been a concern in recent years.[28]

The Federal Trade Commission ("FTC") recently proposed a rule that would ban many non-compete clauses in employment contracts; however, the rule does not reach airline workers. The FTC Act exempts certain employers from its authority, including common carriers and air carriers.[29] Unionization efforts have given many airline employees the bargaining power to eliminate traditional and de facto non-competes. But not all airline employees are unionized,[30] and even those that are, like at Republic Airways, sometimes still confront traditional and de facto non-compete clauses.

## Current State

The DOT's unfair or deceptive practices ("UDP") and UMC investigative and rulemaking authority originate from Section 411 of the Federal Aviation Act of 1958, which granted the nation's original airline regulator, the Civil Aeronautics Board ("CAB"), authority to:

> "upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, . . . investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof."[31]

In 1984, Congress transferred the CAB's competition authority to the DOT,[32] which as a result now possesses the authority at 49 U.S.C. § 41712 to "investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation."[33] Under the DOT's investigative UMC authority, the air carrier or other regulated entity has a right to notice and an opportunity for a hearing before the Secretary orders the air carrier to stop the practice or method.[34] Courts have held that the DOT can start such an investigation on its own motion or through complaints.[35] The Department also possesses the authority to "take action…[it] considers necessary to carry out this part . . . including . . . prescribing regulations."[36] Taken together, these statutory provisions therefore also grant the Department the ability to regulate UDPs and UMCs through notice-and-comment rulemaking.

On the adjudicative front, as a 2020 Government Accountability Office report specified, the DOT (and before it, the CAB) has long relied on a variety of cooperative and enforcement actions, including warning letters and consent orders (in the case of systemic or egregious violations).[37] Before issuing its 1965 overbooking and oversales rulemaking (see below), the CAB first launched investigations to assess the issue of "no-show" passengers but found that the problem arose out of airlines' overbooking behaviors and, upon concluding such practices harmed consumers, ordered airlines to submit documentation of their overbooking compensation and notification policies.[38] More recently, the DOT has relied on violations of specific rules to order airlines to stop UMC violations. For example, in 2016, citing both UDP and UMC authority, the DOT ordered Lufthansa to cease and desist from violating 14 CFR 382.155(d), which requires carriers to advise passengers of their right to enforcement action with the Department, assessing a $200,000 civil penalty.[39] In 2012, the DOT issued a consent order against Allegiant Air partly for violating 14 CFR 399.84 (the full-fare advertisement requirements) and the statutory prohibition of UDPs and UMCs under 49 U.S.C. § 41712.[40]

Under its Section 411 rulemaking authority, the CAB promulgated several rules during its existence on both UDP and UMC grounds. For example, the CAB promulgated a 1965 rule that regulated airlines' use of oversales, including consumer notification requirements.[41] The CAB also introduced many rules regulating computer reservation systems, which airlines used to gain market power by hiding fees or excluding other airlines.[42] Since inheriting the CAB's UDP and UMC authority, the DOT has promulgated several rules under Section 41712, including the tarmac delay rule,[43] the full-fare advertising rule,[44] and the prohibition on post-purchase price increases.[45] It has also issued sub-regulatory guidance predicated on its UMC authority, for example, concerning its enforcement priorities regarding predatory pricing in the 1990s.[46]

During the Trump Administration, the DOT sought to put in place new administrative hurdles to UDP rulemaking,[47] including adding an opportunity for interested parties to request hearings.[48] The Biden Administration has since simplified these administrative procedures, including limiting hearings to specific issues.[49] However, the procedural requirements apply only to UDP rules under 49 U.S.C. § 41712(a), not the DOT's authority to regulate or restrict UMCs (the subject of this memo).

## Proposed Action

The DOT should first launch an investigation under its UMC authority to consider whether to prohibit the specific airlines imposing traditional and de facto non-compete clauses on pilots from doing so; subsequently, the agency should promulgate notice-and-comment rulemaking banning non-competes and certain de facto non-competes in pilot contracts at all airlines.

### Scope of UMC Authority

Under Section 41712, the DOT is charged with "investigat[ing] and decid[ing] whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in . . . an unfair method of competition in air transportation or the sale of air transportation."[50] As explained above, Section 41712 is modeled after the FTC Act and therefore covers at least the scope of behaviors found to be UMCs under the FTC framework, if not more.[51]

The text of both FTC Act Section 5 and Section 41712 are nearly identical in their prohibition of unfair methods of competition.[52] In its recent 2023 proposed rulemaking on non-compete clauses, the FTC has described its Section 5 UMC authority as encompassing not only "all practices that violate either the Sherman or Clayton Acts[,]" but also "incipient violations of the antitrust laws–conduct that, if left unrestrained, would grow into an antitrust violation in the foreseeable future."[53] Similarly, the DOT has defined its UMC rulemaking authority as encompassing practices: (1) that violate the antitrust laws; (2) that are not yet serious enough to violate the antitrust laws but may well do so if left unchecked; or (3) that violate antitrust principles even if they do not violate the letter of the antitrust laws.[54] Finally, if the FTC can prohibit conventional non-compete agreements (and presumably close cousin arrangements like stay-or-pay contracts), then so must the DOT. After all, the DOT's UMC authority was intended to, at minimum, reach the same methods of unfair competition.[55]

Judge Posner reached a similar conclusion in the leading judicial opinion concerning the scope of Section 411's UMC authority, *United Air Lines, Inc. v. C.A.B.*[56] There, he upheld three Computer Reservation System ("CRS") rules, two of which — rules prohibiting price discrimination and the delisting of certain connecting flights by competitors — the CAB exclusively justified on competition grounds. Posner concluded that despite no evidence of monopolization, the airlines' "substantial market power" in the CRS market and the fact their behavior closely tracked "traditional" kinds of unlawfully anti-competitive activity justified the CAB's rules under what he characterized as Section 411's "broad reach."[57] Importantly, Posner's opinion underscored that Section 411 does not require a showing of "monopoly market share[,]" but merely "monopolistic behavior" that resembles conduct that has previously been regarded as anti-competitive.[58]

The DOT relied solely on its UMC authority in its 1997 CRS Rule regulating so-called "parity clauses." At the time, computer reservation systems operated on a tiered service system.[59] When airlines subscribed to higher, and more expensive, tiers on a system, ticket agents using that system would see more information about the airline's flight offerings, increasing the likelihood of a booking.[60] Because ticket agencies typically only used one of the four existing reservation systems (all owned by a major airline or an affiliate), airlines effectively had to subscribe to every agency to ensure their flight information reached the maximum number of consumers.[61] But the tiered model at least allowed an airline to decide how much to invest in each system. Three of the four CRSs began imposing parity clauses to instead require that airlines match, on their own system, whatever the highest tier of service they subscribed to on any other platform.[62]

Noting that each reservation system enjoyed significant market power, the Rule concluded that the parity clauses resembled traditional antitrust violations — including tying arrangements and violations of the essential facilities doctrine — and constituted attempts to monopolize the electronic distribution of airline services to travel agencies.[63] In describing the competitive harms it sought to curb, the DOT pointed to its finding that parity clauses diminished competition among CRS systems, stymieing the CRS systems from meeting airline service needs and creating other inefficiencies.[64] Finally, the DOT referenced *Eastman Kodak Co. v Image Technical Services*, 504 U.S. 451 (1992) to define market power, finding that market power is the power to "force a purchaser to do something that he would not do in a competitive market."[65] The DOT reasoned that CRS systems' market power was analogous because "there [was] no evidence that an airline would accept an obligation like the parity clause in a competitive market."[66]

## The DOT Should Investigate and Prohibit Traditional and de Facto Non-Competes as UMC Violations

The DOT should first launch an investigation into the use of de facto and traditional non-competes in airline pilot contracts. Doing so would comfortably fall within the "broad reach" of the Department's UMC authority.[67] Like the adjudicative and investigatory history of the overbooking and oversales rules described above, the DOT can first launch an investigation into traditional and de facto non-competes before issuing rulemaking. Both traditional and de facto non-compete agreements violate longstanding antitrust principles, and so are appropriate objects of UMC attention according both to the Department's own articulation of its UMC powers and Judge Posner's in *United Air Lines*.

Traditional and de facto non-compete agreements effectively function as restraints on trade within the labor market. As the 7th Circuit recognized in a 1985 case, "[a] covenant not to compete following employment does not operate any differently from a horizontal market division among competitors — not at the time the covenant has its bite, anyway."[68] The FTC, the nation's foremost antitrust authority, has a lengthy history of policing agreements not to compete between would-be competitors,[69] including agreements that require enforcing non-compete agreements.[70]

Non-compete and stay-or-pay agreements also resemble exclusive dealing contracts, another type of suspect trade restraint under the antitrust statutes. For example, in a landmark 1953 decision, the Supreme Court upheld the FTC's decision to invalidate exclusive dealing agreements between movie theaters and Motion Picture Advertising Services ("MPAS").[71] MPAS produced commercials for clients, which it then paid individual movie theaters to advertise to patrons. MPAS arranged exclusive dealing agreements with theaters, preventing these theaters from selling advertising space to any MPAS competitor.[72] In all, "MPAS and the three other major companies . . . foreclosed to competitors 75 percent of all available outlets (theaters) for this business throughout the United States."[73] This unfairly foreclosed the market of motion picture theaters for any newcomers or competitors in the industry, thereby "unreasonably restraining competition and tend[ing] to monopoly."[74] The exclusive dealing arrangement, the Court explained, "sewed up a market so tightly for the benefit of a few," thereby constraining competitors' and start-ups' ability to enter and constituting an "unfair method of competition."[75] The opinion followed earlier circuit court decisions reaching similar conclusions in other exclusive dealing cases.[76]

As the FTC demonstrated in proposing its own prohibition on non-competes,[77] the harmful effects of non-compete agreements, which reduce competitors' access to talent, closely track those of exclusive dealing arrangements described above, by: reducing new business formation (in this case, airlines) by depriving new entrants of essential start-up talent (here, pilots);[78] reducing innovation;[79] artificially depressing wages;[80] and reducing workplace productivity due to job-employee mismatch.[81] Further, because of the airline industry's stark concentration,[82] non-compete and stay-or-pay agreements — like CRSs, an essential and scarce requirement for the business of flying — may have heightened anti-competitive effects.

An investigation will likely demonstrate that a fear of competition appears to be motivating the inclusion of traditional and de facto non-compete agreements in pilot contracts. In justifying his airline's lawsuits against departing pilots to collect on stay-or-pay damages, Southern Airways Express CEO Stan Little explained that signing bonuses and other competitive offers had lured away his pilots.[83] Little noted, "if there weren't a pilot shortage, this wouldn't be an issue at all."[84] Note that even in Little's own description of the practice, stay-or-pay contracts function as a restraint on competition. And as noted above, Little's airline appears to be using its restrictive agreements to subsequently funnel pilots to a privileged partner.[85] Similarly, Republic Airlines has included a waiver provision in its non-compete clause for pilots that effectively hoards scarce pilot talent for United, Delta, and American at the expense of their competitors.[86]

Assuming the fact-finding record mirrors the data included in this memo, the DOT could use the above legal analysis to justify an order prohibiting the airlines from using traditional and certain de facto non-compete agreements in pilot agreements from doing so. The information gathered as part of this process would also bolster the record for eventually banning the practice through rulemaking.

## The DOT Should Promulgate a Ban on Traditional and Certain de Facto Non-Competes Through Notice-And-Comment Rulemaking

### 1. The DOT's power to issue notice-and-comment UMC rules

Whether the Department can exercise its UMC or UDP authority using notice-and-comment rulemaking, as opposed to merely via adjudication, is no longer in doubt. Under Section 40113(a), the Secretary of Transportation has the authority to "take action . . . as appropriate, [if it] considers [it] necessary to *carry out this part*, including conducting investigations, *prescribing regulations*, standards, and procedures, and issuing orders."[87] The Department's UMC and UDP authority, located at 49 U.S.C. § 41712(a) (originally, Section 411 of the FAA), falls under that relevant part within the U.S. Code — Part A of Title 49, Subtitle VII.

Suggestions that Section 41712's delineation of investigatory procedures somehow implicitly disclaims agency UMC or UDP rulemaking were rebuffed by Judge Posner in *United Air Lines*. There, he found that the Board was authorized to promulgate rules addressing unfair methods of competition practices which violated Section 411:

> "[T]he Board can make only rules designed to carry out policies set forth elsewhere in the Act — in section 411, for example. Section 411 announces a policy against unfair or deceptive practices and unfair methods of competition, and while at the same time it creates an adjudicative procedure for enforcing that policy, nothing in the Act indicates that it is the exclusive procedure."[88]

Further, and as Judge Posner also notes in his opinion,[89] the legislative history demonstrates that Congress consciously intended to transfer UMC and UDP rulemaking power from the CAB to the DOT.[90]

Past agency practice affirms this interpretation. Both the CAB and the DOT have invoked their rulemaking powers under Section 41712 on numerous occasions since 1960.[91] In 1967, the CAB finalized an overbooking rule, then codified at 14 C.F.R. Part 250, which guaranteed compensation to passengers who were denied boarding when they had confirmed reservations, relying, in part, on Section 411.[92] In another example, in 1984, the CAB finalized a rule under Section 411 targeting the use of Carrier-Owned Computer Reservations Systems (CRS),[93] which defined some CRS practices that the Board classified as "unfair methods of competition[.]"[94] The DOT has also promulgated several competition regulations, often relying on joint UDP and UMC authority. In 1997, the DOT added additional regulations on CRSs, using Section 411's UMC and UDP authority: "We may adopt rules regulating CRS displays under both parts of the authority granted by 49 U.S.C. 41712, that is, in order to eliminate practices that prejudice airline competition and practices that are likely to mislead consumers and their travel agents."[95] In 2016, the DOT promulgated a third "Enhancing Airline Passenger Protections" rule, which expanded the reporting carrier pool and required performance data for code-share flights marketed by reporting carriers, utilizing Section 41712's "unfair and deceptive practices and unfair methods of competition" authority.[96] In 2018, the DOT promulgated a rule defining additional "unfair or deceptive practices or unfair methods of competition" for air charter brokers.[97]

### 2. The DOT should begin rulemaking that bans the use of traditional and certain de facto non-competes as unfair methods of competition

The DOT should invoke its UMC rulemaking authority to promulgate a rule prohibiting traditional and certain defacto non-competes in pilot contracts at all airlines. The legal justification for doing so largely tracks the reasoning laid out in Section IV.B.[98]

Finally, to the extent a showing of market power must precede any use of UMC rulemaking,[99] *United Air Lines* and past agency practice both underscore that market share assessments can be conducted at varying levels of specificity.[100] In the labor market for pilots, a proper unit of analysis may differentiate between pilot certification ratings. For example, many entry-level to mid-career pilots join regional airlines to log the requisite flight hours that will qualify (or "rate") them for more lucrative jobs at major airlines flying larger craft. Locking this segment of pilots into jobs at regional airlines through traditional and de facto non-competes deprives other regional airlines of access to talent and deprives major airlines of accessing the traditional labor pipeline. These anti-competitive harms are compounded when regional airlines, like Republic and Southern,[101] selectively release pilots from the terms of their de facto non-compete clauses when pilots agree to take a job at a privileged partner airline. Given overall pilot shortages, it does not take many regional airlines deploying non-competes to meaningfully interfere with the competitive dynamics of the airline industry. After all, planes cannot fly without pilots.

## Conclusion

Regional airlines are deploying traditional and de facto non-compete clauses in airline pilot contracts to lock up access to a scarce and vital labor resource — and then selectively waiving those clauses in an effort to steer pilots toward privileged partner airlines. The DOT should use its UMC authority to investigate offender airlines and order a halt to these practices; ultimately, the agency should promulgate regulations prohibiting traditional and certain de facto non-competes in pilot contracts at all airlines.

## Endnotes

1 This paper was authored by Anna Rodriguez.

2 Dave Jamieson, HuffPost, S*outhern Airways Express is Suing Former Pilots For Training Costs* (Aug. 3, 2023), available at: https://www.huffpost.com/entry/southern-airways-express-is-suing-former-pilots-for-training-costs_n_64cbe72ee4b01796c06b6af8?ncid=engmodushpmg00000004.

3 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. Additionally, 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 (AELP) 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 regulation non-compete agreements).

4 49 U.S.C. § 41712.

5 Executive Order on Promoting Competition in the American Economy Sec. 5(m) https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

6 Zoe Salzman, Liquidated Damages Clauses in Employment Agreements, https://www.americanbar.org/content/dam/aba/publications/aba_journal_of_labor_employment_law/v34/number-2/liquidated-damages-clauses.pdf (comparing liquidated damages clauses to non-compete agreements in their effects of preventing worker mobility).

7 Dave Jamieson, *These Pilots Were Sued For Quitting. They Say It Was Dangerous To Stay*, Huffington Post (Oct. 6, 2023), available at: https://www.huffpost.com/entry/southern-airways-express-pilots_n_651ee853e4b0bfc227bf9b9d?jle.

8 *Id*.

9 AELP Letter, *supra* note 2, *2–3.

10 For example PSA Airlines, a subsidiary of American Airlines, has included a non-compete provision in a pilot employment contract that barred PSA pilots from working at competing commercial airlines, stipulating that "it would be impossible for [the employee] to perform services for another commercial air carrier which [sic] competes with PSA without accessing, using, or disclosing PSA's Confidential Information. Available at: https://www.reddit.com/r/flying/comments/nnzhkx/airline_cjo_with_noncompete_clause/.

11 Joe Kunzler, Simple Flying, T*eamsters File Legal Action Against Republic Airways & Cape Air* (June 13, 2023), available at: https://simpleflying.com/teamsters-legal-action-republic-airways-cape-air/#:~:text=The%20Teamsters%20union%20representing%20pilots,first%20three%20years%20of%20employment.

12 RAA Annual Report (2021), https://www.raa.org/content-hub/raa-annual-reports/raa-2022-annual-report/ *14.

13 Student Borrower Protection Center, DOT TRAP Letter (January 30, 2023), https://protectborrowers.org/wp-content/uploads/2023/01/1.30.2023-DOT-TRAP-Letter.pdf.

14 Jamieson, *supra* note 1; *see also Southern Airways v. Ryan,* Case No. 50-2023-sc-01947-xxxx-mb (County Court of the 15th Cir. Palm Beach County, Florida) (counterclaim) (filed September 8, 2023); Jamieson, *supra* note 6.

15 Channing Reid, Simple Flying, *Republic Airways To Issue $100,000 Fine If Pilots Quit Within First Three Years* (May 9, 2023), available at: https://simpleflying.com/republic-airways-100000-fine-pilots-quit/.

16 *See* Kunzler, supra note 10.

17 *Id*., *2.

18 *Id*., *see also* Ameriflight TRAP (2021), available at https://protectborrowers.org/wp-content/uploads/2022/12/Ameriflight-TRAP.pdf.

19 *Id*.

20 *Boutique Air, Inc. v. Sticka*, Case No. CGC-20-585536 (S.F. Sup. Ct. May 22, 2020), Complaint, 3. The case has since been dismissed, since Boutique failed to properly serve the pilot-defendant. Request for Dismissal Case No. CGC-20-585536 (S.F. Sup. Ct. Dec. 3, 2020).

21 *Id*.

22 *Executive Fliteways, Inc. v. Caballero*, 2007 N.Y. Slip Op. 32579 (N.Y. Sup. Ct. 2007). .

23 *Schipor v. Mesa Airlines, Inc.,* Case No. 2:17-cv-04044-JJT (D. Arizona), Complaint, available at: https://storage.courtlistener.com/recap/gov.uscourts.azd.1062825/gov.uscourts.azd.1062825.1.0.pdf.

24 *See* Jamieson, *supra* note 1.

25 *International Brotherhood of Teamsters, et. al. v. Republic Airways Inc., et. al*., Case No.: 1:2023cv00995 (S. D. Indiana June 8, 2023), Complaint, Exhibit 3, at *5.

26 *Southern Airways v. Ryan*, *supra* note 13, at *17–18.

27 *Id*., at * 9.

28 *See, e.g.,* Pete Muntean, CNN, *Exclusive: American Airlines' largest regional carrier gets FAA warning* (May 19, 2021), available at: https://www.cnn.com/2021/05/19/business/american-airlines-envoy-air/index.html.

29 15 U.S.C.A. § 45 (a)(2).

30 Michael Sainato, Guardian, *Delta flights attendants race to unionize: 'We're the people behind the profits'* (2022), available at:https://www.theguardian.com/business/2022/aug/03/delta-flights-attendants-union-push ("Only about 20% of the workforce at Delta is represented by a labor union, consisting of pilots and dispatchers, compared with 86% of the workforce at American Airlines, 85% at United, 82% at Southwest, 86% at Alaska and 48% at JetBlue.").

31 Section 411, Public Law 85-726.

32 Civil Aeronautics Board Sunset Act of 1984, H.R.5297 (98th Congress).

33 49 U.S.C.A. § 41712(a).

34 *Id*.

35 *Allied Air Freight, Inc. v. Pan Am. World Airways, Inc.*, C.A.2 (N.Y.1968), 393 F.2d 441, *certiorari denied* 393 U.S. 846.

36 49 U.S.C. § 40113(a) ("this part" references Part A of Title 49, Subtitle VII—DOT's UDP and UMC authority resides under Part A as well).

37 GAO-21-109, Aviation Consumer Protection, *12, https://www.gao.gov/assets/gao-21-109.pdf.

38 *See* Domestic Trunkline No-Show Compensation/Denied Boarding Plan & Overbooking Practices of Trunkline Carriers, Order E-20859, CAB (May 25, 1964)("Evaluation of the statistics compiled from carrier reports, during the period the plan was in effect, indicates that a substantial portion of the no-show problem is internal rather than passenger-created." *Id*. at *2. "We do not propose, at this time, to take further procedural steps in the Overbooking Practices of Trunkline Carriers Investigation, Docket 11683, but we shall consider, in a separate rule making proceeding, the issuance of a rule prescribing the minimum obligation of the carriers to give notice to passengers of an overbooked condition at a reasonably practicable time prior to scheduled flight departure… Additionally, we expect all carrier parties to adopt, in the immediate future, appropriate procedures designed to fully inform the traveling public of the provisions of the denied boarding compensation tariff…" *Id*. at *3). ; *see also* 30 FR 13236 (Oct. 16, 1965)("Evidence submitted by the carriers in the Overbooking Practices of Trunkline Carriers' investigation, Docket 11683, and information received thereafter indicate that in each of the years 1963 and 1964 approximately 50,000 passengers with tickets for confirmed reserved space have been denied boarding… As announced in the Overbooking case, Order E-20859, May 25, 1964, a rule making proceeding will be instituted to prescribe minimum obligations of carriers to provide the notice…").

39 *Lufthansa German Airlines*, 2016 WL 11543292.

40 *Allegiant Air, LLC* Violations of 14 CFR Parts 382 and 399, and 49 U.S.C. Sections 41705, 41702 and 41712, 2012 WL 1048405, at *3.

41 Passenger Priorities and Overbooked Flights NPRM, 30 FR 13236 (Oct. 16, 1965).

42 Jonathan Edelman, *Reviving Antitrust Enforcement in Airline Industry*, 120 Mich. L. Rev. 125, 142, available at: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=7838&context=mlr (2021). The CAB concluded that, computer reservation system "providers have the power to force competitors to abandon their competitive marketing strategy for reasons unrelated to its merits." 49 FR 63, 12675 (March 30, 1984). Many of the rules have since been allowed to expire after pressure from industry groups, changing ownership of CRS's and the expansion of the internet as a main conduit for ticket sales, Edelman, *id*. at 143.

43 86 FR 83, 23260 (May 3, 2021) (partly relying on DOT's UDP authority), codified in 14 C. FR 259.4.

44 76 FR 79, 23110 (April 25, 2011) (partly relying on DOT's UDP authority and partly relying on DOT's UMC authority to explicitly extend the price advertising rule to ticket agents, *id*. at 23143), codified at 14 C. FR 399.84(a).

45 *Id*. (partly relying on DOT's UDP authority), codified at 14 CFR 399.88(a).

46 Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry, 63 FR 17919 (1998). While that policy guidance was subsequently rescinded, that was due to political controversy — not doubt about the agency's UMC authority. Edelman, *supra* note 41, at 145.

47 The 2020 rule defined "unfair" and "deceptive" adopting the FTC definitions and underscoring the DOT's exclusive authority to prohibit these practices of air carriers. 85 FR 78707, 78717 (December 7, 2020). The rule defined a practice to be unfair if it "causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition. *Id*. The rule defined a practice as being deceptive if it "is likely to mislead a consumer, acting reasonably under the circumstances, with respect to a material matter. A matter is material if it is likely to have affected the consumer's conduct or decision with respect to a product or service." *Id*.

48 *Id*.

49 87 FR 22, 5655 (Feb. 2, 2022).

50 49 U.S.C.A. §41712.

51 *See e.g.*, Edelman, *supra* note 41, at 140, citing *United Air Lines*, at 1109-10. ("Posner's 1985 opinion approving the broader reach of section 411 predated the 1994 amendment to the FTC Act, and the breadth of section 411 has not been litigated since. But general statutory-interpretation principles suggest that section 411 is broader than the amended section 5. The textual canon of in *pari materia* (statutes addressing the same subject should be interpreted together) applies: because Congress included express limits on the conduct captured by section 5, the lack of express limits on section 411 should mean that those limits do not apply. Further, the fact that Congress passed legislation limiting section 5 without corresponding legislation to limit section 411 could reflect intent to keep the DOT's section 411 powers broad.").

52 Compare Section 41712, which allows the DOT Secretary to investigate and stop "an unfair or deceptive practice or unfair method of competition," and Section 5 of the FTCA, which allows the FTC Commission to prevent regulated entities "..from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 49 U.S.C.A. § 41712, 15 U.S.C.A. § 45.

53 88 FR 12, 3499 (Jan. 19, 2023), *citing Fed. Trade Comm'n v. Cement Inst.,* 333 U.S. 683, 693 (1948) (holding practices that violate the Sherman Act are unfair methods of competition); *Fashion Originators' Guild of Am. v. Fed. Trade Comm'n*, 312 U.S. 457, 464 (1941) (holding practices that violate the Clayton Act are unfair methods of competition); *Fed. Trade Comm'n v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394–95 (1953) ("The 'Unfair methods of competition', which are condemned by [Section] 5(a) of the [FTC] Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act. Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business.") (internal citations omitted); and *Cement Inst.*, 333 U.S. at 708 ("A major purpose of [the FTC] Act was to enable the Commission to restrain practices as 'unfair' which, although not yet having grown into Sherman Act dimensions would most likely do so if left unrestrained."); *Fashion Originators' Guild*, 312 U.S. at 466; Triangle Conduit & Cable Co. v. Fed. Trade Comm'n, 168 F.2d 175, 176 (7th Cir. 1948).

54 Delta Air Lines, Inc., Order No. 2004-6-17, DOT-OST-1998-4776-0009 (U.S. Dep't of Transp. June 21, 2004), https://www.transportation.gov/sites/dot.gov/files/docs/2004-617.pdf [perma.cc/G3MR-YAL5].

55 *See generally supra* note 50.

56 766 F.2d 1107 (7th Cir. 1985).

57 *United Air Lines* at 1113–14.

58 *Id*. at 1114. *United Air Lines* seems to imply that practices prohibited by UMC rulemaking must be exercised by entities that enjoy some modicum of market power, although it also suggests that it was appropriate to assess market power at fairly specific units of analysis, for example individual cities or even city pair routes. *Id.* at 1115 ("The record shows that in cities like Denver, where United accounts for a very large fraction of departing and arriving flights, United is able to persuade most travel agents (72 percent, weighted by revenue) to subscribe to its computerized reservation system. This in turn makes a listing in that system a must for airlines that want to compete in Denver, and so enables United to charge a high price for a listing, thereby impeding (no one knows by how much) the growth of competing airlines in the Denver market"). However, the oblique nature of market power language in the opinion, the conspicuous dearth of similar assertions from the current FTC or (as far as we are aware) the DOT, and of course the total absence of an express market share requirement in the statutory text, leave open questions about whether or to what degree a market power showing is required for the DOT to properly invoke its UMC powers. In this case, as noted below, *see infra* at IV. C(b), even if such a showing is required, the airlines deploying traditional and de facto non-competes enjoy a sizable share of the labor market for entry level and mid-career pilots.

59 62 Fed. Reg. 59784, 59785 (Nov. 5, 1997).

60 *Ibid*.

61 *Id*. at 59784.

62 *Ibid*.

63 *Id*. at 59793.

64 "Because of the parity clauses, the systems need not compete on price and service quality to obtain higher-level participation by airlines…[in contrast] In a competitive market, each system would compete to obtain higher levels of participation by airlines, in order to make the system more attractive to the travel agencies doing business in regions where those airlines have a significant market share." *Id*. at 59790; "In addition, the Justice Department states that the parity clauses have kept the systems from working with airlines to create levels of service that will meet their needs." *Id*.

65 62 FR 59789.

66 *Id*.

67 *United Air Lines* at 1114.

68 *Polk Bros. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 189 (7th Cir. 1985).

69 *See e.g. In the Matter of FMC Corporation and Asahi Chemical Industry Co., Ltd.*, FTC (June 21, 2002), available at: https://www.ftc.gov/legal-library/browse/cases-proceedings/981-0237-fmc-corporation-asahi-chemical-industry-co-ltd.

70 *In the Matter of American Renal Associates, Inc., a corporation, and Fresenius Medical Care Holdings, Inc., a corporation*, FTC (October 23, 2007), available at: https://www.ftc.gov/legal-library/browse/cases-proceedings/0510234-american-renal-associates-inc-corporation-fresenius-medical-care-holdings-inc-corporation. (The FTC settled charges involving two dialysis clinic operators, wherein operator A would buy out operator B's clinics in operator A's regional market and force some of operator B's clinics in the market to close. The agreement also required operator B would enforce its non-compete clauses with its medical directors at the closing clinics to prevent them from joining any new entrants to the market. The anti-competitive effects cited in the FTC's complaint included "eliminating actual, direct, and substantial competition between [operator A] and [operator B]; … increasing the ability of [operator A] to unilaterally raise prices; and … reducing [operator A's] incentives to improve service or quality.").

71 *Fed. Trade Comm'n v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392 (1953).

72 *Id*. at 393.

73 *Id*. at 394.

74 *Id*. at 395.

75 *Id*.

76 *See, e.g.*, the 8th Circuit upheld an FTC decision invalidating exclusive dealing arrangements between a carburetor producing company and service stations because it foreclosed a competing carburetor company from accessing the market of service stations, thereby preventing competition from new and existing producer entrants to the carburetor market. *Carter Carburetor Corp. v. Fed. Trade Comm'n*, 112 F.2d 722, 735 (8th Cir. 1940); 1925: The 2nd Circuit upheld an FTC decision invalidating a clothing manufacturer's arrangement with distributors that required both exclusive dealing and RPM (see below). *Butterick Co. v. Fed. Trade Comm'n*, 4 F.2d 910, 911 (2d Cir. 1925).

77 88 FR 3490.

78 88 FR 3491.

79 88 FR 3492.

80 88 FR 3485.

81 88 FR 3485.

82 *See generally* Edelman, *supra* note 41, 131–135.

83 Jamieson, *supra* note 1.

84 *Id*.

85 *See* note 25.

86 *See* note 24.

87 Emphasis added.

88 *United Air Lines*, *Inc. v. C.A.B.*, 766 F.2d 1107, 1111 (7th Cir. 1985).

89 *Id*.

90 The CAB Sunset Act of 1984 was preceded by a period of deregulation in the airline industry, culminating in the termination of the CAB and transfer of certain competition and consumer protection functions to the DOT. See Edelman, *supra* note 41, at 130. And this transfer of authority was intentional. During the hearings on the Sunset Act, some argued that UDP and UMC rulemaking authority should be diverted to the FTC. Legislators instead opted to retain UDP and UMC authority within DOT in part to avoid some of the procedural hurdles involved in FTC rulemaking: "Some of the witnesses at the hearing suggested the problems of split jurisdiction could be avoided by giving all consumer protection and unfair competitive practice authority to FTC, rather than DOT. However, this solution would raise other problems, such as FTC's lack of familiarity with the subject matter, and the prolonged [UDP] rulemaking procedures which FTC is required to undertake under the Magnuson-Moss Act." Civil Aeronautics Board Sunset Act of 1984, Comm. Rep. (May 1984), https://babel.hathitrust.org/cgi/pt?id=ien.35556021349907&view=1up&seq=6. In passing the Sunset Act, legislators emphasized the importance of the DOT retaining CAB's Section 411 rulemaking authority: "[t]he committee believes that after CAB Sunset there should continue to be authority in the federal government to protect consumers against unfair and deceptive practices. Although these regulations touch relatively limited areas of airline operations they furnish important protections for consumers and we do not wish to see these regulations end precipitously when CAB sunsets." H.R. REP. 98-793, 4, 1984 U.S.C.C.A.N. 2857, 2860. Additionally, the committee found that there was also a "strong need to preserve the Board's authority under Section 411 to ensure fair competition in air transportation[.]" Id at 2860–61. One of the Sunset Act's primary objectives was to preserve the agency's authority to regulate UDPs and UMCs. *Id*.

91 *See, e.g.*, *National Airlines, Inc., Enforcement Proceeding,* 31 C.A.B. 390, 392 (1960) (overbooking); 32 F.R. 160, 11921, 11939, Part 250–Priority Rules, Denied Boarding Compensation Tarrifs and Reports of Unaccommodated Passengers (Aug. 18, 1967); 14 C.F.R. Part 253 (notice of passenger contract terms); 14 C.F.R. Part 254 (liability for lost luggage) 766 F.2d 1107, 1111.

92 32 F.R. 160, at 11940.

93 CRSs are now superseded by the term Global Distribution Systems (GDS).

94 49 Fed. Reg. 60, 11644 (March 27, 1984).

95 62 FR 232, 63838 (Dec. 3, 1997).

96 81 FR 213, 76800 (Nov. 3, 2016).

97 Increasing Charter Air Transportation Options, 83 FR 180, 46867 (September 17, 2018).

98 *See generally* Section IV.B, *supra*.

99 This remains unclear. *See supra* note 57.

100 *See United Air Lines* at 1115; 49 FR 159, 32545 ("Because carrier demand for CRS services is essentially regional in nature, and because individual CRS's are in many ways complements, rather than substitutes for one another, CRS competition in some areas has not worked to benefit of air carrier purchasers or CRS services. A carrier with a substantial number of flights serving an area has little choice but tobt to purchase access to each CRS to which a major share of the travel agents in the region subscribe."); 49 FR 32541-42 ("... Our judgment of what is unfair must be informed not only by general antitrust principles, but also by the policy considerations underlying the [FAA]."); 57 FR 184, 43783 (Sep. 22, 1992) ("Participation in each system is also important because, despite the low national market shares of the smaller systems, each system dominates some regional CRS markets…for example, a carrier seeking travelers at Chicago will be severely handicapped if it does not participate in Apollo and Sabre, since their subscribers make over 80 percent of the CRS bookings in that area."); 67 FR 221, 69366 (Nov. 15, 2002) (CRS Proposed Rule) ("Other possible airline practices that would be covered…involve the use of an airline's dominant position in some local markets either to maintain or increase that dominance or to distort competition in the area's CRS market…Airlines can obtain a dominant position in some metropolitan area airline markets due to hub-and-soke system used by all network airlines…The hubbing airline's dominance of the local airline market, however, also enables it to force travel agencies to comply with its wishes." Id at 69387-88.) (Final rule allowed many of the rules to sunset because it found that " . . . market forces are beginning to discipline business practice in the CRS industry." 69 FR 4, 978 (Jan. 2, 2004).).

101 *See supra* notes 24 and 25.

# INVOKING THE ADMINISTRATION’S AUTHORITY TO BAN STAY-OR-PAY AGREEMENTS FOR FEDERAL CONTRACTORS

## 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.[1] 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. The Administration can take immediate action to prohibit stay-or-pay contracts for its federal contractors through its Federal Property and Administrative Services Act ("FPASA") authority, leading to both cost savings and higher-quality services and products.[2]

## Justification

Traditional non-compete agreements prohibit employees who leave their jobs from working elsewhere in a given industry for a certain period of time and within a certain geographic area. Yet as the Biden Administration and state lawmakers crack down on traditional non-compete agreements, employers are increasingly relying on new, nefarious contract provisions: stay-or-pay contracts and closely related Training Repayment Agreement Provisions ("TRAPs"), also known as "de facto" non-competes.

Typically presented as a precondition to employment, stay-or-pay agreements require departing employees to pay their employer liquidated damages, sometimes in the tens of thousands of dollars, if they leave their job within a certain period of time, and can include a host of other financial penalties. TRAPs frame such damages as debt incurred for obligatory and standard on-the-job training. Such agreements can trap workers in jobs they don't want and subject them to crushing debt burdens upon separation. These contracts operate as de facto non-compete agreements,[3] and often seek to achieve the same outcome as traditional non-compete agreements through different means.

Traditional and de facto non-compete agreements are common throughout the American economy. Almost one in five American workers is subject to a non-compete agreement, and about 38% of workers have been subject to noncompete agreements at some point in their careers.[4] TRAPs and other forms of stay-or-pay contracts are becoming more common, particularly among entry-level workers, as a direct response to the increased negative attention to traditional noncompete agreements.[5] In 2022, a study estimated that major employers rely on TRAPs in sectors that collectively employ over a third of all private-sector workers in the U.S.[6] While there is no comprehensive data that analyzes the prevalence of stay-or-pay agreements in government contracting, it is likely to parallel national trends, and these agreements have been documented among government subcontractors.[7]

Stay-or-pay agreements work contrary to the FPASA's statutory goals of "economy" and "efficiency."[8] As further explained below, stay-or-pay and TRAP contracts effectively act as non-compete agreements, which can suppress innovation and new business development.[9] This, in turn, reduces competition amongst potential government contractors, potentially raising prices for their goods and services. Alarmingly, the unsurmountable financial debts created by stay-or-pay contracts may also deter employees from reporting safety or efficiency concerns.[10]

## Current State

The FPASA authorizes the President to "prescribe policies and directives that the President considers necessary to carry out this subtitle," namely the FPASA's goal of promoting "economy" or "efficiency" in federal procurement.[11]

Past administrations have invoked the FPASA to regulate federal contracting in various ways. In the 1970s, courts held that the FPASA authorized the federal government to require that contractors abide by certain anti-discrimination policies.[12] Other administrations have invoked the FPASA to require federal contractors to comply with certain workplace standards, including wage and price standards,[13] regulations concerning project labor agreements,[14,] and requirements that contractors provide employees notice of their rights to opt out of joining a union or paying mandatory dues outside of representational activities.[15] The federal government has also promulgated FPASA rules requiring contractors to provide disclosures of known violations of federal criminal laws or of the civil False Claims Act,[16] creating business ethics awareness and compliance programs,[17] and mandating the use of the E-verify system to verify employment eligibility of workers.[18] In 2011, the Obama administration used the FPASA to mandate that contractors implement screening systems to prevent employee conflicts of interest.[19] And in 2016, the Obama administration relied on its FPASA authority to require federal contractors to receive paid sick leave.[20]

More recently, the Biden Administration has deployed its FPASA authority in two high-profile cases: to impose a vaccine-or-test mandate on the federal contracting workforce and to raise the minimum wage for federal contractors' employees to $15 an hour in 2022.[21] Challengers have successfully won injunctions against both rules in federal courts — although, as explained below, for reasons that do not apply to this proposal.[22]

## Proposed Action

The Administration should prohibit federal contractors from using traditional or de facto non-compete agreements, including certain stay-or-pay agreements, in any of their employment contracts.

### Scope of FPASA Authority

Federal courts have upheld the FPASA directives so long as the government offers good-faith arguments connecting the policy at issue to the statutory goals of "economy" and "efficiency." In *AFL-CIO v. Kahn*, the D.C. Circuit found that an executive order requiring federal contracts, in a bid to slow inflation, to include clauses requiring compliance with wage and price standards fell within the President's power under the FPASA; the court noted that the FPASA's goals of economy and efficiency are broad and found a "sufficiently close nexus" to the statute's goals because, if successful, the program could reduce government procurement prices in the future — even if in the short-run it might boost procurement costs.[23] The court emphasized "the importance to our ruling today of the nexus between the wage and price standards and likely savings to the Government[,]" noting that the decision "does not write a blank check for the President to fill in at his will."[24]

Courts have used *Kahn*'s "reasonably close nexus" standard to compare an executive order's purpose with the FPASA's goals of economy and efficiency. For example, in *UAW-Labor Employment and Training Corp v. Chao*, the D.C. Circuit validated even the "attenuated" nexus between FPASA and an executive order that required all contracts in excess of $100,000 to include a provision obligating contractors to post notices informing employees of their rights not be required to join a union or pay fees.[25] The administration had theorized that "productivity" is enhanced "when workers are better informed of their rights,"[26] a justification the Court validated even if, as it noted, "one can with a straight face advance an argument claiming opposite effects or no effects at all."[27] And, in *Chamber of Commerce v. Napolitano* a federal district court upheld a requirement that contractors ascertain the immigration status of certain new hires using E-verify, finding that a reasonably close nexus exists so long as the "President's explanation for how an Executive Order promotes efficiency and economy [is] reasonable and rational."[28] In this case, the court found that President Bush's conclusion that the E-verify system would result in fewer immigration enforcement actions, fewer undocumented workers — and "therefore generally more efficient and dependable procurement sources" — was sufficient to meet the nexus requirement.[29] The court also held that "[t]here is no requirement …for the President to base his findings on evidence included in a record."[30]

While the case law suggests that an array of good-faith arguments can justify upholding a procurement directive under the FPASA, there are some limitations. Most notably, courts have invalidated FPASA directives that conflict with other statutes. In *Chrysler Corp. v. Brown*, the Court considered a challenge to an executive order requiring the public disclosure of information filed with the Office of Federal Contract Compliance Programs ("OFCCP") about contractors' compliance with their anti-discrimination and affirmative action requirements.[31] There, the Court determined that the information at issue fell under the purview of the Trade Secrets Act, 18 U.S.C. § 1905, which generally forbids agencies from disclosing certain types of information, including "trade secrets[,]" unless "authorized by law."[32] The Court determined that the OFCCP regulations, even if promulgated under the FPASA, did not count as "authorized by law" for the purposes of the Trade Secrets Act, because nothing in the legislative history of the FPASA suggested that Congress intended to override the Trade Secrets Act preference for keeping sensitive business information confidential.[33] Importantly, however, the Court did not hold in that case that the FPASA somehow prohibits information disclosure generally, or that the regulations were at all invalid under the FPASA[34] — a point that Justice Marshall underscored in his concurrence.[35] Similarly, in *Chamber of Commerce of U.S. v. Reich*, the D.C. Circuit Court invalidated an executive order authorizing the Secretary of Labor to disqualify from federal contracts employers who hire replacement workers during lawful strikes because the National Labor Relations Act ("NLRA") preempted such a use of the FPASA.[36]

There remains some uncertainty about the extent to which FPASA directives can apply to subcontractors. In *Kahn*, for example, the court validated the wage rule under the FPASA even as applied to certain subcontractors.[37] But in another case, *Liberty Mutual Insurance Co. v. Friedman*, the Fourth Circuit invalidated an affirmative action requirement as applied to workers compensation insurance subcontractors, finding Liberty was "not itself a federal contractor and there [was], therefore, no direct connection to federal procurement."[38] Further, the court found "no suggestion that insurers have practiced deliberate exclusion of minority employees," and therefore the supposed increase in cost due to discrimination was "too attenuated."[39]

Recent decisions invalidating President Biden's vaccine mandate and minimum wage rule for contractors are discussed in detail below.[40]

## Proposal: Prohibit Non-Compete and Certain Stay-Or-Pay Agreements Among the Federal Contracting Workforce

Using its FPASA authority, the administration should prohibit the use of noncompetes and certain stay-or-pay agreements by federal contractors. As many other FPASA rules have done, the proposed rule should apply firm-wide, not just to the employment contracts of employees working directly on a federal contract. The rule should also apply to subcontractors.[41] Procedurally, the President should first issue an Executive Order to that effect. The Federal Acquisition Regulation ("FAR") Council can subsequently begin the rulemaking process to promulgate the ban.

Prohibiting the use of non-compete or stay-or-pay agreements straightforwardly advances the FPASA's statutory goals of economy and efficiency in at least two ways:

1. First, non-compete and stay-or-pay agreements stymie competition and can therefore suppress innovation and artificially inflate costs for the government. As the Federal Trade Commission ("FTC") demonstrated in proposing its own prohibition on noncompetes,[42] the harmful effects of these exploitative employment contracts include: reducing new business formation by depriving new entrants of essential start-up talent;[43] reducing innovation;[44] and reducing workplace productivity due to job-employee mismatch.[45] Stay-or-pay agreements, in many instances, have the effect of non-compete agreements, since employees may choose to stay with an employer out of fear of the insurmountable debt burden that will attach upon their departure. Eliminating non-compete and stay-or-pay agreements will therefore enable more competition for services and products, which should help reduce prices and improve quality.

2. Second, eliminating stay-or-pay contracts may increase the likelihood that employees will raise safety and other concerns. Many stay-or-pay agreements attach even when an employer terminates a worker's employment, which disincentivizes workers from speaking out about unsafe or unethical workplace conditions. For example, recently, airline pilots at Southern Airways — which includes stay-or-pay provisions in its employment contracts — have reported management pressuring new pilots to fly in poor weather conditions and discouraging employees from reporting maintenance and safety issues.[46] In their counter lawsuits against Southern's stay-or-pay enforcement action, pilots allege that Southern used the training repayment agreements they signed at the beginning of their employment to "intimidate" them into "staying in jobs they are desperate to leave."[47] Without the threat of costly stay-or-pay agreements, workers may feel more comfortable raising safety and other concerns proactively, yielding not just potential cost savings and superior products and services, but also improved worker morale.

These justifications find close analogs in the reasoning that past administrations have used to impose new FPASA obligations that have been upheld in federal court. For example, the pro-competitive and safety benefits of prohibiting traditional and de facto noncompetes echo the reasoning used to justify the Carter administration's wage and price freeze, a bid to stymie rampant inflation.[48] The *Kahn* court held that the order's mere potential to secure long-term cost-savings (even if the policy spiked prices in the short-run) satisfied the FPASA's statutory criteria.[49] Importantly, the court did not require the government to somehow empirically prove that its suppositions would bear out; indeed, the D.C. Circuit would elaborate in 2003, in *UAW*, that what it characterized as an "attenuated" FPASA justification — as noted above, that workers better informed as to their statutory rights are more productive — nonetheless met the statutory threshold even if "one can with a straight face advance an argument claiming opposite effects or no effects at all."[50] To summarize in the words of yet another FPASA decision, this time upholding an E-verify mandate, all an administration need do is offer an economy and efficiency explanation that is "reasonable and rational."[51] Both justifications outlined above readily meet this standard.

The Obama administration's paid sick leave program for federal contractors, though apparently never challenged in court, offers further administrative precedent. The administration justified imposing sick leave requirements by predicting that a more generous benefits package would improve worker performance and attract talent to the contracting workforce.[52] The Executive Order argued that providing sick leave would not only improve the "health and performance" of government contractors but would also "bring benefits packages at Federal contractors in line with model employers, ensuring that they remain competitive employers in the search for dedicated and talented employees."[53] Maintaining a competitive market for contractors, the Executive Order reasoned, would create savings and quality improvement that would lead to improved economy and efficiency in government procurement.[54] Similarly, prohibiting the use of traditional and de facto non-compete agreements would likely boost employee morale and make government contracting jobs more attractive to top-notch prospective employees.

Both safety and competition justifications underpin the proposal's application firm-wide, not just to employees working on a government contract. Safety improvements cannot be achieved without company-wide buy-in, as an unsafe company culture, even if primarily developed on non-government projects, can readily bleed into contracting work. Employees may also move between contract work and non-contract work. Similarly, contractors' employees who do not work directly on a federal contract may nonetheless be well-suited to leave one firm to start or work at another firm that bids on federal contracts; therefore, a firm-wide application will likely foster a more competitive federal contracting sector. The firm-wide application aligns with past FPASA caselaw.[55] For example, in *UAW-Labor Employment and Training Corp. v. Chao*, the D.C. Circuit upheld a directive requiring contractors to post a notice "at all of their facilities" informing employees of their rights not to "join a union or to pay mandatory dues for costs unrelated to representational activities."[56] And in *Chamber of Commerce* *v. Napolitano* the court upheld the requirement to use E-Verify for all new employees, including those who do not work directly on a federal contract.[57]

Additionally, it is helpful to recall that past administrations have successfully withstood legal challenges to far more sweeping and intrusive federal contracting stipulations than the one proposed here.[58] Above all, in its landmark federal contracting case, *Kahn*, the D.C. Circuit upheld the Carter administration's FPASA order establishing highly prescriptive wage and price standards.[59] The policy required contractors to keep price increases for all products, not just those subject to a federal contract, below 0.5 percent of the company's "recent rate of average price increase"; and it restricted employee wages, again firm-wide, to no more than a seven percent annual increase.[60] Such micromanaging of the core pillar of a firm's business enterprises may well mark the outer bounds of a president's FPASA authority, but in doing so offers a useful benchmark. If the Carter wage and price freeze were valid according to *Kahn*, then so too is a far more modest requirement prohibiting just one type of exploitative contract provision: traditional and de facto noncompetes.

Finally, the proposed FPASA rule here does not suffer from the defects that have led to courts striking down other FPASA impositions. It would neither contravene other federal statutes, as the invalidated FPASA rules in *Chrysler* and *Chamber of Commerce* did.[61] Again, see the subsequent section for more detail on why this proposal should survive the kinds of judicial scrutiny that have jeopardized contracting requirements about COVID-19 vaccines and the minimum wage.

## Risk Analysis

Two high-profile Biden administration efforts to impose laudable requirements on federal contractors have succumbed to legal challenges. One was the order[62] enjoined by the Fifth, Sixth, and Eleventh Circuits,[63] requiring all federal agencies to include in their new contracts a provision effectively obligating contract recipients to require their employees to wear face masks at work and be vaccinated against COVID-19. Another order increased the hourly minimum wage paid by parties who contract with the Federal Government to $15.00 for those workers working on or in connection with a Federal Government contract.[64] Despite favorable district court rulings in Arizona and Colorado,[65] a court in the Southern District of Texas enjoined the rule's application in three southern states.[66]

Though these adverse decisions may generate concerns about the feasibility of imposing new FPASA requirements in the current judicial climate, there are at least two reasons to think that the proposed action will ultimately fare better. First, the COVID-19 and adverse minimum wage decisions — not reviewed by the Supreme Court — rely on a crabbed reading of the text of the FPASA at odds with longstanding precedent. And as several legal commentators have begun pointing out, the Fifth Circuit may have overestimated the Supreme Court's appetite for further disturbing judicial precedent in the field of administrative law.[67] Second, and more importantly, the proposed ban here is distinguishable from the adverse vaccine and minimum wage cases even according to the logic of those decisions.

### Vaccine Litigation

The Biden Administration cited the FPASA as authority to impose on federal contractors a requirement to "provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract[.]"[68] Although the Ninth Circuit upheld the requirement as a valid use of the FPASA, district court injunctions enjoining the order were upheld in the Fifth, Sixth, and Eleventh Circuits.[69]

The Fifth Circuit, citing the major questions doctrine, found the FPASA did not clearly authorize the President to impose requirements concerning the conduct of the employees of federal contractors, as opposed to regulating the contractors themselves.[70] A bar against noncompetes and certain stay-or-pay agreements would not regulate employee conduct, even indirectly. Hence, this decision is largely irrelevant to the proposed action.

For their part, the Sixth and Eleventh Circuits relied on a crabbed reading of the terms of the FPASA. That Act authorizes the President to "prescribe policies and directives that the President considers necessary to carry out" the FPASA.[71] President Biden, like his predecessors, understood "carry[ing] out" the act as encompassing the fulfillment of its explicit purposes, including "provid[ing] the Federal Government with an economical and efficient system for . . . [p]rocuring and supplying property and nonpersonal services, and performing related functions."[72] As implemented by presidents of both parties, "an economical and efficient system" for procurement encompasses the provision of goods and services by federal contractors in an economical and efficient manner. As construed by the Sixth and Eleventh Circuits, however, the FPASA allows presidents to concern themselves only with the economy and efficiency by which the Government enters into contracts,[73] rather than with the conduct of federal contractors.

As detailed in the Ninth Circuit opinion upholding the Biden initiative (and by dissenting judges in the Fifth,[74] Sixth,[75] and Eleventh[76] Circuits), so narrow a reading of the FPASA is inconsistent with precedent and longstanding practice:

> Presidents have used the Procurement Act to require federal contractors to commit to affirmative action programs when racial discrimination was threatening contractors' efficiency; to adhere to wage and price guidelines to help combat inflation in the economy; to ensure compliance with immigration laws; and to attain sick leave parity with non-contracting employers because federal contractors were lagging behind and losing talent.[77]

The legality of these various uses of the FPASA were upheld in a series of cases by the Third, Fifth, and D.C. Circuits, as well as the U.S. District Court for the District of Maryland.[78] Congress, undoubtedly aware of supportive decisions issued in the 1960s and 1970s, recodified the Procurement Act without any substantive changes in 1986 and 1996.

In 2001, President George W. Bush issued an Executive Order requiring government contractors and their subcontractors to post notices at their facilities informing their employees of certain labor rights. Congress again recodified the FPASA in 2002, explicitly indicating that the several minor edits then enacted again made "no substantive change in existing law."[79] In 2015, President Obama used the FPASA as authority to require federal contractors to provide paid sick and family care leave. The order was not challenged in court.

These precedents and Congress's repeated re-enactment of the FPASA without disturbing the executive's broad reading of presidential authority support confidence that the adverse COVID-related decisions will not prove persuasive (or, in the case of the Fifth Circuit, relevant), in reviewing an executive order barring contractors from using noncompetes and certain stay-or-pay agreements.[80]

## Minimum Wage Litigation

Courts across the country have weighed in on the President's authority under the FPASA to increase contractors' minimum wage to $15 beginning in 2022, with annual adjustments thereafter. In 2022, the U.S. District Court for the District of Colorado, explaining that the FPASA has been properly used previously to regulate minimum wage for federal contractors, denied two companies' motion for a preliminary injunction to the order.[81] The U.S. District Court for the District of Arizona reached the same conclusion in a challenge brought by five states.[82] More recently, the District Court for the Southern District of Texas enjoined Biden's the minimum wage order as applied in Texas, Louisiana, and Mississippi.[83]

Both the Arizona and Colorado courts applied what has so far been the majority approach to reviewing presidential orders under the FPASA, requiring only that the order be based on "a sufficiently close nexus" between the order's requirements and the FPASA's goals of economy and efficiency in federal contracting.[84] As explained above, an order barring the use of noncompetes and certain stay-or-pay agreements by federal contractors would easily meet that standard.

The Texas district court opinion is weak because it is based on the narrow reading of presidential authority under the FPASA that the Sixth and Eleventh Circuits followed in enjoining the Biden COVID-19 orders.[85] As explained above, that reading is unpersuasive.[86]

Moreover, even according to its own (perhaps flawed) interpretation of the FPASA's scope, the proposed ban on traditional and de facto noncompetes should pass muster. The court described the act's goal as "obtain[ing] full and open competition" using "competitive procedures" in fulfilling the Government's procurement requirements.[87] As explained above, that is precisely what the proposed action here would attempt to do.[88]

## Conclusion

The President should use his FPASA authority to prohibit noncompetes and certain stay-or-pay agreements in government contracts. Doing so accords with the FPASA's goal of economy and efficiency in government contracting and aligns with the administration's commitment to bolster market competition.

## Endnotes

1 This paper was authored by Anna Rodriguez.

2 40 U.S.C. § 101 *et seq*.

3 Zoe Salzman, Liquidated Damages Clauses in Employment Agreements, https://www.americanbar.org/content/dam/aba/publications/aba_journal_of_labor_employment_law/v34/number-2/liquidated-damages-clauses.pdf (comparing liquidated damages clauses to non-compete agreements in their effects of preventing worker mobility).

4 GAO, Noncompete Agreements: Use if Widespread to Protect Business' Stated Interests, Restricts Job Mobility, and May Affect Wages (May 2023), available at: https://www.gao.gov/assets/gao-23-103785.pdf., *2.

5 Student Borrower Protection Center, Trapped at Work 4, (July 2022), https://protectborrowers.org/wp-content/uploads/2022/07/Trapped-at-Work_Final.pdf ("An industry trade association publication has been explicit in encouraging the use of TRAPs as a solution to bans on non-compete agreements, because TRAPs can accomplish the same goal with different terms.").

6 *Id*. at 3.

7 Robin Kaiser-Schatzlein, *Pay Thousands to Quit Your Job? Some Employers Say So*, The New York Times Magazine (Nov. 20, 2023), available at: https://www.nytimes.com/2023/11/20/magazine/stay-pay-employer-contract.html; Student Borrowers Protection Center, "Unconscionable" Debt-for-Training Scheme Funnels Low-Wage Tech Workers to Fortune 500 Companies; Groundbreaking Class-Action Lawsuit Seeks to Void Predatory Training Repayment Agreement Provisions (April 14, 2023), available at: https://protectborrowers.org/unconscionable-debt-for-training-scheme-funnels-low-wage-tech-workers-to-fortune-500-companies-groundbreaking-class-action-lawsuit-seeks-to-void-predatory-training-repayment-agreement-provisions/.

8 40 U.S.C.A. § 101; 40 U.S.C.A. § 121(a).

9 *See*, *e.g.*, Mark Lemley and Orly Lobel, Banning Noncompetes Is Good for Innovation, Harvard Business Rev. (Feb. 6, 2023), available at: https://hbr.org/2023/02/banning-noncompetes-is-good-for-innovation.

10 *See*, *e.g.*, Dave Jamieson, *These Pilots Were Sued for Quitting. They Say It Was Dangerous To Stay*, HuffPost (Oct. 6, 2023), available at: https://www.huffpost.com/entry/southern-airways-express-pilots_n_651ee853e4b0bfc227bf9b9d.

11 40 U.S.C.A. § 101; 40 U.S.C.A. § 121(a).

12 *See*, *e.g.*, *Contractors Ass'n of E. Pa. v. Sec'y of Lab*., 442 F.2d 159 (3d Cir. 1971).

13 *See*, *e.g.*, *Am. Fed'n of Lab. & Cong. of Indus. Organizations v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979).

14 *See*, *e.g.*, *Bldg. & Const. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002).

15 *See*, *e.g.*, *UAW-Lab. Emp. & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003).

16 48 C.F.R. § 52.203-13 (b)(3)(i).

17 48 C.F.R. § 52.203-13(c).

18 48 C.F.R. § 22.1802.

19 48 C.F.R. § 52.203-16.

20 Executive Order 13706 (September 7, 2015); Establishing Paid Sick Leave for Federal Contractors, 81 FR 67598.

21 Ensuring Adequate COVID Safety Protocols for Federal Contractors, 86 Fed. Reg. 50985 (Sep. 14, 2021); Increasing the Minimum Wage for Federal Contractors, 86 FR 22835 (April 27, 2021); Minimum Wage for Federal Contracts Covered by Executive Order 14026, Notice of Rate Change in Effect as of January 1, 2023, 87 FR 59464. This rule has been subject to litigation, discussed further, infra, Risk Analysis: Minimum Wage Litigation. This rule has been subject to litigation, discussed further, infra, Risk Analysis: Minimum Wage Litigation.

22 *See*, infra, Risk Analysis.

23 618 F.2d 784, 792.

24 *Id*. at 793.

25 325 F.3d 360, 366 (D.C. Cir. 2003).

26 Executive Order 13201, § 1(a), 66 FR. at 11,221.

27 325 F.3d 360, 366 (D.C. Cir. 2003).

28 648 F. Supp. 2d 726, 738 (D. Md.).

29 *Id*.

30 648 F. Supp. 2d 726, 738 (D. Md. 2009).

31 *See generally* 441 U.S. 281 (1979).

32 18 U.S.C.A. § 1905 (West).

33 441 U.S. 281, 305 (1979).

34 *Id*. at 309 n.40.

35 *Id*. at 319. (Marshall, J., dissenting) ("Our conclusion that disclosure pursuant to the OFCCP regulations is not "authorized by law" for purposes of § 1905, however, does not mean *the regulations themselves* are 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right' for purposes of the Administrative Procedure Act"). As Marshall also notes, the OFCCP regulations at issue were arguably not promulgated in compliance with the APA, and so unlawful for additional reasons not relevant to this rulemaking. *Ibid*.

36 74 F.3d 1322 (D.C. Cir. 1996).

37 The EO analyzed in *Kahn* included both contractors and "first-tier subcontractor whose contract exceeds $5 million." *Am. Fed'n of Lab. & Cong. of Indus. Organizations v. Kahn*, 618 F.2d 784, 786 (D.C. Cir. 1979).

38 639 F.2d 164, 171 (4th Cir. 1981).

39 *Id*.

40 *See*, infra, Risk Analysis.

41 Although, as noted above, there may be some legal risk involved in doing so. *See supra,* Proposed Action: Scope of FPASA Authority.

42 88 FR 3490.

43 88 FR 3491.

44 88 FR 3492.

45 88 FR 3485.

46 Dave Jamieson, *These Pilots Were Sued For Quitting. They Say It Was Dangerous To Stay*, Huffington Post (Oct. 6, 2023), available at: https://www.huffpost.com/entry/southern-airways-express-pilots_n_651ee853e4b0bfc227bf9b9d?jle.

47 *Id*.

48 618 F.2d 784, 792.

49 "Finally, if the voluntary restraint program is effective in slowing inflation in the economy as a whole, the Government will face lower costs in the future than it would have otherwise.47 Such a strategy of seeking the greatest advantage to the Government, both short- and long-term, is entirely consistent with the congressional policies behind the FPASA." *Id*. at 793.

50 325 F.3d 360, 366–67.

51 648 F. Supp. 2d 726, 738.

52 80 FR 54697.

53 *Id*.

54 *Id*.

55 For example, the *Kahn* court upheld an order that restricted employee wages firm-wide. Kahn at 785-86.

56 325 F.3d 360, 362 (2003).

57 648 F.Supp.2d 726 (S.D. Md. 2009). The regulation also required employers to use E-Verify to ascertain the immigration status of *existing* employees who worked directly on a federal contract. *Id*. at 731.

58 This reasoning also weighs against the Texas court's assertion in the minimum wage case that such a use of FPASA would run afoul of the Major Questions Doctrine (MQD). Texas v. Biden, at *19. In assessing the first prong of the MQD test, Professor Thomas Merrill articulates the features of a policy that violates MQD as including: "first, the agency decision under review is a deviation from its settled sphere of action ("novel," "unprecedented", "unheralded"); second, the agency decision has the effect of significantly changing the scope of the agency's authority ("transformative," "radical change," "wholesale restructuring,"); and third, the agency action is a big deal ("sweeping and consequential," "vast economic and political significance")." Thomas W. Merrill, The Major Questions Doctrine: Right Diagnosis, Wrong Remedy, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4437332, *6. Under this framework, as illustrated by the past use of the FPASA, the proposed rule would, in many ways, be far less reaching that past uses and not cause the radical expansion of authority that the MQD purports to impede.

59 618 F.2d 784 (1979).

60 *Kahn*, at 785-86.

61 *See generally* 441 U.S. 281 (1979); 74 F.3d 1322.

62 Exec. Order 14,042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, 86 Fed. Reg. 50,985 (2021), *revoked by* Exec. Order No. 14,099, Moving Beyond COVID–19 Vaccination Requirements for Federal Workers, 88 Fed. Reg. 30891 (2023).

63 *Commonwealth v. Biden*, 57 F.4th 545 (6th Cir. 2023); Louisiana v. Biden, 55 F.4th 1017 (5th Cir. 2022); *Georgia v. President of the United States*, 46 F.4th 1283 (11th Cir. 2022); *but see Mayes v. Biden*, 67 F.4th 921 (9th Cir. 2023).

64 Exec. Order No. 14,026, Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 22835 (2021).

65 *Bradford v. U.S. Dep't of Lab*., 582 F. Supp. 3d 819 (D. Colo. 2022); Arizona v. Walsh, No. CV-22-00213-PHX-JJT, 2023 WL 120966 (D. Ariz. Jan. 6, 2023).

66 *Texas v. Biden*, No. 6:22-CV-00004, 2023 WL 6281319 (S.D. Tex. Sept. 26, 2023).

67 *See e.g.*, Adam Feldman, Taking the Fifth, Empirical SCOTUS (Oct. 9, 2023), available at: https://empiricalscotus.com/2023/10/09/taking-the-fifth/; Chris Geidner, Supreme Court rejects two lower court rulings to allow Texas execution to proceed, LAW Dork (Oct. 10, 2023), available at: https://www.lawdork.com/p/a-dissenting-fifth-circuit-judge?r=1zaysi; Lydia Wheeler & Kimberly Strawbridge Robinson, Conservative Fifth Circuit Is Stumbling at US Supreme Court, Bloomberg Law (June 26, 2023), available at: https://news.bloomberglaw.com/us-law-week/conservative-fifth-circuit-is-stumbling-at-us-supreme-court.

68 Exec. Order 14,042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, 86 Fed. Reg. 50,985 (2021), *revoked by* Exec. Order No. 14,099, Moving Beyond COVID–19 Vaccination Requirements for Federal Workers, 88 Fed. Reg. 30891 (2023).

69 In each case, the Court of Appeals approved lower court injunctions only as they applied to the respective plaintiff parties in each case. No nationwide injunction was issued.

70 *Louisiana v. Biden*, 55 F.4th 1017, 1030-1033 (5th Cir. 2022).

71 40 U.S.C. § 121(a).

72 40 U.S.C. § 101.

73 *Commonwealth v. Biden*, 57 F.4th at 552-553; *Georgia v. President of the United States*, 46 F.4th at 1294.

74 *Louisiana v. Biden*, 55 F.4th at 1035 (Graves, J. dissenting).

75 The panel upholding the final injunction was unanimous. *Commonwealth v. Biden*, 57 F.4th 545 (6th Cir. 2023). Judge Cole, who was not part of that panel, however, dissented from an earlier decision denying a stay of the injunction pending the appeal. *Kentucky v. Biden*, 23 F.4th 585, 613 (6th Cir. 2022) (Cole, J., dissenting).

76 *Georgia v. President of the United States*, 46 F.4th at 1308 (Anderson, J., dissenting).

77 *Mayes v. Biden*, 67 F.4th 921, 938 (9th Cir. 2023).

78 *Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3 (3d Cir. 1964) (upholding use of the FPASA for imposing racial nondiscrimination requirements); *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967) (same); *Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979) (en banc) (upholding use of the FPASA to require federal contractors to adhere to wage and price controls); *Contractors Ass'n of E. Pa. v. Sec'y of Lab.*, 442 F.2d 159, 170 (3d Cir. 1971) (upholding use of the FPASA to require contractors to adopt affirmative action programs); *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 362 (D.C. Cir. 2003) (upholding use of the FPASA to require contractors to notify employees of their right not to join a union); *Chamber of Commerce v. Napolitano*, 648 F. Supp. 2d 726, 738 (D. Md. 2009) (upholding use of the FPASA to require contractors to use E-Verify system to check employees' immigration status).

79 Pub. L. No. 101-217, § 5(b), 116 Stat. 1062, 1303 (2002).

80 Prior to the Biden Administration, the uses of the FPASA rejected by federal courts were orders purportedly in conflict with federal labor statutes. The D.C. Circuit, without calling into question any earlier decision, overturned a Clinton order purporting to bar the federal government from contracting with employers who hire permanent replacements during a lawful strike. *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996). The

court concluded that the Clinton order was pre-empted by the National Labor Relations Act, which guarantees the right to hire permanent replacements. *Id*. at 1339. Likewise, the U.S. District Court for the Eastern District of Texas enjoined an Obama order that would have required would-be federal contractors to disclose whether actions had been brought against them under a series of labor and civil rights statutes. In an unpublished decision, the court held that the order conflicted with the specific debarment provisions in a number of those statutes. *Associated Builders & Contractors of Se. Texas v. Rung*, No. 1:16-CV-425, 2016 WL 8188655, at *8 (E.D. Tex. Oct. 24, 2016).

81 *Bradford v. U.S. Dep't of Lab.*, 582 F. Supp. 3d 819 (D. Colo. 2022). The decision is on appeal.

82 *Arizona v. Walsh*, No. CV-22-00213-PHX-JJT, 2023 WL 120966 (D. Ariz. Jan. 6, 2023). The decision is on appeal.

83 *Texas v. Biden*, Case No. 6:22-cv-00004 (S.D. Tex. Sep. 26, 2023).

84 *Arizona v. Walsh*, No. CV-22-00213-PHX-JJT, 2023 WL 120966, at *6 (D. Ariz. Jan. 6, 2023); *Bradford v. U.S. Dep't of Lab.*, 582 F. Supp. 3d 819, 835 (D. Colo. 2022).

85 *Texas v. Biden*, No. 6:22-CV-00004, 2023 WL 6281319, at *6-*10 (S.D. Tex. Sept. 26, 2023).

86 The District Court also misinterpreted the Supreme Court's decision in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). Chrysler, as a party to many government contracts, was required to comply with executive orders barring race and sex discrimination by government contractors. Department of Labor regulations issued pursuant to those orders required Chrysler to submit annual affirmative action and employer information reports to the Office of Contract Compliance Programs. These regulations contemplated public disclosures of information submitted to OFCCP if OFCCP determined such disclosures would be consistent with the public interest, even though that information might be exempt from mandatory disclosure as a statutory matter under the Freedom of Information Act. When a third party requested disclosure of information that had been submitted by Chrysler, Chrysler sued to enjoin the disclosure. The Court held that neither FOIA, nor the Trade Secrets Act created a private cause of action to sue for the prevention of public disclosure of the commercial or financial information that a private party had submitted to the government. The Court further held, however, that the APA did create a cause of action to challenge a particular disclosure decision as "not in accordance by law," and Chrysler was entitled to

show that the disclosure would, indeed, be a violation of the Trade Secrets Act. 18 U.S.C. § 1905. That Act bars the disclosure of various kinds of commercial information to the extent "not authorized by law." With regard to the nondiscrimination executive orders, the Court held that the orders would not provide legal authority to permit disclosures otherwise barred by the Trade Secrets Act because, even if those orders were properly based on the FPASA, the FPASA did not authorize disclosure practices that would otherwise run afoul of the Trade Secrets Act. 441 U.S. at 306. The Court did not hold that the executive orders exceeded the President's FPASA authority. *Texas v. Biden*, No. 6:22-CV-00004, 2023 WL 6281319, at *8 (S.D. Tex. Sept. 26, 2023).

87 *Texas v. Biden*, at *9.

88 Even if the decision should be upheld by the Fifth Circuit, it is worth noting, as several legal commentators have begun pointing out, that the Fifth Circuit appears to have overestimated the Supreme Court's appetite for disturbing judicial precedent, especially in the field of administrative law. Adam Feldman, *Taking the Fifth*, Empirical Scotus (Oct. 9, 2023), https://empiricalscotus.com/2023/10/09/taking-the-fifth/; Chris Geidner, *Supreme Court rejects two lower court rulings to allow Texas execution to proceed*, Law Dork (Oct. 10, 2023), https://www.lawdork.com/p/a-dissenting-fifth-circuit-judge?r=1zaysi; Lydia Wheeler & Kimberly Strawbridge Robinson, *Conservative Fifth Circuit Is Stumbling at US Supreme Court*, Bloomberg Law (June 26, 2023), available at: https://news.bloomberglaw.com/us-law-week/conservative-fifth-circuit-is-stumbling-at-us-supreme-court.

# INVOKING THE NLRB'S AUTHORITY TO BAN THE USE OF STAY-OR-PAY CONTRACTS THAT VIOLATE THE NATIONAL LABOR RELATIONS ACT

## Introduction

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.[1] 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."[2]

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.[3] 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.[4] Likewise, the contracts chill workers from union organizing or acting for "mutual aid and protection"[5] 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, and the worker's ability to repay the debt is controlled by the issuer of the debt itself."[6] 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.

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.

# Justification

## 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.[7] 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.[8] 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,[9] 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.[10] 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.[11] A 2020 Cornell Survey Research Institute study reported that approximately one in ten workers reported having been bound by a TRAP.[12] TRAPs are now especially prevalent among firms owned by private equity, including retail chains like PetSmart.[13]

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.[14] 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.[15]

TRAPs are also quite common among aesthetics and cosmetology workers.[16] 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."[17] Bal was required to work for two years to avoid paying a $5,000 TRAP debt.[18] But she said she received only three training sessions that were not worth anything close to $5,000.[19] She was able to defeat the TRAP lawsuit against her, but only because she never received a full training as promised.[20]

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.[21] All together, over 50 percent of the nurses said they had signed a TRAP when they were required to undergo a training program.[22] 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.[23] In addition, dozens of nurses responded that they refrained from joining a union or becoming active in a union because of a TRAP debt.[24]

One nurse's story reveals the mobility restricting and anti-union effects of TRAPs. Jessica Van Briggle began her nursing career at Centinela Hospital in Southern California.[25] 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.[26] Jessica's training started with two weeks of classroom time, then orientation.[27] But her trainer was also a new nurse and, despite being in training, Jessica was frequently assigned to care for high need patients.[28] Jessica began skipping breaks because she felt that if she left, her patients would suffer.[29]

Eventually, Jessica asked about ending her contract early because of fatigue, low staffing, and ethical concerns.[30] The staffing agency told her that she would have to pay the entire $15,000 if she left.[31] Jessica did not have the money, so she worked through unbearable conditions to get to the end of her contract.[32] Moreover, though Centinela was unionized, the staffing agency was not, so Jessica did not have access to union grievance procedures or other union protections.[33] 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.[34]

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."[35] 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.[36] 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.[37]

## 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.[38] 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.[39] 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.[40]

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.[41] According to a U.S. Department of Labor complaint, “ACS has demanded in arbitration amounts that may well require [the employee] to 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.”[42]

Indeed, many stay-or-pay contracts exploit immigrant workers and their lack of knowledge about the immigration process to trap workers in bad jobs.[43] 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.[44] 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.[45] Meanwhile, the nurses faced grueling working conditions at well-below-market wages.[46] One worker became depressed and felt “basically trapped,” especially because she feared potential immigration consequences if she left her position at the staffing agency.[47]

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 bonuses[48] — 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.[49] 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.[50] As Jonathan Harris has written, the Thirteenth Amendment "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."[51] 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.[52]

## 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."[53] A violation of Section 7 is an Unfair Labor Practice ("ULP").[54] This protection applies regardless of whether the employer is unionized.

The current General Counsel ("GC") 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."[55] 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.[56] 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.[57]

The GC's five theories on how non-competes violate Section 7[58] equally apply to stay-or-pay contracts. "First, they chill employees from concertedly threatening to resign to demand better working conditions;"[59] "[s]econd, they chill employees from carrying out concerted threats to resign or otherwise concertedly resigning to secure improved working conditions;"[60] "[t]hird, they chill employees from concertedly seeking or accepting employment with a local competitor to obtain better working conditions;"[61] "[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;"[62] 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."[63] 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.[64] 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.[65]

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.[66] 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.[67] However, the GC memo correctly stated that "such a right follows logically from settled Board law, Section 7 principles, and the Act's purposes."[68] Notably, Juvly Aesthetics's motion to dismiss fails to specifically argue for the TRAPs' lawfulness.[69]

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.

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.*,[70] 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.[71] "[E]ven if a contrary, noncoercive interpretation of the rule is also reasonable," the written policy would still violate the Act.[72]

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.[73]

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,"[74] recoupment of training costs is not a legitimate business interest sufficient to justify a non-compete.[75] 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,[76] 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.[77] 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 employment, *whether or not such control is exercised*, and without regard to *whether any such exercise of control is direct or indirect*."[78] 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.[79] The new rule means that a staffing agency that sends a worker to a client firm, such as the hospital described 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.

## 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.[80] Stay-or-pay contracts are at least as chilling to concerted activity as non-competes.[81] Moreover, as articulated above, 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.[82] 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.[83] 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,"[84] because the maintenance of such a stay-or-pay contract, even if not enforced, has a chilling effect on employees.[85] 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.[86]

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."[87] However, the NLRB should not impose a salary threshold in a ruling on stay-or-pay contracts, nor could it.[88] In fact, stay-or-pay contracts like TRAPs began with high-wage employees[89] and can equally chill high-wage employees' concerted activity, especially as more doctors, nurse practitioners, physician assistants, and technology employees act concertedly and attempt to organize unions.[90] 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.[91] Additionally, a single standard for all employees, regardless of wages, is easier for employees to understand and harder for employers to manipulate.[92] 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.[93]

## 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."[94]

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

## Endnotes

1 This paper was authored by Jonathan F. Harris.

2 Jonathan F. Harris, *Unconscionability in Contracting for Worker Training*, 72 Ala. L. Rev. 723, 726 (2021).

3 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.

4 *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).

5 29 U.S.C. § 157.

6 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/.

7 *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.

8 Harris, *supra* note 1, at 724.

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

10 *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.

11 *Id.* at 14.

12 *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/.

13 *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].

14 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].

15 *See id.*

16 *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.nlrb.gov/news-outreach/region-09-cincinnati/region-9-cincinnati-issues-complaint-alleging-unlawful-non [https://perma.cc/4XQV-HRHZ] (alleging aesthetics employer used TRAPs requiring repayments up to $60,000, in violation of federal labor law).

17 *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).

18 *Id.* (defendant's opening statement and exhibits on file with author).

19 *See id.*

20 *See id.*

21 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).

22 *Id.* at 8.

23 *Id.* at 11.

24 *Id.* at 100.

25 *See id.* at 58–63.

26 *See id.*

27 *See id.*

28 *See id.*

29 *See id.*

30 *See id.*

31 *See id.*

32 *See id.*

33 *See id.* at 14.

34 *See id.*

35 *See id.* at 83.

36 *See id.* at 35.

37 *See id.*

38 *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-nlrb-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).

39 *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.

40 *See id*.

41 *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).

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

43 *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.

44 *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.

45 *See id*.

46 *See id*.

47 *Id*.

48 *See* Nat'l Lab. Rels. Bd., Memorandum GC 23-08, *supra* note 3, at 5.

49 *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).

50 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), https://www.theguardian.com/business/2021/nov/22/indentured-servitude-low-pay-and-grueling-conditions-fueling-us-truck-driver-shortage [https://perma.cc/SX54-SRFF].

51 *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)).

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

53 29 U.S.C. § 157.

54 29 U.S.C. § 158(a)(1) .

55 Nat'l Lab. Rels. Bd., Memorandum GC 23-08, *supra* note 3, at 2.

56 *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.").

57 *See* Nat'l Lab. Rels. Bd., Memorandum GC 23-08, *supra* note 3, at 3, n.14.

58 *See* Nat'l Lab. Rels. Bd., Memorandum GC 23-08, *supra* note 3, at 3–4.

59 *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)).

60 *Id*.

61 *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")).

62 *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)).

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

64 *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.nlrb.gov/news-outreach/region-09-cincinnati/region-9-cincinnati-issues-complaint-alleging-unlawful-non.

65 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.

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

67 *See* Nat'l Lab. Rels. Bd., Memorandum GC 23-08, *supra* note 3, at 3.

68 *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]")).

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

70 372 NLRB No. 113 (Aug. 2, 2023).

71 *See id.* at 3.

72 *Id*.

73 Juvly Aesthetics, NLRB Case 09-CA-300239 (Opposition to Respondent's Motion to Dismiss Complaint Nov. 20, 2023), https://www.nlrb.gov/case/09-CA-300239.

74 372 NLRB No. 113, at 2.

75 *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).

76 *See* Nat'l Lab. Rels. Bd., Memorandum GC 23-08, *supra* note 3, at 4–5.

77 *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.

78 *NLRB Fact Sheet Joint-Employer Standard Final Rule*, Nat'l Lab. Rels. Bd. (Oct. 27, 2023), https://www.nlrb.gov/sites/default/files/attachments/pages/node-9558/joint-employer-fact-sheet-2023.pdf (emphasis in original).

79 *Id*.

80 *See* Nat'l Lab. Rels. Bd., Memorandum GC 23-08, *supra* note 3, at 1.

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

82 *See* Nat'l Lab. Rels. Bd., Memorandum GC 23-08, *supra* note 3, at 6.

83 *See id*.

84 *Id*.

85 *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.").

86 Nat'l Lab. Rels. Bd., Memorandum GC 23-08, *supra* note 3, at 6.

87 *See* Nat'l Lab. Rels. Bd., Memorandum GC 23-08, *supra* note 3, at 5.

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

89 *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.").

90 *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 IATSE*, Variety (Sept. 13, 2023), https://variety.com/2023/artisans/news/marvel-union-special-effects-iatse-1235722298/.

91 *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.nlrb.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).

92 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.

93 *See* Harris & Hicks, *supra* note 9, at 3.

94 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")).

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