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Submitted via www.regulations.gov

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Brian Pasternak
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Re: Comments Regarding ETA's Request for Information, Labor Certification for Permanent Employment of Foreign Workers in the United States; Modernizing Schedule A To Include Consideration of Additional Occupations in Science, Technology, Engineering, and Mathematics (STEM) and Non-STEM Occupations

Dear Principal Deputy Assistant Secretary Parton and Administrator Pasternak:

Governing for Impact ("GFI"), Student Borrower Protection Center ("SBPC"), Towards Justice ("TJ"), and the Asian American Legal Defense and Education Fund ("AALDEF") submit this comment to the Employment and Training Administration's ("ETA's") Request for Information: "Labor Certification for Permanent Employment of Foreign Workers in the United States; Modernizing Schedule A To Include Consideration of Additional Occupations in Science, Technology, Engineering, and Mathematics (STEM) and Non-STEM Occupations" RIN 1205-AC16; Fed Reg. Vol. 88, 88290 (December 21, 2023) ("Request for Information" or "RFI"). These comments are submitted by the undersigned national consumer and workers' rights advocates who work to build a fairer economy.

We write this comment as a response to the RFI's statement at page 88,291 that the "Department does not have comprehensive data on how employers utilize Schedule A and the types of work performed thereunder." We encourage ETA to revise the Schedule A process to require employers to send to ETA a copy of their applications for permanent labor certification ("PERM" or "Form 9089") as well as a copy of the employment contract they plan to use with their visa workers. These changes would ensure that ETA has access to the data it needs to keep the Schedule A process up-to-date and protect Schedule A workers from the harms caused by low-road employer practices like stay-or-pay contracts. The accompanying memorandum provides a more detailed overview of our proposal.

1. **As it is currently designed, the Schedule A process amplifies harms to workers caused by low-road employer practices like stay-or-pay contracts and deprives the ETA of valuable information.**
 - a. Stay-or-pay contracts harm workers who are or may be subject to Schedule A.

Workers who come to the United States under Schedule A, like foreign-educated nurses (“FENs”), are too frequently subjected to low-road employer practices. One such practice, among others,¹ is employers’ use of stay-or-pay contracts, including traditional non-compete, breach, and liquidated damages² clauses and training repayment agreement provisions (“TRAPs”).³ Although the specifics of the arrangements vary, they all have the effect of immobilizing workers by imposing a financial penalty on workers if they choose to quit (and, in some cases, if they are terminated). Subjecting visa workers to stay-or-pay contracts produces myriad harms by exploiting already-vulnerable workers that may believe, often inaccurately and due to employers’ dishonesty,⁴ that they are dependent on employer sponsorship to remain in the country. The contracts limit employees’ ability to exit a job, shift business’s costs onto workers in violation of minimum wage laws, raise the stakes of termination or quitting, and make it more difficult to raise concerns about workplace conditions and safety.⁵

Several of the groups submitting this comment have previously urged ETA to prohibit stay-or-pay contracts under the Immigration and Nationality Act (“INA”).⁶ Under the INA, ETA must ensure that permanent labor certification only occurs when there is a lack of United States workers to fill a particular job and such certification will not “adversely affect” workers in the United States by, for instance, providing employers with a source of labor that is more attractive, for whatever reason, than hiring workers domestically.⁷ The degree to which a worker is dependent on an employer and restricted in their mobility is one factor in a worker’s

¹ For example, employers have placed FENs in substandard housing upon their arrival. 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. *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>. 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. Pittman PM et al. Nov 2007. U.S.-Based International Nurse Recruitment: Structure and Practices of a Burgeoning Industry 5, https://www.macfound.org/media/article_pdfs/nursing_code_researchreportyr1.pdf (hereinafter “Pittman report”).

² 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).

³ 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.

⁴ *See, e.g.*, *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).

⁵ *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>; these negative effects on workers have also led the National Labor Relations Board’s General Counsel to identify these contracts as potentially violative of workers’ rights to act and organize in the interest of mutual aid and protection – a right that AALDEF is working to vindicate in litigation on behalf of nurses subjected to exploitative stay-or-pay contracts. *See* Michael Sainato, *‘I feel like a criminal for quitting’: nurses in the US fight ‘stay or pay’ agreements*, *The Guardian*, (Dec. 29, 2023), <https://www.theguardian.com/us-news/2023/dec/29/nurse-contract-fees-stay-or-pay-communicare>.

⁶ Memorandum by Governing for Impact, Student Borrower Protection Center, Towards Justice, and American Economic Liberties Project, “Issuing regulations under the Immigration and Nationality Act to ban non-compete and stay-or-pay contracts among foreign-educated nurses,” (Nov. 15, 2023), <https://governingforimpact.org/wp-content/uploads/2023/11/DOL-ETA-Stay-Or-Pay-Memo.pdf>.

⁷ 8 U.S.C. § 1182(a)(5)(A)(i)(I). For example, ETA issued a regulation in 2007 prohibiting visa workers from covering the costs of their labor certification application because such financial involvement could make those workers more attractive to employers. Employment and Training Administration, 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, 27904 (May 17, 2007).

“attractiveness” to an employer. Foreign workers on these visas are already more dependent on their employers because of the actual and perceived dependence created by the visa sponsorship process.⁸ Further immobilizing visa workers through these contracts may incentivize an employer to temper their search for United States workers because foreign workers are all-the-more captive. Additionally, permitting stay-or-pay contracts could adversely affect United States workers by coercing them into signing similar exploitative contracts in order to remain competitive with foreign labor.⁹

The contracts’ harms are particularly relevant to the ETA’s current effort to update Schedule A. As we detailed in the attached memorandum published in December 2023,¹⁰ stay-or-pay contracts inflict significant harm on FENs, who are already commonly recruited through Schedule A. Stay-or-pay contracts have also been used in the tech sector — an industry that is a focus of this Request for Information and the President’s Executive Order on artificial intelligence (“AI”).¹¹ For example, with the help of some of the organizations on this comment, a former employee filed a class action lawsuit against Smoothstack, a tech staffing agency and coding bootcamp, over its use of TRAPs to confine workers to low-paying jobs with long and irregular hours.¹²

- b. Schedule A allows employers to bypass ETA in its applications for permanent labor certification, depriving the agency of vital information and reducing workers’ rights-oriented oversight.

Schedule A speeds visa processing by bypassing the ETA in the permanent labor certification process. In the normal certification process, an employer submits its Form 9089 to ETA so the agency can verify that the employer took steps to ensure that there are not enough workers available in the country to fill that occupation and that approval would not “adversely affect” workers in the United States. Schedule A acts as a blanket determination that both conditions exist for certain occupations, including professional nurses and, soon perhaps, AI and STEM occupations, depending on the outcome of this regulatory process. This permits an employer using Schedule A to bypass ETA and submit the same form directly to DHS.

Although this does speed up the process, it has two drawbacks relevant to our organizations’ concerns regarding employers’ low-road employment practices. Both stem from a reality that the ETA acknowledged in this RFI: “. . . in part because Schedule A by definition allows employers to bypass [the Department of Labor in] filing an application for a labor certification, the Department does not have comprehensive data on how employers utilize Schedule A and the types of work performed thereunder.”¹³

⁸ See, e.g., *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).

⁹ For a more detailed legal analysis, see the attached memorandum at 10-13.

¹⁰ See attachment. This was part of a larger compendium written to address avenues that various federal agencies can use to ban stay-or-pay contracts. The entire compendium can be accessed at:

https://governingforimpact.org/wp-content/uploads/2023/12/stay-or-pay-compendium_12-2023_FINAL.pdf

¹¹ The White House, Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, (Oct. 30, 2023),

<https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/>.

¹² Student Borrower 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, (Apr. 14, 2023),

<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/>.

¹³ RFI at 88291.

First, ETA's lack of visibility into the Schedule A process, including into basic facts like which employers use it and the working conditions they impose, is a barrier to ETA's ability to update and administer the permanent labor certification process and carry out its obligations under the INA. Second, the status quo prevents ETA from conducting oversight activities to ensure that employers with Schedule A workers adhere to commitments required by the permanent labor certification application. Form 9089 directs employers to make certain assurances regarding job quality and recruitment practices.¹⁴ Without ETA oversight of the Schedule A process, there is limited ability for the DOL – a workers' rights-oriented agency – to ensure compliance with job quality and worker protection rules. Placing that responsibility solely on DHS is unwise from a policy perspective (DHS, understandably, has less institutional orientation towards safeguarding workers' rights) and a legal one (it is ETA's responsibility — not DHS's — under the INA to ensure that a given labor certification does not “adversely affect” American workers).

2. ETA should revise Schedule A to require employers to submit a copy of their Form 9089 and their proposed employment contract to ETA, and consider interim steps to improve transparency.

Along with the other proposed revisions of the permanent labor certification process recommended in our attached memorandum, ETA should consider 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 ETA. These changes would help solve the data problem that prompted this RFI in the first place. It would also provide transparency for the government and help ETA ensure that admission of visa workers does not adversely affect workers in the United States by, for example, allowing employers to make visa workers even more captive (and therefore more attractive to employers) through the use of stay-or-pay contracts.

This proposal does not interfere with Schedule A's purpose of streamlining the certification process for certain in-demand workers. It does not seek to re-insert ETA into the permanent labor certification process for these occupations, nor does it dramatically increase burdens on employers. Rather, it simply requires adding ETA as a carbon-copied recipient on a form that an employer is already submitting to DHS (the Form 9089) and requires the submission of material (an employment contract) that presumably already exists. It provides ETA with the data it needs to conduct general oversight of the Schedule A process to ensure its proper functioning and employers' compliance with basic job quality standards.

As it considers an outright prohibition on stay-or-pay contracts, ETA could also improve transparency in the Schedule A process by requiring employers to submit along with their Form 9089 a list of each financial obligation purportedly imposed on workers in the event of early termination or resignation and a brief explanation of why that obligation is “primarily for the benefit of the employee” and not the employer, which is a requirement of the Fair Labor Standards Act.¹⁵ As the DOL has already explained in visa-related litigation, efforts to collect on – or even the existence of – stay-or-pay contracts may produce minimum wage and overtime violations.¹⁶ But it is inefficient to prevent the agency from gaining an insight into whether such

¹⁴ And, if ETA implements the proposals suggested in the attached memorandum, the Form 9089 would include an assurance that the employer does not impose stay-or-pay contracts on workers.

¹⁵ Form 9089 requires employers to attest that the labor certification will not be in contravention of federal and state employment laws, including the Fair Labor Standards Act. *See* 20 C.F.R. § 656.10(c)(7).

¹⁶ Complaint, *Su v. Advanced Care Staffing, LLC*, case no. 1:23-cv-02119, (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>; *see also* Letter from Governing for Impact, Towards Justice, Student Borrower Protection Center, American Economic Liberties Project, et. al, re: stay-or-pay contracts under the

contracts indeed violate those requirements only upon a post facto investigation. Transparency would allow ETA access to application information on the front end, consistent with the requirement that employers certify they are complying with federal employment laws.

A comprehensive overview of our recommendations for the permanent labor certification process is included in the attached memorandum. Although it focuses primarily on FENs, the proposal would apply equally to workers in AI and STEM occupations. Thank you for the opportunity to comment on this important issue.

Sincerely,

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Co-signing organizations:
Governing for Impact
Student Borrower Protection Center
Towards Justice
Asian American Legal Defense and Education Fund

Attachment:
[Proposed action memorandum](#) to the Employment and Training Administration re: Issuing regulations under the Immigration and Nationality Act to ban non-compete and stay-or-pay contracts among foreign-educated nurses



STUDENT BORROWER
PROTECTION CENTER



Employment and Training Administration, Department of Labor
Proposed Action Memorandum
November 15, 2023

Issuing regulations under the Immigration and Nationality Act to ban non-compete and stay-or-pay contracts among foreign-educated nurses

I. 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. Stay-or-pay contracts require a worker to pay what are often referred to in the industry as “breach fees”¹ 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.²

II. Justification

A. Stay-or-pay contracts for foreign-educated nurses

Restrictive employment contract provisions like traditional non-compete, breach, and liquidated damages³ clauses and training repayment agreement provisions (“TRAPs”)⁴ – 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

¹ 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”).

² 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”).

³ 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).

⁴ 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”).

currently subject to traditional non-compete clauses.⁵ 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.⁶ 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.⁷ 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.⁸

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.⁹ 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.¹⁰ 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

⁵ 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.

⁶ 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”).

⁷ Trapped at Work report at 15.

⁸ 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.

⁹ 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>.

¹⁰ NNU Comment at 2.

18 months to three years.¹¹ 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.¹²

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.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶ 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.¹⁷ Similar stories of exploitation by nurse staffing agencies are all-too-common.¹⁸

B. *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,¹⁹ FENs are

¹¹ 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”).

¹² 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-conditions-rcna83979>.

¹³ NNU Comment at 23.

¹⁴ 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>.

¹⁵ Pittman report at 5.

¹⁶ 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>.

¹⁷ 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>.

¹⁸ 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-conditions-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>.

¹⁹ *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).

already more likely than United States workers to feel tied to their employer.²⁰ 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.²¹ 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.²² 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.²³ 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.²⁴ Even when such contractual provisions are not enforced, or are not legally enforceable,²⁵ they have an *in terrorem* effect, and their mere existence may pressure workers into

²⁰ 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.

²¹ 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>.

²² *Id.*

²³ National Labor Relations Board, NLRB General Counsel Issues Memo on Non-compete Violating the National Labor Relations Act, (May 30, 2023), <https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-issues-memo-on-non-compete-violating-the-national> (explaining that non-competes chill employees' ability to leave their jobs).

²⁴ 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").

²⁵ 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),

staying in an otherwise unacceptable job.²⁶ In fact, some employers actively reference the existence of the contract in reply to worker concerns about job conditions.²⁷ Several FENs spoke with NBC News on the condition of anonymity to describe why they weren't able to quit unsafe jobs.²⁸ One described being unable to leave her job — at which she felt unsafe — after her employer threatened an \$100,000 lawsuit.²⁹ 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.³⁰ 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.³¹

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.³² As alluded to above, FENs are also commonly underpaid when compared to their domestic counterparts.³³ 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).³⁴

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.³⁵ 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.³⁶ 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

<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).

²⁶ 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”).

²⁷ CFPB Report.

²⁸ 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-conditions-rcna83979>.

²⁹ *Id.*

³⁰ *Id.*

³¹ CFPB Report.

³² NNU Comment at 24 quoting Pittman report.

³³ 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-conditions-rcna83979> (FENs “described being paid less than their American counterparts despite immigration laws that require they be paid the local prevailing wage”).

³⁴ 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.

³⁵ HHS Report.

³⁶ *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).

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.”³⁷ The court found the liquidated damages provision to be an unenforceable penalty under New York state law.³⁸ 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.”³⁹

In *Magtoles v. United Staffing Registry, Inc.*,⁴⁰ 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.⁴¹ 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.”⁴² 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.⁴³

C. 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.⁴⁴

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.⁴⁵

³⁷ *Paguirigan v. Prompt Nursing Emp. Agency LLC*, 286 F. Supp. 3d 430, 435 (E.D.N.Y. 2017).

³⁸ *Paguirigan v. Prompt Nursing Emp. Agency LLC*, No. 17-CV-1302 (NG) (JO), 2019 WL 4647648, at *8 (E.D.N.Y. Sept. 24, 2019), *aff’d in part*, appeal dismissed in part, 827 F. App’x 116 (2d Cir. 2020).

³⁹ *Id.* at *18.

⁴⁰ No. 21-CV-1850 (KAM) (PK), 2021 WL 6197063 (E.D.N.Y. Dec. 30, 2021).

⁴¹ *Magtoles v. United Staffing Registry, Inc.*, No. 21CV1850KAMPK, 2023 WL 2710178, at *25 (E.D.N.Y. Mar. 30, 2023).

⁴² *Id.* at *27 quoting *Javier v. Beck*, No. 13-CV-2926 (WHP), 2014 WL 3058456, at *6 (S.D.N.Y. July 3, 2014).

⁴³ *Id.*

⁴⁴ Many nurses are brought in under Schedule A, which removes employers’ obligation to post a job for domestic workers at all. United States Citizenship and Immigration Service, Policy Manual Chapter 7, (Accessed: Oct. 23, 2023), <https://www.uscis.gov/policy-manual/volume-6-part-e-chapter-7> (explaining that “an employer who wishes to hire a person for a Schedule A occupation is not required to conduct a test of the labor market and apply for a permanent labor certification with DOL”).

⁴⁵ 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).

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%.⁴⁶

Stay-or-pay contracts like TRAPs and breach fees used to be concentrated exclusively among health systems and staffing agencies recruiting FENs,⁴⁷ 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.⁴⁸ 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.⁴⁹ 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.⁵⁰ 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.

D. 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.”⁵¹ 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.”⁵² 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.⁵³ An SEIU regulatory comment identified the University of Pittsburgh Medical Center as a

⁴⁶ Federal Trade Commission, Non-Compete Clause Proposed Rule, 88 Fed. Reg. 3482, 3486 (Jan. 19, 2023).

⁴⁷ See Pittman report.

⁴⁸ 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).

⁴⁹ 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-conditions-rcna83979> (FENs “described being paid less than their American counterparts despite immigration laws that require they be paid the local prevailing wage”).

⁵⁰ Shaffer FA, et. al, International Nurse Recruitment Beyond the COVID-19 Pandemic: Considerations for the Nursing Workforce Leader. Nurse Lead, (Apr. 2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8850103>.

⁵¹ NNU Comment; 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.”)

⁵² NNU Comment at 14.

⁵³ DOL Complaint at 8.

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.⁵⁴

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.⁵⁵ 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.”⁵⁶ 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.⁵⁷ 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.⁵⁸

III. Current State

A. 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.⁵⁹ Employers that recruit workers under the EB-3 program must first request a prevailing wage determination from the DOL.⁶⁰ Then, they submit to the DOL an application for Permanent Employment Certification (“Form 9089”).⁶¹ As part of that application, they must attest to having taken steps to recruiting United States workers for the position, among other commitments.⁶² The DOL will approve the application upon determining that the labor certification will not

⁵⁴ Comment from Service Employees International Union to the Consumer Financial Protection Bureau 2, (Sept. 23, 2022), <https://www.regulations.gov/comment/CFPB-2022-0038-0051>.

⁵⁵ 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/>.

⁵⁶ *Magtoles v. United Staffing Registry, Inc.*, No. 21CV1850KAMPK, 2023 WL 2710178, at *26 (E.D.N.Y. Mar. 30, 2023); 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.” *The Impact of a Non-Compete Clause on Patient Care and Orthopaedic Surgeons in the State of Louisiana: Afraid of a Little Competition?*, *Orthopedic Reviews* Vol 13, Issue 4 at 9, (2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9569414/pdf/orthopedicreviews_2022_14_4_38404.pdf.

⁵⁷ 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-conditions-rcna83979>.

⁵⁸ 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>.

⁵⁹ United States Citizenship and Immigration Service, *Employment-Based Immigration: Third Preference EB-3*, (Accessed: Oct. 23, 2023), <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-third-preference-eb-3>.

⁶⁰ 20 C.F.R. § 656.40.

⁶¹ 20 C.F.R. § 656.17.

⁶² 20 C.F.R. § 656.10(c).

“adversely affect” U.S. workers.⁶³ 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 wage⁶⁴ and whether the immigrant in fact received the training or degrees required by the desired visa category.⁶⁵ 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.⁶⁶ 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,⁶⁷ they do not have to wait for DOL certification before submitting the immigrant petition to DHS.

B. 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.⁶⁸ 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.⁶⁹ Additionally, the DOL’s recently-filed lawsuit referenced above was based on minimum wage and overtime requirements of the Fair Labor Standards Act (“FLSA”).⁷⁰ 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,⁷¹ 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.⁷² In 2022, the New York Attorney General’s office settled

⁶³ 20 C.F.R. § 656.2(c)(1)(ii)

⁶⁴ 8 C.F.R. § 204.5(g)(2).

⁶⁵ 8 C.F.R. § 204.5(l)(3)(ii).

⁶⁶ 20 C.F.R. § 656.15(a).

⁶⁷ 8 C.F.R. § 204.5(l)(3)(ii)(B)-(C).

⁶⁸ Federal Trade Commission, Non-Compete Clause Proposed Rule, 88 Fed. Reg. 3482 (Jan. 19, 2023).

⁶⁹ See American Hosp. Ass’n, Fast Facts on U.S Hospitals, (2019), <https://www.aha.org/statistics/fast-facts-ushospitals>.

⁷⁰ Department of Labor, *Department Of Labor Seeks Court Order To Stop Brooklyn Staffing Agency From Demanding Employees Stay 3 Years Or Repay Wages*, (Mar. 20, 2023), <https://www.dol.gov/newsroom/releases/sol/sol20230320>.

⁷¹ *Paguirigan v. Prompt Nursing Emp. Agency LLC*, No. 17-CV-1302 (NG) (JO), 2019 WL 4647648, at *17 (E.D.N.Y. Sept. 24, 2019), aff’d in part, appeal dismissed in part, 827 F. App’x 116 (2d Cir. 2020) (explaining that defendants’ reference to H-1B regulations permitting bona fide liquidated damages is irrelevant because no such regulations apply to EB-3s, which was the visa category at issue).

⁷² Illinois Department of Labor, Nurse Staffing Industry Reforms Signed into Law, (May 31, 2022), <https://labor.illinois.gov/news/press-release.24983.html>

with a health system that illegally charged FENs for resigning or being fired within the first three years of employment.⁷³ 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.⁷⁴

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.⁷⁵ 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.⁷⁶ 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.”⁷⁷

IV. Proposed Action

A. 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.”⁷⁸ 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.⁷⁹ 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.⁸⁰ 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.⁸¹

⁷³ New York State Attorney General’s Office, Attorney General James Returns \$24,000 to Nurses Taken Advantage of by Albany Hospital (Sept. 13, 2022), <https://ag.ny.gov/press-release/2022/attorney-general-james-returns-24000-nurses-taken-advantage-albany-hospital>.

⁷⁴ New Jersey Office of the Attorney General, Attorney General and Division of Consumer Affairs Reach \$134,000 Settlement with Health Care Service Firm, (Aug. 22, 2005), <https://www.nj.gov/oag/newsreleases05/pr20050822a.html>.

⁷⁵ NNU Comment.

⁷⁶ *Id.*

⁷⁷ National Nurses United comment on Federal Trade Commission and Department of Justice Request for Information 14, (Apr. 21, 2022), <https://www.regulations.gov/comment/FTC-2022-0003-1831>.

⁷⁸ 8 U.S.C. § 1182(a)(5)(A)(i)(I).

⁷⁹ *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286, 1287 (9th Cir. 1992) (upholding a regulation that prohibited alien self-employment).

⁸⁰ *See, Inc. v. Walsh*, 581 F. Supp. 3d 265, 269 (D.D.C. 2022) citing *Tri-Town Family Dental, LLC*, 2016-PER-00231, 2019 WL 3453199, at *2 (Bd. Alien Lab. Cert. App. July 19, 2019).

⁸¹ *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286, 1287 (9th Cir. 1992) (upholding a regulation that prohibited alien self-employment).

Prohibiting employers' use of restrictive employment contracts like noncompetes 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.⁸²

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.⁸³ 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."⁸⁴ 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.⁸⁵

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 noncompetes 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.⁸⁶ 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.⁸⁷ This may require workers in the United States to accept lower actual wages in order to compete with foreign labor. Third, noncompetes have been shown to

⁸² *AFL-CIO v. Dole*, 923 F.2d 182, 187 (D.C. Cir. 1991) (citing *AFL-CIO v. Brock*, 835 F.2d 912, 915 n.5 (D.C. Cir. 1987).

⁸³ *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276, 1285 (11th Cir. 2016).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ 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").

⁸⁷ See Governing for Impact et. al letter regarding the Fair Labor Standards Act application to stay-or-pay contracts, (Oct. 4, 2023), <https://governingforimpact.org/wp-content/uploads/2023/10/DOL-Stay-Or-Pay-Letter.pdf>.

suppress wages by reducing labor market competition.⁸⁸ 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 wage⁸⁹) and working conditions (e.g., that the conditions be “normal to the occupation in the area and industry”⁹⁰). 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.⁹¹

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.⁹² 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.⁹³

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;⁹⁴ required employers to cover inbound transportation and other costs;⁹⁵ and otherwise sought to

⁸⁸ Evan Starr, et. al, Noncompete Agreements in the U.S. Labor Force, *Journal of Law and Economics* 64, no. 1 (2021): 53-84.

⁸⁹ Department of Labor, Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 69 Fed. Reg. 77326, 77396 (Dec. 27, 2004).

⁹⁰ *Id.* at 77394.

⁹¹ *Id.* at 77358.

⁹² Employment and Training Administration, 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, 27904 (May 17, 2007).

⁹³ *Id.* at 27921 (emphasis added).

⁹⁴ Employment and Training Administration, Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States, 88 FR 12760, 12765, (Feb. 28, 2023).

⁹⁵ Employment and Training Administration, Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 80 Fed. Reg. 24042, 24064 (Apr. 29, 2015).

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."⁹⁶

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.

B. 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 noncompete 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.⁹⁷

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 procedures⁹⁸ and several federal statutes that prohibit making false statements to government agencies,⁹⁹ particularly in the context of visa misuse.¹⁰⁰
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 procedures¹⁰¹ 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.

⁹⁶ 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. (emphasis added).

⁹⁷ Though this does not seem likely, as the Executive Order on Artificial Intelligence directed the DOL to update Schedule A to include new occupational categories. *See* Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence Section 5.1(e), (October 30, 2023).

⁹⁸ *See generally* 20 C.F.R. § 656.31.

⁹⁹ *See, e.g.*, 18 U.S.C. § 1001.

¹⁰⁰ *See, e.g.*, 18 U.S.C. § 1546.

¹⁰¹ *See generally* 20 C.F.R. § 656.31.

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.

V. 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.