WORKER DEBT AND WORKER EXIT

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Abstract

One of the primary ways in which workers exercise power in the employment relationship is by leveraging competition among employers through the threat that they may go work for an employer that would pay them more or treat them better. Increasingly, employers have tried to undermine this core component of worker bargaining power through stay-or-pay contracts that charge workers penalties or threaten them with damages actions for leaving jobs before they have completed a prescribed term of employment. These contracts are intended and function to constrain worker mobility, suppress wages, and enable worker mistreatment.

Through case studies of contemporary litigation challenging stay-or-pay contracts in the courts, this Article examines enforcement opportunities offered by existing state and federal laws, including the Fair Labor Standards Act, consumer protection laws, the Trafficking Victims Protection Act, and state unfair competition and unfair and deceptive acts and practices laws. It proposes that, while these laws provide some useful tools for enforcement, effective regulation will require the development of clear and bright-line rules.

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INTRODUCTION

Economist and former U.S. Department of Labor official David Weil has explained that the foundations of worker bargaining power are "worker exit" and "worker voice."[1] The latter is the opportunity for

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workers to exercise their rights and power through formal channels such as unions and other collective action or by enforcing workplace rights. Worker exit is the threat of working elsewhere. Put simply, one of the key components of worker bargaining power is the mere threat that workers have to seek out different employment.

Over the past few years, employers have sought new ways to undermine the threat of worker exit. In November 2021, more workers left their jobs than at any other point in the prior twenty years.[2] The phenomenon widely became described as the "Great Resignation."[3] A variety of factors contributed to the trend, including the reopening of the job market following the effects of the COVID-19 pandemic, but the majority of workers who quit did so to secure better wages and working conditions.[4] Most of those who changed jobs during the Great Resignation reported that they earned more money, had more opportunities for advancement, had an easier time balancing work and family, and had greater flexibility in their new positions.[5]

Employers began looking for new ways to retain workers during this turnover wave. Undoubtedly, competition for workers induced some employers to offer increased wages and other benefits, as a model of a well-functioning market would predict. However, other employers have tried to impede worker mobility, including through the use of restrictive employment agreements, such as non-competes and, increasingly, stay-or-pay contracts that indebt workers to their employers for up to several years and seek to collect that debt if (and only if) workers quit.[6] These

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1. Tanya Goldman & David Weil, *Who's Responsible Here? Establishing Legal Responsibility in the Fissured Workplace*, 42 BERKELEY J. EMP. & LAB. L. 55, 62 (2021).

2. Eli Rosenberg, *A Record 4.5 Million Workers Quit or Changed Jobs in November*, WASH. POST (Jan. 4, 2022), https://www.washingtonpost.com/business/2022/01/04/job-quits-november-2021/ [https://perma.cc/896Z-B2GY].

3. *See* Kim Parker & Juliana Menasce Horowitz, *Majority of Workers Who Quit a Job in 2021 Cite Low Pay, No Opportunities for Advancement, Feeling Disrespected*, PEW RSCH. CTR. (Mar. 9, 2022), https://www.pewresearch.org/short-reads/2022/03/09/majority-of-workers-who-quit-a-job-in-2021-cite-low-pay-no-opportunities-for-advancement-feeling-disrespected/ [https://perma.cc/2NAV-N3KY].

4. *See id.*

5. *See id.*

6. *See, e.g.*, Jessica March, *Labor Shortages Sparks Rise in Non-Compete Lawsuits by Employers*, ALM BENEFITS PRO (May 10, 2022), https://www.benefitspro.com/2022/05/10/labor-of-law-amid-labor-shortages-more-employers-suing-to-enforce-non-competes-412-129910/?sl return=20240222142746 [https://perma.cc/X8RZ-P9VF].

contracts undermine worker power, suppress wages, and enable employer abuse. Such contracts have become increasingly common, especially in industries where workers' services have increased in demand since the pandemic, like aviation and healthcare.[7] Notably, stay-or-pay contracts have profound deleterious effects on workers, whether or not a court would ever enforce them. For example, even if they blatantly seek to recoup costs that an employer should bear under wage-and-hour law, employers leverage the threat of potential debt, including litigation, credit reporting, and even blackballing, to undermine the viability of worker exit.[8]

This Article tracks the rise of stay-or-pay contracts across the American economy, describes how they harm both workers and the general public, and provides a framework for addressing them through litigation, legislation, and regulation. First, this Article provides background on the proliferation of stay-or-pay contracts across the labor market, especially as an alternative to more traditional non-compete agreements. Second, it provides several illustrations of how stay-or-pay contracts affect employees, drawn from real-life cases filed by the Article's authors. Third, it describes the legal framework applicable to assessing the legality of these contracts, analyzing theories of illegality under employment law, consumer law, unfair competition law, and forced labor law, among others, and examining the strengths and weaknesses of the various approaches. And fourth, it recommends that state regulators adopting the Uniform Restrictive Employment Agreement Act (UREAA), or similar reforms, set clear, bright-line rules protecting workers from abusive stay-or-pay contracts.

I. THE RISE AND FALL OF NON-COMPETES

In 2014, a Jimmy John's employee named Emily Brunner filed a lawsuit against Jimmy John's, a fast-food sandwich chain, for using non-compete agreements against its low-wage food service employees.[9] The non-compete agreements that Jimmy John's used blocked employees from working at any company within two to three miles that derived more than ten percent of its revenue from "submarine," "hero-type," "deli-style," "pita," and "wrapped" or "rolled" "sandwiches" for up to two

7. *See FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FTC (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition [https://perma.cc/TK9R-APWH].

8. *See CFPB Report Shows Workers Face Risks from Employer-Driven Debt*, CFPB (July 20, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-shows-workers-face-risks-from-employer-driven-debt/ [https://perma.cc/JM2X-TWYA].

9. Brunner v. Liautaud, No. 14-C-5509, 2015 WL 1598106 (N.D. Ill. Apr. 8, 2015).

years after the end of their employment.[10] Other investigations and lawsuits followed, including ones from the Illinois and New York attorneys general, with New York's Attorney General describing the use of non-competes for low-wage workers as "unconscionable."[11] Jimmy John's quickly agreed to stop using non-competes for its retail food service workers.[12] But issues with non-competes and other restrictive covenants persist.

Non-compete agreements (sometimes referred to under the broader category of "restrictive covenants") have existed since approximately the late nineteenth century.[13] Traditionally, they have been used primarily to protect "trade secrets" and the related but broader category of "proprietary information."[14] In one early examination of non-competes, the 1711 case of *Mitchel v. Reynolds*,[15] the court reviewed a non-compete in which a bakery shop owner promised not to work as a baker within his parish for five years in connection with the sale of the bakery.[16] While the judge recognized that there was a presumption under the common law that restraints of trade are valid, he determined that it could be overcome under certain circumstances, developing a balancing of the interests test whose broad contours survive to this day.[17]

Subsequent caselaw has refined the balancing test to consider whether a restraint of trade (i) "is greater than required for the protection of the person for whose benefit it is imposed"; (ii) "imposes undue hardship on the person restricted"; or (iii) imposes "injury to the public" greater than "the benefit to the covenantee."[18] Factors considered often include the geographical scope, the length of time, and the breadth of the restriction.[19]

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10. Daniel Wiessner, *Jimmy John's Settles Illinois Lawsuit over Non-Compete Agreements*, REUTERS (Dec. 7, 2016), https://www.reuters.com/article/idUSKBN13W2J9/ [https://perma.cc/2V5V-2XPX].

11. *See A.G. Schneiderman Announces Settlement with Jimmy John's To Stop Including Non-Compete Agreements in Hiring Packets*, N.Y. STATE ATT'Y GEN. (June 22, 2016), https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-jimmy-johns-stop-including-non-compete [https://perma.cc/YS2T-KL5M].

12. *See id.*

13. *See* Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800–1920*, 52 HASTINGS L.J. 441, 454 (2001).

14. *Id.* at 458.

15. 24 Eng. Rep. 347 (Q.B. 1711).

16. *Id.* at 351–52.

17. *See id.* Notably, the judge recognized that one category of restraints on trade, restraints on employment, reflected a particular danger for abuse. *Id.*

18. Harvey J. Goldscmid, *Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants Under Federal Law*, 73 COLUM. L. REV. 1193, 1196 (1973).

19. *Id.*

Studies suggest that wages, job mobility, and job satisfaction are lower in industries where non-compete agreements are common.[20] This result makes sense on the most basic economic level. Non-competes quite literally prohibit competition; the less competition for workers, the less bargaining power they have, and the less money they are able to secure for their work. Research has shown that a significant portion of wage growth comes from changing employers. And as economist Evan Starr has noted, even the threat of leaving an employer can give a worker leverage to negotiate higher pay.[21]

Perhaps not coincidentally, non-competes had proliferated across the American economy by the 2010s, their use often unmoored from any genuine effort to protect trade secrets or other intellectual property.[22] A 2019 survey by the Economic Policy Institute found that half of respondent businesses used non-competes for at least some of their employees, and nearly a third used non-competes for all employees.[23] A similar survey in 2014 found that only eighteen percent of workers were covered by non-competes, suggesting that their use had exploded in the intervening years.[24] Although the popular perception of non-competes is that they primarily cover highly skilled and compensated workers, the Jimmy John's case was a striking illustration that this is not always true. In fact, the 2019 EPI study found that twenty-nine percent of responding establishments where the average wage was less than thirteen dollars an hour used non-competes for all their workers.[25] Another study from 2014 found that the modal worker subject to a non-compete was paid approximately fourteen dollars an hour.[26]

States have recognized the opportunity for abuse and increasingly banned non-compete agreements, particularly for low-wage workers.[27] Since approximately 2008, at least ten states have passed laws banning or limiting the use of non-compete agreements, and other states have

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20. Isaac Chotiner, *What a Ban on Non-Compete Agreements Could Mean for American* Workers, THE NEW YORKER (Jan. 10, 2023), https://www.newyorker.com/news/q-and-a/what-a-ban-on-non-compete-agreements-could-mean-for-american-workers [https://perma.cc/5QBZ-A32C]; Alexander Colvin & Heidi Shierholz, *Noncompete Agreements*, ECON. POL'Y INST. (Dec. 10, 2019), https://www.epi.org/publication/noncompete-agreements/ [https://perma.cc/V6EN-MYEB].

21. *See* Chotiner, *supra* note 20.

22. *See* Najah Farley, *How Non-Competes Stifle Worker Power and Disproportionately Impede Women and Workers of Color*, NAT'L EMP. L. PROJECT (May 18, 2022), https://www.nelp.org/publication/faq-on-non-compete-agreements/ [https://perma.cc/R6XG-3JHW] (noting that noncompetes are "increasingly being used by companies in low-wage industries to block workers from changing jobs").

23. *See* Colvin & Shierholz, *supra* note 20.

24. *Id.*

25. *Id.*

26. Chotiner, *supra* note 20.

27. *See id.*

banned them in certain industries.[28] In 2022, the Federal Trade Commission (FTC) introduced a proposed rule that would ban most non-compete agreements under its authority to regulate unfair methods of competition.[29] The FTC has estimated that the rule would increase the earnings of American workers by as much as $296 billion a year.[30]

II. STAY-OR-PAY CONTRACTS AS AN ALTERNATIVE TO TRADITIONAL NON-COMPETE AGREEMENTS

As traditional non-compete agreements have increasingly come under fire, especially for low-wage workers, employers are turning to other restraints on worker exit. One such tactic is stay-or-pay contracts, which shift business costs onto workers and threaten workers with debt for leaving a job.[31] Many employers may consider these contracts to have less legal risk than non-compete agreements, perhaps because employers often frame stay-or-pay contracts as penalties or damages for an employee's "breach" of an employment contract—namely, leaving before the end of a contractual commitment period.

Generally, stay-or-pay contracts purport to reimburse employers for some investment made in the worker.[32] One common form is a Training Repayment Agreement Provision (TRAP), which requires employees to pay back employers for their training—even when it is standard on-the-job training that provides no portable credential or benefit to the worker beyond simple work experience.[33] Other stay-or-pay contracts purport to indebt workers to their employers for costs of doing business like equipment purchases and immigration costs or to provide compensation to the employer for lost profits, loss of goodwill, or other potential

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28. Jane Flanagan & Terri Gerstein, *Welcome Developments on Limiting Noncompete Agreements*, ECON. POL'Y INST. (Nov. 7, 2019), https://www.epi.org/blog/welcome-developments-on-limiting-non-compete-agreements-a-growing-consensus-leads-to-new-state-laws-a-possible-ftc-rule-making-and-a-strong-bipartisan-senate-bill/ [https://perma.cc/YZ38-FF HD].

29. *See Non-Compete Clause Rulemaking*, FTC (Jan. 5, 2023), https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking [https://perma.cc/XAQ8-SLNP].

30. *Id.*

31. *See* UNIF. RESTRICTIVE EMP. AGREEMENT ACT prefatory note (UNIF. L. COMM'N 2021) (noting that, "[w]hile noncompete agreements get the most attention, they are part of a family of restrictive employment agreements" that includes training repayment agreement provisions).

32. *See* Jeffrey H. Ruzal & Alexandria Adkins, *Should I Stay or Should I Go? Federal Regulators and Employers May Face Impending Clash Over "Say or Pay" Clauses in Employment Agreements*, EPSTEIN BECKER GREEN (Dec. 22, 2023), https://www.tradesecretsandemployeemobility.com/should-i-stay-or-should-i-go-federal-regulators-and-employers-may-face-impending-clash-over-stay-or-pay-clauses-in-employment-agreements [https://perma.cc/7JE7-6RXM].

33. *See* Skye Schooley, *Don't Scare Employees with This Employment TRAP*, BUSINESS.COM (Feb. 21, 2023), https://www.business.com/hr/trap/ [https://perma.cc/DW6E-2D4J].

consequences of employee turnover.[34] While the purported justification is different, these contracts operate in much the same way as non-compete agreements. They require workers to pay their employers to change jobs (or open themselves up to potentially devastating litigation if they don't or can't pay), which ratchets up the consequences of job mobility, discouraging workers from seeking better wages and working conditions elsewhere.

Recent litigation provides stark examples of how stay-or-pay contracts seek to impede worker mobility. In August 2023, commuter airline Southern Airways Express (Southern) brought a lawsuit against former pilot Benjamin Ryan, seeking to collect $3,333 in unpaid training debt.[35] The debt arose from a TRAP that took the form of a promissory note, a kind of consumer credit instrument rarely seen in the employment context, that Ryan had been required to sign on his first day of employment.[36] The TRAP required Ryan to pay Southern up to $16,000 for what it described as an "advance" for the training provided by the company unless he stayed at his job for approximately two years.[37] This training was a credit product expressly tied to his employment relationship. Southern representatives clarified that it would fire anyone who did not sign the TRAP on the spot.[38]

Although more senior pilots can be highly compensated, Ryan was just starting his career, and his salary on hire was $12 an hour, making the $16,000 penalty for leaving his job far out of reach.[39] Ryan has alleged in litigation that once he started working, he quickly found the work wasn't just low-paid but also dangerous.[40] At one point, Southern required Ryan to fly a plane that began emitting smoke upon landing.[41] When he raised his concerns with mechanics, they told him they could see nothing wrong with the aircraft.[42] On another occasion, Ryan realized upon landing that several bolts in his plane's engine had shaken loose during flight because mechanics had overlooked a routine maintenance

34. Reed Shaw et al., Stay or Pay: Federal Actions to End Modern-Day Indentured Servitude Across the Economy (manuscript at 20), (2023), https://ssrn.com/abstract=4683210 [https://perma.cc/9CSJ-MJ9X].

35. Complaint at 1, S. Airways Corp. v. Ryan, No. 50-2023-sc-010947-xxxx-mb (Fla. Palm Beach Cnty. Ct. filed Aug. 4, 2023).

36. *See id.* at ¶ 18. The authors note that all citations to the Ryan Complaint reflect well-pleaded allegations and have not been proven at trial.

37. *Id.* at Exhibit A.

38. Class Counterclaim at ¶ 118, S. Airways Corp. v. Ryan, No. 50-2023-sc-010947-xxxx-mb (Fla. Palm Beach Cnty. Ct. filed Sept. 8, 2023).

39. *Id.* at ¶ 124.

40. *Id.* at ¶ 5.

41. *Id.* at ¶ 143.

42. *Id.* at ¶ 144.

step, placing the craft at risk of imminent engine failure.[43] These experiences were by no means isolated: Ryan both witnessed and experienced supervisors pressuring pilots to fly in unsafe conditions, such as icing, hail, and thunderstorms.[44] A Huffington Post reporter interviewed nineteen Southern pilots who said they had similar experiences, including being pushed to fly in icy conditions or while fatigued.[45] Many of these pilots said they feared they would jeopardize their pilot certificates, their lives, or the lives of their passengers if they continued to fly for the airline through their TRAP term.[46]

Fearing for his health and pilot's license, Ryan resigned from his job at Southern in October 2022.[47] At that time, he had $3,333 remaining on his TRAP term, which the promissory note required him to pay before his final date of employment.[48] He did not pay, and ten months later, in August 2023, Southern sued him in Palm Beach County small claims court.[49] Ryan is not the only pilot Southern has sued—between July and November 2023, Southern sued 100 former pilots.[50] Its chief executive officer has been explicit that these lawsuits are an attempt to keep pilots from quitting and punish those who have, describing the litigation as a "threat" to curb high employee turnover.[51] In other words, the TRAP wasn't just about shifting the costs of doing business onto workers—if that were all that it was about, Southern could have considered paying workers even less in exchange for their purported training—this was about using the threat of the debt to chill workers from leaving the company. It was, in effect, a supercharged non-compete.

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43. *Id.* at ¶¶ 146–48.

44. Class Counterclaim at ¶ 155, S. Airways Corp. v. Ryan, No. 50-2023-sc-010947-xxxx-mb (Fla. Palm Beach County Ct. filed Sept. 8, 2023).

45. Dave Jamieson, *These Pilots Were Sued for Quitting. They Say It Was Dangerous to Stay*, HUFFINGTON POST (Oct. 6, 2023), https://www.huffpost.com/entry/southern-airways-express-pilots_n_651ee853e4b0bfc227bf9b9d [https://perma.cc/X6BY-G3EH].

46. *Id.*

47. Class Counterclaim at ¶ 136, S. Airways Corp. v. Ryan, No. 50-2023-sc-010947-xxxx-mb (Fla. Palm Beach County Ct. filed Sept. 8, 2023).

48. *See id.* at ¶ 100.

49. Complaint, S. Airways Corp. v. Ryan, No. 50-2023-sc-010947-xxxx-mb (Fla. Palm Beach County Ct. filed Aug. 4, 2023).

50. *See* Class Counterclaim at ¶ 1, S. Airways Corp. v. Ryan, No. 50-2023-sc-010947-xxxx-mb (Fla. Palm Beach County Ct. filed Sept. 8, 2023).

51. Elaine Haskins, *Southern Airways Looking at Ways To Resolve Pilot Attrition Issue*, COURIER EXPRESS (Nov. 11, 2023), https://www.thecourierexpress.com/news/southern-airways-looking-at-ways-to-resolve-pilot-attrition-issue/article_bbef0086-7f0e-11ee-af65-9bef6450cd13.html [https://perma.cc/7KLS-PXRE].

TRAPs have received substantial media attention over the past year,[52] but they are by no means the only type of stay-or-pay contract plaguing workers today. Another common example of a stay-or-pay contract is illustrated by the case of Eliahkim Mabute, a nurse from the Philippines who immigrated to the United States in 2022 to work in a hospital in Beaumont, Texas.[53] Mabute was an employee of a nurse staffing company called Medliant, Inc. (Medliant), whose business model is to facilitate immigration for foreign-educated nurses and then place them in American hospitals.[54] Since the pandemic, nurse wages have increased substantially in some regions.[55] But many foreign-educated workers employed in this country on EB-2 or EB-3 green card visas are stuck in jobs with substantially below-market wages because their employers burden them with substantial debts if they depart before the end of a commitment period.[56]

In a complaint filed in November 2023, Mabute alleged that, in exchange for sponsoring his work visa, Medliant required him to sign a contract that committed him to work for the company for 5,200 hours (not counting overtime) or else pay "liquidated damages" in the amount of $2,500 for each month remaining on his contract, as well as any costs that Medliant expended in facilitating his immigration to the United States."[57]

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52. *See* Claire H. Brown, *They Quit Their Jobs. Their Ex-Employers Sued Them for Training Costs*, N.Y. TIMES (Sept. 27, 2023), https://www.nytimes.com/2023/09/27/business/training-repayment-agreement-debt.html [https://perma.cc/2ACJ-K566]; Karla L. Miller, *Work Advice: Training Debt Can Keep Employees Trapped at Jobs*, WASH. POST. (Feb. 9, 2023), https://www.washingtonpost.com/business/2023/02/09/training-repayment-agreement-worker-debt/ [https://perma.cc/4EXU-YDLJ]; 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 [https://perma.cc/7DMG-73GB]; Dave Jamieson, *When This Pilot Quit Her Job, Her Employer Billed Her $20,000*, HUFF POST (Jan. 31, 2023), https://www.huffpost.com/entry/ameriflight-pilot-training-repayment-provisions_n_63a2214ee4b04414304bc464 [https://perma.cc/B3R4-RD39]; Caitlin Harrington, *Beware the Contract Clause Loading US Workers With Debt*, WIRED (Aug. 4, 2022), https://www.wired.com/story/contract-clause-loading-us-workers-with-debt/ [https://perma.cc/PV3L-VEX4].

53. Complaint at ¶¶ 43, 53-55, Mabute v. Medliant Inc., No. A-23-881156-C (Clark Cty. Nevada Dist. Ct. filed Nov. 8, 2023). The authors note that all citations to the *Mabute* Complaint reflect well-pleaded allegations and have not been proven at trial.

54. *Id.* at ¶ 2.

55. *See* Zelda Meeker, *Stay Informed with Career Insights from the 2022 Nurse Salary Report*, NURSE.COM BLOG (May 31, 2022), https://www.nurse.com/blog/stay-informed-with-insights-from-2022-nurse-salary-report/ [https://perma.cc/93UR-F4UU].

56. *See* Josh Eidelson, *Nurses Who Faced Lawsuits for Quitting Are Fighting Back*, BLOOMBERG (Feb. 2, 2022), https://www.bloomberg.com/news/features/2022-02-02/underpaid-contract-nurses-who-faced-fines-lawsuits-for-quitting-fight-back [https://perma.cc/FWJ8-VPLL].

57. Complaint at ¶ 24, Mabute v. Medliant Inc., No. A-23-881156-C (Clark Cty. Nevada Dist. Ct. filed Nov. 8, 2023).

The liquidated damages alone could amount to as much as $80,000.[58]

Medliant also told departing nurses that immigration authorities would be informed of any employees who quit before their term was up, telling them that the authorities had "the power to determine that you intended to defraud the government" for failure to fulfill their contract with Medliant.[59] Mabute's complaint alleges that this threat is untrue, that the U.S. government does not enforce private contracts, and the visas on which Medliant nurses immigrate to the United States do not require workers to remain working for the company for a certain period of time.[60] But these threats were a powerful tool to keep employees from leaving their jobs, particularly combined with the damages provisions in the contract.[61]

Mabute soon found that the hospital he was assigned to was significantly understaffed, and his work was difficult and sometimes dangerous.[62] The intense work that he was required to perform caused a flare-up of psoriatic arthritis, for which his doctor prescribed light duty.[63] Medliant informed him that light duty was unavailable and required him to take unpaid leave to recover.[64] Shortly afterward, a Medliant representative called Mabute and told him that although rumors had been circulating about employee discontent, she wanted to remind him that he could not buy out his contract (i.e., pay a penalty to leave) and had no choice but to complete the full hours requirement.[65] If he failed to do so, she said, Medliant would report him to immigration as a fraud, he would be deported and banned from the United States, and he would have to pay Medliant as much as $100,000 in damages.[66]

Mabute worked for Medliant for several more months, but in November 2023, he resigned, filing a lawsuit challenging Medliant's stay-or-pay contract the same day.[67] Two weeks later, on November 21, 2023, Medliant sued him for breach of contract in Texas court.[68]

Ryan's and Mabute's experiences are by no means isolated. As outlined in a series of reports published in December 2023 by Towards Justice and a coalition of other nonprofits, stay-or-pay contracts are used across a broad range of industries, including transportation, health care,

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58. *Id.* at ¶ 6.
59. *Id.* at ¶ 31.
60. *Id.* at ¶ 35.
61. *Id.* at ¶ 36.
62. *Id.* at ¶ 61.
63. Complaint at ¶ 69, Mabute v. Medliant Inc., No. A-23-881156-C (Clark Cty. Nevada Dist. Ct. filed Nov. 8, 2023).
64. *Id.* at ¶ 71.
65. *Id.* at ¶ 72.
66. *Id.*
67. *Id.* ¶ 8.
68. Complaint, Medliant Inc. v. Mabute, No. 1:23-CV-00419 (E.D. Tex. Nov. 21, 2023).

retail, aviation, and tech.[69] Sandeep Vahesan, the legal director of the Open Markets Institute, observed that these contracts can be even more restrictive than a traditional non-compete: "While noncompete clauses prevent employees from working for a competitor or in the same occupation, TRAPs and liquidated damages provisions can stop workers from leaving their employer entirely."[70]

While stay-or-pay contracts can sometimes fly under the radar, regulators have started to take notice. Citing UREAA, the FTC's proposed rule on non-competes recognized that TRAPs can operate as de facto non-competes and proposed banning them alongside non-competes to the extent that "the required payment [for leaving] is not reasonably related to the costs the employer incurred for training the worker."[71] The National Labor Relations Board has signaled that the use of TRAPs can be an unfair labor practice, including by filing an enforcement action against Juvly Aesthetics for several alleged violations of the National Labor Relations Act, including using a TRAP to seek to keep workers from exercising the right to leave their jobs.[72] The Consumer Financial Protection Bureau has suggested that stay-or-pay contracts may violate consumer protection laws.[73] And through a series of enforcement actions, the U.S. Department of Labor has taken the position that some forms of stay-or-pay contracts can be illegal kickbacks against wages in violation of the minimum wage laws.[74]

III. CURRENT ENFORCEMENT OPTIONS

While efforts to comprehensively regulate stay-or-pay contracts alongside non-competes as a form of restrictive covenant are just beginning, using such contracts implicates a range of existing protections

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69. *See* Shaw et al., *supra* note 34, at 5.

70. Sandeep Vaheesan, *Beyond Noncompetes, Firms Use These Tactics To Stop Workers from Leaving*, WASH. POST (Apr. 13, 2023), https://www.washingtonpost.com/opinions/2023/04/13/noncompete-agreements-worker-restrictions-employers/ [https://perma.cc/MZC8-XJEU].

71. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3510 (Jan. 19, 2023) (to be codified at 16 C.F.R. pt 910).

72. *See Region 9-Cincinnati Issues Complaint Alleging Unlawful Non-Compete and Training Repayment Agreement Provisions (TRAPs)*, NLRB (Sept. 7, 2023), https://www.nlrb.gov/news-outreach/region-09-cincinnati/region-9-cincinnati-issues-complaint-alleging-unlawful-non [https://perma.cc/ZTF2-T4G5].

73. *See Consumer Risks Posed by Employer-Driven Debt*, CONSUMER FIN. PROT. BUREAU (July 20, 2023), https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-consumer-risks-posed-by-employer-driven-debt/full-report/ [https://perma.cc/XPS5-QR5D].

74. *See* Press Release, Dep't of Lab., 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 [https://perma.cc/AZ7E-GADE] (describing lawsuit seeking injunction forbidding an employer from seeking to recover lost profits, attorneys' fees, and arbitration costs from departing worker).

and authorities. These authorities provide a useful, if somewhat patchwork, set of tools to combat abusive employer-driven debt.

One law that is proving powerful in limiting the use of stay-or-pay contracts to keep workers from leaving their jobs is the federal Fair Labor Standards Act (FLSA).[75] While primarily a minimum wage law, the FLSA recognizes that it is not enough to pay the minimum wage; instead, it must be paid "finally and unconditionally" or "free and clear."[76] Accordingly, an employer violates the FLSA when it requires an employee to kick back "directly or indirectly to the employer . . . for the employer's benefit the whole or part of the wage delivered to the employee."[77] Deductions can be unlawful whether they are actual (i.e., taken directly out of a paycheck) or "de facto" (i.e., that the employee is required to pay an expense that is legally the employer's to bear).[78] Moreover, when employers pay wages subject to a potential kickback that would bring those wages below the minimum for a given pay period, they fail to pay the minimum wage "free and clear," which does not require that an employer actually *collect* a kickback.[79] Instead, the FLSA's implementing regulations provide that wages that are not paid "finally and unconditionally"—such as wages paid subject to the condition that the employee continue to work for the employer for additional workweeks—"cannot be considered to have been paid by the employer and received by the employee."[80]

The FLSA provides a powerful tool to combat employer's efforts to weaponize contract law against workers. In the typical contracting relationship, a party can require another to provide services for a period of time and then sue for breach if the other party terminates the contract

75. 29 U.S.C. § 201, *et seq.*

76. 29 C.F.R. § 531.35.

77. *Id.*; *see also* Ramos Barrientos v. Bland, 661 F.3d 587, 594 (11th Cir. 2011) (holding that the FLSA "prohibits any arrangement that 'tend[s] to shift part of the employer's business expense to the employees' . . . to the extent that it reduce[s] an employee's wage below the statutory minimum." (quoting Mayhue's Super Liquor Stores, Inc. v. Hodgson, 464 F.2d 1196, 1199 (5th Cir. 1972)); Arriaga v. Fla. Pac. Farms, LLC, 305 F.3d 1228, 1235–36 (11th Cir. 2002) (holding that unreimbursed costs that employer was legally required to bear were "de facto deductions" from employee wages); Davis v. Colonial Freight Sys., Inc., No. 3:16-CV-674, 2017 WL 11572196, at *6 (E.D. Tenn. Nov. 22, 2017) ("[B]ecause he alleges Defendants required repayment of alleged wages already delivered to him, Plaintiff pleads sufficient facts to support a claim that Defendants did not deliver the minimum wage 'free and clear.'"); Perez v. Westchester Foreign Autos, Inc., No. 11 CIV. 6091 ER, 2013 WL 749497, at *9 (S.D.N.Y. Feb. 28, 2013) (holding the "free and clear" requirement was violated by a policy that required employees to pay back a draw on commission).

78. *See Arriaga*, 305 F.3d at 1235–37.

79. *See, e.g.*, Mayhue's Super Liquor Stores, Inc. v. Hodgson, 464 F.2d 1196, 1199; *Davis*, 2017 WL 11572196, at *6; *Perez*, 2013 WL 749497, at *9.

80. 29 C.F.R. § 531.35.

early.[81] Damages for such a breach could include "expectation damages," which intend to put the non-breaching party in as good of a position as the non-breaching party would have been in were it not for the breach.[82] Under this framework, employers argue that they can recover the amounts they would have received had the worker not departed (their "lost profits") or for the amounts they expend to respond to the breach (like the costs of hiring a replacement).[83] But recovering these amounts would turn the minimum wage laws on their head. In every employment relationship, every worker would be under constant threat of having to pay back their wages if they terminate their employment due to the headaches to employers of worker turnover. The U.S. Department of Labor, including in a case filed on behalf of a Towards Justice client, has expressly articulated that these practices violate minimum wage laws.[84]

However, the FLSA's reach is limited to prohibiting employers from recouping debts when those debts are primarily for the employer's benefit.[85] Thus, courts have found that training which provides some form of transferrable licensing and credentials does not fall within the statute's authority to regulate.[86] While it is sometimes apparent that training primarily benefits the employee (e.g., when an employer pays for an employee's master's in business administration degree at an accredited business school) or the employer (e.g., standard on-the-job training involving work for paying customers), in many cases, the primary beneficiary question can be resource-intensive, which somewhat limits the FLSA's utility, particularly in cases involving low-wage workers.

In addition to wage laws (and sometimes as an alternative), federal consumer laws may apply to stay-or-pay contracts, which employment contracts often frame as a forgivable consumer loan from employer to employee without attention to any of the legal requirements for such loans.[87] One potential hook available to private litigants who cannot enforce all of the Dodd-Frank Act's protections against unfair practices in the consumer lending space is the Truth In Lending Act (TILA),[88] which requires lenders to provide certain disclosures in connection with

81. *See* 17 AM. JUR. 2D *Contracts* § 702 (1964).

82. RESTATEMENT (SECOND) OF CONTRACTS § 344 (AM. L. INST. 1981).

83. 17 AM. JUR. 2D *Contracts* § 711 (1964).

84. *See* Brief for Dep't of Just. as Amicus Curiae in Support of Neither Party, Burrell v. Staff, 60 F. 4th 25 (3d Cir. 2023) *cert. denied sub nom.* Lackawanna Recycling Ctr. v. Burrell, 143 S. Ct. 2662 (2023).

85. *See, e.g.*, Mayhue's Super Liquor Stores, Inc. v. Hodgson, 464 F.2d 1196, 1199 (5th Cir. 1972) (discussing that debts cannot "tend[] to shift part of the employer's business expense to the employees").

86. *See, e.g.*, Gordon v. City of Oakland, 627 F.3d 1092, 1096 (9th Cir. 2010); Bland v. Edward D. Jones & Co., 375 F. Supp. 3d 962, 977 (N.D. Ill. 2019).

87. *See* 12 C.F.R. § 1026.1.

88. 15 U.S.C. § 1601 *et seq.*

offering a loan, including any finance charge and annual percentage interest rate.[89] As with the FLSA, however, TILA's reach may be limited by the unique properties of stay-or-pay contracts. For example, TILA applies only to loans payable in installments or loans that include a finance charge.[90] Many stay-or-pay loans are due in a lump sum shortly after—or even before—the end of employment.[91]

A third possible recourse for employees seeking relief from a stay-or-pay contract is the Trafficking Victims Protection Act (TVPA),[92] a federal law prohibiting forced labor.[93] The TVPA was enacted to address "a broad range of conduct,"[94] including "increasingly subtle" methods of forced labor such as "nonviolent" and "psychological" coercion.[95] Under the TVPA, an employer, among other things, may not use the threat of "serious harm" or "abuse of legal process" to coerce workers into continuing to work for them.[96] Serious harm is explicitly defined to include financial harm, as well as psychological and reputational damage.[97]

Not all stay-or-pay contracts rise to the level of forced labor. Still, courts have concluded in several cases that the threat of collecting a large debt against a departing worker can be a threat of serious harm, and the threat of filing litigation or arbitration over such a debt can be threatened abuse of legal process.[98] TVPA cases are prevalent in the foreign nurse staffing industry, where employers frequently seek to recover damages of $20,000 or more from nurses who desire to quit their jobs and routinely threaten them with lawsuits and other consequences to compel them to stay.[99] Although it is unnecessary to state a claim under the statute, courts

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89. *See* 12 C.F.R. § 1026.6(a).

90. *Id.* § 1026.1(c)(1)(iii).

91. Since the value of the product or service being provided in a stay-or-pay contract (e.g., training) is often highly inflated, it may be the case that this inflated valuation constitutes a finance charge in some stay-or-pay contracts.

92. 22 U.S.C. § 7101.

93. *See id.* § 7101(a).

94. Burrell v. Staff, 60 F. 4th 25, 37 (3d Cir. 2023), *cert. denied sub nom.* Lackawanna Recycling Ctr. v. Burrell, 143 S. Ct. 2662 (2023).

95. United States v. Dann, 652 F.3d 1160, 1169 (9th Cir. 2011) (citation omitted); United States v. Bradley, 390 F.3d 145, 150, 156 (1st Cir. 2004), *rev'd on other grounds*, 545 U.S. 1101 (2005).

96. 18 U.S.C. § 1589(a)(2)–(4).

97. *Id.* § 1589(c)(2).

98. *See* United States v. Dann, 652 F.3d 1160, 1169 (9th Cir. 2011).

99. *See, e.g.*, Salcedo v. RN Staff Inc., No. 121CV01161SEBDLP, 2023 WL 2403832, at *11 (S.D. Ind. Mar. 8, 2023) (noting that a $20,000 liquidated damages provision is sufficient to plead serious harm); Vidal v. Advanced Care Staffing, LLC, No. 122CV05535NRMMMH, 2023 WL 2783251, at *14 (E.D.N.Y. Apr. 4, 2023) (noting that unspecified damages including "lost profits" and "expenses" were sufficient to plead serious harm); Paguirigan v. Prompt Nursing Emp. Agency LLC, 286 F. Supp. 3d 430, 438 (E.D.N.Y. 2017) (noting that threats of payment of $25,000 are "more than enough to rise to the level of harm necessary to state a TVPA claim").

often find allegations of some form of bait-and-switch or an especially punishing working environment compelling.[100]

Finally, state unfair competition laws or unfair and deceptive acts and practices laws—which often incorporate existing state laws banning non-competes—may also restrict the use of stay-or-pay contracts. For example, Texas and Tennessee courts have recognized that state prohibitions on "restraints of trade" apply to contracts that restrict employee mobility by imposing economic penalties on employees seeking to change jobs.[101] And other states, like Colorado, have explicitly identified how and when TRAPs violate their own non-compete laws.[102] However, not all states have such laws, and even in those states that do, some courts have taken the position that a financial penalty does not restrict employee mobility.[103]

IV. The Future of Protecting Worker Mobility

In light of the current landscape, state and federal policymakers must set up clear and bright-line rules regarding using stay-or-pay contracts. The existing patchwork of state and federal law lends considerable uncertainty as to whether stay-or-pay contracts are enforceable and, if so, under what circumstances. As both research and experience demonstrate, this uncertainty has a substantial chilling effect on employees' exercise of their rights, even when their contracts are entirely unenforceable.[104] Research into non-competes shows little difference in the effect of including a non-compete in an employment contract in states where non-competes are unenforceable versus states where they are enforceable.[105] This is because worker choices about mobility are generally driven by fears about the likelihood of court enforcement of a non-compete, the likelihood that an employer will sue to enforce the non-compete, and

100. *See, e.g.*, Carmen v. Health Carousel, LLC, No. 1:20-cv-313, 2023 WL 5104066, at *7; Vidal v. Advanced Care Staffing, LLC, No. 1-22-cv-05535-NRM-MMH, 2-23 WL 2783251, at *5 (E.D. N.Y. Apr. 4, 2023).

101. Peat Marwick Main & Co. v. Haass, 818 S.W.2d 381, 388 (Tex. 1991); Spiegel v. Thomas, Mann & Smith, P.C., 811 S.W.2d 528, 530–31 (Tenn. 1991).

102. *See* COLO. REV. STAT. § 8-2-113 (2023).

103. *See, e.g.*, Heder v. City of Two Rivers, 295 F. 3d 777, 782 (7th Cir. 2002); McFall v. NCH Healthcare Sys., No. 2:23-cv-572-SPC-KCD, 2024 WL 111920, at *3 (M.D. Fla. Jan. 10, 2024) (holding that the program requiring employee to pay for training expenses was not a forbidden restraint of trade).

104. *See* 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 [https://perma.cc/EJE4-F3JB].

105. *See FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, *supra* note 7; Evan Starr et al., *The Behavioral Effects of (Unenforceable) Contracts*, 36 J. LAW, ECON., & ORG. 633, 636 (2020).

reminders about the existence of the non-compete from the employer rather than an actual court order.[106]

Furthermore, while basic economic theory suggests that an employer will only file an enforcement lawsuit if "litigation is likely to result in enforcement and is not overly costly,"[107] this disregards that employers who sue their employees may see themselves as not simply trying to collect money they believe they are owed from the employee they sue, but also to send a message to current employees that quitting has consequences. The chief executive officer of Southern articulated this with unusual candor when he told a local newspaper that the company needed to "use a combination of carrots and sticks" to keep pilots from leaving their jobs for better ones and described the lawsuits filed to enforce the company's TRAPs as "trying to control . . . the behavior" of pilots.[108] Similarly, Mabute's complaint against Medliant alleges that when the company began to suspect that he was discontented at his job, a company representative called him and told him that another employee who had left the company before his contract was up owed $100,000.[109]

Meanwhile, the costs to workers of even an unsuccessful enforcement lawsuit are often astronomical, and defending against litigation is frequently out of reach.[110] As a result, employees are generally stuck choosing between proceeding pro se against a represented employer or paying a lawyer an hourly rate likely to exceed the challenged debt quickly. Even for a represented litigant who can afford to pay a lawyer, a lawsuit is an extraordinary commitment, requiring time spent responding to discovery, sitting for a deposition, and traveling to hearings or trial.

As such, in practice, it rarely matters if a debt is unlawful—getting to that outcome is simply too hard for the average worker. Meanwhile, the risk for the employer is relatively limited: The worst-case scenario is frequently no more than a ruling that a stay-or-pay provision in a contract is unenforceable, leaving the employer to walk away from the contract with no consequences other than perhaps the attorneys' fees incurred in trying to defend it. As a result of these deeply skewed incentives, the vast majority of employer-driven debt cases end up in default judgments or settlements where the worker is forced to cave to the employer's demands.[111]

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106. Starr et al., *supra* note 105.

107. *Id.* at 634.

108. Haskins, *supra* note 51.

109. Complaint at ¶ 72, Mabute v. Medliant Inc., No. 2:23-cv-02148-APG-DJA (D. Nev. filed Dec. 28, 2023).

110. *See, e.g.*, Haskins, *supra* note 51.

111. OFF. OF GEN. COUNSEL, NLRB, MEMORANDUM GC 23-08, NON-COMPETE AGREEMENTS THAT VIOLATE THE NATIONAL LABOR RELATIONS ACT (2023).

In this context, two overarching principles become clear. First, to be effective, any law regulating restrictive employment agreements must provide relative certainty as to whether and when stay-or-pay contracts are permissible and when they are not. And second, it is not enough to simply make contract terms imposing improper employer-driven debt voidable or unenforceable.

Importantly, UREAA recognizes stay-or-pay contracts as a type of restrictive employment agreement, as they "probihit[], limit[], or set[] conditions on working elsewhere after the work relationship ends."[112] It explicitly addresses TRAPs, providing in § 2 that such contracts must be prorated, last no longer than two years after the completion of training, and be limited to "special training," defined as:

> instruction or other education a worker receives from a source other than the employer that: (A) is designed to enhance the ability of the worker to perform the worker's work; (B) is not normally received by other workers; and (C) requires a significant and identifiable expenditure by the employer distinct from ordinary on-the-job training.[113]

Beyond TRAPs, UREAA's discussion of stay-or-pay contracts is substantially more limited. However, it recognizes that any agreement that requires an employee to pay their employer to quit their job operates as a restraint on employment.[114] UREAA's Section 16, which provides for awarding attorneys' fees to a party that successfully challenges a restrictive employment agreement,[115] is especially crucial in discouraging employers from including unlawful stay-or-pay provisions in their employment contracts. The statutory damages provision is also helpful in this regard, although the default amount of $5,000 per violation is unlikely sufficient for workers challenging stay-or-pay contracts, at least not in the absence of attorney's fees.[116]

CONCLUSION

Employers seek to justify stay-or-pay contracts based on the purported "freedom of contract." Just like other contracting parties, they assert employers should be able to impose consequences on the other party to the contract in the case of a breach. But that analysis turns the employment relationship on its head. The freedom to move between

112. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 2 cmt. (UNIF. L. COMM'N 2021).

113. *Id.* § 2(15).

114. *See id.* § 2 cmt. (noting that an arrangement where an "[e]mployee agrees to pay employer $1,000 if she leaves employment without employer's permission" would be unlawful under UREAA).

115. *Id.* § 16(c).

116. *Id.* § 16(e).

employers for higher pay or better treatment is one of the foundations of worker bargaining power and dignity and is the basis for prohibitions against indentured servitude, peonage, and non-compete agreements. Employers should not be permitted to sidestep these basic principles through fine-print contract terms and damages actions. The problem is that right now our legal system is too stacked against workers to give them a fair shot to fight back. Most have no meaningful opportunity to negotiate over contracts or hire a lawyer when hauled into court. In this context, even unenforceable contractual terms can exert extraordinary harm. We must implement policies with this fact in mind and establish clear and bright-line rules against coercive contracts that restrict worker mobility, including stay-or-pay contracts.