

OKLAHOMA CITY UNIVERSITY LAW REVIEW

VOLUME 49

WINTER 2024

NUMBER 2

NOTE

THE EMPLOYEE TRAP: DEVELOPMENTS IN TRAINING REPAYMENT AGREEMENT PROVISIONS AND TOWARDS A LABOR MARKET FREE OF SNARES

*Lacy Kelly**

Introduction

Nationwide, the labor shortage in the healthcare industry was already in full swing before the beginning of the COVID-19 pandemic, with “27 open healthcare practitioner jobs . . . for every available unemployed healthcare practitioner across the country” in 2018.¹ During the pandemic,

* Lacy Kelly is a J.D. Candidate at Oklahoma City University School of Law, Class of 2025. She focuses on transactional law, with an emphasis on commercial real estate, business entities, and estate planning. Before law school, Lacy worked in municipal government in positions dedicated to financial and contract management. She would like to thank Professor D. A. Jeremy Telman for his guidance on this note. Lacy dedicates this note to her husband, Matthew Fong, in recognition of his unconditional support.

1. AM. IMMIGR. COUNCIL, THE GROWING DEMAND FOR HEALTHCARE WORKERS IN OKLAHOMA 1 (2023), https://www.americanimmigrationcouncil.org/sites/default/files/growing_demand_health_care_workers_oklahoma.pdf [https://perma.cc/FF4E-92H2] (citing *Immigrant Healthcare*

“Oklahoma lost the equivalent of nearly 40,000 eight-hour nursing shifts.”² Efforts to combat the nursing shortage in Oklahoma are ongoing and include creative solutions like the March 2024 agreement between the Oklahoma State Regents for Higher Education and the Oklahoma Department of Career and Technology Education that allows students to receive college “credit for prior learning in practical nursing programs” at Oklahoma career and vocational-technical centers.³ Like the narrower nursing labor market, the wider labor market in Oklahoma has still not recovered from a general workforce shortage. September 2024 data from the Bureau of Labor Statistics shows that there are only “52 available workers for every 100 open jobs” statewide.⁴ The Oklahoma labor market needs workers at all levels of responsibility in all sectors of industry in order to be productive, efficient, and produce the goods and services people and businesses need. While some market practices, such as the education credit agreement mentioned above, position states to grow through and overcome its labor shortage, other market practices hinder the free movement of employees between jobs.

Monopsony is defined generally as “[a] market situation in which one buyer controls the market.”⁵ Monopsony in the labor market occurs when the employer controls much of the labor market and has been defined broadly as “the exercise of employer market power in labor markets.”⁶

Workers Are Critical in the Fight Against Covid-19, NEW AM. ECON. (Apr. 9, 2020), <https://research.newamericaneconomy.org/report/covid-19-immigrant-healthcare-workers/> [https://perma.cc/DZ6C-QSMH].

2. Corey Jones, ‘Oklahoma is way behind’ in nurse shortage, with nursing home execs ‘deeply concerned,’ TULSA WORLD (Nov. 7, 2023), https://tulsa-world.com/news/local/oklahoma-is-way-behind-in-nurse-shortage-with-nursing-home-execs-deeply-concerned/article_2d844326-3f34-11ed-a46d-17070206608b.html [https://perma.cc/P98V-B98C].

3. *State Regents, CareerTech Sign Statewide Nursing Articulation Agreement*, OKLA. STATE REGENTS FOR HIGHER EDUC. (Feb. 28, 2024), <https://okhighered.org/2024/02/state-regents-careertech-sign-statewide-nursing-articulation-agreement/> [https://perma.cc/M26E-P9FU].

4. Lindsay Cates & Stephanie Ferguson Melhorn, *Understanding America’s Labor Shortage: The Most Impacted States*, U.S. CHAMBER OF COM. (Feb. 11, 2025), <https://www.uschamber.com/workforce/the-states-suffering-most-from-the-labor-shortage?state=ok> [https://perma.cc/J6JC-DPGA].

5. *Monopsony*, BLACK’S LAW DICTIONARY (11th ed. 2019).

6. ALAN B. KRUEGER & ERIC A. POSNER, A PROPOSAL FOR PROTECTING LOW-INCOME WORKERS FROM MONOPSONY AND COLLUSION, THE HAMILTON PROJECT 2 (2018), https://www.hamiltonproject.org/assets/files/protecting_low_income_workers_from_monopsony_collusion_krueger_posner_pp.pdf [https://perma.cc/NC9S-KFVH].

Employers exercise market power through the use of practices like non-compete clauses in employment contracts and no-poaching agreements (which are a type of agreement that companies make, promising that they will not hire each other's employees).⁷ Even though the United States economy is a capitalist, free-market economy, courts frequently enforce instruments that hinder competition in employment, absent statutory prohibitions on those instruments. One familiar tool used to control employee decisions about where to work is the above-mentioned non-compete clause in an employment contract. Non-compete clauses are clauses in employment agreements prohibiting the employee from "joining or starting a competing enterprise, typically within time and geographic boundaries" after their employment ends.⁸ Non-compete clauses were traditionally used in industries such as technology and sales, but these clauses have since proliferated and can be found in employment contracts for positions like a summer camp counselor, a textbook editor, a pesticide technician, and an intern.⁹ In Oklahoma, non-compete clauses are forbidden by State statute.¹⁰ The only exception to that prohibition is that employees are prohibited from directly soliciting the customers of their former employers.¹¹

A less well-known, but comparably chilling tool that erodes the ability of employees to choose where to work is called the Training Repayment Agreement Provision, or "TRAP." A TRAP "requires an employee to pay the employer a fixed or pro rata sum if the employee received on-the-job training and quits work or is fired within a set period of time."¹² The most typical TRAP is a clause in an employment agreement, or a separate agreement, obligating the employee to repay some specified training cost

7. 1 WILLIAM CONSTANGY, *NON-COMPETE LAW* § 3.04 (2023 ed. LexisNexis Matthew Bender).

8. Evan P. Starr et al., *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. & ECON. 53, 53 (2021) (footnote omitted).

9. Steven Greenhouse, *Noncompete Clauses Increasingly Pop Up in Array of Jobs*, THE N.Y. TIMES (June 8, 2014), <https://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html#:~:text=From%20event%20planners%20to%20chefs,working%20for%20a%20company's%20rivals>.

10. OKLA. STAT. tit. 15, § 219A (2001).

11. *Id.*

12. Jonathan F. Harris, *Unconscionability in Contracting for Worker Training*, 72 ALA. L. REV. 723, 725-26 (2021) (footnote omitted).

if they separate from employment before a specified time period.¹³ Another common TRAP is an employer requirement that an employee sign a promissory note for the amount of the training costs, where the training cost debt is forgiven pro-rata over whatever period of time the employee is required to stay employed.¹⁴ Still another type of TRAP is a liquidated damages clause, where employees are required to repay a certain amount representing the employer's training investment in them if they leave employment before a specified time period.¹⁵

Employers like TRAPs because they shift the cost of training employees from the employer to the employee. Additionally, TRAPs give employers some protection against employee turnover, which can be costly and introduce inefficiencies to the business. However, TRAPs ultimately hurt employers and employees by reducing competition in the marketplace, and TRAPs hurt employees by limiting their potential job opportunities. TRAPs also hurt employees by saddling them with debt, introducing the possibility of being sued for finding a better job, and ultimately hurting their opportunity to get better and more productive employment as their skills and knowledge increase. Many, if not most, TRAPs balance the employer's interest at the expense of the employee's interest, and this anti-competitive practice is hurting the labor market. Existing legal and regulatory frameworks that do not protect employees from the most predatory types of TRAPs should be reevaluated and reworked to protect workers.

Part I of this Note gives an overview of TRAPs, including the different types of TRAPs and the frameworks that courts use to evaluate the enforceability of TRAPs. Part I also provides an update on the trend of courts' rulings on TRAPs. Part II examines state statutes that ban or limit TRAPs and gives an update on recent state legislation, proposed state legislation, and proposed federal rulemaking prohibiting TRAPs. Part II also explores proposed uniform model legislation on restrictive employment agreements.

13. See *Smith v. Collection Recovery Sols. Int'l, LLC*, No. 1:19-CV-952-MLB-CCB, 2022 U.S. Dist. LEXIS 96100, at *2 (N.D. Ga. Jan. 25, 2022).

14. See *Rum v. HCA Healthcare, Inc.*, No. CV 23-5142-JFW(BFMx), 2023 WL 7107268, at *1 (C.D. Cal. Oct. 11, 2023).

15. *Carmen v. Health Carousel, LLC*, No. 1:20-cv-313, 2023 U.S. Dist. LEXIS 139403, at *6-*7 (S.D. Ohio Aug. 9, 2023).

I. General Characteristics of TRAPs

While traditional forms of student debt are well known and recognized, the debt that may follow employees who have been penalized by TRAPs is less well known. Some employers are upfront about the TRAP contained in their employment contract. However, many times when employees sign employment agreements that contain TRAPs, they do not understand what they are signing. PetSmart advertises free, paid training for dog grooming positions at its stores.¹⁶ For example, in her class-action complaint against PetSmart, BreAnn Scally, a former dog groomer for the defendant, alleged that she signed a TRAP that stated she would pay the company \$5,500 if she left employment before two years had passed after she entered the PetSmart Grooming Academy, but the PetSmart manager who gave her this document to sign allegedly did not explain the terms of the agreement.¹⁷

Sometimes employers change the terms of the TRAP after employment has begun. A U.S. district court found that the nursing staffing and recruiting company Health Carousel required a nurse to sign an employment contract that provided that, in exchange for Health Carousel paying for her relocation expenses to work for their company in the United States, she was obligated to stay with the company for thirty-six months starting after employee orientation or becoming fully licensed, whichever period was later.¹⁸ The agreement stated that if the nurse left the company before the thirty-six months were over, she would be responsible for paying an unspecified amount of liquidated damages to the company.¹⁹ However, once the nurse started working for Health Carousel, the company introduced an addendum to her employment agreement that created specified liquidated damages of up to \$35,000 for leaving the company before thirty-six months of employment.²⁰ Additionally, the company gave the nurse an employee handbook, which she was required to sign upon beginning her employment.²¹ This employee handbook

16. Class Action Complaint at 7, *Scally v. PetSmart LLC*, No. 22-CIV-03057 (San Mateo Cnty., Cal. July 28, 2022).

17. *Id.* at 11.

18. *Carmen v. Health Carousel, LLC*, No. 1:20-cv-313, 2023 U.S. Dist. LEXIS 139403, at *5 (S.D. Ohio Aug. 9, 2023).

19. *Id.* at *7-*8.

20. *Id.* at *8-*9.

21. *Id.* at *8.

extended the thirty-six-month period to when the nurse became fully licensed, instead of the later of either licensure or orientation completion.²²

In July 2022, after an investigation into the problems associated with “shadow student debt,” the Student Borrower Protection Center, a non-profit organization dedicated to addressing student debt, found that “major employers rely upon TRAPs in segments of the U.S. labor market that collectively employ more than one in three private-sector workers.”²³ The industries these workers populate have broadened over time.

A. TRAPping Employees: From Required Employment Certifications to Relocations

Scholars began studying TRAPs in the early 1990s, when they were confined to mostly higher-earning jobs in the engineering, securities, and airline industries.²⁴ In the 2000s and 2010s, TRAPs became common in many other industries, especially the nursing and trucking industries.²⁵ Today, TRAPs continue to be found in traditional industries like aviation and nursing, but also now show up in lower-wage positions such as hourly service or retail employees.

The training provided under TRAPs varies greatly. Some TRAPs provide education and preparation for a certificate or license, a portable credential that could potentially benefit the employee further down the road in their career. In *McClain v. Cape Air*, Cape Air provided its employee pilots with “an FAA-certified” Airline Transport Pilot (“ATP”) training program, which included providing training instructors and flight simulations, as well as paying the cost of employee housing and food expenses during the training.²⁶ Additionally, Cape Air provided the funding for all other outside instruction, training, and tests that its employee pilots needed to attain ATP certification.²⁷ In exchange for this training, Cape Air employees were required to remain employed with the

22. *Id.* at *8-*9.

23. JONATHAN F. HARRIS & CHRIS HICKS, TRAPPED AT WORK: HOW BIG BUSINESS USES STUDENT DEBT TO RESTRICT WORKER MOBILITY, STUDENT BORROWER PROT. CTR. 3 (2022).

24. Jonathan F. Harris, *Unconscionability in Contracting for Worker Training*, 72 ALA. L. REV. 724, 741 (2021).

25. *Id.*

26. *McClain v. Cape Air*, No. 22-cv-10649-DJC, 2023 U.S. Dist. LEXIS 220741, at *3-*4 (D. Mass. Dec. 12, 2023).

27. *Id.* at *4.

company after they became ATP-certified for periods ranging between twelve and eighteen months, or else they would be required to repay the cost of their training, which was “acknowledged to be . . . (\$30,000).”²⁸ ATP certification is a valuable credential that qualifies the holder as a commercial pilot with the federal government.²⁹ This TRAP produced a credible, portable qualification that employees could take with them to future positions in other aviation companies, and represented a real investment in the employee’s education and skills.

Other TRAPs provide preparation and education for a credential only recognized or required by that specific company. Jonathan Smith went to work for a company called TechField, LLC, and signed a TRAP that forgave his debt for the company’s training program costs if he worked for the company for twenty-four months.³⁰ The training that TechField provided him was training in the company’s “business operations” to “improve his marketability to TechField’s customers.”³¹ Even though the training Smith was provided in this instance was “specific to TechField’s operations,” the company still obtained a judgment against him for \$14,437 plus interest and attorney’s fees because he left employment with the company about a year before the twenty-four-month TRAP period was completed.³² This TRAP left an employee with over \$14,000 of debt for training that was specifically for this particular company’s business operations and did not provide the employee with any type of portable education or qualification.³³ This TRAP represents an investment in the business’s interest, not in the employee’s interest.

Another type of TRAP concerns employee relocation costs. Some employers require employees who relocate at the employer’s request to sign an agreement stating that the employee will repay part or all of the costs of their relocation if they do not remain employed at that location for a certain length of time. Frank Fournier began working for Kyowa Kirin Pharmaceutical (KKR) in 2015 in its San Diego office.³⁴ In 2018, Fournier entered into an agreement with KKR regarding an international posting to

28. *Id.* at *5 (citation omitted).

29. 14 C.F.R. § 121.436 (2024).

30. *Smith v. Collection Recovery Sols. Int’l, LLC*, No. 1:19-CV-952-MLB-CCB, 2022 U.S. Dist. LEXIS 96100, at *4 (N.D. Ga. Jan. 25, 2022).

31. *Id.* at *18.

32. *Id.* at *19.

33. *Id.* at *6.

34. Complaint for Breach of Contract at 1, *Kyowa Kirin Pharm. Rsch., Inc., v. Fournier*, No. 37-2020-00043781-CU-BC-CTL (Cal. Super. Dec. 1, 2020).

the parent company's office in Japan.³⁵ The agreement stated that KKR would "pay relocation/repatriation allowances, travel costs, amounts for shipment of personal items and household goods, amounts for language and cultural training, and other amounts for services during the relocation process."³⁶ The agreement also stated that Fournier would repay 100% of these relocation payments if he resigned from KKR within twelve months of the end of his two-year assignment period.³⁷ Even though Fournier completed his assignment period on June 30, 2020, when he voluntarily resigned from KKR in September 2020, KKR demanded he repay it the total amount of the \$63,995.07 it had spent to relocate Fournier to Japan in 2018, since he had resigned within twelve months of the assignment period.³⁸ According to the agreement Fournier signed, his annual base salary for this assignment was \$62,830.04.³⁹ Relocation cost TRAPs are common for employees recruited from other countries to the United States to work as nurses.⁴⁰

Yet another different type of TRAP is known as a tuition reimbursement agreement or tuition repayment agreement. This type of TRAP involves an employer agreeing to pay some or all of an employee's tuition costs for educational classes but requires the employee to repay those costs if they separate from employment within a specified time period. Oklahoma City, with a budgeted workforce of 5,108 full-time positions in 2024, is one of the largest employers in the Oklahoma City Metropolitan Statistical Area.⁴¹ Since 1998, The City of Oklahoma City has provided a Tuition Reimbursement Program to qualified employees, reimbursing each eligible employee up to \$1,250 for tuition and fees per semester, including spring, summer, and fall semesters.⁴² This Tuition Reimbursement Program "recognizes that improved job skills and educational development is becoming increasingly important."⁴³ The City

35. *Id.* at 2.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at Exhibit 1.

40. See *Healthcare Facility Mgmt. LLC v. Malabanan*, No. 1:23-cv-236, 2024 U.S. Dist. LEXIS 19649, at *2 (S.D. Ohio Feb. 5, 2024); *Carmen v. Health Carousel, LLC*, No. 1:20-cv-313, 2023 U.S. Dist. LEXIS 139403, at *3-*6 (S.D. Ohio Aug. 9, 2023).

41. CITY OF OKLA. CITY, 2024 ADOPTED BUDGET, A-5, A-23 (2024), <https://www.okc.gov/home/showpublisheddocument/37443/638294975809730000>.

42. *Personnel Service Bulletin No. 20-4*, issued by *The City of Oklahoma City*, 1 (2020).

43. *Id.*

of Oklahoma City's Tuition Reimbursement Program also mandates that employees who leave employment within two years after they receive their tuition reimbursement, whether voluntarily or involuntarily (except for those employees laid off through a reduction-in-force), must repay The City of Oklahoma City the full amount of the tuition reimbursement they have received.⁴⁴ That means that an employee who takes advantage of the program, designed to help with professional and "personal development and . . . employee recruitment and retention," and who is terminated involuntarily must still repay all of the tuition reimbursement they received within two years of receipt.⁴⁵ If an employee utilized this program in the spring, summer, and fall semesters for two years, that would mean they would be obligated to repay up to \$7,500 in tuition reimbursement to their employer after being terminated.

Employers routinely enforce TRAPs when employees separate from employment before the contractually required time period, whether the employees resign or are fired with or without cause.⁴⁶ And when employers take their former employees to court to recover the cost of their training, courts usually rule for the employer and enforce the TRAP.⁴⁷ When employers bring lawsuits against their employees to recover training costs, they typically bring a breach of contract claim.⁴⁸ When employees sue employers to avoid repayment of the TRAP, or when employees defend against employers' attempts to collect on TRAPs, several different legal strategies have been tried, tested, and mostly failed.

B. Recent but Developing Precedents

The first comprehensive survey on how courts enforced TRAPs was undertaken in 2008.⁴⁹ At that time, courts usually enforced TRAPs against many different types of legal challenges.⁵⁰ One of the most influential

44. *Id.* at 2.

45. *Id.* at 1.

46. Anthony Kraus, *Employee Agreements for Repayment of Training Costs: The Emerging Case Law*, 59 LAB. L.J. 213, 223 (2008).

47. Jonathan F. Harris, *Unconscionability in Contracting for Worker Training*, 72 ALA. L. REV. 724, 726 (2021).

48. *See Sanders v. Future Com, Ltd.*, No. 02-15-00077-CV, 2017 Tex. App. LEXIS 4575, at *4 (Tex. App. 2017).

49. *See generally* Anthony Kraus, *Employee Agreements for Repayment of Training Costs: The Emerging Case Law*, 59 LAB. L.J. 213 (2008).

50. *Id.*

cases guiding this line of jurisprudence is *Heder v. City of Two Rivers*, a 2002 decision written by Seventh Circuit Judge Frank Easterbrook, where the court held that a provision that a firefighter who left employment after being hired “within the next three years would reimburse the City for the cost of the [required paramedic] training” was a valid provision under Wisconsin statute because it was not a restrictive covenant not to compete, which “must be linked to *competition*.”⁵¹ Kraus’s 2008 survey also demonstrates that courts usually enforced TRAPs against liquidated damages challenges, unconscionability challenges, and duress challenges.⁵² At that time, the most successful legal strategy used by employees seeking to avoid TRAPs were claims under state statutes that prohibited kickbacks in employment or caused employees to receive final paychecks that fell below the statutory minimum wage.⁵³

When Professor Jonathan Harris updated the TRAP caselaw in his 2021 article *Unconscionability in Contracting for Worker Training*, he noted that courts were still usually enforcing TRAPs against employee challenges, including Fair Labor Standards Act (“FLSA”) anti-kickback claims, liquidated damages challenges, or non-compete challenges.⁵⁴ Since that update, recent cases have demonstrated that the losing arguments are still losing, the very narrow winning arguments are still winning, and there are several new types of challenges that are being brought against TRAPs that offer innovative strategies but that have yet to be fully adjudicated.

Turning to developments in state courts, in December 2021, the Fourth Circuit Court of Appeal of Louisiana held that reimbursement of training costs required in an employment contract was “a de facto forfeiture of wages clause” prohibited by the Louisiana Wage Payment Act and that this clause was void as contrary to public policy.⁵⁵ MaShanna Gallo’s “employment contract with Greenpath International, Inc. (‘GI’)” required her to repay the company for any expense the company incurred for her training if she left employment with the company before the two-year

51. *Heder v. City of Two Rivers*, 295 F.3d 777, 778, 780 (7th Cir. 2002).

52. Anthony Kraus, *Employee Agreements for Repayment of Training Costs: The Emerging Case Law*, 59 LAB. L.J. 213, 220, 222 (2008).

53. *Id.*

54. Jonathan F. Harris, *Unconscionability in Contracting for Worker Training*, 72 ALA. L. REV. 724, 743-46 (2021).

55. *Gallo v. Greenpath Int’l, Inc.*, 2021-0313 (La. App. 4 Cir. 12/16/21), 334 So. 3d 399, 409.

contract period ended.⁵⁶ When Gallo left employment with GI before the two-year contract period was over, she sent the company an email acknowledging that pursuant to her employment contract, she knew that she would be responsible for reimbursing the company \$219.75 for a training program.⁵⁷ GI responded with a list of expenses they planned to deduct from Gallo's final paycheck, including not only the training program cost, but also the cost of Gallo's hourly wages for the three days she attended the training, the cost of Gallo's hourly wages for the two days that they could not access a company file cabinet while waiting for the return of Gallo's company keys through the postal service, and notice that they refused to pay Gallo for her unused vacation hours.⁵⁸

The trial court where Gallo filed her claim against GI for unpaid wages held "that it is against public policy to take a [deduction from the employee's final paycheck] unless the [deduction] is for specific things such as loans, damages caused by an employee, lost equipment, uniforms, over-payment from a previous paycheck, or property that is being improperly retained by the employee."⁵⁹ The appeals court affirmed the trial court's decision, holding that the reimbursement requested by GI, and specifically the reimbursement for the training program Gallo attended, was a de facto forfeiture of employee wages under the Louisiana Wage Payment Act, and that GI was not entitled to the training reimbursement, nor Gallo's wages paid on the days of the training or when her keys were en route.⁶⁰

In 2022, the United States District Court for the Middle District of Louisiana applied the court's holding in *Gallo* to hold a similar employment contract clause void as contrary to public policy.⁶¹ In February 2020, Timothy L. Carver was hired by Capital Area Transit Systems (CATS) as a bus driver trainee.⁶² After completing his training period and becoming a bus driver, Carver was fired in July 2020, and CATS deducted \$389.19 from his "final paycheck in accordance with an employment agreement, which allowed for the deduction of up to \$500.00 in training costs from a final paycheck where the employee leaves CATS

56. *Id.* at 402.

57. *Id.*

58. *Id.* at 403-04.

59. *Id.* at 404 (citation omitted).

60. *Id.* at 410.

61. *Carver v. Capital Area Transit Sys.*, No. 21-281-RLB, 2022 U.S. Dist. LEXIS 69555, at *15-*16 (M.D. La. Apr. 14, 2022).

62. *Id.* at *1-*2.

before reaching one year of employment.”⁶³ When Carver sued CATS in federal district court for violations of the FLSA and the Louisiana Wage Payment Act, CATS admitted in its answer that they “violated the minimum wage requirements of the FLSA.”⁶⁴ The court first acknowledged that training reimbursement agreements did not necessarily violate the anti-kickback sections of the FLSA, but the court noted that “an employer cannot deduct . . . ‘training costs’ to the extent the deduction reduces wages below minimum wage.”⁶⁵ Since CATS did not object to Carver’s motion for summary judgment on his federal and state claims and did not submit any evidence contrary to Carver’s claims, the court held that CATS violated the minimum wage provisions of the FLSA and then turned to the state law claims.⁶⁶

The court held that the contract provision allowing CATS to deduct training costs of up to \$500.00 from an employee’s final paycheck if the employee left CATS before one year of employment was “null and void as a matter of Louisiana public policy.”⁶⁷ The court cited *Gallo* to support its conclusion that an employment contract provision requiring reimbursement of training costs is, in effect, a forfeiture of wages forbidden by the Louisiana Wage Payment Act.⁶⁸ Accordingly, the court awarded Carver wages, penalty wages, and attorney’s fees.⁶⁹ Louisiana remains the only state where state courts have held that training reimbursement agreements are contrary to public policy.

While individuals are still bringing federal and state challenges to TRAPs, many recent challenges to TRAPs have appeared in the form of proposed class-action lawsuits. A recent ruling on a proposed class-action lawsuit has crystallized the way that a certain federal district court reads FLSA anti-kickback TRAP challenges and could provide guidance to those seeking to challenge TRAPs under that statutory framework. Kathleen Fredericks, a pilot, signed an employment agreement with Ameriflight in 2021 agreeing that if she left employment before completing “12 months of revenue flying,” she would repay Ameriflight \$20,000 for the required training she completed in order to become

63. *Id.* at *2.

64. *Id.* at *3.

65. *Id.* at *12 (citation omitted).

66. *Id.* at *13 (citation omitted).

67. *Id.* at *15-*16 (citation omitted).

68. *Id.* at *16.

69. *Id.* at *16-*17.

certified to fly for Ameriflight.⁷⁰ As a charter airline, the training that Ameriflight provided to Fredericks only certified her to fly for that airline and was not a credential that could be transferred to another airline.⁷¹ When Fredericks resigned from employment with Ameriflight before the twelve-month period was complete, she agreed to begin making monthly payments of \$3,250 to Ameriflight to repay the \$20,000 training cost.⁷² After making several payments, she brought a lawsuit against Ameriflight alleging that the training repayment was a violation of the FLSA kickback and minimum wage statutes, that the employment contract was in restraint of trade in violation of Texas statutes, and seeking a declaratory judgment and an injunction that the \$20,000 training repayment provision was a penalty.⁷³

The United States District Court for the Northern District of Texas, Dallas Division, reviewed Ameriflight's motion to dismiss Fredericks's proposed class-action lawsuit under Federal Rule of Civil Procedure 12(b)(6) and found that Fredericks had satisfied the requirement that her claims must be plausibly alleged.⁷⁴ During its discussion of the FLSA claims, the court found the fact that the training Fredericks received was not portable to another position was a critical factor when determining whether the claim would survive. The court stated that case law held that an employer was not prohibited under the FLSA, nor under state laws on covenants not to compete, from "seeking repayment as an ordinary creditor for training that gives a portable credential," but the court then noted that the credential Fredericks received during her time at Ameriflight was not portable.⁷⁵ The court then held that Fredericks's claims under the FLSA would survive Ameriflight's motion to dismiss since the training was "primarily for Ameriflight's benefit," comparing this training to the required "tools of the trade" in 29 C.F.R. § 531.35.⁷⁶ The court distinguished Fredericks's claims from *Heder* because of the issue of credential portability, and the proposed class-action FLSA claims live on to be further litigated, along with Fredericks's other claims.⁷⁷

70. Fredericks v. Ameriflight, LLC, No. 3:23-CV-1757-X, 2024 U.S. Dist. LEXIS 48073, at *2 (N.D. Tex. Mar. 19, 2024).

71. *Id.* at *1.

72. *Id.* at *2.

73. *Id.* at *2-*3.

74. *Id.* at *13-*14, *16.

75. *Id.* at *11-*12.

76. *Id.* at *12.

77. *Id.* at *13.

Another proposed class-action TRAP lawsuit currently being litigated is *Dorta v. SpecialtyCare, Inc.* Miguel Dorta and Nathan Fuchs were surgical neurophysiologists employed by SpecialtyCare to provide “intraoperative neuromonitoring services, which involve observing patients during surgery and alerting doctors to symptoms of abnormal brain and nerve functioning.”⁷⁸ When they became employed with SpecialtyCare, the company provided them with a “year-long training program” that included “in-person and online coursework, laboratory practicums, and practical training in the operating room.”⁷⁹ In exchange for that training, which gave them the opportunity to work as surgical neurophysiologists for the company, Fuchs and Dorta signed Training Repayment Agreements that obligated them to repay the company for the cost of their training if they left employment within three years.⁸⁰ The Training Repayment Agreement featured an unusual balloon-style repayment structure: although the surgical neurophysiologist training ended after one year, the training debt they were obligated to repay should they leave within three years increased as time went on, equaling an interest rate of about 25% on the training cost if they left employment between one to two years of starting their position, and then an interest rate of about 50% if they left employment between two to three years of starting their position.⁸¹ When Dorta left the company within one year of employment, SpecialtyCare requested a \$15,000 repayment for his training, and when Fuchs left the company after two years of employment, SpecialtyCare requested a \$25,000 repayment for his training.

Dorta and Fuchs brought a proposed class-action lawsuit against SpecialtyCare, alleging FLSA kickback claims, violation of the Truth in Lending Act, unlawful restraint of trade, and unlawful liquidated damages.⁸² The United States District Court for the Middle District of Tennessee, Nashville Division, reviewed SpecialtyCare’s motion to dismiss the proposed class-action lawsuit under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The court retained subject matter jurisdiction over the lawsuit, dismissing Fuchs’s FLSA claim for not alleging that he received less than the minimum wage when his training

78. *Dorta v. SpecialtyCare, Inc.*, No. 3:23-cv-00892, 2024 U.S. Dist. LEXIS 82188, at *1-2 (M.D. Tenn. May 6, 2024) (citation omitted).

79. *Id.* at *2 (citation omitted).

80. *Id.*

81. *Id.* at *2-3.

82. *Id.* at *2.

repayment amount was taken out of the salary he earned.⁸³ The court noted that the \$15,000 repayment that SpecialtyCare asked Dorta for was “recoupment of almost all of Dorta’s salary,” should the court accept his allegations as true for purposes of evaluating the motion to dismiss.⁸⁴ The court ruled that the plaintiffs’ Truth In Lending Act violation claim was barred by the statute of limitations, but the court ruled that the restraint of trade and liquidated damages claims were well-pled enough to survive SpecialtyCare’s motion to dismiss.⁸⁵

Several other class-action lawsuits containing TRAP challenges are currently working their way through the legal system. Challengers suing to avoid relocation cost TRAPs for nurses who are recruited to work in the United States from countries like the Philippines are bringing claims under the federal Trafficking Victims Protection Act along with FLSA claims or breach of contract claims.⁸⁶ Novie Dale Carmen signed an employment agreement with nursing staffing and recruiting company Health Carousel that, in exchange for the company’s payment of her relocation costs to move to the United States from the Philippines to work for the company, she would pay liquidated damages to the company if she left employment before completing at least a thirty-six-month period.⁸⁷ In 2019, when Carmen resigned from employment before the thirty-six-month period, “she borrowed \$20,000 . . . to pay Health Carousel the liquidated damages for her early termination due under both the Employment Contract and the Handbook” and then filed a class-action lawsuit against the company.⁸⁸ The lawsuit alleged that Health Carousel violated the Trafficking Victims Protection Act, the Racketeer Influenced and Corrupt Organizations (RICO) Act, the Ohio Corrupt Practices Act, the Fair Labor Standards Act, and Ohio’s Human Trafficking Code.⁸⁹ Health Carousel published a statement on its website on March 21, 2024, announcing that the company had reached a settlement agreement in this lawsuit; it wrote that while the

83. *Id.* at *8-*9.

84. *Id.*

85. *Id.* at *12, *14-*17.

86. *See generally* Carmen v. Health Carousel, LLC, No. 1:20-cv-313, 2023 U.S. Dist. LEXIS 139403 (S.D. Ohio Aug. 9, 2023); Complaint, Cherry Lyn Miclat v. Advanced Care Staffing, LLC, No. 23-CV-5296 (E.D.N.Y. July 12, 2023); Class and Collective Action Complaint, Eliahkim Mabute v. Medliant Int’l Healthcare Staffing, No. 2:23-CV-02148-APG-DJA (Clark Cnty., Nev. Nov. 8, 2023).

87. Carmen v. Health Carousel, LLC, No. 1:20-cv-313, 2023 U.S. Dist. LEXIS 139403, at *5, *7-*8, *10 (S.D. Ohio Aug. 9, 2023).

88. *Id.* at *13.

89. *Id.* at *19-*20.

company was “proud of our business practices . . . as a leader in the legal, ethical, and socially responsible recruitment and employment of international healthcare professionals,” and that they were “confident [that] it would have won the case . . . at trial,” current Health Carousel nurses in Carmen’s former position would receive a payment of around \$600 as part of the settlement, but provided no information about the amount of any settlement payments made to former nurses.⁹⁰

One challenge to proposed class-action lawsuits is the presence of mandatory arbitration clauses in employment contracts. In 2021, BreAnn Scally signed an agreement with PetSmart that, in exchange for receiving dog grooming training, she would pay \$5,500 to PetSmart if she left employment before two years ended.⁹¹ Scally quit her position with PetSmart later that same year because of the stress induced by the position, including challenges paying for her living expenses on the position’s wage.⁹² In 2022, Scally discovered a \$5,500 collection on her credit report, and after further research, learned that the amount was attributed to a debt collection company working to collect the TRAP for PetSmart.⁹³ Scally then filed a proposed class-action lawsuit against PetSmart, alleging the company had committed violations of several California statutes and requesting declaratory and injunctive relief.⁹⁴ The United States District Court for the Northern District of California analyzed the PetSmart Dispute Resolution Policy and found that under controlling California law the cost-splitting provision requiring Scally to pay part of the costs of arbitrating her dispute with PetSmart was unconscionable; however, the court severed the cost-splitting provision from the Dispute Resolution Policy, stayed the lawsuit, and granted PetSmart’s request to compel arbitration on Scally’s claims.⁹⁵

Scally then moved to certify two questions for interlocutory appeal: one regarding the court’s denial of her request for injunctive relief and the other regarding “the Court’s discretion to sever terms drafted in ‘bad faith’

90. *Health Carousel Public Statement*, HEALTH CAROUSEL (Mar. 21, 2024), <https://www.healthcarousel.com/statement> [<https://perma.cc/32J7-4U29>].

91. Complaint at 7, *Scally v. PetSmart*, No. 22-CIV-03057, at 11 (San Mateo Cnty., Cal. July 28, 2022).

92. *Id.* at 12.

93. *Id.* at 13.

94. *Scally v. PetSmart LLC*, No. 4:22-cv-06210-YGR, 2023 U.S. Dist. LEXIS 232209, at *1, *12 (N.D. Cal. May 25, 2023).

95. *Id.* at *8-11, *14.

from an arbitration agreement.”⁹⁶ Scally argued that the agreement she signed was one of adhesion because it required her to share the costs of arbitration unless the arbitrator varied the terms of the cost-sharing agreement in arbitration.⁹⁷ Despite her argument that it was unconscionable for an individual employee making an hourly wage to be responsible for large arbitration fees in order to pursue her complaints against PetSmart, the court did not find a showing of bad faith in this agreement and denied her motion to certify her questions for review by the Ninth Circuit.⁹⁸

C. Where Are the Courts Going from Here?

TRAP challengers, except maybe for those filing challenges under the Louisiana Wage Payment Act, cannot rely on existing jurisprudence to avoid TRAP provisions in employment contracts. At best, TRAP challengers whose training produced a non-portable credential may be able to challenge the TRAP under the logic the court introduced in *Fredericks*; however, it remains to be seen whether that argument will ultimately succeed in court. Mandatory arbitration clauses in many employment agreements force TRAP lawsuits out of the courtroom and into the conference room, where outcomes are private. Given the poor outcomes for TRAP challengers suing under the FLSA and current state law claims, and the growing prevalence of TRAPs in the labor market, a survey of recent state legislation and federal rulemaking is required to determine if any new legal strategies may soon be available to challenge TRAPs in state or federal courts.

II. State Legislative Update: The Few Existing States with TRAP Bans are Not Joined by Other States

Only a handful of states have taken legislative steps to forbid TRAPs, but in the last two years, more states have introduced legislation addressing TRAPs.⁹⁹ Connecticut has banned the requirement that

96. *Scally v. PetSmart LLC*, No. 4:22-cv-06210-YGR, 2024 U.S. Dist. LEXIS 454, at *7 (N.D. Cal. Jan. 2, 2024).

97. *Id.* at *7-8.

98. *Id.* at *8-*9.

99. H. Claire Brown, *They Quit Their Jobs. Their Ex-Employers Sued Them for*

employees sign promissory notes as a condition of employment since 1985.¹⁰⁰ Connecticut General Statute section 31-51r(a)(3) defines an “[e]mployee promissory note” as “any instrument or agreement . . . which requires an employee to pay the employer[] . . . a sum of money if the employee leaves such employment before the passage of a stated period of time.”¹⁰¹ The statute specifically exempts from this ban any agreements requiring employees to repay wages advanced by an employer, any agreement requiring the employee to pay for any property sold or leased to the employee by the employer, or any agreements requiring employees working in education to comply with the terms of any sabbatical.¹⁰² Additionally, any TRAP provisions banned by section 31-51r(b) of the Connecticut General Statutes are enforceable in collective bargaining agreements.¹⁰³ The statute seems to have been effective in reducing the number of TRAP lawsuits filed by employees in Connecticut; most of the case law surrounding this statute relates to disputes about agreements covered by the exceptions in section 31-51r(c) rather than disputes about TRAPs executed in violation of section 31-51r(b).¹⁰⁴

California Labor Code section 2802(a) requires an employer to “indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties.”¹⁰⁵ In *In re Acknowledgement Cases*, the California Fourth District Court of Appeal held that while this statute does not require employers to pay for the cost of a license needed to be eligible for a job,

Training Costs, THE N.Y. TIMES (Sept. 27, 2023), <https://www.nytimes.com/2023/09/27/business/training-repayment-agreement-debt.html#:~:text=Their%20Ex%2DEmployers%20Sued%20Them,they%20leave%20the%20jobs%20early>.

100. CONN. GEN. STAT. § 31-51r (2023).

101. *Id.*

102. *Id.*

103. *Id.*; *Heder v. City of Two Rivers*, 149 F. Supp. 2d 677, 690 (E.D. Wis. 2001).

104. See *Glencore, Ltd. v. Winkler*, FSTCV135014052S, 2015 Conn. Super. LEXIS 1855, at *6-7 (Conn. Super. Ct. July 10, 2015); *Town of Stonington v. Thornton*, No. 92353, CV054002440S, 2006 Conn. Super. LEXIS 537, at *2-4 (Conn. Super. Ct. Feb. 21, 2006); *Town of Stonington v. O'Brien*, No. 92352, CV054002430S, 2006 Conn. Super. LEXIS 535, at *2-4 (Conn. Super. Ct. Feb. 21, 2006); *Town of Stonington v. Charron*, No. 92349, CV054002439, 2006 Conn. Super. LEXIS 534, at *2-4 (Conn. Super. Ct. Feb. 21, 2006).

105. CAL. LAB. CODE § 2802(a) (West 2016).

this statute does require employers to pay the cost of job training “intended solely to enable the employee to discharge his or her duties.”¹⁰⁶

California has experienced a shortage of registered nurses since 2022, and that shortage is not predicted to end until 2029.¹⁰⁷ California strengthened existing anti-TRAP legislation in January 2021 with the addition of a section specifically protecting healthcare workers from TRAPs.¹⁰⁸ California Assembly Bill 2588 was codified as California Labor Code section 2802.1, and the corresponding committee report clarifies that “existing law prohibits the practice of charging exorbitant up front training fees that do not fulfill specific licensure or certification requirements.”¹⁰⁹ The committee report also clarifies “that [the] practice of requiring applicants for employment in direct patient care facilities to pay a fee if they do not complete a set term of employment is prohibited.”¹¹⁰

In March 2023, Pennsylvania State Representatives introduced House Bill 608, the Protect Workers from Training Repayment Agreement Provisions Act.¹¹¹ Inspired by a recommendation to abolish training repayment programs in a report detailing the effects of healthcare market dominance by the University of Pittsburgh Medical Center system, House Bill 608 “would ban the use of TRAPs in the contracts of all employees in Pennsylvania and penalize employers who continue using TRAPs as a hurtful job retention tactic.”¹¹² The bill was referred to the Pennsylvania

106. *In re Acknowledgment Cases*, 192 Cal. Rptr. 3d 337, 342 (Cal. Ct. App. 2015).

107. JOANNE SPETZ ET AL., FORECASTS OF THE REGISTERED NURSE WORKFORCE IN CALIFORNIA 11 (2022).

108. CAL. LAB. CODE § 2802 (West 2024); CAL. LAB. CODE § 2802.1 (West 2024).

109. *Educational programs and training: costs: employees and applicants providing direct patient care; Hearing on A.B. 2588 Before the S. Comm. on Lab., Pub. Emp., and Ret.*, 2020 Leg., 1st Sess. 3 (Cal. 2020).

110. *Id.*

111. *Protect Workers from Training Repayment Agreement Provisions (TRAPs)*, PENN. HOUSE OF REPRESENTATIVES (Dec. 3, 2024, 04:24 PM), <https://www.palegis.us/house/co-sponsorship/memo?memoID=43764&document=HB421> [https://perma.cc/GNW4-EK9R].

112. Tarik Khan et al., Opinion, *We must stop corporations from making Pa. workers sign coercive training agreements* Opinion, LEHIGH VALLEY LIVE (Mar. 31, 2023, 11:40 a.m.), <https://www.lehighvalleylive.com/news/2023/03/we-must-stop-corporations-from-making-pa-workers-sign-coercive-training-agreements-opinion.html> [https://perma.cc/VE6M-XREG]; *Critical Condition: How UPMC's Monopoly Power Harms Workers and Patients*, AM. ECON. LIBERTIES PROJECT (Jan. 19, 2023), <https://www.economicliberties.us/our-work/critical-condition-how-upmcs-monopoly->

House Labor and Industry Committee on March 21, 2023, but remains in committee and has not passed a first committee vote at the time this Note was written.¹¹³

In New York, companion anti-TRAP bills were introduced in the State Assembly and the State Senate in the 2023 legislative session.¹¹⁴ Assembly member Phil Steck introduced the New York State Assembly version of the Trapped at Work Act after hearing from a constituent who made \$14 an hour as an eyelash technician and was being sued for \$5,000 for training reimbursement after leaving her position within the first year of her employment, even though the purported training only “consisted of another employee demonstrating how to apply lashes on a customer.”¹¹⁵ The proposed language in the Trapped at Work Act closely mirrors the language of the Connecticut anti-TRAP statute, banning employers from “requir[ing] as a condition of employment, any worker or prospective worker to execute an employment promissory note.”¹¹⁶ Neither the New York State Senate nor the New York State Assembly version of the Trapped at Work Act made it out of committee in the 2023 session.¹¹⁷ However, since the New York State Legislature operates on two-year

power-harms-workers-and-patients/ [https://perma.cc/TPX4-ZNTF]; *House Co-Sponsorship Memoranda, House of Representatives Session of 2023-2024 Regular Session*, PENN. HOUSE OF REPRESENTATIVES (Mar. 1, 2023), <https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20230&cosponId=40017> [https://perma.cc/M9WU-SAGP].

113. *Bill Information, House Bill 608 2023-2024 Regular Session*, PA. GEN. ASSEMBLY (Mar. 21, 2023), <https://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2023&sInd=0&body=H&type=B&bn=608> [https://perma.cc/JK5G-LHB3]; *Bills by Committee, Session Of 2023, Documents Ever In The House Committee On Labor and Industry*, PA. GEN. ASSEMBLY, [https://www.legis.state.pa.us/cfdocs/legis/BC/bc_action.cfm?sessId=20230&Committees=H\[26&inOut=A](https://www.legis.state.pa.us/cfdocs/legis/BC/bc_action.cfm?sessId=20230&Committees=H[26&inOut=A) [https://perma.cc/28MP-FPQ5].

114. Assemb. 6819-A, 246th Assemb., Reg. Sess. (N.Y. 2023); S.B. 6794, 246th Reg. Sess. (N.Y. 2023).

115. *Assemblymember Steck Introduces Legislation to Protect New Yorkers from Training Repayment Agreement Provisions*, ASSEMBLYMEMBER PHIL STECK ASSEMBLY DIST. 110 (May 24, 2023), <https://assembly.state.ny.us/mem/Phil-Steck/story/106271> [https://perma.cc/C55K-7ARS].

116. Assemb. 6819-A, 246th Assemb. Reg. Sess. (N.Y. 2023).

117. *Senate Bill S6794, 2023-2024 Legislative Session, Enacts the “trapped at work act”*, THE N.Y. STATE SENATE, <https://www.nysenate.gov/legislation/bills/2023/S6794> [https://perma.cc/LLW6-JB23]; *Assembly Bill A6819A, 2023-2024 Legislative Session, Enacts the “trapped at work act”*, THE N.Y. STATE SENATE, <https://www.nysenate.gov/legislation/bills/2023/A6819/amendment/A> (last visited Mar. 15, 2024).

sessions, bills that do not advance out of committee during the first year of the session are automatically reintroduced at the beginning of the second year of the session.¹¹⁸

While the Trapped at Work Act proposes to explicitly ban TRAPs, the Twenty-First Century Anti-Trust Act, introduced in the New York State Senate in the same legislative session, proposed to broadly ban all practices that establish monopsony power in the labor market. The bill bans “any person or persons with a dominant position in the conduct of any business, trade or commerce, in any labor market, or in the furnishing of any service in this state to abuse that dominant position.”¹¹⁹ The Twenty-First Century Anti-Trust Act would ban TRAPs, defining “abuse” as including, but not limited to, “imposing contracts by which any person is restrained from engaging in a lawful profession, trade, or business of any kind.”¹²⁰ Like the Trapped at Work Act, The Twenty-First Century Anti-Trust Act did not make it out of committee in the 2023 session, but it has been reintroduced in the 2024 session.¹²¹

A. Federal Regulatory Update: FTC Rulemaking Bans Functional Non-competes (but Not All TRAPs)

While states like California, Pennsylvania, and New York have recently grappled with ways to improve labor market competition, the Federal Trade Commission (FTC) introduced a notice of proposed rulemaking to introduce a draft rule to ban non-compete clauses nationwide in January 2023.¹²² Not only would the rule ban non-compete clauses, but it would also ban clauses that function as de facto non-compete clauses, such as other types of restrictive employment covenants

118. RULES OF THE SENATE OF THE STATE OF NEW YORK 2023-2024, SENATE OF THE STATE OF N.Y. (2023), https://www.nysenate.gov/sites/default/files/admin/structure/media/manage/filefile/a/2024-02/2023-24_rules_of_the_senate_-_march_2023_update.pdf [<https://perma.cc/P873-JV6V>]; RULES OF THE ASSEMBLY OF THE STATE OF NEW YORK 2023-2024, ASSEMBLY OF THE STATE OF N.Y. (2023), https://assembly.state.ny.us/Rules/rules_2023.pdf [<https://perma.cc/BV4L-DP2H>].

119. S.B. 6748, 246th Reg. Sess. (N.Y. 2023).

120. S.B. 6748, 246th Reg. Sess. (N.Y. 2023).

121. *Senate Bill S6748B, 2023-2024 Legislative Session, Relates to actions or practices that establish or maintain a monopoly, monopsony or restraint on trade, and authorizes a class action lawsuit in the state anti-trust law*, THE N.Y. STATE SENATE, <https://www.nysenate.gov/legislation/bills/2023/S6748> [<https://perma.cc/5XZ5-JMKK>].

122. 16 C.F.R. § 910 (2024).

that are not called non-competes.¹²³ 16 C.F.R. § 910.1(b)(1) in the proposed rule defines prohibited non-compete agreements “as a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker’s employment with the employer.”¹²⁴ The proposed rule language includes de facto non-competes in 16 C.F.R. § 910.1(b)(2) “by explaining that whether a contractual term is a non-compete clause for purposes of the Rule would depend on a functional test. In other words, whether a contractual term is a non-compete clause would depend not on what the term is called, but how the term functions.”¹²⁵ The proposed rule language gives an example of training repayment contract terms “where the required payment is not reasonably related to the costs the employer incurred for training the worker” as a functional non-compete clause.¹²⁶ The FTC extended the public comment period for the proposed rule from March 20, 2023, to April 19, 2023.¹²⁷ The United States Chamber of Commerce, a business advocacy group, has publicly opposed the proposed non-compete rule, promising to challenge the rule after its approval “with all the tools at our disposal, including litigation.”¹²⁸

More than a year after the extended public comment deadline, the FTC approved the issuance of the final rule on non-competes on April 23, 2024, with the FTC Commissioners voting 3-2 to approve the final rule.¹²⁹ The final rule reflected the Commission’s consideration of over 26,000 public comments on the proposed rule, with more than 25,000 of the public comments, or about 96% of the public comments submitted, supporting

123. *Id.*

124. *Id.* at 3509.

125. *Id.*

126. *Id.* at 3535.

127. *FTC Extends Public Comment Period on Its Proposed Rule to Ban Noncompete Clauses Until April 19*, FED. TRADE COMM’N (Mar. 6, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-extends-public-comment-period-its-proposed-rule-ban-noncompete-clauses-until-april-19> [<https://perma.cc/HQB7-8WP6>].

128. Suzanne P. Clark, Opinion, *The Chamber of Commerce Will Fight the FTC: We’ll go to court if necessary to stop the legally baseless ban on non-compete clauses.*, WALL ST. J. (Jan. 22, 2023, 3:29 pm), <https://www.wsj.com/articles/chamber-of-commerce-will-fight-ftc-lina-khan-noncompete-agreements-free-markets-overregulation-authority-11674410656>.

129. *FTC Announces Rule Banning Noncompetes*, FED. TRADE COMM’N (Apr. 23, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes> [<https://perma.cc/X5NG-GVB3>].

the proposed ban on non-competes in employment agreements.¹³⁰ Responding to the language in the proposed rule that would ban de facto non-competes, including the example given in proposed 16 C.F.R. § 910.1(b)(2) that would ban TRAPs “where the required payment is not reasonably related to the costs the employer incurred to train the worker,” many public commenters urged the Commission to broaden the definition of de facto non-competes to encompass all TRAPs.¹³¹ Some commenters expressed concern that TRAPs could harm competition in employment even more than traditional non-compete clauses, since non-compete clauses do not regulate all post-employment decisions, but TRAPs can prevent someone from leaving their job at all due to the financial penalties associated with the TRAP.¹³²

While the Commission responded to public concerns about TRAPs by clarifying the final language applying to de facto non-competes in 16 C.F.R. § 910.1, the Commission emphasized that not all TRAPs are banned under the rule.¹³³ The final rule language in 16 C.F.R. § 910.1 defines a non-compete clause as:

A term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from: (i) Seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or (ii) Operating a business in the United States after the conclusion of the employment that includes the term or condition.¹³⁴

The Commission noted that by inclusion of the “functions to prevent” language, the definition of prohibited non-competes includes other restrictive employment covenants that “restrain such a large scope of activity that they function to prevent a worker from seeking or accepting other work.”¹³⁵ Stating that this definition “does not categorically prohibit . . . TRAPs,” the Commission emphasized that the three prongs of

130. 16 C.F.R. §§ 910.1-910.60 (2024).

131. *Id.* at 38,362 (footnote omitted).

132. *Id.*

133. *Id.* at 38,363-38,365.

134. *Id.* at 38,502.

135. *Id.* at 38,364.

the non-compete definition (“prohibit, penalize, or function to prevent”) reflect current legal tests that determine whether a restrictive employment covenant is a non-compete, no matter what the covenant is called.¹³⁶ While the Commission noted that TRAPs can function as non-competes, the Commission declined to “categorically prohibit all TRAPs related to leaving employment” as part of their non-compete rulemaking.¹³⁷ Employees seeking to avoid TRAPs through the non-compete rule will be required to prove that the TRAP functioned to prevent them from “seeking or accepting other work or starting a business after the employment associated with the TRAP” in order to avoid the TRAP as a non-compete under the rule.¹³⁸

Another concern of public commenters was whether the final rule would govern employment contracts in the non-profit sector, specifically the healthcare sector.¹³⁹ Commenters questioned the Commission’s jurisdiction over hospitals and other non-profit organizations with 501(c)(3) tax exempt status under the Internal Revenue Code, since the FTC Act gives the Commission jurisdiction to regulate “corporations,” which the Act defines as an entity “organized to carry on business for its own profit or that of its members.”¹⁴⁰ In response to arguments that non-profit hospitals are exempt from following the provisions of the non-compete rule, the Commission stated that relevant legal and administrative jurisprudence holds that just because an entity is tax-exempt, it does not automatically escape the Commission’s jurisdiction.¹⁴¹ Instead, a two-part test governs whether a tax-exempt entity qualifies as a corporation under the Commission’s rule-making authority, where the Commission considers if the organization is really only doing business for charitable purposes and whether the entity’s members receive profit from the income generated by the entity.¹⁴² Given this test, and its functional focus, it is clear why the Commission has previously been able to exercise its jurisdiction over several different non-profit hospitals and non-profit hospital associations.¹⁴³ This is good news for employees seeking to avoid TRAPs, given their prevalence in the healthcare industry, especially in the

136. *Id.*

137. *Id.* at 38,365.

138. *Id.* at 38,366.

139. *Id.* at 38,356.

140. *Id.* (quoting 15 U.S.C. § 44).

141. *Id.* at 38,357.

142. *Id.*

143. *Id.*

nursing field. In a 2022 survey, National Nurses United reported 51% of nurses surveyed were required to enroll in some type of training program to get a nursing position, and of those who reported being required to enroll in employer-mandated training, 55% of those nurses reported that they were expected to pay the cost of such training if they left employment before the length of time mandated by the employer, with 13% of those nurses not actually knowing if they were required to repay the training costs or not.¹⁴⁴

The same day that the final non-compete rule was approved by the FTC Commissioners, Ryan, a company that provides software and tax services, filed a lawsuit challenging the FTC's authority to issue unfair competition rules.¹⁴⁵ The complaint alleges that not only does the FTC not have statutory authority to issue the non-compete rule, but also that the FTC Act authorizing the Commission to make rules violates the nondelegation doctrine.¹⁴⁶ The complaint also alleges that the FTC Act unconstitutionally interferes with the President's officer removal power.¹⁴⁷ The lawsuit asks the United States District Court for the Northern District of Texas to issue a declaratory judgment vacating the FTC's non-compete rule and declaring that the FTC "does not have the authority to issue rules defining acts to be unfair methods of competition," "the FTC Act violates the . . . nondelegation doctrine," and "that the FTC is unconstitutionally structured in violation of Article II."¹⁴⁸ True to its earlier promise, the U.S. Chamber of Commerce filed a motion to intervene in Ryan's lawsuit as an additional plaintiff, which was granted by the court.¹⁴⁹

In the text of its final rule, the Commission, both responding to public comments and perhaps anticipating litigation strategies, analyzed its legal authority to issue the non-compete rule, concluding that there were no valid legal theories to prevent the Commission from promulgating the

144. CONSUMER FIN. PROT. BUREAU, *Comment from National Nurses United*, REGULATIONS.GOV (Sept. 22, 2022), <https://www.regulations.gov/comment/CFPB-2022-0038-0048> [<https://perma.cc/2WVT-8HNP>].

145. Complaint at 14, *Ryan, LLC, v. Fed. Trade Comm'n*, No. 3:24-cv-986, (N.D. Tex. Apr. 23, 2024).

146. *Id.* at 15, 17-18.

147. *Id.*

148. *Id.* at 20-21.

149. Unopposed Motion to Intervene as Plaintiffs at 1, *Ryan, LLC, v. Fed. Trade Comm'n*, No. 3:24-cv-986-E (N.D. Tex. May 8, 2023); Order Granting Unopposed Motion to Intervene as Plaintiffs at 1, *Ryan, LLC, v. Fed. Trade Comm'n*, No. 3:24-CV-986 (N.D. Tex. May 9, 2024).

rule.¹⁵⁰ The Commission first addressed the theory that it lacked authority under the FTC Act to make rules about unfair competition, stating that the legislative history and the plain text of the FTC Act authorize the Commission to promulgate such rules.¹⁵¹ The Commission also rejected challenges to its rule-making authority under the major questions and nondelegation doctrines.¹⁵² Additionally, the Commission rejected arguments that the non-compete rule-making was not valid under the Constitution's Interstate Commerce Clause, the Tenth Amendment to the Constitution, the Constitution's Contracts Clause, and a challenge that the rule was unconstitutionally vague.¹⁵³ Finally, the Commission emphasized its compliance with the Administrative Procedure Act, noting that it had made many changes to the proposed rule that were responsive to public commenters' concerns.¹⁵⁴

B. Proposed Solutions to TRAPs in Uniform Model Legislation

In July 2021, the Uniform Law Commission (ULC) approved the Uniform Restrictive Employment Agreement Act (UREAA), a new piece of model legislation that regulates “restrictive employment agreements.”¹⁵⁵ The ULC, composed of lawyers from different states, was established in 1892 and provides model legislation for adoption by states on topics ranging from unlawful restrictions in land records to public-health emergency authority.¹⁵⁶ The ULC's UREAA regulates non-competes, confidentiality agreements, no-poaching agreements, and training repayment agreements.¹⁵⁷ The UREAA defines “training-repayment agreement” as “a restrictive employment agreement that requires a worker to repay the employer for training costs incurred by the

150. 16 C.F.R. §§ 910.1-910.60 (2024).

151. *Id.* at 38,352.

152. *Id.* at 38,354-55.

153. *Id.* at 38,355.

154. *Id.*

155. *ULC Approves Uniform Restrictive Employment Agreement Act*, UNIF. L. COMM'N (July 23, 2021, 10:55 AM), <https://www.uniformlaws.org/committees/community-home/digestviewer/viewthread?MessageKey=ef54caf7-88d8-4bba-8597-7bb794f99867&CommunityKey=d4b8f588-4c2f-4db1-90e9-48b1184ca39a&tab=digestviewer> [<https://perma.cc/JG72-S6D7>].

156. *About Us*, UNIF. L. COMM'N, <https://www.uniformlaws.org/aboutulc/overview> [<https://perma.cc/6U6U-SQ63>]; *New Acts*, UNIF. L. COMM'N, <https://www.uniformlaws.org/acts/catalog/newacts> [<https://perma.cc/6L7G-X8QD>].

157. UNIF. RESTRICTIVE EMP. AGREEMENT ACT (UNIF. L. COMM'N 2021).

employer.”¹⁵⁸ Section 14 prohibits training-repayment agreements as unenforceable “unless the agreement: (1) requires repayment only of the cost of special training; (2) lasts not longer than two years after the special training is completed; and (3) prorates the repayment for work done during the post-training period.”¹⁵⁹ The UREAA defines special training as training that an employee “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.”¹⁶⁰ The UREAA’s ban on training-repayment agreements provides significant protection from TRAPs to employees, but it leaves the door open for employers to define their TRAP as special training in line with the UREAA’s definition.

The UREAA was introduced in the Oklahoma State Legislature in both the House of Representatives and the Senate but failed to move out of committee in the 2023 legislative session.¹⁶¹ The UREAA also failed to make it out of committee in Michigan and North Carolina in 2023.¹⁶² The UREAA made it to the governor’s desk in New York in 2023 but was vetoed there.¹⁶³ In April 2024, the UREAA passed out of committee in the Missouri House of Representatives.¹⁶⁴ It remains to be seen what kind of success the UREAA will enjoy, especially if the FTC’s non-compete rule survives legal challenges.

158. *Id.* § 11-12.

159. *Id.* § 40.

160. *Id.* § 11.

161. *Bill Info. for SB 697*, OKLA. STATE LEGISLATURE, <http://www.oklegislature.gov/BillInfo.aspx?Bill=SB697&Session=2400>

[<https://perma.cc/T74K-WZ4J>]; *Bill Info. for HB 1799*, OKLA. STATE LEGISLATURE, <http://www.oklegislature.gov/BillInfo.aspx?Bill=HB1799&Session=2400> [<https://perma.cc/L2TG-CS7X>].

162. *House Bill 4399 of 2023*, MICH. LEGISLATURE, <https://legislature.mi.gov/Bills/Bill?ObjectName=2023-HB-4399> (last visited May 10, 2024); *House Bill 812*, N. C. GENERAL ASSEMBLY, <https://www.ncleg.gov/BillLookUp/2023/H812> (last visited May 10, 2024).

163. *Find Your Senator, Senate Bill S3100A*, N.Y. STATE SENATE, <https://www.nysenate.gov/legislation/bills/2023/S3100/amendment/A> (last visited Oct. 13, 2024).

164. *102nd Gen. Assemb., 2nd Reg. Sess., H.B. 2787, Establishes the “Uniform Restrictive Employment Agreement Act”*, MO. HOUSE OF REPRESENTATIVES, <https://house.mo.gov/BillContent.aspx?bill=HB2787&year=2024&code=R%20> (last visited Oct. 13, 2024).

Conclusion

Training Repayment Agreement Provisions show up in all kinds of industries, in all kinds of jobs, whether they pay salaries over \$100,000 or at the rate of \$15 an hour, and in all kinds of guises, ranging from requirements to repay special training, requirements to repay relocation expenses, or requirements to repay the cost of regular on-the-job training. Employees leave jobs for all kinds of reasons and have regularly been faced with demands from former employers for large sums of money, disrupting their careers and their personal lives. With the patchwork jurisprudence currently in place, challengers usually lose in court when they seek to avoid TRAPs, even where those TRAPs are unconscionable. Once the legal challenges to the FTC non-compete rule are completed, employment lawyers will have a clearer guideline for what constitutes a permissible and impermissible TRAP under the law, but employees will still likely be bound by TRAPs. The Uniform Restrictive Employment Agreement Act provides reasonable regulation of TRAPs but has yet to be widely introduced in state legislatures. Wider awareness of TRAPs is needed, but the main effort to reduce the use of TRAPs may have to come from the business community itself.