

April 1, 2024

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RE: Stay-or-Pay Contracts and Training Repayment Agreement Provisions (TRAPs)

Dear Chair Khan and Commissioners,

We, the undersigned organizations, commend the Federal Trade Commission (FTC) for proposing a total ban on non-compete clauses in labor contracts.¹ The FTC has led a whole of government approach to enhancing worker mobility, and the proposed rule will restore \$300 billion in wages to workers across the economy.² We continue to call on the FTC to close loopholes in the final rule to ensure that the regulation is truly a complete ban on non-compete clauses and functionally similar contracts, such as stay-or-pay contracts and Training Repayment Agreement Provisions (TRAPs).

Stay-or-pay contracts, such as TRAPs, are forced on workers as a condition of employment, allowing corporations to use the threat of debt collection or litigation to lock workers in place, limiting workers' mobility and bargaining power, and leverage crushing financial penalties just because a worker had the audacity to quit their job.

Last week, academics released new findings about the prevalence of TRAPs, uncovering a rise in survey respondents indicating they have worked under a TRAP, from 4.1 percent in 2014 to 8.7

¹ Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023).

² Press Release, Fed. Trade Comm'n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2022), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-ruleban-noncompete-clauses-which-hurt-workers-harm-com>.

percent in 2020.³ This would mean that today, millions of workers are unable to leave their job without triggering tens of thousands of dollars of contingent loan obligations under stay-or-pay contract schemes. But not all workers experience TRAPs the same way. The researchers found that:

- **TRAPs are more common for younger workers.** Their research found that in 2014, 25-40 year-olds reported signing TRAPs at a rate of five to six percent; in 2020, the reported use of TRAPs grew to 15-20 percent for 25-40 year-olds. For workers between 41 and 65 years, the rates are 3.6 percent and 4.3 percent in the 2014 and 2020 datasets, respectively.
- **More educated workers appear more likely to enter TRAPs.** Their research found, “those with a graduate degree are the most likely to have a training repayment agreement (7.4 percent in 2014 and 11.9 percent in 2020). In contrast, those with at most a high school degree are the least likely to have one (0-2 percent in both 2014 and 2020).”
- **The use of TRAPs is uneven in labor markets, with certain industries appearing to rely on TRAPs with more frequency.** Their research found that while some workers are unlikely to ever encounter a TRAP, they are “not at all rare” for other groups of workers. Advocates and labor unions have highlighted similar findings in the past, noting that in some industries large firms appear to adopt the use of TRAPs to further their monopsony power. Advocates have raised alarms about the notable growth of TRAPs among entry-level positions paying only minimum wage, or close to it, across new industries in recent years. One notable case is PetSmart, in which a pet groomer earning just above minimum wage was charged nearly a fourth of their annual earnings in order to depart.⁴

These new findings echo a survey of nurses conducted by National Nurses United (NNU) in 2022 which found an increasing share of newer hospital registered nurses (RNs) are required to enroll into training or residency programs and TRAPs.⁵ NNU found that among registered nurses in hospitals who had been RNs for one to five years, nearly 45 percent reported having been in a TRAP. In contrast, for those who had been RNs for 11-20 years, only 24 percent had ever been in a TRAP.⁶

The effect that stay-or-pay contracts, including TRAPs, have on wages has not been widely studied, but the initial analysis of labor unions and advocates suggests that TRAPs may depress wages and wage growth over time.⁷ This raises alarms if TRAPs are regularly deployed among young workers. In the aftermath of the Great Recession, research found that young workers who

³ J.J. Prescott, Stewart Schwab, and Evan Starr, *First Evidence on the Use of Training Repayment Agreements in the US Labor Force*, ProMarket (March 27, 2024), <https://www.promarket.org/2024/03/27/first-evidence-on-the-use-of-training-repayment-agreements-in-the-us-labor-force>.

⁴ *Trapped at Work: How Big Business Uses Student Debt to Restrict Worker Mobility*, Student Borrower Prot. Ctr. (July 2022), https://protectborrowers.org/wp-content/uploads/2022/07/Trapped-at-Work_Final.pdf.

⁵ National Nurses United, Comment on Employer-Driven Debt CFPB-2022-0038 (Sept. 23, 2022): <https://www.regulations.gov/comment/CFPB-2022-0038-0048> (see Appendix A).

⁶ *Id.*

⁷ National Nurses United, Comment on Employer-Driven Debt CFPB-2022-0038 (Sept. 23, 2022): <https://www.regulations.gov/comment/CFPB-2022-0038-0048> (at 10); Student Borrower Protection Center, Comment on Non-Compete Clause Rule FTC-2023-0007 (Apr 19, 2023): <https://www.regulations.gov/comment/FTC-2023-0007-21048> (at 7).

entered the labor market at times of depressed wages and salaries experienced a “scarring” effect that could lead to a lifetime loss in earnings.⁸ Thus, stay-or-pay contracts may further disadvantage these workers and hinder innovation and business dynamism across our economy.

As we have seen in the past, when policymakers ban the use of specific restrictions on labor mobility, employers switch to functionally equivalent restraints in response.⁹ It is vital that the FTC not allow hard-earned progress to be lost by empowering employers to simply migrate traditional non-compete clauses to new restrictive terms facilitated through stay-or-pay contracts that undercut the intention of this proposed rule. These include all forms of stay-or-pay contracts, including TRAPs,¹⁰ lengthy notice periods,¹¹ and liquidated damages clauses in which firms require workers to pay prohibitive sums if they leave a job before a certain period,¹² or even clauses purporting to allow employers to sue for unspecified damages, including the purported “lost profits” that follow from employee turnover.¹³

The Biden Administration has made clear that advancing worker empowerment and organizing is essential.¹⁴ We applaud the FTC and other agencies, like the Consumer Financial Protection Bureau and National Labor Relations Board, for making significant progress towards this goal. But more work remains. The Administration must take this new scholarship into consideration, as it shows that the core economic liberties of Americans, particularly younger Americans, are vulnerable because of TRAPs. It is essential that the FTC considers how workers experience freedom in their day-to-day lives, such as choosing where they work without feeling trapped due to the looming threat of debt if they dare to leave, and protect these core liberties. In its final rule, the FTC should stay ahead of employers seeking to evade these new worker protections and categorically ban contracts that are functionally equivalent to non-compete clauses.

Sincerely,

⁸ Jesse Rothstein, *The Lost Generation? Labor Market Outcomes for Post Great Recession Entrants*, NBER Working Paper No. 27516 (July 2020), https://www.nber.org/system/files/working_papers/w27516/w27516.pdf

⁹ Anna Pletcher, Julia Schiller and Mike Rosenblatt, *What California Can Teach Us About a World Without Non-Competes*, The Antitrust Source (December 2023), https://awards.concurrences.com/IMG/pdf/v23_i2_dec2023_with_copyright_pletcher_1_.pdf. See also Peter Norlander, *New Evidence on Employee Noncompete, No Poach, and No Hire Agreements in the Franchise Sector* (2023), <https://equitablegrowth.org/wp-content/uploads/2023/02/022323-WP-New-Evidence-on-Employee-Noncompete-No-Poach-and-No-Hire-Agreements-in-the-Franchise-Sector-Norlander.pdf>.

¹⁰ Trapped at Work, *supra* note 2.

¹¹ Josh Eidelson and Zachary Mider, *Giving Four Months Notice or Paying to Quit Has These Workers Feeling Trapped*, Bloomberg Businessweek (Jan. 26, 2023), <https://www.bloomberg.com/news/articles/2023-01-26/concentra-health-employees-feel-trapped-at-work>; Ariel Zilber, *JP Morgan Requires Tech Workers Give 6 Months Notice Before Quitting*, N.Y. Post (Mar. 3, 2023), <https://nypost.com/2023/03/03/jpmorgan-chase-requires-workers-give-6-months-notice/>.

¹² Elizabeth Schulze & Michelle Stoddart, *FTC's New Rule Could End Noncompete Agreements for Millions of Workers*, ABC News (Mar. 8, 2023), <https://abcnews.go.com/US/ftcs-new-rule-end-noncompete-agreements-millions-workers/story?id=97684108>.

¹³ Complaint, *Su v. Advanced Care Staffing, LLC*, No. 23-cv-2119, at 2 (E.D.N.Y. Mar. 20, 2023).

¹⁴ Memorandum on Advancing Worker Empowerment, Rights, and High Labor Standards Globally (Nov. 16, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/11/16/memorandum-on-advancing-worker-empowerment-rights-and-high-labor-standards-globally>.

20/20 Vision

American Economic Liberties Project

Colorado Plaintiff Employment Lawyers Association

Consumer Federation of America

CFPB Union, NTEU 335

Debt Collective

Economic Security Project

Governing for Impact

National Consumer Law Center, on behalf of its low-income clients

National Employment Law Project

National Nurses United

New Jersey Citizen Action

Open Markets Institute

People's Parity Project

Public Good Law Center

Service Employees International Union (SEIU)

Student Borrower Protection Center

Towards Justice

Tzedek DC

Young Invincibles