

December 1, 2021

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Protecting Workers Against Predatory Employer Loans

Dear Director Chopra:

We applaud the Bureau's commitment to safeguarding household financial security and protecting workers.¹ To that end, we write to alert the Bureau of a burgeoning consumer and worker rights issue currently harming working people across the country: the use of Training Repayment Agreements (TRA) to hinder worker mobility and market competition.² We urge you to use the expansive investigatory and enforcement tools at the Bureau's disposal to protect workers from the predatory use of TRAs. As a growing chorus of consumer protection policymakers, experts, and litigators have recognized,³ consumer protection enforcement has a critical role to play in checking employers' anti-worker and anti-competitive practices.

Employers nationwide are using TRAs to hold workers hostage in low-paying, substandard working conditions and to stifle labor market competition. TRAs require workers who receive on-the-job training—often of dubious quality or necessity—to pay back the “cost” of this training to their employer if they leave their job before a fixed amount of time, sometimes with an interest rate attached.⁴ The provisions are often buried deep inside workers' employment contracts or presented as a stand-alone contract in a mountain of hiring paperwork. They are often used as a mandatory precondition to employment. Employers or third-party collectors have sued employees on these debts in court for breach of contract and otherwise, plus damages and attorneys fees.⁵ The costs of these agreements can be exorbitant. For instance, TRAs have

¹ <https://www.consumerfinance.gov/about-us/blog/the-cfpb-is-looking-out-for-families-workers-and-communities/>.

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<https://protectborrowers.org/the-nations-top-consumer-watchdog-can-end-predatory-practices-trapping-workers-in-employer-driven-debt/>.

³

<https://www.epi.org/blog/when-corporations-deceive-and-cheat-workers-consumer-laws-should-be-used-to-protect-workers/>.

⁴ See e.g., *Boutique Air, Inc. vs. Michael Wade Sticka et al.*, CGC-20-584536 (Ca. Sup. Ct., May 20, 2020).

⁵ *Id.*

required a metal polisher to pay \$20,000 to leave a metal furnishing company before 3 years,⁶ truck drivers to pay \$8,000 for an early departure,⁷ or a trainee on a \$23,000 salary to pay \$30,000 for leaving a job before 2 years.⁸ Moreover, these costs often bear no reasonable relationship to the cost of training itself,⁹ which is frequently rudimentary and firm-specific, if it is of any value at all.¹⁰

The results of employers' use of these contract terms to hold back their employees are staggering. In one prominent case, workers who left their employer before a set period of time were required to "immediately pay to Employer as liquidated damages (and not as a penalty) an amount equal to forty percent (40%) of Employee's then annual compensation" for a period equal to "the greater of (a) twenty-five percent (25%), or (b) the percentage of the current contract year remaining after such termination."¹¹ Reflecting on this contract term, one employee said:¹²

"These jobs—they're very hard to come by. And if I quit, I owe the company 40 percent of my salary, plus a percentage of the [redacted] years remaining on my contract, plus any bonuses that they've paid to me and any reimbursements that they've paid to me. And they're going to take me to court for it. And in the time that I'm in court, I'm not employable."

In effect, workers are being transformed into debtors and are being held hostage in their jobs because they don't earn enough to cover the cost of quitting. TRAs are often structured with this outcome in mind,¹³ and in an attempt to evade existing state and federal regulatory protections including state-level bans on non-compete clauses.¹⁴

⁶ *Brunner v. Hand Industries, Inc.*, 603 N.E.2d 157 (Ct. App. Ind. 1992).

⁷ https://www.oregonlive.com/business/2017/08/student_debt_trap_snags_unwary.html.

⁸ *Park v. FDM Grp. (Holdings) PLC*, No. 16 CV 1520- LTS, 2017 WL 946298, (S.D.N.Y. Mar. 9, 2017) (vacated in part on other grounds, No. 16-CV-1520-LTS, 2018 WL 4100524, at *1 (S.D.N.Y. Aug. 28, 2018).

⁹ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3642017 at 21.

¹⁰ <https://www.law.ua.edu/lawreview/files/2021/05/2-Harris-723-783.pdf> at 33 .

¹¹ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3359847 at 6.

¹² *Id.*

¹³ <https://perma.cc/NA32-WGZY> ("Notably, in California, noncompete agreements are unenforceable. In other states, such as Georgia, . . . courts may refuse to enforce a noncompete agreement against a field employee. But roofing contractors in these states are not without hope. Another potential solution is a reimbursement agreement. If properly drafted, you can require a field employee who is achieving [National Roofing Contractors Association] ProCertification to repay or reimburse your company the expenses incurred if the employee leaves the company within a certain time after achieving NRCA ProCertification.")

¹⁴

<https://www.openmarketsinstitute.org/publications/testimony-by-sandeep-vaheesan-before-dc-council-in-support-of-upholding-and-strengthening-the-districts-non-compete-protections>.

As employers increasingly make insurmountable debt a precondition of employment, the chilling effect it has on individual workers' ability to leave their jobs will continue to cement long-standing power imbalances between labor and management across industries. In fact, observers have noted that TRAs may be even more effective at stopping labor market competition than more traditional non-compete clauses.¹⁵

The Bureau has several tools at its disposal to protect workers from harm and end these abuses. Indeed, there are implications for enforcement at various stages in the life cycle of these TRA debts—as employers and their agents act as originators, servicers, and debt collectors. Debt buyers and third-party debt collectors are also implicated when employers sell off these debts, creating a variety of entry points for the Bureau as it seeks to protect working people.

In particular, we encourage you to take the following steps to ensure workers and working families are protected from these predatory loans.

- **Vigorously enforce the prohibition against unfair, deceptive, or abusive acts and practices (UDAAPs), and other essential consumer protection laws such as the Truth in Lending Act (TILA) and the Equal Credit Opportunity Act (ECOA), to protect against industry abuses.** The Bureau should scrutinize these arrangements and identify the circumstances under which the inclusion of TRA contract terms constitutes the offering of a consumer financial product or the provision of a consumer financial service. Where the Bureau determines that employers that offer TRAs are extending consumer credit to their employees or providing consumer financial services, it should vigorously enforce crucial consumer protections. For instance, the Bureau should ensure employers are not engaging in UDAAPs, such as inducing or coercing their employees into entering into loan agreements by making them a mandatory condition of employment or otherwise. Furthermore, the Bureau should consider whether employers are selling postsecondary education or training to workers, thereby acting as private educational lenders issuing private educational loans subject to the Truth in Lending Act and implementing regulations.¹⁶ Additionally, investigation into whether employers are violating ECOA is also warranted. TRAs tend to be issued to workers in low-wage industries with high employee turnover such as nursing and trucking. Such jobs are disproportionately held by women, immigrants, and Latino and Black employees.¹⁷ The

¹⁵ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3642017 at 4.

¹⁶ 12 C.F.R. § 1026.46(b)(5). Employers have attempted to skirt the Fair Labor Standards Act (FLSA) by arguing that the loans they issued are for the employees' educational and training benefit, rather than a kick-back to employers. See e.g., *Bland v. Edward D. Jones & Co., L.P.*, 375 F. Supp. 3d 962 (N.D. Ill. 2019). If that is the case, employers are in violation of a host of consumer protection statutes, including TILA. They cannot have it both ways.

¹⁷ See e.g., *Albany Med Health Systems*, NY Labor Bureau, AOD no 21-040 (June 11, 2021).

Bureau should investigate whether employers are engaged in the selective enforcement of or reporting on such debts based on protected characteristics in violation of federal fair lending law.

- **Routinely supervise debt collectors that collect on TRA loans.** The CFPB engages in routine supervision of larger participants in the debt collection market for compliance with a range of consumer financial protection laws, including the Federal Debt Collection Practices Act (FDCPA). The FDCPA protects debtors from unfair and predatory debt collection practices. As third-party debt collectors pursue workers for debts under TRAs, the Bureau should ensure they are not engaged in unlawful debt collection practices. This may involve determining whether debt collectors are making false representations about the collectability of otherwise unenforceable debts. Furthermore, the Bureau should investigate and pursue any Fair Credit Reporting Act (FCRA) violations by debt collectors furnishing information to credit bureaus about debts that may be invalid or unenforceable.
- **Exercise the Bureau’s market monitoring authority to identify consumer harm before it happens.** Section 1022(c)4 of the Dodd-Frank Act empowers the Bureau to “gather information from time to time regarding the organization, business conduct, markets, and activities of covered persons and service providers.”¹⁸ We urge the Bureau to monitor the marketplace for TRAs by routinely collecting data from debt collectors, debt buyers, large employers, and other market participants. Through a targeted data collection effort, the Bureau can determine which businesses are involved across commerce, what activities they are engaged in, and how consumers are being affected.

Right now, employers, through the use of TRAs, are exploiting power imbalances in the labor market that the COVID-19 pandemic has exacerbated and harming working people—often immigrants and people of color. But these working people are not alone. Because while employers seeking novel and clever ways to rein in their employees may have found a powerful tool in consumer debt, the Bureau’s capacity to protect the public and stamp out harmful practices in consumer financial markets is even greater.

We urge the Bureau to deploy all of the various robust tools in its arsenal to investigate this matter and aggressively enforce consumer protections where worker-consumers are being harmed.

¹⁸ Pub. L. 111-203, Title X, § 1022(c)(4)(A) (2010) (codified at 12 U.S.C. § 5512(c)(4)(A)).



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We welcome the opportunity to discuss these issues with you or your staff. For further information, please contact SBPC Counsel Claire Torchiana (claire@protectborrowers.org).

Sincerely,

Mike Pierce
Executive Director
Student Borrower Protection Center

Alexis Goldstein
Financial Policy Director
Open Markets Institute