STUDENT BORROWER PROTECTION CENTER

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Re: FTC's Proposed Rule on Non-compete Clauses (Docket FTC-2023-0007)

Dear Chair Khan and Commissioners,

The Student Borrower Protection Center (SBPC) appreciates the opportunity to comment on the Federal Trade Commission's (FTC) proposal for a ban on non-compete clauses in employment contracts. This proposal marks an exciting step forward to advance workers' rights, promote fair competition, and build a fairer economy. Its full implementation would afford workers a true opportunity to pursue the American Dream, whether that means starting a business, changing jobs, or starting a family.

We applaud the FTC's recognition that the coercive and wage-depressing effects of non-compete clauses can exist even where contract terms use other language—so-called "de facto" non-competes. Specifically, we are pleased to see the FTC identify the coercive use of employer-driven debt in its description of the sort of pseudo non-competes prohibited under its proposed rule.[1]

The FTC's treatment of de facto non-compete clauses is particularly necessary, as our recent investigations into the growing use of employer-driven debt—including Training Repayment Agreement Provisions (TRAPs)[2]—suggest 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. Consider the following harrowing stories:

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[1] 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.

[2] Trapped at Work: How Big Business Uses Student Debt to Restrict Worker Mobility, Student Borrower Protection Center (July 2022), https://protectborrowers.org/wp-content/uploads/2022/07/Trapped-at-Work_Final.pdf.

- BreAnn, a former pet groomer at PetSmart, was excited about the prospect of getting to work with the company full-time when she applied for the position. But she immediately began noticing problems; her manager was too busy to provide her the mentorship the company advertised, the company training was much shorter than promised, and more. After struggling to get by on her $15 hourly wage, BreAnn decided she needed to pursue a better opportunity and gave the company her notice. PetSmart responded by referring her $5,000 TRAP, as well as $500 in equipment debt for grooming tools, to a debt collector, wrecking her credit score.[3]

- Kate is a pilot and former employee of the cargo airline Ameriflight. She, like millions of others, lost a promising new job when the COVID-19 pandemic began. Eager to continue her career, Kate took a job with Ameriflight even though the company imposed a two-year commitment for providing a training that offered little marketability to Kate, and was merely a routine training required of all airlines by the Federal Aviation Administration. In addition, the company paid well below market rates, and only $12.50 per hour during the training period. Kate ultimately decided to pursue a better opportunity. When she did, the company told her she would have to pay $20,000.[4]

- Stacy, a nurse at Parkland Memorial Hospital in Dallas, Texas, described herself as "overworked and depressed." After her supervisor denied her request to transfer to a different unit, she decided her best option was to take a new job at a hospital in Houston. Three years later she received a knock at her door; she was handed court papers informing her that Parkland Memorial Hospital was suing her for $5,000, plus attorneys' fees that brought her total debt to $6,300.[5]

- Despite graduating with a degree in engineering, Charles was struggling to find work in his field. He came across a job advertisement with a company named Revature, which offered a three-month training program and branded itself as the "largest employer of entry level software engineers."[6] While enrolling in the company's training program was a last resort, Charles was eager to find work in his field. A few days into the training, the company handed out employment contracts for everyone to sign and return by the end of the day. The contracts were alarming; they required workers to commit to a two-year employment period for a client Revature selected (workers had no say), even if it meant moving across the country. If a worker failed to do this, they would be on the hook for $36,500. During the training, employees earned only $8 an hour, minus housing

[3] Taylor Telford, *PetSmart offered free training. But it saddled employees with debt*, Washington Post (Aug. 4, 2022), https://www.washingtonpost.com/business/2022/08/04/petsmart-dog-grooming-training-labor-lawsuit/.
[4] Dave Jamieson, *When This Pilot Quit Her Job, Her Employer Billed Her $20,000*, HuffPost (Jan. 31, 2023), https://www.huffpost.com/entry/ameriflight-pilot-training-repayment-provisions_n_63a2214ee4b04414304bc464.
[5] Kevin Krause, *For Nearly Two Dozen Nurses, Leaving Parkland Early Comes at a Cost*, Dall. Morning News (July 3, 2020), https://www.dallasnews.com/business/health-care/2020/07/03/for-nearly-two-dozen-nurses-leaving-parkland-early-comes-at-a-cost.
[6] *Entry Level Software Engineer*, Revature, https://revature.com/jobs/entry-level-software-engineer-3/ [https://perma.cc/BQ5E-TH63].

expenses, making this figure all the more overwhelming.[7]

- Wayne, who was new to truck driving, did not know what was wrong but knew he could no longer press the pedals on the tractor-trailer he was driving. He had made his way home to South Carolina from Texas and learned his foot was broken, leaving him unable to drive for six weeks. Wayne had entered a contract with CRST Expedited (CRST) a few months earlier in which he agreed to drive ten months for the company in exchange for two weeks of training. After his foot healed and he was ready to return to work he learned that CRST had fired him. Needing to find work, he secured a new job with Schneider International (a rival trucking company), but CRST was not done with him. The company called him to tell him the company was suing him for $6,500 because he had not worked for the company for 10 months, and that it would also sue Schneider for hiring him if he stayed with the company (due to a no-poach agreement the companies shared without Wayne's knowledge). Blocked from taking a new job, Wayne was even more frustrated to learn that CRST also refused to take him back, meaning he had no choice but to pay his former employer $6,500.[8] It was later discovered through a class action by former truckers that while the company charged truck drivers $6,500 for their training if they departed early and hounded them for years, CRST was only paying truck driving schools $1,400 to $2,500 per driver to deliver this training.[9]

- Trisha, a licensed cosmetologist and aesthetician since 1999 in New York, decided to take time off during the pandemic as she healed from a personal illness. When she was ready to return to work in May 2022, she began working at a lash bar, but she soon realized the working conditions were far from ideal. Three and half months in, she decided it was best to leave, but she soon discovered that she had signed a TRAP requiring her to pay $4,000 if she left in the first six months. Her employer promptly sued her for the training fee, and included an additional $1,000 for alleged violations of a non-solicitation agreement. But Trisha had not received any formal training. She came into the job fully licensed, and the on-the-job training she had received was simply how her employer preferred tasks be done or performed.[10]

- Carmella works for a private medical emergency company, and has been overwhelmed with 96-hour work weeks during her more than two years with the firm. Carmella wanted to become a paramedic and was required to complete a training offered by her employer to become certified. She is currently enrolled in the training, and wants to complete it, but

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[7] Emma Rindlisbacher, *The Coding Bootcamp Trap*, OneZero (Jan. 26, 2021), https://onezero.medium.com/recent-grads-are-being-lured-into-indentured-servitude-by-a-coding-bootcamp-8a3b2b8e87e8.
[8] Sarah Butrymowicz and Meredith Kolodner, *Trucking Companies Train You on the Job. Just Don't Try to Quit*, New York Times (April 5, 2022), https://www.nytimes.com/2022/04/05/business/economy/trucker-training.html
[9] Press Release, Fair Work Law P.C., *CRST's Driver Training Program Violates the Law* (June 01, 2020), https://www.fairworklaw.com/cases/driver-training-program-violates-state-and-federal-law/.
[10] Amal Tlaige, *Proposed legislation could change new hire contract*, WETM TV 18 (Feb. 10, 2023), https://www.mytwintiers.com/news-cat/top-stories/proposed-legislation-could-change-new-hire-contract/.

she hopes to reduce her working hours. When she asked her superiors about reduced hours, she was told that when she received certification she would be required to work for the company for two years, full-time only, and would likely be terminated if she worked part-time. On top of being terminated, she was told she had to pay up to the full cost of the training, which was $10,000. Carmella is aware of former co-workers who have received bills from her employer upon termination for $8,000, and is in fear of being trapped into long hours for two more years or indebted for this training.[11]

- Advanced Care Staffing, LLC (ACS) recruited Benzor, a nurse living in the Philippines. Benzor had left a previous job to work for ACS, leaving him feeling like he "had no choice" but to sign a contract with ACS that required him to work for them for at least three years or repay all that he had earned—plus paying the company's future profits, attorneys' fees, and arbitration costs, resulting in Benzor being paid below the federal minimum wage. After starting work for the company, Benzor voiced concerns that went unaddressed about working conditions, specifically about staff-to-patient ratios that left him feeling unable to properly care for patients. After a few months, he submitted his resignation letter citing safety and ethical concerns, as well as “grueling” working conditions. The company responded by demanding $24,000.[12]

- After beginning his position, a doctor (who only shared his story anonymously, for fear of retribution) for Concentra, Inc. described himself as "definitely feel[ing] trapped." With a workload that was upwards of 40 patients a day and breaks that lasted only a few minutes, this was clearly a bad fit. But when the doctor informed his boss he was thinking about quitting, he was told, "[w]e will make you pay" and "[t]he contract will be enforced." The contract in question included a "stay-or-pay" provision that requires employees to give four months’ notice when quitting, or pay a fee that is the equivalent of their salary for the remainder of that window. With the onerous threat of tens of thousands of dollars of debt looming over him, he found a way to stick it out for another four months. But during that time he turned down multiple job offers with companies who said they simply could not hold a position that long. Bloomberg Law viewed Concentra's employment contract and found, "a requirement that workers who quit compensate management for each day over the next four months on which they ‘failed to provide services.’ It also includes a noncompete clause, forbidding similar work anywhere within a 10-mile radius of their work location; a non-solicitation clause…; and a nondisclosure clause."[13]

- Novie was living in the Philippines when she was recruited by Health Carousel, LLC, a healthcare staffing agency. Health Carousel called Novie at 4 a.m. to offer her the job;

[11] Story on file with the Student Borrower Protection Center.
[12] Julia Marnin, *Company Demands Nurse Repay All The Money He’s Earned — Because He Resigned, Feds Say*, Miami Herald (Mar. 21, 2023), https://www.miamiherald.com/news/nation-world/national/article273401485.html.
[13] Josh Eidelson and Zachary Mider, *Concentra Health Employees Feel Trapped at Work*, Bloomberg Law (Jan. 26, 2023), https://www.bloomberg.com/news/articles/2023-01-26/concentra-health-employees-feel-trapped-at-work.

> her mom could only say how proud she was. Novie was excited about moving to the U.S. and thought this was a good deal. That changed when she arrived in Pennsylvania. After starting at the hospital where she would be working, Novie learned that she was paid much less than other nurses, earning only $25.50 an hour compared to more than $35 an hour. Worse, UPMC was paying Health Carousel $52 an hour for her contract. The staffing agency exerted an unusual amount of control over her: not allowing her to discuss working conditions with other staff or even to leave town without their permission. She found the work to be brutal, and often dangerous, due to chronic understaffing. Eventually she found herself feeling depressed and "basically trapped." When she decided to leave her job, Health Carousel charged her $20,000 in liquidated damages, which she paid with money her boyfriend had been saving for years to buy a house.[14]

We encourage the FTC to stand by this strong proposal, and we offer the following suggestions for how it can be even further refined:

The proposed rule should ban all instances of "stay-or-pay" contracts that are intended to act as a de facto non-compete.

In the final rule, the FTC should categorically ban contracts that are functionally equivalent to non-compete clauses. Experience has shown that employers switch to functionally equivalent restraints when specific restrictions on labor mobility are banned. These functionally equivalent restraints include TRAPs, other "stay-or-pay" contracts that require departing employees to compensate their employer for every day that they "fail to provide services" and pay their replacement's salary, and liquidated damages clauses in which firms require workers to pay prohibitive sums if they leave a job before a certain period.

Stay-or-pay contracts like TRAPs and liquidated damages clauses are in key respects more harmful than traditional non-compete clauses. While non-compete clauses prevent workers from working for a competitor, or in the same occupation, TRAPs and liquidated damages provisions restrict workers from leaving their employer entirely, including, for example, taking time off to care for family members. If the agency believes that banning the use of TRAPs and other stay-or-pay contracts is not sufficiently covered by unfair methods of competition authority, we encourage you to instead turn to the agency's unfair and deceptive acts and practices authorities. As the stories above make clear, the FTC must explore utilizing its unfairness authorities—in both competition and consumer protections—to create clear rules that protect workers.[15]

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[14] Josh Eidelson, *Nurses Who Faced Lawsuits for Quitting Are Fighting Back*, Bloomberg Businessweek (Feb. 2, 2022), https://www.bloomberg.com/news/features/2022-02-02/underpaid-contract-nurses-who-faced-fines-lawsuits-for-quitting-fight-back.
[15] Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45(a)(1)).

Accordingly, the FTC should take the following steps regarding its proposal:

- ***The FTC should incorporate a blanket ban on TRAPs.*** Often buried deep inside workers' employment contracts and used as a precondition to taking a job, TRAPs 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 an arbitrary, fixed amount of time.[16] These charges often come with additional costs through interest rates, attorney's fees, and collection fees. These TRAP debts create a burden that is likely to hang over workers' heads for years if they do move on to another job. And most concerningly, it appears that the rise in TRAPs is becoming increasingly common in a number of industries. Our research estimates 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.[17] This trend has been accelerated by some employers who have gone further, developing and acquiring for-profit training centers and academies for potential and current employees.[18]

  The use of TRAPs is a flagrantly unfair method of competition by employers to undermine worker bargaining power by keeping people trapped in their jobs. Where traditional non-compete agreements prevent a worker from seeking employment in an entire industry or geography, TRAPs require a departing worker to bear these costs when leaving for any reason, anywhere, not just because they are joining a rival company. Therefore, TRAPs can often be even more harmful than traditional non-compete agreements.

  Millions of workers are likely bound by TRAPs.[19] These millions include some of the most essential workers during the worst phases of the COVID-19 pandemic: nurses, retail workers, and truck drivers. Many of these people could command better pay by going to another employer, but they feel trapped in their current jobs due to the looming threat of debt if they dare to leave. And that is precisely the purpose of these contract terms: at least one trade association has counseled its members to consider TRAPs as a way to keep workers from leaving.[20]

  Currently, the FTC's proposed rule seeks to ban TRAPs that "are not reasonably related to the cost of training." If this loophole remains, employers are sure to exploit it, leading workers to have to individually adjudicate every TRAP, a process that can last years, cost workers tens to hundreds of thousands of dollars, and create the same chilling

[16] Student Borrower Protection Center, *supra* note 2, at 5.
[17] Student Borrower Protection Center, *supra* note 2, at 3.
[18] Student Borrower Protection Center, *supra* note 2, at 7.
[19] Diane Bartz, *More U.S. companies charging employees for job training if they quit*, Reuters (Oct. 17, 2022), https://www.reuters.com/world/us/more-us-companies-charging-employees-job-training-if-they-quit-2022-10-17/.
[20] Philip Siegel, *Protect Your Investment*, Professional Roofing (Nov. 2019), https://www.professionalroofing.net/Articles/Protect-your-investment—11-01-2019/4566 [https://perma.cc/NA32-WGZY].

effect on worker mobility as a traditional non-compete clause. Worse, as legal scholar Jonathan Harris has written, "[a]n unenforceable TRAP coupled with a mandatory arbitration agreement or waiver of class arbitration for employment disputes, ubiquitous in today's workplaces, might have an additional *in terrorem* effect on a worker contemplating a legal challenge to a TRAP."[21] The FTC correctly recognized the need for a blanket ban on the use of traditional non-compete agreements in its proposed rule, and it should approach de facto non-compete agreements—such as TRAPs—the same way. Otherwise, the FTC will only be creating a loophole that employers seeking to evade this rule will widely abuse.

There has been only a single empirical study conducted into the use of TRAPs, which found that the top reason for one firm's use of these provisions was to ensure employee immobility.[22] As noted by the union, National Nurses United, limiting worker mobility in the healthcare sector through TRAPs has the potential to depress wages and wage growth.[23] This is further reinforced by anecdotal evidence across additional industries, showing that TRAPs are most frequently used by less desirable employers who are unwilling to compete with other employers offering higher wages and benefits as noted in the examples above. For example:

- Pilots at Ameriflight were paid below-market wages of as little as $12.50 an hour or $30,000 a year to fly out-of-date planes, while the average salary for pilots in Puerto Rico is $53,330.[24]
- A computer programmer who participated in Smoothstack's coding bootcamp was then paid $26.44 per hour to perform work for its client, Accenture, at well below average market wage rate of $46.46 for computer programmers.[25]
- Nurses working at the Golden Gate Rehabilitation and Health Care Center in Staten Island, NY, which utilizes TRAPs, make $29 an hour, while the hourly median wage for registered nurses in the state is $46.24.[26]

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[21] Jonathan F. Harris, *Unconscionability in Contracting for Worker Training*, 72 Ala. L. Rev. 723, 740 (2021).
[22] Mitchell Hoffman & Stephen V. Burks, *Training Contracts, Employee Turnover, and the Returns from Firm-Sponsored General Training* 1 (Nat'l Bureau of Econ. Rsch, Working Paper No. 23247, Mar. 2017).
[23] National Nurses United, Comment on Employer-Driven Debt CFPB-2022-0038 (Sept. 23, 2022): https://www.regulations.gov/comment/CFPB-2022-0038-0048.
[24] Press Release, Student Borrower Protection Center, *Major Cargo Airline Company Accused of Illegally Trapping Pilots in Up to $30,000 of Training Debt Amidst Supply Chain Crisis* (Jan. 21, 2023), https://protectborrowers.org/major-cargo-airline-company-accused-of-illegally-trapping-pilots-in-up-to-30000-of-training-debt-amidst-supply-chain-crisis/; *State Occupational Employment and Wage Estimates: Puerto Rico*, U.S. Bureau of Labor Statistics (May 2021), https://www.bls.gov/oes/current/oes_pr.htm
[25] Press Release, Student Borrower Protection Center, *Unconscionable Debt-for-Training Scheme Funnels Low-Wage Tech Workers to Fortune 500 Companies* (April 14, 2023), https://protectborrowers.org/unconscionable-debt-for-training-scheme-funnels-low-wage-tech-workers-to-fortune-500-companies-groundbreaking-class-action-lawsuit-seeks-to-void-predatory-training-repayment-agreement-provisions/; *Occupational Employment and Wages,* U.S. Bureau of Labor Statistics (May 2021), https://www.bls.gov/oes/current/oes151251.htm.
[26] National Nurses United, Comment Submitted on Federal Trade Commission and Department of Justice Merger Enforcement No. FTC-2022-0003 (Apr. 21, 2022), https://www.regulations.gov/comment/

- ***The FTC should incorporate a blanket ban on "stay-or-pay" contracts that demand departing workers pay the salaries and training costs of their replacements if they do not provide lengthy notice of resignation periods.*** Much like TRAPs, these types of "stay-or-pay" employment contracts are an abusive form of employer-driven debt and act as a de facto non-compete agreement. They require departing employees to compensate their employer for every day that they "fail to provide services" and pay their replacement's salary.

  As the examples above indicate, employers are using these abusive contract terms to lock workers into jobs. This is yet another example of a de facto non-compete, in which the same outcome is achieved through different contract terms, by demanding departing employees ensure the future profits of an employer.

- ***The FTC should incorporate bans on other forms of employer-driven debt, such as so-called "liquidated damages" provisions.*** Some employers may require employees to pay either a flat fee (called "liquidated damages") or an indefinite amount of money to repay what the employer characterizes as expenses related to employee training, finding and training a replacement employee, or for vague harms like "loss of goodwill." These damages provisions could violate existing laws against using liquidated damages clauses as penalties, laws against making employees pay for the employer's cost of doing business, or even laws against forced labor, as nurses have alleged in cases against employers like Health Carousel and Advanced Care Staffing.[27]

  As noted in the example above, liquidated damage clauses in contracts go much further than TRAPs or stay-or-pay contracts, instead demanding workers pay a penalty for no particular reason other than leaving. These employment terms are meant to deter exit and like other forms of employer-driven debt, achieve the same outcome as traditional non-compete clauses through different terms.

- ***The proposed rule should ban "no-poach" and "no-hire" agreements.*** No-poach or no-hire agreements are bilateral agreements between companies not to solicit or hire each other's employees. Employees often have no knowledge that these agreements exist or that companies may be privately sharing lists of employees with each other, but the effect can be devastating. The courts have been clear that no-poach and other forms of collusion among competing employers are *per se* illegal under the Sherman Act.[28] In contrast, however, the current law on no-poach, no-hire, and other contracts between firms not in a competitive relationship—consider franchisors and franchisees—is muddled. The FTC can fix that in this rule. Failure to enact a per se ban on *all* such

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FTC-2022-0003-1831; S*tate Occupational Employment and Wage Estimates: New York*, U.S. Bureau of Labor Statistics (last modified Mar. 31, 2022), https://www.bls.gov/oes/current/oes_ny.htm.

[27] *See Carmen v. Health Carousel, LLC*, No. 1:20-cv-00313 (S.D. Ohio); *Vidal v Advanced Care Staffing*, No. 1:22-CV-0553, E.D.N.Y.

[28] *See Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) (Sotomayor, J.).

restrictive covenants threatens to undercut the FTC's aim to promote fair competition among employers, and may provide an easily exploitable loophole for employers who otherwise wish to not compete for employees with higher wages and better working conditions.

No-poach and no-hire agreements often appear with other types of restrictive covenants. Take for example the class action lawsuit, *Markson v. CRST International, et al.* Though the companies, including CRST International, Inc., CRST Expedited, Inc., C.R. England, Inc., Western Express, Inc., Schneider National Carriers, Inc., Southern Refrigerated Transport, Inc., Covenant Transport, Inc., Paschall Truck Lines, Inc., and Stevens Transport, Inc., denied wrongdoing in the settlement agreement,[29] they faced strong allegations that they conspired to drive down wages and wage growth by relying on a combination of no-poach agreements and employer-driven debt. The plaintiffs alleged that these companies embraced a uniform practice of "contract handcuffs," in which they agreed not to poach or hire one another's drivers who had entered a company-sponsored training and signed a TRAP (committing to stay with that company for a certain period of time or repay the purported "cost" of the training). The lawsuit alleged that in many cases, the drivers who attended the company-sponsored trainings were not provided the employment contracts, including their TRAP, until they had already traveled long distances to the training location and were only directed on "where to sign" without the contract being explained to them. Once the TRAP, or "contract handcuff," was imposed, these companies refused to hire an "under contract" driver from one another if they failed to repay the TRAP debt or had not yet completed the mandatory employment commitment. This practice continued beyond the employment period if the former driver was still indebted to their previous employer, with other companies refusing to hire them even if the original employer refused to employ them.

Employers' use of TRAPs and other forms of employer-driven debt to track and enforce no-poach and no-hire agreements should raise new concerns for federal regulators across multiple government agencies, including the FTC. Decades of evidence shows that these agreements also have very real and concrete non-wage consequences, such as keeping workers trapped in dead-end and exploitative jobs, and making workers more vulnerable to workplace abuse. While no-poach and no-hire agreements are already per se illegal under the Sherman Act, there is less clarity among firms that do not directly compete for workers' services. This ambiguity has enabled some employers to routinely skirt the law and engage in the use of TRAPs to enforce these likely illegal contract terms. The FTC should ban all no-poach, no-hire, and other similar anti-worker restraints between firms in its finalized rule.

[29] *See Markson v. CRST International, et al.*, No. 5:17-CV-01261-SB-SP (C.D. Cal. Feb. 23, 2023).

The proposed rule should not develop a "reasonableness" test for de facto non-competes.

As drafted, the proposed rule allows companies to use TRAPs "where the required payment" is "reasonably related to the costs the employer incurred for training the worker." This massive, vague loophole practically guarantees that these contract terms will remain and become an even more attractive means for employers to hold back workers. In revising its rule, the FTC should close this loophole entirely.

- ***There is generally no consistent mechanism to truly identify reasonable costs for training.*** While this proposal seeks to resolve the problem of employers inventing training costs out of whole cloth, something that they have been discovered to do in previous court cases,[30] it fails to address numerous other factors. Employers can quickly and easily inflate the costs of on-the-job training to reach a figure that is insurmountable for workers to afford. Without pursuing years-long, expensive litigation, workers will have no knowledge if the TRAP debt the employer claims reasonably reflects the cost of their training. Workers will then face the unpalatable choice of staying at their current job or leaving and assuming tens of thousands of dollars in debt to their employer.

- ***The "reasonableness" test provided in the FTC's example inappropriately focuses on the cost of the training, and fails to consider the reasonableness of requiring the worker to repay the employer-driven debt.*** Even if there were a clear mechanism to identify reasonable training costs, that would miss the point: it is the prohibitive cost of exiting a job that makes TRAPs de facto non-competes, regardless of industry, salary, or any other factor. As noted above, the vast majority of TRAPs appear to be used with workers holding entry level positions at the beginning of their careers, often earning minimum wage or close to it. For these workers, it does not matter if the TRAP debt is "reasonably" calculated by the employer if the cost amounts to months or years of an employee's salary. Consider Table 1, which looks at many of the examples provided above and additional cases. Many of these workers earn close to the minimum wage while laboring under TRAPs.

[30] *See Heartland Sec. Corp. v. Gerstenblatt*, No. 99 CIV. 3694 WHP, 2000 WL 303274, at *7 (S.D.N.Y. Mar. 22, 2000).

Table 1: Examples Demonstrating the True Cost of a TRAP

Occupation	Annualized Salary	TRAP Debt	TRAP Percentage of Annual Salary
Aircraft pilots and flight engineers[31]	$30,000	$30,000	100%
Animal caretakers[32]	$31,200	$5,500	17.6%
Computer programmers[33]	$62,500	$24,000	38.4%
Truck drivers[34]	$35,000	$8,000	22.8%
Registered nurses[35]	$62,400	$15,000	24%
Sheet metal workers[36]	$53,440	$20,000	37.4%
Skincare specialists[37]	$27,040	$5,000	18.5%

Source: These examples, cited below, come from court cases in which employers sued to enforce TRAP debt or were reported in the media.

Further, the FTC should consider the risk of unintended consequences in developing such a "reasonableness" test as proposed. In the agency's attempt to create a ceiling on TRAP debt, it may instead develop a safe harbor for the very abuses this rulemaking seeks to eliminate. Setting any level of expense as "reasonable" will make TRAPs only an even more appealing contract term for employers to exploit in an effort to limit workforce turnover, even among employers who currently do not use TRAPs.

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[31] *See Fredericks v. Ameriflight, LLC*, No. 3:23-cv-01042, (D.P.R. filed Jan. 30, 2023).
[32] *See Scally v. PetSmart LLC*, No. 3:22-cv-06210-SK, Dkt. 1 (Cal. Sup. Ct., July 28, 2022).
[33] *See O'Brien v. Smoothstack, Inc.,* No. 1:23-cv-00491 (E.D. Va. filed Apr. 13, 2023).
[34] *See Montoya v. CRST Expedited*, Inc. 311 F. Supp. 3d 411 (D. Mass. 2018).
[35] National Nurses United, Comment on Employer-Driven Debt CFPB-2022-0038 (Sept. 23, 2022): https://www.regulations.gov/comment/CFPB-2022-0038-0048 (see page 60).
[36] *See Brunner v. Hand Industries, Inc.*, 603 N.E.2d 157 (Ct. App. Ind. 1992).
[37] *See Oh Sweet, LLC v. Simran Bal*, No. 22CIVO5745KCX (King Cty. Ct. 2022).

The FTC should not bow to industry pressure in developing standards for acceptable harm to workers. While employers have recently sued both former employees[38] and the federal government[39] for lost profits, the SBPC unequivocally reminds you that **there is no guaranteed right to be profitable** for any business. Employers frequently make both capital and labor investments in their companies that often do not work out. If they wish to grow and sustain their businesses, they must invest in their workforce. If they are unwilling to compete to retain their employees with higher wages and better working conditions, that is a business decision that is likely to have consequences. Those consequences should not be passed along to the departing workers.

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The FTC's proposed ban on non-compete clauses will restore a core economic liberty for millions of workers. The rule will require employers to compete to retain their workers with higher wages and better working conditions, allow workers to develop new innovative businesses, and promote a healthy, competitive economy.

In addition to the comments above, we also encourage the FTC to look for future cross-agency collaboration to protect workers, bringing a whole-of-government approach to ensure that employers are following the law. As it finalizes and implements this rule, the FTC would both hugely benefit from and likely be able to contribute substantively to collaboration with peer agencies such as the Consumer Financial Protection Bureau and the Department of Labor. In particular, the FTC should establish lines of information sharing across the full set of state and federal agencies that also engage in—or otherwise might be interested in FTC's findings from—oversight of employers that are using employment terms like the ones described above, as they may violate consumer and/or labor protection laws. No TRAP exists in a vacuum, as they require a web of companies to deploy them: the law firm that drafts the employment contract, the employer who presents a "take-it-or-leave-it" contract on the hiring process, and the debt collector who pursues this debt years after the worker has departed.

Further, the FTC should follow the lead of states in addressing these de facto non-competes. A handful of states have passed legislation directly affecting the use of TRAPs in employment contracts, with Connecticut and California prohibiting mandatory TRAPs for at least some types of workers, and Colorado limiting the enforceability of TRAPs to narrow circumstances.[40] Many more states are currently considering similar prohibitions on the use of these de facto non-competes, with states such as California, New York, and Pennsylvania introducing

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[38] Press Release, U.S. Dept. of Labor, Department Of Labor Seeks Court Order To Stop Brooklyn Staffing Agency From Demanding Employees Stay 3 Years Or Repay Wages (Mar. 5, 2023), https://www.dol.gov/newsroom/releases/sol/sol20230320.

[39] Danielle Douglas-Gabriel, *SoFi sues Cardona, Education Dept. to End Student Loan Payment Pause*, Washington Post (Mar. 6, 2023), https://www.washingtonpost.com/education/2023/03/06/sofi-student-loan-payment-pauselawsuit/.

[40] Conn. Gen. Stat. § 31-51r(b); Cal. Lab. Code § 2802.1; Colo. Rev. Stat. § 8-2-113(2)(c).

legislation this year that would prohibit many forms of employer-driven debt and TRAPs.[41] Where possible, the FTC should collaborate with state regulators where legislation is enacted, through training and technical assistance, and sharing information to support investigations where evidence may exist that helps both parties enforce these worker and consumer protections.

Arguments by opponents of the FTC's proposed rule, such as the U.S. Chamber of Commerce (the Chamber),[42] have little grounding in reality. The Chamber has two core arguments against the FTC's proposed rule. First, the Chamber writes, the agency proposed the rule "without any showing of harm to consumers or anticompetitive intent" despite the agency including more than 200 pages of factual background prior to the language of the proposed rule, demonstrating these exact harms and intents. Second, the Chamber argues that the rule extends beyond the agency's authority and "establish[es] itself as a rule maker to govern competition in the market." A quick history lesson disproves this argument. When Congress passed the FTC Act, it charged the FTC with policing "unfair methods of competition."[43] Further, the FTC has the statutory authority to "make rules and regulations for the purpose of carrying out the provisions of this subchapter [the FTC Act]."[44] The text is clear and unambiguous: the FTC can write competition rules. What the agency is seeking to do through this rulemaking process is not simply legal, it is the mandate that Congress gave it. Consistent with the thoughtfulness of its comments on the proposed rule, the Chamber has already announced its plan to sue to block any finalized rule in court, regardless of what the agency proposes.[45] Such bad-faith and unreasonable opposition should not shape the agency's mission to ban employers from engaging in the widespread and exploitative practices outlined above.

The FTC has a unique opportunity to shield workers from flagrantly unfair methods of competition by employers who aim to hold back labor market competition, and to address unfair and deceptive labor market practices that are targeting working people. Indeed, the FTC must reorient its labor market enforcement to safeguard workers from these one-sided contract terms that lock in power disparities in the workplace. To accomplish this goal, 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 employer-driven debt and stay-or-pay contracts that undercut the intention of this proposed rule.

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[41] *An Act Protecting Workers From Training Repayment Agreement Provisions*, H.B. 608 (Pa. 2023-24), https://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2023&sind=0&body=H&type=B&bn=0608; *Worker Freedom and Competition Act*, A.B. 747 (Ca. 2023-2024), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB747; *Trapped at Work Act*, (Sponsored by Asm. Phil Steck, N.Y. bill number pending).
[42] Sean Heather, *What Does the FTC Want to Ban Next?*, U.S. Chamber of Commerce (Jan. 31, 2023), https://www.uschamber.com/finance/antitrust/what-does-the-ftc-want-to-ban-next.
[43] 15 U.S.C. § 45(a).
[44] 15 U.S.C. § 46(g).
[45] Suzanne P. Clark, *The Chamber of Commerce Will Fight the FTC*, Wall Street Journal (Jan. 22, 2023), https://www.wsj.com/articles/chamber-of-commerce-will-fight-ftc-lina-khan-noncompete-agreements-free-markets-overregulation-authority-11674410656.

We look forward to the FTC's implementation of its proposed ban on non-compete and de facto non-compete clauses.

Thank you for your time and consideration.

Sincerely,

Student Borrower Protection Center