---FOR EMBARGO UNTIL DECEMBER 4, 2023 AT 12:01AM---

Fact Sheet: Protecting Workers from Exploitative Stay-or-Pay Contracts

Governing for Impact, Towards Justice, the American Economic Liberties Project, and the Student Borrower Protection Center released a groundbreaking new policy roadmap outlining a broad range of executive actions that agencies across the federal government must take to curb so-called "Stay-or-Pay" contracts. Stay-or-pay contracts 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 their mobility and bargaining power. When they do leave, workers are hit with a crushing financial penalty just because they left their job.

Stay-or-pay contracts take many forms. For example, last year the giant pet retailer PetSmart made headlines for threatening to stick low-wage pet groomers who quit with thousands of dollars in illegal training debt via a Training Repayment Agreement Provision, or "TRAP," buried in the fine print of its employment contracts. Other employers have included contract clauses that require workers to pay liquidated damages if they separate or even clauses purporting to allow employers to sue for unspecified damages, including the purported "lost profits" that follow from employee turnover. Stay-or-pay contracts are proliferating across the economy, harming workers in industries including transportation, health care, retail, aviation, and tech.

A copy of this compendium, *Stay-or-Pay: Federal Actions to End Modern-Day Indentured Servitude Across the Economy*, is available here:
https://protectborrowers.org/wp-content/uploads/2023/12/stay-or-pay-compendium_12-2023_FINAL.pdf

The Biden administration has already taken action against some of these practices, including through the Federal Trade Commission's proposed rule prohibiting traditional and certain de facto non-compete clauses, the Consumer Financial Protection Bureau's inquiry into employer-driven debt, and litigation by the Department of Labor and the National Labor Relations Board. The following slate of recommendations spans additional agencies and builds on previous requests from workers and advocates by adding supporting legal analysis and further policy details.

The individual proposals included in this compendium were shared with senior federal officials between September and December 2024. Recommendations include:

1. **The Department of Labor ("DOL") issues subregulatory guidance that explains to employers and employees how stay-or-pay contracts may violate the Fair Labor Standards Act's ("FLSA") prohibition on "kick-backs" of wages to employers and the requirement that minimum wage and overtime wage payments be made "free and clear" of conditions and obligations to repay.**
   Kick-backs are expenses primarily for the employer's benefit that tend to shift business expenses onto employees. Demands for payment on most stay-or-pay contracts are likely employer kick-backs and deprive employees of wages that are free and clear of obligations to repay. When these demands cause workers' net wages to dip below minimum and overtime wage levels, they are unlawful.
   Link to memo as transmitted

   This Memorandum was transmitted to the DOL's Wage and Hour Administrator on behalf of the authors of this report and the following organizations: Action Center on Race and the Economy,

Center for Law and Social Policy, Demand Progress Education Fund, Economic Policy Institute, Institute for Local Self-Reliance, Jobs With Justice, Missouri Workers Center, National Employment Law Project, National Employment Lawyers Association, National Institute for Workers' Rights, National Organization for Women, National Women's Law Center, North Carolina Justice Center, Open Markets Institute, People's Parity Project, and Workplace Fairness.

2. **The Federal Aviation Administration ("FAA") at the Department of Transportation issues regulations banning traditional and de facto non-compete clauses for pilots as unfair methods of competition.** These restrictive employment practices harm competition and prevent pilots from pursuing new job opportunities. They also threaten safety by discouraging pilots from reporting concerns and reducing incentives for airlines to improve working conditions for pilots to retain them. The FAA should invoke its authority over unfair methods of competition in the airline sector to investigate and ban traditional and de facto non-compete clauses in airline pilot employment arrangements.
   Link to memo as transmitted

3. **The Federal Motor Carrier Safety Administration ("FMCSA") at the Department of Transportation issues safety regulations that ban these employment practices.** Restrictive employment contracts increase the economic pressure on drivers, which incentivizes unsafe driver behavior; disincentivizes maintenance and repairs that are necessary for safety; and traps drivers in unsafe and even violent working arrangements. The FMCSA should use its authority to regulate commercial motor vehicle safety by banning these restrictive employment contracts.
   Link to memo as transmitted

4. **The Department of Health and Human Services ("HHS") conditions Medicare and Medicaid funding on employers' agreements not to use traditional or de facto non-competes.** Non-compete and stay-or-pay clauses are common among healthcare workers, especially low-wage healthcare workers. The contracts can negatively impact patient health and safety by: disrupting continuity of care and limiting patient access to familiar care; preventing workers from speaking up about dangerous conditions that harm patient well-being; creating toxic work environments and increasing medical error; and increasing prices and therefore financial insecurity among patients. HHS should use its authority to set conditions on Medicare and Medicaid funding to ban these practices in the interest of patient health and safety.
   Link to memo as transmitted

   This memorandum was transmitted to the Department of Health and Human Services on behalf of the authors of this report and the American Federation of Teachers.

5. **The DOL modifies the labor certification process for permanent employment of aliens in the United States to prohibit non-compete and stay-or-pay contracts.** Stay-or-pay contracts, also known as "breach fees," are increasingly common among foreign-educated nurses that come into the country via the EB-3 visa category. The contracts can trap foreign-educated nurses, who are already more vulnerable as a result of their visa status, in unsafe and underpaid jobs. Additionally, their use can adversely affect United States workers, as such workers must assent to worse conditions and less pay in order to compete with foreign labor. The DOL should use its authority under the Immigration and Nationality Act to prevent these adverse effects and prohibit these practices.
   Link to memo as transmitted

6. **The Federal Acquisition Regulation ("FAR") Council promulgates regulations banning these practices among federal contractors.** These restrictive employment contracts decrease competition for labor, reduce innovation, and slow business formation. They also discourage workers from speaking up about safety concerns. The President and FAR Council should use their authority to promote "economy" and "efficiency" in federal contracting, under the Federal Property and Administrative Services Act, to ban these practices among federal contractors.
   Link to memo as transmitted

7. **The National Labor Relations Board General Counsel increases pressure on employers where use of noncompetes and stay-or-pay contracts violate workers' rights under labor laws.** As the General Counsel has explained in a memo and in recent enforcement action, restrictive employment contracts can have chilling effects on workers' exercise of their rights to unionize or engage in protected concerted activity for mutual aid or protection. The NLRB should issue clear guidance explaining how stay-or-pay contracts can cause violations of workers' rights under Section 7 of the National Labor Relations Act.
   Link to memo as transmitted

Background On Stay-Or-Pay Contracts

Whereas traditional non-compete clauses directly prohibit employees from working for competing firms, stay-or-pay provisions — often presented as a precondition to employment — obligate employees who quit or are fired within a certain period of time, typically years, to pay their employer potentially huge sums of money. Because they create such large financial burdens for switching jobs, stay-or-pay contracts are sometimes called de facto non-compete clauses. Workers often aren't aware of these penalties until it's too late (for example, when they try to quit in favor of a better job or are disciplined for speaking up about poor conditions). And even when employees know they will be subject to a stay-or-pay contract, working conditions and wages are often much worse than they anticipate. Meanwhile, the contracts also deprive competitor firms of access to labor talent. Much like "junk fees," stay-or-pay contracts operate to pad profit margins not by developing a new product or improving services, but through deception and raw exercises of market power.

Restrictive employment contracts like non-competes and stay-or-pay contracts produce relatively more negative impacts on women, workers of color, and workers with disabilities than other groups. These workers are generally more likely to be low-wage workers, who are most negatively impacted by stay-or-pay practices. TRAPs, for example, are more common in industries that disproportionately employ women and people of color.

Recent examples illustrate the ubiquity of these practices:

1. **A healthcare staffing agency attempted to claw back *all* of a worker's earnings when he quit because of unsafe working and patient conditions.** A Department of Labor filing against Advanced Care Staffing detailed the company's demands that a departing worker pay $24,000 to compensate the company for its "lost profits."
2. **Southern Airways Express has begun suing pilots to enforce its stay-or-pay contracts.** The airline has filed 100 lawsuits against departing pilots in an effort to enforce TRAPs worth up to $20,000.

3. **Republic Airways announced new pilot contracts that require pilots to pay a $100,000 penalty if they leave the airline within three years.** The Teamsters union is challenging these provisions in court.
4. **Petsmart forced pet groomers to sign a TRAP that charges workers up to $5,000 if they leave within two years.** Most of these workers made wages close to the minimum wage, so the TRAP effectively prevented resignations at a company that has been cited for workplace safety violations.
5. **Trucking companies like CRST and C.R. England used TRAPs to retain drivers.** The companies charged departing drivers more than $6,000.

FURTHER READING

SBPC report on TRAPs: *Trapped at Work: How Big Business Uses Student Debt to Restrict Worker Mobility*

Lawsuit against PetSmart for its use of TRAPs, *Scally v. PetSmart*: Groundbreaking Lawsuit Seeks to Block PetSmart's Predatory Lending Scheme

Lawsuit against Ameriflight for its use of TRAPs, *Fredericks v. Ameriflight*: Major Cargo Airline Company Accused of Illegally Trapping Pilots in Up to $30,000 of Training Debt Amidst Supply Chain Crisis

Lawsuit against Smoothstack for its use of TRAPs, *O'Brien v. Smoothstack*: "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

For more background on Training Repayment Agreement Provisions: See here.

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