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#KnowTheDifference

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Via Regulations.gov

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The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Ave NW
Washington, DC 20580

RE: Non-Compete Clause Rule (RIN 3084-AB74)

Dear Chair Khan:

REAL Women in Trucking (“RWIT”) appreciates the opportunity to comment in support of the Federal Trade Commission’s Proposed Rule regarding non-compete clauses. The Proposed Rule would, among other things, provide that it is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; to maintain with a worker a non-compete clause; or, under certain circumstances, to represent to a worker that the worker is subject to a non-compete clause. Non-Compete Clause Rule, 88 Fed. Reg. 3482 (Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910). We support this rulemaking by the Federal Trade Commission (“FTC”), which should eliminate the use of non-compete clauses and limit other employment contract provisions that act as *de facto* non-compete clauses in the trucking industry.

RWIT is a non-profit group formed by seasoned female commercial motor vehicle drivers who saw the need for authentic representation for women in the trucking industry. It is a member-based organization that includes both seasoned female drivers and entry-level candidates. The organization encourages ethical corporate business practices and improved industry standards, including compensating workers for all work performed, and treating people of all genders equally when it comes to hiring, training, paying, and promoting motor vehicle drivers.

This comment highlights the harms inherent in a particular type of *de facto* non-compete agreement: training-repayment agreements (“TRAs”).¹ First, we discuss research that shows that increasingly-popular TRAs generally function as *de facto* non-compete clauses. Second, we provide specific information about how TRAs in the trucking industry stifle worker mobility,

¹ 88 Fed. Reg. at 3484. These agreements are sometimes referred to by advocates as training repayment agreement provisions (“TRAPs”). See also *Trapped at Work: How Big Business Uses Student Debt to Restrict Worker Mobility*, Student Borrower Prot. Ctr. (2022) https://protectborrowers.org/wp-content/uploads/2022/07/Trapped-at-Work_Final.pdf.

depress wages, and hinder competition among trucking companies. TRA misuse in the trucking industry also deters workers from speaking out about harms they experience on the job, like sexual harassment and assault, and can deter them from leaving unsafe working conditions. Finally, we make recommendations as to how any Final Rule could be strengthened. Ideally the Rule would categorically ban TRAs because they are typically *de facto* non-compete clauses; short of that, we recommend that the FTC strengthen its proposed functional test for *de facto* non-compete clauses. In order to safeguard competition in the trucking industry and beyond, the FTC's Proposed Rule must clearly reach the ever-growing use of TRAs as an alternative means to the same ends: less competition and less worker mobility.

I. Research shows that TRAs often function as *de facto* non-compete clauses, restricting workers' mobility and ability to earn a decent living.

A. The Proposed Rule rightfully acknowledges that some TRAs can be so broad that they function as *de facto* non-compete clauses.

As correctly stated in the Proposed Rule, TRAs are one type of liquidated damages provision in an employment contract in which the worker agrees to pay the employer for the employer's training expenses if the worker leaves their job before a certain date.² The Proposed Rule rightfully acknowledges that TRAs can sometimes be "so broad in scope" that they serve as *de facto* non-compete clauses. Non-compete clauses make it more difficult for workers to switch to new jobs, inhibiting well-matched employer-worker employment arrangements across the labor force. As we explain further below, TRAs also inhibit workers from switching to more optimal jobs that may maximize their productivity. TRA misuse can reduce wages for workers across the board, because jobs that would otherwise have been better matches for a worker *not* subject to a TRA are filled by workers subject to TRAs.³

In the preamble, the Proposed Rule explains that the definition of non-compete clause in proposed section 910.1(b)(1) would be clarified by section 910.1(b)(2), which states that whether a contractual term is a non-compete clause would depend on a "functional test."⁴ Thus, whether a contractual term is considered a non-compete clause would depend "not on what the term is called, but how the term functions."⁵ The FTC names TRAs explicitly as one category of contract provisions that could potentially meet that functional test.⁶ However, the FTC states that the definition of non-compete clause "would generally not include these types of covenants, because these covenants generally do not prevent a worker from seeking or accepting work with a person or operating a business after the conclusion of the worker's employment with the employer."⁷ The FTC also states that these types of covenants also generally do not prevent a worker from competing with their former employer altogether or prevent other employers from competing for that worker's labor.

² 88 Fed. Reg. at 3484.

³ *Id.* at 3485.

⁴ *Id.* at 3509.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

B. Growing evidence shows that TRAs often function as *de facto* non-compete clauses in that they restrict worker mobility similarly to traditional non-compete clauses.

A growing body of evidence and research supports the notion that TRAs often function as *de facto* non-compete clauses. According to a report by the Student Borrower Protection Center (“SBPC”), TRAs have been used more commonly by major employers, which often control a large market share of their respective industry, thus affecting millions of workers.⁸ The SBPC estimates that major employers now rely upon TRAs in segments of the U.S. labor market that collectively employ more than a third of all private-sector workers.⁹ Nearly ten percent of a sample of American workers surveyed in 2020 were covered by a training repayment agreement, according to the Cornell Survey Research Institute.¹⁰ TRAs “impose significant financial burdens on workers and foster monopsony in labor markets by reducing worker mobility and bargaining power.”¹¹

The rise of credentialization in employment—i.e., the growing number of jobs requiring an occupational certificate or license—has led to more selective job search processes and the transfer of the cost of training from an employer to potential employees.¹² Some employers have taken this new dynamic further by developing for-profit training centers and academies for potential and current employees, acquiring educational subsidiary organizations, or developing formal partnerships with schools or third-party companies to offer workers training and educational “opportunities.”¹³

Employers argue that these TRA provisions are a way to recoup the cost of teaching useful skills to employees who may leave employment sooner than anticipated, but the SBPC report finds that TRAs which artificially inflate the costs of training are instead used to trap people in poor (or even dangerous) working environments and low-paying jobs.¹⁴ Workers are monetarily punished by TRA enforcement if they leave a job prior to a certain date, and, even if a TRA is not actually enforced, its mere presence has the power to pressure workers into staying in jobs that may no longer suit their needs or help them achieve optimal productivity.¹⁵

⁸ *Trapped at Work*, *supra* n. 1, at 3. TRAs have trapped workers in other industries, like tech, nursing, and medicine. See Josh Eidelson & Zachary Mider, *Giving Four Months’ Notice or Paying to Quit Has These Workers Feeling Trapped*, Bloomberg (Jan. 26, 2023), <https://www.bloomberg.com/news/articles/2023-01-26/concentra-health-employees-feel-trapped-at-work?leadSource=verify%20wall>; Emma Rindlisbacher, *The Coding Bootcamp Trap*, Medium: OneZero (Jan. 26, 2021), <https://onezero.medium.com/recent-grads-are-being-lured-into-indentured-servitude-by-a-coding-bootcamp-8a3b2b8e87e8>.

⁹ *Trapped at Work*, *supra* n. 1, at 14.

¹⁰ 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/>.

¹¹ *Trapped at Work*, *supra* n. 1, at 6; One unnamed Consumer Finance Protection Bureau official noted that, regarding TRAs, “[w]e have heard from workers and worker organizations that the products may be restricting worker mobility.” See Bartz, *supra* n. 10.

¹² *Trapped at Work*, *supra* n. 1, at 7.

¹³ *Id.*

¹⁴ *Id.* at 3.

¹⁵ *Id.*

Through the use of TRAs, some employers have begun to turn on-the-job education into a debt trap, turning worker mobility into a financial impossibility for many workers. The training in question can range from preparing for a recognized credential to basic, firm-specific orientations that offer “no actual or transferable value to the worker.”¹⁶ Often, the alleged cost of training to be reimbursed according to TRAs dramatically exceeds the actual value of the training, and in many cases, the training primarily benefits the employer, rather than the worker. Similarly, As state and federal regulation of traditional non-compete agreements expands, employers are shifting their approach by using TRAs instead of non-compete clauses to achieve identical ends. At least one roofing industry trade association publication points to TRAs as a solution to bans on non-competes, because TRAs “can accomplish the same goal with different terms.”¹⁷

Furthermore, when TRAs first came into use in the 1990s, they were mainly limited to higher-skilled, higher-wage workers; that is no longer the case. Now, many industries with widespread TRA use involve underpaid workers and jobs that are disproportionately held by women, immigrants, and Latinx and Black employees.¹⁸

The worker-borne costs of causing a TRA to go into effect can be substantial across industries, giving employers significant power to prevent workers from leaving for a certain period of time. TRAs have required a metal polisher to pay \$20,000 to leave her employer before three years on the job, a truck driver to pay \$8,000 for an early departure, and an information technology trainee to pay \$30,000 to leave before two years on the job.¹⁹ In instances where workers have challenged unfair TRA terms in court, employers have countersued citing breach of contract (as employers are wont to do when sued regarding traditional non-compete clauses). Scholars note that, similar to non-competes, employers may be imposing TRAs on employees “not to protect legitimate business interests, but rather to ‘solidify their bargaining power is-à-vis their workers.’”²⁰ Indeed, as we discuss in detail below, many employers in the trucking industry use informal agreements not to hire workers with outstanding TRA debt. In sum, TRAs lead to workers either held in place under threat of overwhelming debt or penalized for taking better employment opportunities elsewhere.²¹

Workers often have little say in whether to take on TRA debt: the debt comes with the job, and workers can take it or leave it. In many cases, workers are unaware that their employment contract comes with a debt obligation buried deep within contract provisions. Once threatened by TRA debt, workers are trapped in their positions so as not to trigger TRA repayment obligations. Ultimately, this leads to workers stuck in low-paying jobs with poor

¹⁶ *Id.* at 7-8.

¹⁷ “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...[an industry certification]...to repay or reimburse your company the expenses incurred if the employee leaves the company within a certain time after achieving [that certification]....” *Id.* at 12.

¹⁸ *Id.* at 8.

¹⁹ *Id.*

²⁰ See Stuart Lichten & Eric M. Fink, ‘Just When I Thought I Was Out . . .’: Post-Employment Repayment Obligations, 25 Wash. & Lee J. C.R. & Soc. Just. 51, 81 (2019).

²¹ *Trapped at Work*, *supra* n. 1, at 9.

conditions, or else they are saddled with debt they can rarely afford. TRAs undermine workers' economic stability and prevent them from participating fully and freely in the labor market, where employers should be able to compete for workers and vice versa without hindrances.

Whereas a non-compete clause would prevent a worker from seeking employment in an entire industry or geographic area, TRAs require a departing worker to bear training costs when leaving for any reason, anywhere, and not just because they are joining a rival employer.²² For this reason, Professor Jonathan F. Harris of Loyola Law School notes that TRAs may be even more effective than traditional non-compete clauses at limiting or blocking competition among employers:

[M]any [TRAs] can be worse for low-wage workers than noncompetes; that is because preventing workers from working for a competitor may be less onerous to workers than requiring them to pay the employer a substantial sum to quit. TRAs can be especially burdensome for workers in industries accustomed to high turnover, where the average employee would not be expected to stay for the duration of the two-to-three-year TRA repayment period.²³

II. TRAs in the trucking industry are commonly tied to “company sponsored training,” where they stifle worker mobility, depress wages, and hinder competition among trucking companies.

Decades of deregulation have left workers in the trucking industry with harsh working conditions, low wages, and a high turnover rate.²⁴ The industry has always suffered from alarmingly high turnover rates due to various factors like declining pay and insufferable working conditions.²⁵ In 2019, for instance, the trucking industry had a ninety-one percent annualized turnover rate.²⁶

To combat these trends, trucking companies have begun to use TRAs more extensively, which has in some cases reduced worker exit from employment. Indeed, the only empirical study on TRAs in various industries and countries shows that one trucking company's use of two types of TRAs (a twelve-month and an eighteen-month post-training employment period) led to a fifteen percent reduction in employees quitting and “significantly increase[d] firm profits from training.”²⁷ This study found that the top reason for the company's use of these types of

²² *Id.* at 12.

²³ *Id.* at 13; Jonathan F. Harris, *Unconscionability in Contracting for Worker Training*, 72 Ala. L. Rev. 723, 740 (2021).

²⁴ *Trapped at Work*, *supra* n. 1, at 16-17.

²⁵ William B. Cassidy, *U.S. Truckload Driver Turnover Flattens as Wages, Demand Rise: ATA*, J. Com. (Mar. 30, 2021), https://www.joc.com/article/us-truckload-driver-turnover-flattens-wages-demand-rise-ata_20210330.html; Robin Kaiser-Schatzlein, *How Life as a Trucker Devolved Into a Dystopian Nightmare*, N.Y. Times (Mar. 15, 2022), <https://www.nytimes.com/2022/03/15/opinion/truckers-surveillance.html>; *Trapped at Work*, *supra* n. 1, at 16-17.

²⁶ Cassidy, *supra* n. 25; *Trapped at Work*, *supra* n. 1, at 16-17.

²⁷ *Trapped at Work*, *supra* n. 1, at 17; Mitchell Hoffman & Stephen V. Burks, *Training Contracts, Employee Turnover, and the Returns from Firm-Sponsored General Training* 21 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23247, 2017).

provisions was to encourage employee immobility.²⁸ Although reducing employee turnover may be seen as a positive goal for employers, reducing turnover should not be accomplished by trapping employees who might otherwise have better alternatives via employer-driven debt.

Many of the nation's largest trucking companies utilize TRAs in employment contracts,²⁹ and many of these companies lure potential truck drivers into training programs with promises of "company-sponsored," "free," or "paid" training and a higher paying job upon completion of training. Drivers often learn too late that these fast-track training programs either bind them to companies for anywhere between ten months and two years, or cost them thousands of dollars with sky-high interest rates. In RWIT's experience, major trucking companies like Prime, Inc. and C.R. England³⁰ recruit student trainees from vulnerable populations, such as people experiencing homelessness or living in temporary shelters for domestic violence survivors, who are more likely to accept these TRAs because of their urgent need for employment. Additionally, trucking recruits are generally not given the opportunity to read their employment contracts closely, to ask questions, or even to consult with an attorney. In RWIT's experience, recruits are rushed into signing documents and are not provided with copies to keep for their own records.³¹ RWIT has faced issues locating copies of contracts for member drivers who seek RWIT's assistance with their complaints.

The actions of one company, CRST The Transportation Solution, Inc., exemplify the misuse of TRAs in the trucking industry.³² In 2014, CRST aggressively advertised its trucking school, which promised a steady trucking career and a large signing bonus. A former CRST trainee named Jim Simpson stated that CRST "didn't really prep you for [the commercial driver's license] test. There was no real training in backing up. One guy got hypothermia... I felt like after eight months with them I'd go running away screaming."³³ Mr. Simpson's trainer quit after one month, after which Mr. Simpson decided to leave employment with CRST. Once he left, Mr. Simpson began receiving calls from debt collection agencies trying to collect more than \$6,000 on behalf of CRST for his incomplete training.³⁴

In 2022, another former CRST employee named David Boyd spoke with *Time Magazine* about his own experience.³⁵ During Mr. Boyd's training, he co-drove with trainees who physically threatened him; another driver he'd befriended was murdered by his co-driver while

²⁸ Hoffman & Burks, *supra* n. 27, at 21; *see also* Sarah Butrymowicz & Meredith Kolodner, *Trucking Companies Train You on the Job. Just Don't Try to Quit*, N.Y. Times (Apr. 5, 2022), <https://www.nytimes.com/2022/04/05/business/economy/trucker-training.html>.

²⁹ These include Swift Transportation School (an on-site training program for Knight-Swift Transportation Holdings Inc.), Schneider Trucking School (a training program for Schneider National), Prime Trucking School (a training program for Prime, Inc.), and Contract Freighters. *Trapped at Work*, *supra* n. 1, at 17; Butrymowicz & Kolodner, *supra* n. 28, <https://www.nytimes.com/2022/04/05/business/economy/trucker-training.html>.

³⁰ C.R. England, <https://www.crengland.com/> (last visited Apr. 11, 2023).

³¹ Third Am. Compl. at ¶ 66, *Cervantes v. CRST Int'l, Inc.*, No. 20-cv-00075 (N.D. Iowa Oct. 23, 2020), ECF No. 108.

³² *See Federal Judge Issues Injunction Against CRST*, Fair Work P.C. (June 3, 2020), <https://www.fairworklaw.com/news/federal-judge-enjoins-crst/>.

³³ *Trapped at Work*, *supra* n. 1, at 18.

³⁴ *Id.*

³⁵ *Id.* at 18-19; Alana Semuels, *A Trucker's Killing Highlights Problems in the Industry*, Time (Mar. 18, 2022), <https://time.com/6158781/aristedes-garcia-truck-driver-murder/>.

on the road.³⁶ Given this risk of violence, Mr. Boyd thought about quitting CRST but decided not to because he would owe CRST \$5,000 if he quit before the ten month post-training period ended.³⁷

In RWIT's experience, major fleets like C.R. England, CRST Van Expedited, Covenant Transport, Western Express, PAM Transport, and others use low-wage student trainees to perform highly dangerous team driving exercises that would otherwise demand premium pay for experienced drivers. RWIT has observed that trucking companies point to the nationwide truck driver shortage to justify their focus on hiring entry-level drivers who must be trained and are thus subject to predatory TRAs.³⁸ In this way, TRA misuse in the trucking industry can artificially depress wages by trapping workers in entry-level positions with low pay for long periods of time, despite performing sophisticated or high-skilled driving exercises that would normally demand higher pay.

In RWIT's experience, the amount that these companies charge former employees to repay their training is frequently inflated and not reasonably related to actual value. Between January 2016 and July 2020, CRST faced three class action lawsuits in Massachusetts and Florida, based on its TRA practices.³⁹ CRST violated Iowa's state usury laws by charging eighteen percent interest rates on the TRAs it imposed on drivers, and violated other state and federal wage laws.⁴⁰ CRST charged drivers \$6,500 for training, but paid truck driving schools it partnered with only \$1,400 to \$2,500 per trainee.⁴¹ Although such lawsuits can provide limited relief to the drivers who challenge their TRAs, they do not benefit every driver subject to unfair provisions and do not prevent TRAs from being misused in the future.

Finally, RWIT has anecdotal evidence from our members of the disparity in pay between trucking companies that use TRAs and those that do not. Our records show that companies without TRAs and with better reputations among drivers pay about 59 cents per mile to 62 cents per mile, as opposed to some of the worst actors with exploitative TRAs paying 14 cents per mile to 57 cents per mile.⁴² This data is consistent with our experience that TRAs can depress wages

³⁶ *Trapped at Work*, *supra* n. 1, at 18; Semuels, *supra* n. 35.

³⁷ *Trapped at Work*, *supra* n. 1, at 19; Semuels, *supra* n. 35.

³⁸ Third Am. Compl. at ¶¶ 90-92, *Cervantes*, No. 20-cv-00075; *see also* Alana Semuels, *The Truck Driver Shortage Doesn't Exist. Saying There is One Makes Conditions Worse for Drivers*, *Time* (Nov. 12, 2021), <https://time.com/6116853/truck-driver-shortage-supply-chain/>.

³⁹ On January 21, 2016, named plaintiff Juan Carlos Montoya brought a lawsuit against CRST Expedited, Inc. and CRST International, Inc. (collectively "CRST") challenging CRST's wage payment practices and practices relating to post-employment debt collection, etc. Compl., *Montoya v. CRST Expedited, Inc.*, No. 16-cv-10095 (D. Mass. Jan. 21, 2016). On June 12, 2020, named plaintiffs Larry Wimbish and Rinel Tertilus brought a lawsuit against CRST challenging CRST's practice of not paying drivers in Florida for attending orientation. Compl., *Wimbish v. CRST Int'l, Inc.*, No. 16-2020-CA-003424 (Fla. 4th Cir. June 12, 2020). On July 17, 2020, named plaintiffs Maurice Smith, Jeal Paul Bricault Jr., Jose Torres Rosado, Austin Coddington, and Kevin Hamilton brought a lawsuit against CRST challenging CRST's wage payment practices, postemployment debt collection practices, and enforcement of its non-competition provision. Compl., *Smith v. CRST Expedited, Inc.*, No. 20-cv-11353 (D. Mass. July 17, 2020).

⁴⁰ *CRST's Driver Training Program Violates the Law*, Fair Work (June 1, 2020), <https://www.fairworklaw.com/cases/driver-training-program-violates-state-and-federal-law/#:~:text=Chief%20Judge%20Saris%20determined%20that,the%20Iowa%20Consumer%20Frauds%20Act.>

⁴¹ *Id.*

⁴² This data was sourced from an analysis performed by Student Borrower Protection Center, and is on file with the organization.

and wage growth in the trucking industry. The data also demonstrates that TRAs serve as a high barrier to departure, because in some instances it may take a driver locked into a TRA up to six months of low wages to “afford” to quit and repay their employer for training. As such, TRAs lock our drivers into exploitative, harmful working conditions.

III. TRA misuse also deters truck drivers from speaking out about harms they experience on the job, like sexual harassment and assault, and can prevent them from leaving unsafe working conditions.

In addition to stifling worker mobility and competition, TRAs can prevent survivors of sexual harassment and assault from speaking out about being harmed during training programs, or from leaving unsafe working conditions. The prospect of losing one’s job can be enough to silence many survivors; the looming threat of TRA-based debt makes speaking out about sexual assault even more dangerous and consequential, and can keep survivors locked in with employers whose unsafe training practices led directly to their physical harm.⁴³

For trucking trainees who survive sexual harassment and assault, reporting their harm can cost them their job, particularly when the harm was inflicted by a co-driver tasked with training and reviewing them. The trainer’s recommendation and documentation directly influence whether or not a trainee passes and becomes a truck driver. In RWIT’s experience, intensive “over the road” or “long haul” training can be the site of various assaults, and trainees may be unaware of the logistics of training before being recruited. According to RWIT members, “over the road” training can involve living and working with another student trainee or trainer, in a space comparable to a small walk-in closet, utilizing bunk beds for multiple weeks at a time without additional supervision.⁴⁴ The threat of TRA debt chills workers’ ability and willingness to speak up about the harms they experience. Beyond that, TRA debt itself compounds the harm to the driver who is effectively forced out of a job due to unsafe working conditions, or is subject to retaliatory firing for lodging a complaint.

In one case, a female CRST trainee reported being raped in a truck by her trainer at the start of her ten-month training program.⁴⁵ After no action was taken against the alleged assailant, the female trainee was effectively terminated by CRST in retaliation for making her complaint. Upon her termination, she received a bill for \$9,000 due to her TRA.⁴⁶ In 2015, former CRST drivers attempted to bring a class action lawsuit against the company for systemic gender discrimination, including retaliation for complaints about sexual harassment in the workplace.⁴⁷ In that case, the lead attorney stated: “One of the most common complaints is from women

⁴³ See also Alana Semuels, *There’s a Problem With How We Train Truckers*, Time (Feb. 7, 2022), <https://time.com/6144516/truck-driver-training/>.

⁴⁴ Third Am. Compl. at ¶ 86, *Cervantes*, No. 20-cv-00075.

⁴⁵ David M. Ring, *Natalie Weatherford and John Taylor Secure \$5 Million Settlement in Rape Case Against CRST Trucking*, Taylor Ring (May 11, 2021), <https://www.tayloring.com/blog/natalie-weatherford-and-john-taylor-secure-a-record-setting-5-million-settlement-in-rape-case-against-crst-trucking/>.

⁴⁶ *Id.*

⁴⁷ See Halley Freger, *Sexual Harassment Lawsuit Against Long-haul Trucking Company in the Age of #MeToo*, ABC News (May 31, 2018), <https://abcnews.go.com/US/sexual-harassment-lawsuit-long-haul-trucking-company-age/story?id=55542493>

trainees, who make up the overwhelming majority of the class, who were made to understand that their passage—that is being able to move on to be drivers and receive actual pay—was dependent on providing sexual favors.”⁴⁸ In another civil suit, a C.R. England student trainee and rape survivor sued the company, alleging that, after she was assaulted by her instructor, the company demanded she either finish her training or repay the full amount of her driving school tuition.⁴⁹ Consistent with these examples, a 2022 Center for Public Integrity report showcases a pattern of workplace violence and sexual assault in the trucking industry, including both high incidents of assault during training programs and the harmful role TRA debt plays in the aftermath of these assaults.⁵⁰

The experiences of Falyssa Mayhew, a RWIT member, demonstrate the full spectrum of harm TRAs can inflict on truck drivers. Falyssa pursued truck driving as a new career opportunity. She could not afford to pay for her own training, so offers of “company-sponsored training” from trucking companies were appealing. She contacted C.R. England about employment, and began orientation in August 2018 in Utah. Orientation was conducted with a large group of students, and included sexual harassment training videos. C.R. England staff passed out employment contracts in the group setting, and glossed over the contract’s one-year TRA provisions. Falyssa felt pressured to speed read and sign the documents quickly to continue with orientation. Additionally, C.R. England paid for Falyssa’s bus ticket to their campus, which added more pressure. Falyssa was provided a copy of the contract, but lost track of her copy. During training with an inexperienced instructor, Falyssa encountered an issue on the road while her trainer was taking his required break.⁵¹ Her trainer stepped in to assist, but instead of handing her back the wheel, he drove “on her clock,” which is both dangerous and violates federal regulations. Falyssa reported the incident to C.R. England, and the trainer was terminated. Falyssa was next placed with a trainer who began making sexually inappropriate and explicit comments about her within her earshot, which made her deeply uncomfortable. Falyssa endured this discomfort in order to complete that phase of training. Falyssa was upgraded to the next phase of training, which took place in California at a hotel with other trainees. During this phase of training, a male student showed Falyssa a photo of his genitals without her consent. The same male student attempted to grope her in the hotel lobby, with the incident caught on camera. Falyssa reported the incident to C.R. England, which took no action against the male trainee. Falyssa resigned from C.R. England in October 2018 due to the company’s refusal to take her

⁴⁸ *Id.*

⁴⁹ The assault in this case happened mere hours after the student trainee met her instructor, and occurred in the sleeping area of the very same truck to be used for training. Gretel Kauffman & Annie Knox, *Utah Woman Raped by Instructor Sues C.R. England Trucking Company*, *Deseret News* (June 18, 2019), <https://www.deseret.com/2019/6/18/20675905/utah-woman-raped-by-instructor-sues-c-r-england-trucking-company>; see also Cristina Flores, *Truck Driving Student Sues Company After She Was Raped*, 2KUTV (June 17, 2019), <https://kutv.com/news/local/truck-driving-student-sues-company-after-she-was-sexually-assaulted>.

⁵⁰ Alexia Fernández Campbell & Claire Molloy, *Attacked Behind the Wheel*, *Ctr. for Pub. Integrity* (Dec. 11, 2022), <https://publicintegrity.org/labor/female-drivers-attacked-behind-the-wheel/>; see also Scripps News, *In Real Life: Attacked Behind the Wheel*, YouTube (Dec. 11, 2022), <https://www.youtube.com/watch?v=CLrweVz7Fe0>.

⁵¹ According to the Federal Motor Carrier Safety Administration’s Hours of Service Regulations, property-carrying drivers must take a 30 minute driving period when they have driven for a period of eight cumulative hours. See Fed. Motor Carrier Safety Admin., *Summary of House of Service Regulations*, <https://www.fmcsa.dot.gov/regulations/hours-service/summary-hours-service-regulations> (last updated Mar. 28, 2022).

sexual harassment experience seriously. When she resigned, no one from C.R. England reminded her of the TRA provisions in her contract.

Falyssa applied to another trucking company called U.S. Xpress after leaving C.R. England, but she was informed that U.S. Xpress had an agreement with C.R. England that they would not hire drivers with unpaid TRA debt.⁵² In February 2019, Falyssa applied to Covenant Transportation and made it to the orientation phase before finding out that C.R. England had put a “not eligible for rehire” notation on her record. As a result, Covenant Transportation declined to hire her after she had already completed a road test, a drug test, and filled out paperwork. Falyssa eventually left the trucking industry altogether.

In March 2020, Falyssa was notified that an unpaid debt of \$6,000 appeared on her credit report from a collection agency called Lockhart, Morris, and Montgomery.⁵³ The debt disappeared from her credit report shortly after, until it reappeared in July 2022. Falyssa was able to have the unpaid debt removed from her credit report, solely thanks to the intervention of the Consumer Financial Protection Bureau. In RWIT’s experience, trucking companies that use TRAs rely on the isolated nature of long haul driving, which prevents drivers from learning about consumer protection options and reporting systemic issues. Falyssa’s positive resolution and removal of debt are extremely uncommon in RWIT’s experience.

IV. We recommend that the FTC include a categorical ban on TRAs in the Final Rule, or, in the alternative, flesh out its proposed reasonableness test to reach anti-competitive TRA abuses across industries.

The Proposed Rule is a significant step in the right direction and will reach some especially egregious TRAs. To further enhance workers’ ability to leave a bad job, we recommend that any Final Rule be even more robust, by including more specific language about TRAs in its definitions section and not relying on functional tests to reach TRAs on a case-by-case basis. Instead, we recommend that the FTC categorically ban TRAs that are functionally equivalent to non-compete clauses.

A. Definitions

In the Proposed Rule’s preamble, the FTC names TRAs explicitly as one category of contract provisions that restrict what workers can do after they leave a job.⁵⁴ However, the FTC states that the definition of non-compete clause “would generally not include these types of covenants, because these covenants generally do not prevent a worker from seeking or accepting work with a person or operating a business after the conclusion of the worker’s employment with the employer.”⁵⁵ The FTC also states that these types of covenants also generally do not prevent

⁵² See also *Curtis Markson, et. al. v. CRST International, Inc., et. al.*, No. 5:17-cv-01261-SB (C.D. Cal. 2022). In this case, which settled in late 2022 for almost ten million dollars, major trucking companies CRST International, CRST Expedited, C.R. England, Western Express, Schneider National Carriers, Southern Refrigerated Transport, Covenant Transport, Paschall Truck Lines, and Stevens Transport were sued by truck drivers alleging that the companies had colluded to not hire drivers who owed TRA debt to other companies.

⁵³ *Lockhart, Morris & Montgomery, Inc.*, <https://www.lmmine.com/> (last visited Apr. 11, 2023).

⁵⁴ 88 Fed. Reg. at 3509.

⁵⁵ *Id.*

a worker from competing with their former employer altogether or prevent other employers from competing for that worker's labor. As described in detail in the sections above, TRAs in the trucking industry do, indeed, prevent workers from competing with former employers and prevent other employers from competing for labor because they suppress worker mobility by dangling devastating debt over workers' heads for varying periods of time. The same general assumptions that can be made of non-disclosure agreements ("NDAs"), as the FTC does in the Proposed Rule, cannot be made of TRAs because of how TRAs generally function in the real world.

The FTC is rightfully concerned that "some employers may seek to evade the requirements of the Rule by implementing restrictive employment covenants other than non-compete clauses that restrain such an unusually large scope of activity that they are *de facto* non-compete clauses."⁵⁶ Under proposed § 910.1(b)(2), such functional equivalents would be non-compete clauses for purposes of the Rule.⁵⁷ Proposed § 910.1(b)(2) would state that the term non-compete clause includes a contractual term that is a *de facto* non-compete clause because it has the effect of prohibiting the worker from seeking or accepting work with a person or operating a business after the conclusion of the worker's employment with the employer.⁵⁸

Nonetheless, employers that use TRAs to suppress worker mobility and inflate the true cost of training needn't implement provisions that restrain an "unusually large scope of activity"; TRAs, by their nature, restrict such a large scope of post-employment activity such that they should be explicitly banned by any final Rule. They are, in almost all cases of which RWIT is aware, the functional equivalents of non-compete clauses because TRAs prevent workers from leaving employers entirely, or for lengthy periods of time to avoid incurring debt. Therefore it is not enough to include TRAs in the Proposed Rule via a functional test that clarifies the definition of non-compete clauses. Instead, the FTC should name and ban TRAs explicitly in its definition of non-compete clauses for the purposes of enforcement of the Proposed Rule once final.

B. The Necessity of a Categorical Ban on TRAs

The FTC's detailed reasoning for implementing a categorical ban on non-compete clauses can be applied to TRAs in almost every respect.⁵⁹ The FTC proposes a ban on non-compete clauses "because, fundamentally, non-compete clauses obstruct labor market competition through a similar mechanism for all workers."⁶⁰ As functional non-compete clauses, TRAs obstruct labor market competition by blocking "workers in a labor market from switching to jobs in which they would be better paid and more productive."⁶¹ TRAs and their accompanying threat of debt harm workers subject to them by restricting their mobility, and they harm other workers because jobs that may be a better fit for those workers are filled with workers trapped by TRAs. TRAs also harm other employers in the market because they diminish the pool of available workers from which to hire, if a significant number of workers are trapped by TRAs. Regardless of a worker's income or job status, TRAs, as functional non-compete clauses, block workers

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ 88 Fed. Reg. at 3512

⁶⁰ *Id.*

⁶¹ *Id.*

from switching jobs and restricting the opportunities of all workers in that labor market. Furthermore, experience has shown that employers switch to functionally equivalent restraints (like TRAs, liquidated damages clauses, and lengthy notice periods⁶²) when traditional restrictions on labor mobility like non-competes are banned.⁶³

C. The “Reasonably Related Costs” Test

If the FTC decides against a categorical ban on TRAs, or TRAs in the trucking industry, we strongly recommend the FTC elaborate further on its proposed reasonableness test. The FTC provides two examples of *de facto* non-compete causes based on case law: one of which is a TRA where the required repayment is not “reasonably related” to the training costs borne by the employer.⁶⁴ The FTC also stressed that the examples are not exclusive, and noted that other TRAs and similar provisions may constitute *de facto* non-compete clauses under factual scenarios other than those outlined in the examples.⁶⁵

As drafted, the reasonableness test might not sufficiently protect workers in practice. Workers, before agreeing to and signing a TRA, will typically not have sufficient information to determine if the stated cost of their training is indeed “reasonable.” In order to find out whether training costs are reasonable enough to justify TRA-based debt, workers would have to individually litigate each of their contracts, or attempt class action litigation, to determine whether their employer artificially inflated the cost of their training. As discussed above, in the context of just one federal lawsuit against CRST, evidence demonstrated that CRST charged drivers \$6,500 for training while only paying truck driving schools it partnered with \$1,400 to \$2,500 per trainee.⁶⁶ The lengthy, cost-prohibitive, and labor-intensive nature of litigation, combined with the pressure of looming debt, will have a chilling effect on worker mobility if the Proposed Rule requires a reasonableness test to reach most TRAs. The reasonableness test as drafted is too grounded in the circumstances of an individual worker and their contract.

We suggest the FTC elaborate, in detail, on how courts should weigh certain enumerated factors to determine if the costs of repayment under a given TRA are “reasonably related” to the employer’s purported training costs in the Final Rule. The Final Rule should lay out the specific factors to be considered, and should assign weight to each factor such that courts are given clear guidance as to how to adjudicate these cases in a uniform manner. One such factor should be the worker’s ability to repay the cost of training. Considering that TRA usage has grown in industries where workers earn minimum or low wages, it may take lengthy periods of time for workers to save up enough of their wages to repay even relatively low TRA debt should they

⁶² Eidelson & Mider, *supra* n. 8; 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/>.

⁶³ Peter Norlander, *New Evidence on Employee Noncompete, No Poach, and No Hire Agreements in the Franchise Sector 6*, Wash. Ctr. for Equitable Growth (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>; Eidelson & Mider, *supra* n. 8; Zilber, *supra* n. 61.

⁶⁴ 88 Fed. Reg. at 3509-10.

⁶⁵ 88 Fed. Reg. at 3510.

⁶⁶ *CRST’s Driver Training Program Violates the Law*, *supra* n. 40.

anticipate quitting. This means many workers have little opportunity to exit on their own terms, and accordingly limits competition. These factors are necessary to provide clarity and consistency across the industry. Allowing individual adjudications to fill in the details of this reasonableness test may lead to judicial inconsistencies, wherein workers are not sure what the outcome of their TRA dispute may be depending on what jurisdiction they are in. Relying on the courts to resolve individual disputes does not protect workers from harm, nor does it quell the threat of the anti-competitive effects of TRAs in various industries like trucking.

We also encourage the FTC to include additional examples of TRAs that would be considered *de facto* noncompetes, including the TRAs at issue in the lawsuits described earlier in this comment. One of the Proposed Rule's examples with respect to TRAs is based on case law regarding a liquidated damages provision, not a TRA. The FTC cites *Wegmann v. London*, in which the U.S. Court of Appeals for the Fifth Circuit found that a liquidated damages provisions in a partnership agreement were *de facto* non-compete clauses "given the prohibitive magnitudes of liquidated damages they specify."⁶⁷ But as stated above, the content of TRAs need not reach certain magnitudes or a certain restrictive scope to accomplish what non-compete clauses do—by their very nature, TRAs suppress worker mobility and competition by trapping workers with their current employers until their TRA period lapses. Any Final Rule should do more than hint at the functionality of TRAs by using an imperfect example of a liquidated damages clause operating as a *de facto* non-compete clause.

V. Conclusion

Thank you for your consideration of our comments. We encourage the FTC to finalize the Proposed Rule promptly, including the additional content, points of clarification, and examples we have provided. If you have any questions, please contact our counsel for submission of this comment, Breanne Palmer, Democracy Forward Foundation, bpalmer@democracyforward.org.

Sincerely,

Desiree Ann Wood
President/Truck Driver
REAL Women in Trucking

⁶⁷ *Wegmann v. London*, 648 F. 2d 1072, 1073 (5th Cir. 1981); 88 Fed. Reg. at 3484, 3509-10