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"Just When I Thought I Was Out . . . .": Post-Employment Repayment Obligations

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"Just When I Thought I Was Out . . . .":[1] Post-Employment Repayment Obligations

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I. Introduction

The common law doctrine of "employment at will" has dominated U.S. employment law for over a century.[2] Pursuant to this concept, an employer may discharge an employee at any time for any reason, or for no reason at all.[3] An employee may similarly resign at any time for any reason, or for no reason at all.[4] Despite the rule's facial even-handedness,[5] it operates against the background of "the deeply rooted conception of the employment relation as a dominant-servient relation rather than one of mutual rights and obligations."[6] Within that relationship, "the employer [has] the right to impose any requirement on the employee, give

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2. *See, e.g.*, KAREN ORREN, BELATED FEUDALISM 85 (1991) ("The principle of hiring 'at will,' under which either party could terminate the contract for any reason, began to take hold in the 1880s."); *see also, e.g.*, Richard A. Bales, *Explaining the Spread of At-Will Employment As an Interjurisdictional Race to the Bottom of Employment Standards*, 75 TENN. L. REV. 453, 457 (2008) ("[S]cholars seem to agree that most American states did not formally begin to adopt the at-will rule until Horace Gay Wood, a New York State treatise writer, published Master and Servant in 1877."); Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 67 (2000) (citing Wood's treatise as origin of the rule); Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 704–10 (1994) (identifying "Maine (1851) and Mississippi (1858)" as "the earliest common law adopters" and noting the appearance of a "weak version" in 1860s civil codes); Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: A Historical Analysis*, 5 COMP. LAB. L.J. 85 (1982) (discussing judicial adoption of at-will rule in late 19th century); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 126 (1976) (citing adoption of rule from Wood's treatise by New York Court of Appeals in 1895*). But see* Deborah A. Ballam, *Exploding the Original Myth Regarding Employment-At-Will: The True Origins of the Doctrine*, 17 BERKELEY J. EMP. & LAB. L. 91, 98 (1996) (arguing at-will "doctrine has been firmly embedded in our employment practices since colonial days").

3. *See* Summers, *supra* note 2, at 65 ("Men must be left without interference . . . to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se." (citing *Payne v. Western & Atl. R.R.*, 81 Tenn. 507 (1884))); *see also* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 947–48 (1984) (same).

4. *See supra* note 3 and accompanying text.

5. *See* Epstein, *supra* note 3, at 953–77 (arguing that the at-will rule protects individual liberty and promotes mutual gains in utility for employees and employers alike).

6. Summers, *supra* note 2, at 78.

any order and insist on obedience, [and] change any term of employment," backed by the ultimate right to "discard the employee at any time."[7]

Not content with the domination they already enjoy under this arrangement, employers have sought to enhance their control by placing restrictions and conditions on the very element that makes at-will employment mutually beneficial and protects workers from employer coercion: The right to quit.[8] One longstanding approach has been to limit employees' choice of alternative employment through noncompete covenants. Historically limited to high-level executives or employees with access to proprietary information, employers have increasingly imposed noncompetes on rank-and-file, low-wage workers.[9] At least in theory, the legal limits on their enforcement temper the effectiveness of noncompetes as barriers to exit.[10] In most

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7. *Id.*; *see* Elizabeth Anderson, Private Government (Mar. 4–5, 2015), *in* THE TANNER LECTURES ON HUMAN VALUES, Mar. 2015, at 94, 105:

> For the most part . . . at-will employment . . . grants the employer sweeping legal authority not only over workers' lives at work but also over their off-duty conduct. Under the employment-at-will baseline, workers, in effect, cede *all* of their rights to their employers, except those specifically guaranteed to them by law, for the duration of the employment relationship.

(emphasis added); *see also* Feinman, *supra* note 2, at 132–33 ("Employment of will is the ultimate guarantor of the capitalist's authority over the worker.").

8. *See* Epstein, *supra* note 3, at 957, 966–67, 973–76 (arguing that the freedom to quit at-will gives employees countervailing control over, and protection against, abuse by employers); *see also* Alchain & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 777 (1972) (arguing that employment relations are not based on hierarchical power and control by employers over employees, but on "terms that must be acceptable to both parties . . . [because] neither the employer nor the employee is bound by any contractual obligations to continue their relationship").

9. Alan B. Krueger & Eric A. Posner, *A Proposal for Protecting Low-Income Workers from Monopsony and Collusion*, HAMILTON PROJECT, 6–7 (Feb. 2018), http://www.hamiltonproject.org/assets/files/protecting_low_inncome_workers_from_monopsony_collusion_krueger_posner_pp.pdf (on file with the Washington & Lee Journal of Civil Rights & Social Justice) (noting recent example of fast food workers bound by noncompetes and citing research indicating "12 percent of low-income workers" and "one in five workers" overall subject to noncompetes in their current jobs, with nearly one in four subject to a noncompete from either their current or past employment).

10. *See* Catherine L. Fisk, *Reflections on the New Psychological Contract and the Ownership of Human Capital*, 34 CONN. L. REV. 765, 782–83 (2002) (highlighting use of noncompetes in California, despite state law prohibiting their enforcement); *see also* COUNCIL OF ECON. ADVISORS, LABOR MARKET MONOPSONY:

jurisdictions, noncompetes are subject to judicial scrutiny under "the 'rule of reasonableness,' requiring employers to establish both a legitimate property interest deserving protection and that the restraint is reasonable in scope in consideration of the harm to the employee and effect on the public."[11] In a few states, employee noncompetes are generally unenforceable.[12]

More recently, employers have adopted a different tactic: Demanding payment from departing employees in the form of reimbursements for commission and bonus payments, training expenditures, and relocation allowances.[13] These post-employment financial obligations force departing employees to forfeit compensation they have received or to bear expenses that have traditionally been understood as part of the employer's cost of doing business.[14]

An example of such provisions recently drew media attention in connection with a controversy over politically charged statements that Sinclair Broadcast Group required news anchors at its television stations to read on air.[15] The employees' contracts obligated those who voluntarily quit outside of a limited time

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TRENDS, CONSEQUENCES, AND POLICY RESPONSES 8 (2016) (observing that noncompetes "are prevalent even in States where they are not enforced" and that "in California, which does not generally enforce non-compete agreements, 22 percent of workers report that they have signed one").

11. Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility*, 2006 MICH. ST. L. REV. 963, 965 n.5 (2006).

12. *See* Cal. Bus. & Prof. Code § 16600 (2018) (voiding contracts that restrict individuals from engaging in a lawful profession, trade, or business); Mont. Code Ann. § 28-2-703 (West 2018) (same); N.D. Cent. Code § 9-08-06 (West 2018) (providing limited exceptions to the general prohibition of contracts that restrict individuals from engaging in a lawful profession, trade, or business); Okla. Stat. Ann. § 217 (West 2018) (same).

13. *See, e.g.*, Jordyn Holman & Rebecca Greenfield, *Sinclair Employees Say Contracts Make It Too Expensive to Quit*, BLOOMBERG (Apr. 3, 2018), https://www.bloomberg.com/news/articles/2018-04-03/sinclair-employees-say-their-contracts-make-it-too-expensive-to-quit (reporting on the constricting effects of the Sinclair Broadcast, Inc. employment contracts on employees) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

14. *See id.* (same).

15. *See* Stephen Battaglio & Matt Pearce, *Backlash Grows over Sinclair Broadcast Group's 'Must-Run' Conservative Content on Local TV Stations*, L.A. TIMES (Apr. 5, 2018), http://www.latimes.com/business/hollywood/la-fi-ct-sinclair-promo-20180405-story.html (describing the tension at Sinclair TV stations over the forced presentation of "prepackaged reports" reflecting conservative views) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

window, or were fired for cause, to "immediately pay to Employer as liquidated damages (and not as a penalty) an amount equal to forty percent (40%) of Employee's then annual compensation" for a period equal to "the greater of (a) twenty-five percent (25%), or (b) the percentage of the current contract year remaining after such termination."[16] The clause recites that the payment is "[i]n consideration of Employer's expenditure of considerable money, time and effort in training, promoting and assimilating the Employee into Employer's business and operations."[17] Sinclair employees cited the contract provisions as a reason they acquiesced despite misgivings about the statements:

> All those people who are like, "I would quit," that's really easy for you to say. CNN put something out calling all the news anchors complicit or zombies or whatever yesterday, and I just think that portion of this is unfair. These jobs—they're very hard to come by. And if I quit, I owe the company 40 percent of my salary, plus a percentage of the [redacted] years remaining on my contract, plus any bonuses that they've paid to me and any reimbursements that they've paid to me. And they're going to take me to court for it. And in the time that I'm in court, I'm not employable.[18]

Some scholars have endorsed repayment obligations as a less-restrictive alternative to noncompetes.[19] But, the effect of such

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16. *See* Holman & Greenfield, *supra* note 13 (displaying excerpts from a Sinclair employment contract).

17. *Id.*; *see* Matt Pearce (@mattpearce), Twitter (Apr. 2, 2018, 9:54 AM), https://twitter.com/mattdpearce/status/980850915623108609 (providing an excerpt of a Sinclair Broadcast employee contract) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

18. Maxwell Strachan, *How to Hit Sinclair Where It Hurts, According to an Anonymous Sinclair Anchor*, HUFFINGTON POST (Apr. 4, 2018), https://www.huffingtonpost.com/entry/sinclair-as-told-to-anchor_us_5ac3f42ae4b0ac473edb0108 (on file with the Washington & Lee Journal for Civil Rights & Social Justice); *see We're Journalists at a Sinclair News Station. We're Pissed*, VOX (Apr. 5, 2018), https://www.vox.com/first-person/2018/4/5/17202336/sinclair-broadcasting-promo-deadspin ("We know some anchors tried to resist, but for many reasons, they felt pressured to read it. They had families to support. They literally couldn't afford to quit.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *see also* Holman & Greenfield, *supra* note 13 ("[C]urrent and former Sinclair employees said it was the potential financial penalty that had the greatest impact on those thinking of quitting.").

19. *See* Brandon S. Long, *Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements*, 54 DUKE L.J. 1295, 1297 (2005) (identifying repayment agreements as a more sensible alternative to noncompete

provisions on employees' ability to exercise their right to quit may be even more onerous.[20] Whereas a noncompete only precludes a departing employee from pursuing certain opportunities for a limited period of time, a repayment obligation may amount to what is often a substantial exit toll that operates regardless of the employee's reason for leaving.

Restraining employees' freedom of exit, whether through noncompetes or repayment obligations, raises both efficiency and equity concerns stemming from reduced job mobility and an attendant loss of employee bargaining power in the labor market.[21] To remedy these problems, repayment obligations, like noncompetes, should be subject to heightened scrutiny. At a minimum, employers asserting claims for reimbursement should be required to establish the amounts sought through evidence of actual expenditures or costs, rather than allowing employers to rely on boilerplate "liquidated damages" recitations. As with noncompetes under the "rule of reasonableness," employers should also be required to show that a repayment obligation protects a legitimate and genuine business interest, and that the terms are reasonably tailored to protect that interest without turning employees into indentured servants or restraining labor market competition.

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agreements); *see also* Katherine V.W. Stone, *Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721, 755 (2002) (describing training repayment agreements as an alternative to covenants not to compete).

20. *See* Alan B. Krueger & Eric Posner, *Corporate America Is Suppressing Wages for Many Workers*, N.Y. TIMES (Feb. 28, 2018), https://www.nytimes.com/2018/ 02/28/opinion/corporate-america-suppressing-wages.html (identifying monopsony power as the cause of employment wages stagnancy) (on file with the Washington & Lee Journal for Civil Rights & Social Justice).

21. *See id.* ("When employers exercise monopsonistic power, wages are suppressed, jobs are left unfilled, and economic growth suffers."); *see also* COUNCIL OF ECON. ADVISORS, *supra* note 10, at 2–3 (discussing the deleterious effect of labor market monopsony on economic efficiency and inequality).

II. Types of Post-Employment Obligations

A. Relocation Incentives

Employers have long provided incentives for out-of-town recruits in the form of relocation bonuses or other payments to cover the cost of moving to the employer's home base. Such incentives often require repayment if the employee voluntarily leaves within a certain period of time. These arrangements, seemingly reasonable on their face, and usually involving relatively modest sums, have proven to be a gateway to more onerous post-employment obligations.

The case law on recoupment of relocation incentives is sparse, likely because the overwhelming majority of employees have no employment contract, most employment contracts contain no relocation bonus, most employees stay for the requisite period of time, or employers do not pursue reimbursement claims that may be worth only a few thousand dollars. Indeed, in most of the reported cases involving moving bonuses, the employer raises the issue as a counterclaim or defense to claims brought by the employee.

For example, in *Fondel v. Grumman Aerospace Corp.*,[22] the plaintiff sued his former employer for race discrimination.[23] The employer then asserted a counterclaim based on a "Relocation Reimbursement Agreement" that plaintiff signed at hire:

> I agree that if, before the expiration of twelve months from the date of hire I . . . vacate the position without authority, or if I am removed for cause, I will, upon demand repay to the said Grumman Aerospace Corporation a sum of money equal to that paid to or for me for transportation and relocation expenses for myself and my dependents.[24]

The trial court dismissed the plaintiff's discrimination claim and found for the employer on the relocation reimbursement counterclaim.[25] Affirming that judgment, the appellate court found

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22. 884 F.2d 657 (2d Cir. 1989).

23. *See id.* at 659 (addressing allegations of racial discrimination and concluding that they were without merit).

24. *Id.* at 658.

25. *See id.* (citing Silberman v. Penn General Agencies of New York, Inc., 63 A.D.2d 929, 406 (1978)) ("Al]though the plaintiff was found not to have committed such acts of misconduct as disqualified him from benefits, he still could be found

that plaintiff was dismissed for cause and that the employer was entitled to reimbursement of $7,861.66 for relocation expenses.[26]

Similarly, in *Ebenstein v. Ericsson Internet Applications, Inc.*,[27] a former employee brought an action for severance benefits, and the employer asserted a counterclaim for relocation expenses.[28] The court dismissed the employee's claim and found for the former employer on the counterclaim, concluding that the employee's relocation expenses were paid "on the express condition that he remain with the company for a period of one year."[29] The court awarded documented expenses which the employer estimated as $74,346.59.[30]

In these cases, the employees raised no fundamental objections to the relocation expense provisions.[31] Rather, the main dispute is over the contractual conditions regarding when termination of employment triggers the obligation.[32] Similarly, in *Conagra Foods, Inc. v. Shipp*,[33] the agreement provided that the employee must reimburse the employer for 100 percent of relocation expenses if he "voluntarily left employment" within the first year, and 50 percent if he did so within the second year.[34] The employee argued that the termination of his employment was

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to have been sufficiently deficient in his job performance to justify a 'for cause' termination.").

26. *See id*. at 658–59 (same).

27. 263 F. Supp. 2d 636 (E.D.N.Y. 2003).

28. *See id*. (addressing an employee claim against a leading provider of mobile communications systems).

29. *Id*. at 643.

30. *See id.* at 643–44 (explaining that the discrepancies in the expense estimates required further appropriate documentation detailing the exact amounts).

31. *See Fondel*, 884 F.2d at 658 (finding no opposition to the terms of the employee relocation policies); *see also Ebenstein*, 263 F. Supp. 2d at 638 (same).

32. *See Fondel*, 884 F.2d at 659 (focusing on the terms of the employee repayment agreement); *see also Ebenstein*, 263 F. Supp. 2d at 643 (same).

33. No. 8:01CV647, 2003 WL 431613, at *2 (D. Neb. Feb. 24, 2003) (addressing allegations of an involuntary termination and an employee's options under a management incentive plan).

34. *See id.* (reporting the parameters of an employee's voluntary exit from the company).

involuntary, and "offer[ed] no other defense to this case."[35] The court concluded that the issue should go to the jury.[36]

Counterclaims seeking the return of relocation incentives may not have been brought if the employees had not initially asserted their own claims from the start. The amounts involved were usually not huge, and it comports with most people's sense of fair play that the employer should not be stuck with the moving bill for a new hire who quits shortly after getting the free trip.[37]

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35. *Id.*

36. *See id.* at *3 (stating that the factual question existed as to whether the employer had constructively discharged the employee). Other courts have also faced similar questions. *See Niehous v. Arkansas Glass Container Corp.*, 154 F. Supp. 2d 1006, 1013 (S.D. Tex. 2001) (finding that a provision to pay back a $5,000 relocation incentive only applied if employee had quit, not if employer terminated employment); *see also Staples v. Sceppaguercio*, No. 0102641, 2002 WL 31957012, at *1, *6–7 (Mass. Super. Ct. Nov. 25, 2002) (resolving a material factual dispute as to whether claim for relocation expense recoupment was settled).

37. Nevertheless, courts have often invoked the at-will rule to deny claims of employees who have relocated at their own expense and inconvenience to accept employment and were then discharged shortly after starting the job. *See, e.g.*, *Kurtzman v. Applied Analytical Indus., Inc.*, 493 S.E.2d 420, 423–24 (N.C. 1997) (concluding that a plaintiff's change of residence did not constitute additional consideration that would make an otherwise at-will employment into a for-cause employment); *see also, e.g.*, *Poff v. W. Nat'l Mut. Ins. Co.*, 13 F.3d 1189, 1191 (8th Cir. 1994) (concluding that the employment was at-will and thus did not benefit from an implied covenant of good faith and fair dealing); *Whiteco Indus., Inc. v. Kopani*, 514 N.E.2d 840, 843 (Ind. Ct. App. 1987) (stating that forsaking prior employment and moving to new employer's city did not satisfy the statute of frauds); *Beyda v. USAir, Inc.*, 697 F. Supp. 1394, 1396–97 (W.D. Pa. 1988) (finding that the parties had specifically contracted for at-will employment and that an implied contract of employment for a reasonable period of time did not exist). In some cases, courts have recognized an exception to the at-will rule where an employee gave up secure employment and relocated or incurred other special hardship to accept a new job in response to the employer's special recruitment efforts or assurances of security, only to be fired a short time after starting. *See, e.g.*, *Cashdollar v. Mercy Hosp. of Pittsburgh*, 595 A.2d 70, 73 (Pa. Super. Ct. 1991) (stating that an employee giving up a secure position and uprooting her family constituted sufficient additional consideration to rebut the employment at-will presumption); *see also, e.g.*, *News Printing Co. v. Roundy*, 597 A.2d 662, 665 (Pa. Super. Ct. 1991) (concluding that an employee giving up secure employment, selling his home, and purchasing a new home to change jobs constituted sufficient additional consideration to overcome the presumption of at-will employment); *Romack v. Pub. Serv. Co. of Indiana*, 511 N.E.2d 1024, 1025 (Ind. 1987) (concluding that being recruited to leave, leaving permanent employment, purchasing a new home, and moving family constituted sufficient consideration to rebut the at-will employment presumption). Some courts have also allowed promissory estoppel claims for damages incurred in relocating, or making preparations to do so, in reliance of a job offer that was rescinded before the

Relocation reimbursement obligations may thus be a somewhat weak deterrent against quitting, but a stronger deterrent against suing the former employer after the employee has done so.[38] These provisions, though, served as the camel's nose in the tent.

B. Training Costs

Another, more troubling, form of repayment obligation is connected to employee training. When employers incur training costs, they run the risk that employees might leave, taking the knowledge and skills they have acquired with them.[39]

One way to reduce that risk is through a noncompete provision.[40] At least some courts have considered an employer's investments in employee training as a factor in determining the validity of noncompetes.[41] But, courts have commonly limited protection to situations where "employers . . . spend substantial

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employee started work. *See, e.g.*, *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981) (concluding that the appellant had a right to assume that he would be given a good faith opportunity to perform his employment duties). But, courts have denied similar claims where the employee was discharged shortly after starting the job, on the grounds that the promise of at-will employment had been fulfilled. *See, e.g.*, *Forrer v. Sears, Roebuck & Co.*, 153 N.W.2d 587, 590 (Wis. 1967) (concluding that the employment was at-will and could be terminated by either party once the promise of employment was fulfilled).

38. *See supra* notes 23–37 and accompanying text.

39. *See* Long, *supra* 19, at 1301 ("Much like any other investment, employers will invest in training only if they can recoup that investment by exploiting the skills of those who receive the training.").

40. *See* Matt Marx, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOC. REV. 695, 707 (2011) (describing noncompetes as a means of "asserting property rights over workers' skills"); *see also* Sampsa Samila & Olav Sorenson, *Non-Compete Covenants: Incentives to Innovate or Impediments to Growth*, 57 MGMT. SCI. 425, 429 (2011) (observing that enforceable non-compete provisions represent a form of employer property rights over employees' knowledge and relationships).

41. *See, e.g.*, Beckman v. Cox Broad. Corp., 296 SE 2d 566, 568–69 (Ga. 1982) ("In determining the legitimacy of the interest the employer seeks to protect, the court will take into account the employer's time and monetary investment in the employee's skills and development of his craft.").

sums for special training"[42] that "goes beyond what is usual, regular, common, or customary in the industry in which the employee is employed."[43] Such decisions essentially link the provision of special training to the likelihood that the employee is privy to the employer's trade secrets or other proprietary information.[44]

Even assuming employers have some legitimate interest in protection against employees who would take the training and run, noncompetes are too blunt an instrument for that purpose.[45] They do not distinguish between "training received at a firm [and] expertise developed during [the employee's] education or prior spans of employment."[46] Further, they may not be triggered until long after the employer has already recovered its expenses through increased employee productivity.[47] At least according to some commentators, training expense reimbursement agreements represent a better alternative:

> In contrast to traditional noncompetes, repayment agreements offer a sensible alternative whereby an employer's level of protection moves in lockstep with the cost of, and value derived from, the training. That is, repayment agreements more closely

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42. *See* Educ. for Living Seminars, Inc. v. Leone, 558 So. 2d 250, 253–54 (La. Ct. App. 1990) (citing Orkin Exterminating Co. v. Foti, 302 So. 2d 593, 597 (La. 1974)). (finding that $7,900 was a substantial expense for an Ontological Design Course).

43. Hapney v. Cent. Garage, Inc., 579 So. 2d 127, 132 (Fla. Dist. Ct. App. 1991); *see* Dyer v. Pioneer Concepts, Inc., 667 So. 2d 961, 964 (Fla. Dist. Ct. App. 1996) (finding that a "three-week training school," "on-the-job-training," and "company seminars and meetings" did not amount to "extraordinary training" protectable under a noncompete); *see also* Brunswick Floors, Inc. v. Guest, 506 SE 2d 670, 673 (Ga. App. 1998) (denying enforcement of noncompete where employer provided "minimal training" in the form of two off-site programs); Robbins v. Finlay, 645 P. 2d 623, 627 (Utah 1982) (identifying "extraordinary investment in the training or education of the employee" as factor bearing on reasonableness of a noncompete).

44. *See* Moore Business Forms, Inc. v. Foppiano, 382 S.E.2d 499, 501–02 (W.Va. 1989) (denying enforcement of a noncompete where the evidence failed to show that Moore provided the defendant with any unique or specialized training).

45. *See* Long, *supra* 19, at 1304 (describing policy rationales against noncompetes).

46. Marx, *supra* note 40, at 707.

47. *See Moore Business Forms*, 382 S.E.2d at 502 (noting that the employer "had more than recouped the value of its investment in the defendant's training in the almost fourteen years of his employment").

> approximate the degree of protection required to encourage employer investment in training.[48]

As with relocation costs, courts generally have upheld these provisions.[49] But, the reasoning and outcomes in training expense reimbursement cases have varied.[50]

One leading case in this area is *City of Oakland v. Hassey*.[51] Hassey signed a conditional offer with the Oakland Police Department, stating that his selection as a police officer trainee was on the condition that he repay the cost of his training (totaling $8,000) if he voluntarily terminated his employment before the end of five years.[52] The amount owed was prorated over the five year period: Hassey would owe 100% if he left after less than a year, 80% if he left before the end of the second year, 60% at the end of his third year, 40% at the end of his fourth year, and 20% up to the end of his fifth year.[53]

Hassey left after eleven months.[54] The City withheld his final paycheck and retirement balance, and brought an action against him for the balance of the training reimbursement ($6,619.92), a $100 collection fee, interest, attorney fees, and costs.[55] The appellate court held that "Oakland was permitted to seek reimbursement from police officers who gained the benefit of its training program at the Oakland Police Academy but did not stay with the police department long enough for Oakland to benefit from that training."[56]

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48. Long, *supra* note 19, at 1297.

49. *See, e.g.*, Heder v. City of Two Rivers, 295 F.3d 777, 780–81 (7th Cir. 2002) (likening repayment agreements to other valid employment incentives).

50. *Compare* USS-Posco Indus. v. Case, 244 Cal. App. 4th 197, 212 (Cal. Ct. App. 2016) (employing principles of contract law and finding that the noncompete did not lack consideration and was not unconscionable), *with Heder*, 295 F.3d at 777 (employing a law-and-economics approach).

51. 163 Cal. App. 4th 1477 (Cal. Ct. App. 2008) (concluding that former police officer had failed to establish that the conditional offer, reimbursement agreement, and repayment agreement were unlawful).

52. *See id.* at 1483 (describing the repayment terms set out in the agreement).

53. *See i*d. at 1484 (same).

54. *See id.* (noting the month that triggered the repayment obligation).

55. *See id.* (describing the City exercising its contractual rights under the repayment agreement).

56. *Id.* at 1488; *see* Gordon v. City of Oakland, 627 F.3d 1092, 1096 (9th Cir.

The Hassey decision was not so much an affirmative endorsement of recouping education costs, as it was an inability to find any legal rationale to stop recoupment.[57] Hassey's defense focused primarily on the Federal Fair Labor Standards Act[58] ("FLSA"), which sets a minimum hourly wage and requires time-and-a-half for overtime.[59] In a creative argument, Hassey contended that the reimbursement obligation violated the FLSA, because it meant that the city did not pay Hassey his wages "free and clear" and "unconditionally" as the statute requires.[60]

The court found no FLSA violation.[61] Citing settled FLSA law, the court noted that an employer may not pass along the costs of "board, lodging, or other facilities" if "to do so would cut into an employee's minimum wage."[62] In this case, however, the court concluded that "there is no evidence that deducting training costs from Hassey's paycheck as they were incurred would have reduced his wages below minimum wage."[63]

The court dismissively rejected Hassey's state statutory defenses, finding that California Labor Code sections 221, 222, and 223 deal with entirely distinct and inapplicable issues, none of which implicated recoupment.[64] In conclusion, the court held that

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2010) (allowing Oakland to attain reimbursement of training costs).

57. *See Hassey*, 163 Cal. App. 4th at 1490 ("[T]here was nothing unlawful about requiring Hassey to repay his training costs.").

58. *See* 29 U.S.C. §§ 201–19 (2018) (codifying the Fair Labor Standards Act of 1938).

59. *See Hassey*, 163 Cal. App. 4th at 1486 (stating that Hassey's first argument on appeal was that the reimbursement agreement violated the FLSA).

60. *See id.* at 1487 ("[Hassey] claims that while he was working under the reimbursement agreement, he was being paid under the 'condition' that he repay his training costs should he leave before the end of five years." (citing 29 C.F.R. § 531.35 (2007))).

61. *See id.* (finding the reasoning from *Heder*, 295 F.3d 777 (7th Cir. 2002), persuasive).

62. *See id.* at 1489 ("[I]f an employer passes along such an expense to the employee, the expense is deducted from the cash wage to determine compliance with the FLSA minimum.").

63. *See id.* at 1489–90 (stating that Hassey made $23.39 per hour during his final pay period with Oakland, but that there was no evidence of how much Hassey made during his training).

64. *See id.* at 1490–91 ("Three of the Labor Code provisions [Hassey] cites address proper payment of wages, an issue not contemplated by the agreement to repay Oakland for training expenses.").

"there was nothing unlawful about requiring Hassey to repay his training costs if he left the police department before five years."[65]

In *USS-POSCO Industries v. Case*, an "entry-level laborer and side trim operator" signed up for a "learner program" training him to become a "skilled maintenance technical electrical worker."[66] He agreed that if he voluntarily terminated his employment within 30 months of completing the program, he would reimburse the employer for a portion of the training.[67] Two months after completing the program, the employee quit.[68] The employer filed an action seeking $28,000, $1,000 for every month that remained in the employee's earnback period.[69] Affirming a judgment for the company, the appellate court found that the plaintiff

> voluntarily agreed to participate in the training program and understood UPI would front all the costs of the Learner Program and expected reimbursement of training costs if he chose to leave within 30 months of completing the program. This was an agreement concerning advanced educational costs . . . . Case quit UPI and went to work elsewhere, and he was entirely free to do so. He had also agreed to reimburse UPI for the costs it fronted for his advanced training, a benefit Case retained despite his departure.[70]

In *Heder v. City of Two Rivers*,[71] the collective bargaining agreement between the city and the firefighters' union provided that an employee leaving within three years after receiving paramedic certification training would reimburse the city for the cost of the training.[72] Judge Easterbrook offered a law-and-economics analysis to justify enforcement of the repayment obligation:

> Employees received considerable benefits as a result [of the collective bargaining agreement]: [P]aramedic training that will be useful for years to come, a 3% increase in

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65. *Id.* at 1490 (footnote omitted).

66. USS-Posco Indus. v. Case, 244 Cal. App. 4th 197, 20 (Cal. Ct. App. 2016).

67. *Id.*

68. *Id.*

69. *Id.* at 203.

70. *Id.* at 208.

71. *See* Heder v. City of Two Rivers, 295 F.3d 777, 782 (7th Cir. 2002) (finding the reimbursement agreement valid and requiring Heder to repay the full cost of training tuition and books).

72. *See id.* at 778 (describing the arrangement between the City and the firefighter union).

> compensation . . . for those who are certified paramedics, and extra compensation (at overtime rates) for the training time. Residents of Two Rivers received the benefit of a fire department more likely to save lives.[73]

As is often the case with law-and-economics analyses, the outcome is somewhat preordained by neglecting certain costs and benefits.[74] What about the psychological cost to the firefighter who hates Two Rivers but cannot afford what is effectively a resignation fee? What about the resulting assault on morale, a situation that the employer is less likely to address because it knows the firefighters cannot leave? What about the idea that, if the benefit provides an incentive for workers to sign up with Two Rivers, doesn't the repayment provide a disincentive? What about the firefighter who has no choice but to leave Two Rivers for whatever reason—such as a spouse's job relocation—and must take the hit?

The court's narrow economic analysis, in Gradgrind fashion, takes no account of such social and moral concerns.[75] The rationalizations defending these arrangements echo apologists for Cold War emigration restrictions imposed by the Soviet bloc countries, who claimed the measures were "intended to prevent their professionals, trained at the expense of their society, from being used to enrich other countries."[76] The apologists also stressed the average citizen's debt owed to the state, "which offered care

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73. *Id.* at 781.

74. *See id.* at 782 (equating the training costs to a loan and neglecting to require employers to factor in, among other things, the time value of money in the form of interest).

75. *See* CHARLES DICKENS, HARD TIMES 10 (Penguin Classics 1995):

> Thomas Gradgrind, sir. A man of realities. A man of facts and calculations. A man who proceeds upon the principle that two and two are four, and nothing over, and who is not to be talked into allowing for anything over. Thomas Gradgrind, sir—peremptorily Thomas—Thomas Gradgrind. With a rule and a pair of scales, and the multiplication table always in his pocket, sir, ready to weigh and measure any parcel of human nature, and tell you exactly what it comes to. It is a mere question of figures, a case of simple arithmetic.

See also Heder, 295 F.3d at 780 ("[The] repayment obligation shares with genuine restrictive covenants the feature that it makes changing jobs costly. But that is not enough to throw a contract out the window.").

76. ALAN DOWTY, CLOSED BORDER: THE CONTEMPORARY ASSAULT ON FREEDOM OF MOVEMENT 88, 114–16 (Yale Univ. Press 1989).

from birth, including subsidized education and training" and, thus, they justified the emigration restrictions as an "'education tax' with the state having a right to recoup its investment."[77]

California law offers some protection for employees in this regard, providing that "[a]n employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties."[78] As a state appellate court recently explained, "the broad purpose of Labor Code section 2802 is to require an employer to bear all of the costs inherent in conducting its business and to indemnify employees from costs incurred in the discharge of their duties for the employer's benefit."[79]

In that case, "[t]he City of Los Angeles . . . require[d] that all newly hired police officers attend and graduate from the Los Angeles Police Academy."[80] In response to the experience of having "many officers who graduated from the academy . . . leaving within a few years to join other law enforcement agencies," the Los Angeles City Council enacted a requirement that officers who served less than 60 continuous months following graduation would have to reimburse the city for the cost of police academy training.[81] The court held that an "acknowledgment" signed by police recruits agreeing to the repayment obligation was "entirely void."[82]

In interpreting Labor Code § 2802, the court adopted the analysis of the California Department of Industrial Relations, Division of Labor Standards Enforcement ("DLSE")[83] The DLSE distinguished between situations where state or local law imposes a licensure requirement for an occupation and those "where licensure is not actually required by statute or ordinance but the employer requires either the training or the licensing (or both) simply as a requirement of employment."[84] In the former situation,

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77. *Id.* at 114.

78. Cal. Labor Code § 2802(a) (West 2018).

79. *In re* Acknowledgment Cases, 239 Cal. App. 4th 1498, 1506 (Cal. Ct. App. 2015) (citing Edwards v. Arthur Andersen LLP, 44 Cal. 4th 937, 952 (Cal. Ct. App. 2008)).

80. *Id.* at 1501.

81. *Id.* at 1501–02.

82. *Id.* at 1508.

83. *See id.* at 1506 ("We agree with DLSE's analysis.").

84. *Id.* (quoting Cal. Dep't of Indus. Relations, Div. of Labor Standards Enf't,

the cost of obtaining a license—including any requisite training—is the employee's responsibility, and Labor Code § 2802 does not apply.[85] In the latter situation, by contrast, it is the employer who has imposed the training or licensure requirement for its own purposes, and thus under Labor Code § 2802 it is the employer who must pay.[86]

The police academy training that the city required included training for certification under state "peace officer standards and training (POST) legislation,"[87] and additional training related to "challenges that are present within the City of Los Angeles [such as] crime occurrences, crime patterns, [and] crime trends that are specific to the city."[88] California law requires POST certification for all police officers in the state.[89] Consequently, "basic POST certification training is not employer-mandated training as described by the DLSE, and is not an expense of discharging the duties of employment, within the meaning of Labor Code section 2802, but is rather an expense which is to be borne by the individual officer."[90] But the additional training that the city required, which was "instituted purely to satisfy the needs of the city, is employer-mandated training and therefore an expense which the city must bear."[91]

Opinion Letter on Cost of Licensure Training Not Usually Payable by Employer (Nov. 17, 1994)).

85. *See id.* ("There is generally no requirement that an employer pay for training leading to licensure or the cost of licensure for an employee." (internal citations omitted)).

86. *See id.* (explaining the application of Labor Code § 2802).

87. *Id.* at 1505.

88. *Id.* at 1507.

89. *Id.* at 1506–07

90. *Id.* at 1507 (citing Cal. Dep't of Indus. Relations, Div. of Labor Standards Enf't, Opinion Letter on Cost of Licensure Training Not Usually Payable by Employer (Nov. 17, 1994)). The officers challenging the reimbursement policy argued that, because the city required all new hires (including those who were already POST certified) to undergo POST certification training at the city's police academy, instead of permitting them to do so through other training programs approved by the state POST commission, that part of the training should also be treated as employer-mandated. *Id.* at 1508. The court did not address that argument, because "[t]he case was tried on an all-or-nothing basis—either the acknowledgment was enforceable or it was not" and "no evidence was admitted at trial which would permit apportionment of the cost of the academy between the basic POST certification training and the employer-mandated training." *Id.*

91. *Id.* Under this reasoning, if *Heder* had arisen in California, the

The decision, while favorable to the employees in that case, still leaves open the questions of whether the distinction between legally-mandated and employer-mandated training is reasonable, and how to draw the line.[92] One answer may turn on the portability of the training. If the employer requires special training for its own particular needs or interests, it may have little or no value for employees who leave. Whereas, if the training qualifies employees for a license or certification legally required for anyone engaged in an occupation, and which employees might otherwise receive elsewhere (either at their own or someone else's expense), there does seem to be some unfairness in having an employer foot the bill only to have the employee leave, depriving that employer of the benefit, and giving the employee (and their subsequent employer) a free ride. Moreover, under the latter scenario, at least in a competitive labor market, the new employer might be willing to pay some premium to recruit a trained and licensed employee—instead of having to provide the training itself—which could offset all or part of the employee's repayment obligation to the former employer.[93]

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repayment provision would have been invalid. In that case, the city "decided that all of its firefighters must be certified as paramedics" and then negotiated with the firefighters' union over the terms of payment for the requisite training. *Heder v. City of Two Rivers*, 295 F.3d 777, 778 (7th Cir. 2002). Because paramedic certification was not a general licensing or similar legal requirement for employment as a firefighter, Labor Code § 2802 would require the city to bear the cost and prohibit any reimbursement obligation.

92. A good example of a borderline question is the issue that the court declined to reach in the *Acknowledgement Cases*: Whether the city could require reimbursement for the POST certification portion of the training that all new hires were required to complete at the city's police academy, even though state law would allow them to take that training at other facilities (and indeed may already have done so before joining the LAPD). *See In re Acknowledgement Cases*, 239 Cal. App. 4th 1498, 1508 (Cal. Ct. App. 2015).

93. This notion is merely a variation on a premise Judge Easterbrook relies on in *Heder*. Employers who only hire employees who have already received training elsewhere, either because of the employer's preference or because of legal requirements, "must pay [for the training] indirectly, through a higher salary . . . ." *Heder*, 295 F.3d at 781. The implication appears to be that the additional pay compensates employees, not only for the enhanced value of their work by virtue of the training, but also for the cost they incurred in self-financed training. The premise that employers "must" pay a training premium is empirically questionable, especially in the context of monopsonistic labor markets. *See infra* Part 3.

Outside California, however, the outlook for employees is dim. One striking example is the recent case of *Park v. FDM Group (Holdings) PLC*,[94] in which the court dismissed a challenge to a creative scheme for labor exploitation.[95] Under this arrangement, new FDM recruits serve a training period lasting up to six months, during which they are unpaid.[96] They are then employed as "FDM Consultants" at an annual salary of $23,000 plus daily bonuses depending on the number of hours worked.[97] The "Employment Agreement" imposes "a Termination Fee of $30,000 if the Consultant leaves employment within the first year, and $20,000 in the event the Consultant leaves employment in the second year."[98] There is, however, no corresponding "minimum two-year commitment" on the part of FDM, which remains free to discharge the employee at will whenever it wishes.[99]

The plaintiff relied primarily on FLSA.[100] First, she contended that she should have been paid during the six weeks she was labelled a "Trainee."[101] FDM argued that she was not entitled to compensation for that period, pointing to a recitation in its "Training Agreement" that trainees are not employees.[102] Dismissing that claim, the court held that the Training Agreement dispelled any "expectation on plaintiff's part that she would receive compensation . . . ."[103]

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94. No. 16 CV 1520-LTS, 2017 WL 946298 (S.D.N.Y. Mar. 9, 2017).

95. *See id.* at *1 (addressing the alleged improper conduct of a business involved in recruiting and training individuals in information technology related skills).

96. *See id.* at *1 (describing the circumstances surrounding initial recruitment).

97. *See id.* (describing the consultant position).

98. *See id.* at *1–2 (describing the repayment obligations triggered at different exit times).

99. *See id.* at *3 ("[N]othing in this Agreement shall give rise to a relationship of employee and employer between you and FDM . . . .").

100. *See id.* ("Plaintiff asserts claims for minimum wage and overtime violations under the Fair Labor Standards Act . . . .").

101. *Id.*

102. *Id.*

103. *Id.* The court applied the "primary beneficiary" standard for assessing the legality of unpaid internships under the FLSA, recently adopted by the Second Circuit in *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 533–34 (2d Cir. 2016), and subsequently embraced by other federal courts and the Trump administration's Department of Labor. *See, e.g.*, *Benjamin v. B & H Educ., Inc.*, 877 F.3d 1139, 1147 (9th Cir. 2017); *see also, e.g.*, *Hollins v. Regency Corp.*, 867

Second, the plaintiff challenged the $20,000 "Termination Fee" as an unlawful kickback that effectively reduced her pay

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F.3d 830, 836 (7th Cir. 2017); *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1212 (11th Cir. 2015); *Eberline v. Douglas J. Holdings, Inc.*, No. 14-CV-10887, 2018 WL 4701706, at *7 (E.D. Mich. Oct. 1, 2018) U.S. Dept. of Labor, "Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act" (last updated January 2018) https://www.dol.gov/whd/regs/compliance/whdfs71.htm (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *see also Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 529 (6th Cir. 2011) (applying multi-factor primary beneficiary analysis "for determining whether an employment relationship exists in the context of a training or learning situation" pre-*Glatt*). *But see Nesbitt v. FCNH, Inc.*, 908 F.3d 643, 647 (10th Cir. 2018) (declining to adopt Glatt standard to FLSA claim by participant in "mandatory clinical training program leading to a state-licensed profession"). Under that standard, a court engages in a "weighing and balancing [of] all the circumstances" of the internship to determine "whether the intern or employer is "the primary beneficiary of the relationship." *Glatt*, 811 F.3d at 537–38. The Glatt court identified a "list of non-exhaustive factors to aid courts in answering that question." *Id.*

One problem with the primary beneficiary test is that there is no evident metric for weighing the respective benefits to employers and interns. FDM illustrates this problem. The court recites the putative benefits of the training arrangement to the plaintiff, while ignoring any benefits the company derived from her work as a trainee. *FDM*, 2017 WL 946298 at *3. Without offering any explanation of how it balanced the scales, the court then simply declares that the plaintiff was "the primary beneficiary." *Id.*

A more fundamental objection is that the primary beneficiary test is inconsistent with the essential premise of the wage and hour provisions of the FLSA, which is that those who perform economically valuable labor under the direction and control of employers should receive compensation in the specific form of wages. *See* 29 C.F.R. § 531.27 (requiring payment of wages in cash or equivalent). The primary beneficiary test subverts this policy, by allowing employers to reap economic value from workers' labor while evading the obligation to pay wages because those workers ostensibly derive some other non-monetary benefits from the experience. The primary beneficiary test opens the door to rampant exploitation, particularly of entry-level and other vulnerable workers, through the expediency of designating jobs as "internships" or "training programs." In this regard, cases like *Glatt* and *FDM* have a significance beyond the specific legal issues raised. They are moments in a broader, ongoing degradation of labor standards through a wholesale assault on labor and employment law, labor unions, and other institutions that protect and empower workers. *See* Steven Hill, *A Rundown of All the Ways Trump Is Overseeing an All Out, Under-the-Radar Attack on Workers*, IN THESE TIMES (Aug. 17, 2018), http://inthesetimes.com/working/entry/21391/trump_workers_labor_unions_nlrb/ (reviewing recent trends in federal labor and employment law and policy) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

below the minimum wage.[104] That argument fared no better than it did in *Hassey*.[105] The *Park* court found that:

> [E]ven assuming that the amount of the Termination Fee, when subtracted from the compensation Plaintiff earned as a consultant, would result in a net figure below the aggregate minimum wage for the consultant period, Plaintiff has not alleged facts that would support a finding that the fee constituted an illegal kickback.[106]

In support of this conclusion, the court relied on the Employment Agreement, which characterized the Termination Fee as "liquidated damages approximating the damages FDM suffered by reason of breach of the Employment Agreement prior to the completion of the two-year contracted period."[107] Remarkably, the court did not apply, nor even mention, the established legal standard for assessing the validity of a liquidated damages clause.[108] Instead, the court merely declared that "[t]he $30,000 maximum fee corresponds to the maximum value of the training, as set forth in . . . the Training Agreement," without any inquiry into how FDM arrived at that figure or whether it plausibly represented a realistic estimate of the actual cost.[109]

Instead of trying to force the FLSA peg into the post-employment obligation hole and allowing FDM to define all its own terms with its own agreements, the plaintiff should have attacked the agreement at its foundation. First, the plaintiff could have argued that the contract—under which she was employed at-will if she wanted to stay, but employed for a two-year term if

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104. *Park*, 2017 WL 946298, at *2.

105. *See* City of Oakland v. Hassey, 163 Cal. App. 4th 1477, 1480 (Cal. Ct. App. 2008) (rejecting Hassey's argument on this).

106. *Park*, 2017 WL 946298, at *4.

107. *Id.*

108. New York law provides that

> Liquidated damages . . . are valid if the "damages flowing from a breach are difficult to ascertain [and under] a provision fixing the damages in advance . . . the amount is a reasonable measure of the anticipated probable harm." On the other hand, if "the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced . . . ."

BBDO Seidman v. Hirshberg, 93 N.Y.2d 382, 396 (N.Y. 1999) (internal citations omitted).

109. *Park*, 2017 WL 946298, at *4.

she wanted to leave[110]—was void for failure of mutuality of obligation.[111] Second, the contractual recitation valuing the training at $30,000—an amount roughly equal to the average annual tuition at a private college or university[112]—is by no stretch of the imagination a plausible estimate of FDM's damages. As such, the supposed liquidated damages clause is really an unenforceable penalty.[113] Finally, taken as a whole, the terms of FDM's program give the employer free rein to impose any terms or conditions it wishes and to discharge employees at any time for any reason without any liability, while leaving employees with only the Hobson's choice of forfeiting all or nearly all their earnings as the price of freedom. Such a grossly one-sided arrangement renders the agreement unconscionable.[114]

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110. *Id.* at *1–2.

111. *See* Murphy v. American Home Products Corp., 58 N.Y.2d 293, 300, 461 N.Y.S.2d 232,, 448 N.E.2d 86, 89 (1983) ("[W]here employment is for an indefinite term it is presumed to be a hiring at will which may be freely terminated by either party at any time."); *see also* Dorman v. Cohen, 66 A.D.2d 411, 415, 413 N.Y.S.2d 377, 380 (1st Dep't 1979) (stating that an agreement "terminable at will only by plaintiffs and as to defendants would be binding for the full five-year term" is "illusory for lack of mutuality of obligation").

112. *See* THE COLL. BD., *Trends in College Pricing 2017*, Table 1, https://trends.collegeboard.org/sites/default/files/2017-trends-in-college-pricing_0.pdf (showing the average cost of annual tuition) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

113. *See* BBDO Seidman v. Hirshberg, 93 N.Y.2d 382, 386, 690 N.Y.S.2d 854, 861, 712 N.E.2d 1220. 1227 (1999) (ruling that liquidated damages provision imposing amount disproportionate to actual loss constituted unenforceable penalty); *see also* Novendstern v. Mt. Kisco Medical Group, 177 A.D.2d 623, 576 N.Y.S.2d 329 (2d Dep't 1991) (same). In addition to the farcically inflated valuation of the training, the liquidated damages provision also fails the requirement that "it would be difficult, if not actually impossible, to calculate the amount of actual damage" in the event of breach. *JMD Holding Corp. v. Cong. Fin. Corp.*, 4 N.Y.3d 373, 380, 795 N.Y.S.2d 502, 828 N.E.2d 604, 609 (2005) (quoting *Truck Rent-A-Ctr., Inc. v. Puritan Farms 2nd, Inc.*, 41 N.Y.2d 420, 424, 393 N.Y.S.2d 365, 361 N.E.2d 1015 (1977)). The actual cost to FDM of training new recruits would be easy enough to calculate, and FDM most likely keeps track of those costs as part of its regular business accounting.

114. *See* Gillman v. Chase Manhattan Bank, N.A., 534 N.E.2d 824, 828 (1988) (defining unconscionability as "an 'absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party'") (quoting Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965))).

This set-up extends the exploitation of labor in ways even Marx did not contemplate.[115] For up to six months, employees are not even paid for their time and work. For the next two years, those who leave must fork over an amount nearly equal to or even exceeding their base pay. Those who find the price of a ticket out too steep will be effectively at the mercy of the employer for the duration. In form, if not necessarily in extremity, their situation is not unlike those who are smuggled across the border and then compelled to work in low-wage, often dangerous or degrading jobs for years while struggling to pay off their debts to their human traffickers.

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115. 1 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 177–86, *in* MARX & ENGELS COLLECTED WORKS, VOL. 35 (Lawrence & Wishart ed., 2010) (analyzing the capitalist employment relation arising from the sale of a worker's labor-power (i.e., their capacity to perform labor) as a commodity). The worker and employer "meet in the market, and deal with each other as on the basis of equal rights, with this difference alone, that one is buyer, the other seller; both, therefore, equal in the eyes of the law." *Id.* at 178. Despite this formal equality of the parties, within the capitalist labor relation, capitalists exploit labor by appropriating the "surplus value" (the difference between the value of what a worker produces and the value of the wages they receive) created in the labor process. *Id.* at 196–209. Yet, Marx assumed that workers under capitalism are paid some wage and retain the right to limit the duration of the employment relationship. Otherwise, the worker "would be selling himself, converting himself from a free man into a slave, from an owner of a commodity into a commodity." *Id.* at 178. This essential characteristic of free labor, Marx suggests, finds expression in laws regulating the duration and termination of employment contracts. *Id.* at 178 n. 2.

Even those who might not otherwise embrace Marx's views agree that the ability to tell your employer "take this job and shove it" is an essential aspect of free labor under capitalism:

> Under a wage labor system, workers are entirely free to enter or leave the work relationship as they wish. They cannot be forced or dragooned into work or compelled to stay at work if they wish to quit. In the eyes of many conservative theorists, it is this contractual right of refusal—a right that protects both employer and employee from the coercive use of his property (capital in the case of the employer, the capacity to labor in that of the worker)—that constitutes the essential political foundation of capitalism and, beyond that, its essential justification as a moral order.

ROBERT HEILBRONER, THE NATURE AND LOGIC OF CAPITALISM 66 (1985); s*ee* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 138 (quoting the Illinois Federation of Labor President, Victor Olander, as saying, "[t]he slave is a slave because he is by law prevented from leaving the service of those for whom he works").

Employees who do leave can look forward to more decisions like *Town of Stonington v. Charron*.[116] After finding that Charron was hired as a police officer on December 2, 2002, completed his training on May 2, 2003, and left the department on October 3, 2004, the court authorized the Town of Stonington to

> secure the sum of $14,500 (fourteen thousand five hundred dollars), by (a) attaching sufficient property of Nathan Charron; (b) attaching or garnishing Nathan Charron's bank accounts, certificates of deposit, money market accounts, bonds, treasury notes, stocks, mutual funds, debts accruing to him; and any and all annuities or structured pay out contracts to which he is a beneficiary.[117]

As for the employee's argument, the court merely observed that "defendants question the legal propriety of enforcing the repayment provisions"[118] without deigning to explain why enforcement was legally proper.

C. Sales Commission Chargebacks and Bonus Recoupments

Another form of post-employment obligation is the recoupment of commissions or bonuses. An employee is paid what she often believes to be compensation for work performed, but after her employment ends, the employer demands a portion be returned. Employers can bring actions against former employees for the return of "advances" or "commission chargebacks."

In *Lindell v. Synthes, USA*,[119] a former sales consultant challenged deductions from his final paycheck and a counterclaim for the return of sales commissions." A company policy manual provided that, "if a Sales Consultant's employment is terminated for any reason, and his/her commissions do not accrue for any of the reasons specified . . . the Sales Consultant is responsible for the return of the advance to the Company."[120] The specified reasons included customers' failure and tardiness to pay.[121]

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116. 40 Conn. L. Rep. 775 (Conn. Super. Ct. 2006).
117. *Id.*
118. *Id.*
119. 155 F. Supp. 3d 1068 (E.D. Cal. 2016).
120. *Id.* at 1076.
121. *Id.* at 1088.

The court ruled that "an employer may make an advance on commissions to employees 'and later reconcile' any overpayments by deductions from future commissions."[122] Under the company's compensation plans, "sales consultants earn commissions upon completion of a sale. Payment is disbursed once an invoice is received; however, the money is considered an advance until payment is received from the customer."[123]

California courts have held that "the obligation to pay a commission may be contingent on events that occur after the sale (such as the customer returning the merchandise), and amounts advanced to the salesperson may be deducted at a later date if the contingencies are not satisfied."[124] "However, the preconditions to earning the commission must be 'clearly expressed, generally . . . in writing,' 'must relate to the sale,' and 'cannot merely serve as a basis to shift the employer's cost of doing business to the employee.'"[125]

This "sale-related" versus "cost-of-doing-business" dichotomy is similar to the "legally-required" versus "employer-required" distinction for training reimbursements under Labor Code § 2802. After all, the employer under capitalism is still expected to bear some risk and cannot impose all its costs on its sales employees. Even sales-related expenses, however, can leave the employee with substantial post-employment obligations.

Judicial treatment of employer claims for recoupment of bonus payments similarly turns on the contractual terms and conditions governing when the bonus is earned. Once again, California law affords greater protection.

In *DHR Int'l Inc. v. Charlson*,[126] for example, the defendant's employment agreement provided that he would receive a one-time bonus of $250,000 if he collected a certain amount of search fees in his first six months, and another $250,000 if the same amount were collected in his second six months. Ten months after paying

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122. *Id*. at 1085 (quoting Steinhabel v. Los Angeles Times Commc'ns, 126 Cal.App.4th 696, 707 (2005)).

123. *Lindell*, 155 F.Supp.3d at 1084.

124. Davis v. Farmers Insurance Exchange, 245 Cal. App. 4th 1302, 1333 (Cal. Ct. App. 2016) (citing Prachasaisoradej v. Ralphs Grocery Co., 42 Cal. 4th 217, 239–40 (Cal. 2007)).

125. *Davis*, 245 Cal. App. 4th at 1333.

126. No. C 14-1899 PJH, 2014 WL 4808752 (N.D. Cal. Sept. 26, 2014).

these bonuses, the employer discharged the employee and demanded repayment, based on a contract provision declaring that the bonuses were "subject to a claw back of $105,000 each should [the employee] depart [the company] within one year of payment."[127]

The court dismissed the employer's claim, based on California Labor Code § 221:

> It shall be unlawful for an employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee.[128]

This provision "prevents an employer from taking back wages earned and paid, and a commission chargeback is unlawful where the commission was fully earned at the time of a sale."[129] The court found that the defendant employee had indeed fully earned the bonus payments in dispute:

> The bonuses were paid as part of Charlson's "compensation," after the search fees were collected. Had the full amount of the search fees not been collected, Charlson would have been compensated under DHR's regular commission schedule. The requirement that he remain employed for one year afterwards was not a condition for earning the bonuses, as the bonuses had already been earned. Moreover, because his remaining employed for one year was not something that was entirely within his control, it cannot be viewed as a condition he was required to fulfill in order to retain the bonuses.[130]

Because the employee had "satisfied the condition precedent for earning the one-time bonuses—the payment of $550,000 in search fees for each of the six-month periods,"[131] Labor Code § 221 precluded the employer from taking back that portion of the employee's wages.

In another case, an economic consulting firm paid an employee $225,000 a year as a "draw" against commissions.[132] If his

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127. *Id.* at *1–2.

128. *Id.* (quoting Cal. Labor Code § 221).

129. *Id.* at *7.

130. *Id.* at *6.

131. *Id.*

132. Berkeley Research Group, LLC v. Savage, JAMS, Ref. No. 1425024745, Decision on Motion for Summary Disposition (2017).

employment ended, his contract provided that he had to pay back the difference between $195,000 of the draw and his actual earnings in each year, or in this instance, approximately $160,000.[133]

In a preliminary ruling, the arbitrator defined the issue:

> Whether the "additional draw" obtained after the first year constituted wages which could never be subjected to a "claw back" under the California Code, or whether it was an advance which, under California case law, can be recovered. This is particularly so where, as here, there is an express agreement for recoupment.[134]

Addressing the agreement's characterization of the payment as an "advance," the arbitrator held:

> [I]t cannot be said as a matter of law that the "additional draw" which was paid to respondent after his first year in the employ of claimant constituted an earned wage that could not be recovered under California Labor Code sec. 221. To the contrary, it had sufficient indicia of being an advance, for which courts have allowed recovery. This is particularly so where, as here, the employment contract specifically provides for recoupment upon not achieving principal earnings at a level equal to the "Combined Draw" that was to be paid to respondent on a monthly basis.[135]

The arbitrator thus concluded "whether the 'additional earnings' that respondent received constituted earned wages or were merely as advance" was one of the "factual issues to be determined as the hearing."[136] After the hearing, the arbitrator held without explanation "that the 'additional earnings' were advances that were subject to recoupment pursuant to the employment agreement between the parties."[137]

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133. *Id*.

134. *Id*. at 3 (citations omitted).

135. *Id*.

136. *Id*. at 3–4.

137. Berkeley Research Group, LLC v. Savage, JAMS, Ref. No. 1425024745, Final Award, 2–3 (2018) (Gische, Kapnick, Oing, Moulton, Arbs.). The arbitrator also determined that the employee had earned more in commissions than he was paid. *Id.* Setting off that amount against the employer's claim, the arbitrator awarded the employer approximately $106,000. *Id.*

Once again, the law outside California is much less protective of employees in this position.[138] In *Conagra Foods, Inc. v. Shipp*,[139] for instance, the employer sued to recover a $100,000 relocation bonus it had paid the employee when he agreed to move from Omaha to Chicago at the employer's request.[140] A bonus agreement signed by the employee provided that he would reimburse the employer for the full amount of the bonus if he voluntarily terminated his employment within three years.[141] About eighteen months later, the employee tendered his resignation and subsequently took a job with one of the employer's competitors.[142]

When the employer sued to recoup the bonus money, the employee defended by contending that he had been constructively discharged, and as such had not voluntarily terminated his employment to trigger the repayment obligation.[143] Denying the employer's motion for summary judgment, the court held that there was a genuine question of material fact as to "whether defendant was involuntarily terminated from his employment," and directed that the case proceed to trial on that issue.[144]

It is noteworthy that the employee in *Shipp* did not otherwise contest the validity or terms of the bonus agreement.[145] Under California law, he might have argued, along the lines of

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138. *Compare* DHR Int'l Inc. v. Charlson, No. C 14-1899 PJH, 2014 WL 4808752 (N.D. Cal. Sept. 26, 2014) (showing California courts' pattern to deny employers remittance of payments owed by former employees), *with* Conagra Foods, Inc.v. Shipp, No. 8:01CV647, 2003 WL 431613, at *2 (D. Neb. Feb. 24, 2003) (indicating an example of the unwillingness of non-California state courts to rule for the employer in repayment cases).

139. *See Conagra Foods*, 2003 WL 431613, at *2 (denying the employer's motion for summary judgment because a genuine issue of fact existed: Namely, the parties disputed over whether or not the employee was involuntarily terminated).

140. *Id.* The relocation bonus was in addition to moving expenses that the company paid. *Id.*

141. *See id.* (describing the provision of the agreement that underlies the fact under dispute).

142. *See id.* (detailing the facts of the case surrounding the employee's termination).

143. *See id.* (explaining the employee's defense to the employer's complaint to recover benefits).

144. *Id.* at *3.

145. *See id.* at *2 (noting that the employee only defended against the agreement on the grounds that he was involuntarily terminated, not any challenges to the underlying provision itself).

Charlson,[146] that he fully earned the bonus once he fulfilled the condition that he relocate as the company requested. Thus, the employer Labor Code § 221 precluded the employer from demanding repayment.[147] He might also have argued that his relocation was "in direct consequence of the discharge of his . . . duties" to his employer, and that the bonus was, in effect, indemnification for the "expenditures or losses he necessarily incurred" in doing so, as required under Labor Code § 2802.[148] It is uncertain whether these arguments would prevail under California law, but they would almost certainly be of no avail elsewhere.

III. Repayment Obligations, Monopsony, and Exploitation

Repayment obligations represent a novel instrument of labor exploitation in two respects.[149] First, by deterring employees from changing jobs, they expose employees to more intense exploitation within the labor process.[150] Second, by permitting employers to

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146. *See* DHR Int'l Inc. v. Charlson, No. C 14-1899 PJH, 2014 WL 4808752 (N.D. Cal. Sept. 26, 2014) ("[O]nce the right to compensation has vested, it has been earned and cannot be recouped.").

147. *See* CAL. LAB. CODE § 221 (West 2018) (rendering it "unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee").

148. CAL. LAB. CODE § 2802 (West 2018).

149. *See* discussion, *infra* notes 150–51 and accompanying text.

150. The "labor process" refers to the production of value through the performance of work, and the social relations and organizational arrangements under which production occurs. *See* A DICTIONARY OF MARXIST THOUGHT 297–98 (Tom Bottomore et al. eds., 2d ed. 1991) (1983). In the capitalist labor process, "[w]ork is . . . performed under the supervision, direction and control of the capitalist" who owns the means of production and hires the workers, "and the products produced are the property of the capitalist, and not the property of the immediate producers [i.e. the workers]." *Id.* Critics, especially within the broad Marxian tradition, have typically focused on the labor process as the primary site where labor both experiences and seeks to resist exploitation through contestation over the scope and intensity of managerial control. *See generally* HARRY BRAVERMAN, LABOUR AND MONOPOLY CAPITAL: DEGRADATION OF WORK IN THE TWENTIETH CENTURY (1974) (examining managerial strategies aimed at "deskilling" labor as a means of enhancing control over the labor process, and workers' resistance to such efforts); *see also generally* Stewart Clegg, *Organization and Control*, 26 ADMIN. SCI. Q. 545 (1981) (analyzing organizations with a focus on the formal and informal rules that structure control over the labor process); Allen Buchanan, *Exploitation, Alimentation, and Injustice*, 9 CAN. J.

extract payment from employees who do leave, they extend the site of exploitation beyond the labor process to the exit door.[151]

Repayment obligations contribute to exploitation within the labor process by constraining employee exit, thus blunting, if not eliminating altogether, the primary mechanism by which employees can "defend [their] welfare or . . . improve [their] position."[152] Along with noncompetes and "no-poaching agreements" (under which "two or more employers agree that they will not hire each other's employees"),[153] repayment obligations are a means by which employers gain and maintain monopsony power in the labor market.[154] As a consequence, "workers accept low wages and substandard working conditions because few alternative job opportunities exist for them or because switching jobs is costly. In other words, in the labor market, effectively a small number of employers are competing for their labor."[155]

PHIL. 121 (1979) (arguing that theoretical accounts of exploitation "mistakenly confine Marx's concept of exploitation to the labor process itself").

151. *See* discussion, *infra* notes 171–78 and accompanying text.

152. ALBERT O. HIRSHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 15, 21–29 (1970). For the vast majority of U.S. employees, who lack union representation and are subject to at-will termination, neither "voice" nor "loyalty" has much effect. *Id.*

153. Alan B. Krueger & Eric A. Posner, *A Proposal for Protecting Low-Income Workers from Monopsony and Collusion*, HAMILTON PROJECT, 5 (Feb. 2018), http://www.hamiltonproject.org/assets/files/protecting_low_inncome_workers_from_monopsony_collusion_krueger_posner_pp.pdf (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

154. *See id.* at 4–5 ("[A]n employer can use non-compete agreements to bind workers and discourage competitors from entering the market because they will face a scarcity of available labor."); *see also* Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 966 (2006) ("[C]urrent rules of noncompete enforcement fail to provide a complete account of the bargaining position of workers presented with or subject to noncompete agreements.").

155. Alan B. Krueger & Eric Posner, *Corporate America Is Suppressing Wages for Many Workers*, N.Y. TIMES (Feb. 28, 2018), https://www.nytimes.com/2018/02/28/opinion/corporate-america-suppressing-wages.html (last visited Sept. 18, 2018) (on file with the Washington & Lee Journal of Civil Rights & Social Justice). Empirical research on noncompetes finds that enforceability is associated with restricted career patterns and reduced compensation. *See* NATARAJAN BALASUBRAMANIAN, ET AL., U.S. CENSUS BUREAU FOR ECON. STUD, LOCKED IN? THE ENFORCEABILITY OF COVENANTS NOT TO COMPETE AND THE CAREERS OF HIGH-TECH WORKERS, 6–7, 33 (finding that stricter enforceability of noncompete agreements is associated with lower wages over the course of an

Courts enforcing repayment obligations assume (explicitly or implicitly) that the agreements imposing those obligations are the products of bargained-for exchange between employees and employers.[156] Such decisions err in failing to recognize the economic reality of the contemporary labor market, in which "monopsony is omnipresent."[157] Particularly in this context, the premise that employees freely and knowingly agree to repayment provisions becomes tenuous.[158] And, as with noncompetes, there is good reason for concern that employers are imposing these provisions, not to protect legitimate business interests, but rather "to solidify their bargaining power vis-à-vis their workers."[159]

The combination of "an 'absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party'" has long been a basis

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employee's tenure with the company); *see also* Matt Marx, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOC. REV. 695, 707 (2011) ("[By asserting property rights over workers' skills . . . firms restrict the supply of labor within their industry."); Sampsa Samila & Olav Soronson, *Non-Compete Covenants: Incentives to Innovate or Impediments to Growth*, 57 MGMT. SCI. 425, 427 (2011) ("The firm can usually reap the rewards of [its] investments because employees cannot benefit elsewhere from their human capital."); Mark J. Garmaise, *The Ties that Truly Bind: Non-Competition Agreements, Executive Compensation, and Firm Investment*, 27 J.L., ECON., ORGANIZATION 376, 376 (Aug. 2011) ("[T]ougher noncompetition enforcement promotes executive stability. Increased enforceability also results in reduced executive compensation and shifts its form toward greater use of salary.").

156. *See* EMPLOYMENT LAW: ESSENTIALS AND BEST PRACTICES § 8.06 (AM. LAW. INST. 2015) (detailing the enforceability of restrictive covenants in employee agreements).

157. Kreuger & Posner, *supra*, note 155 at 23; *see* COUNCIL OF ECON. ADVISERS, LABOR MARKET MONOPSONY: TRENDS, CONSEQUENCES, AND POLICY RESPONSES, at 7–13 (reviewing evidence "that employers often have some degree of monopsony power in labor markets" and effects on labor market competition, employee mobility, and wages).

158. Research on noncompetes reveals "that in many cases, workers sign non-compete clauses without full information on what they are signing or how it will be enforced," they are frequently "presented [to employees] . . . only after they had accepted the job offer," and that they "are prevalent even in States where they are not enforced." COUNCIL OF ECON. ADVISERS, *supra* note 157 at 23. This evidence "suggests workers are not well-informed [about noncompetes],and raises the possibility of disparate impacts across workers with and without sophisticated understanding of the legal implications of these agreements." *Id.* at 8. There is no reason to imagine that the impact is any different with respect to repayment provisions.

159. *Id.*

for deeming a contract as unconscionable and unenforceable.[160] Yet courts do not appear to have applied that established standard to repayment obligations, presumably because employees have not asserted that defense.[161]

A case like *FDM Group*[162] illustrates the problem. The company's hiring model involves classifying new recruits as "Trainees" for a period of two to six months, during which they are unpaid.[163] While the opinion does not provide much detail about what participants actually do during the training period, the reference to "hands-on-training" suggests that it includes at least some work for FDM's paying clients.[164] The court justifies this arrangement on the grounds that the benefit to the training participants exceeds the benefit to FDM,[165] which, under the Glatt

160. Gillman v. Chase Manhattan Bank, 534 N.E.2d 824, 828 (N.Y. 1988) (quoting Williams v. Walker–Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965)).

161. In a few cases, courts denying enforcement of repayment provisions have noted the heavy burden they would impose on employees. *See Brunner v. Hand Industries, Inc.*, 603 N.E.2d 157, 161 (Ind. Ct. App. 1992) (noting provision would require employees to pay between half and all of the wages they earned); *see also Heartland Sec. Corp. v. Gerstenblatt*, 2000 WL 303274, at *7 (S.D.N.Y. Mar. 22, 2000) ("Requiring repayment of up to $200,000, particularly of a recent college graduate in his first post-college job, approaches indentured servitude."). These decisions implicitly recognize the unfairness of the arrangement, even if they do not explicitly use the doctrine of unconscionability to get there.

162. Park v. FDM Group, No. 16-CV-1520-LTS, 2018 WL 946298, at *3 (S.D.N.Y. Mar. 9, 2017) (dismissing plaintiff employee's claim against FDM Group for failure to pay minimum wage during training period because plaintiff was not deemed an "employee"), *vacated in other* parts, No. 16-CV-1620-LTS, 2018 WL 4100524 (S.D.N.Y. Aug. 28, 2018).

163. Contrary to the facts as presented in *FDM Group*, a recruitment brochure available through the company's website refers to "the paid training period". *Compare FDM Group*, 2018 WL 946298, at *1–3, *with FDM: You are the Next Generation of IT & Business Consultants*, at 13 (2017) https://www.fdmgroup.com/wp-content/uploads/FDM-US-Academy-Brochure.pdf (last visited Sept. 18, 2018) (on file with Washington & Lee Journal of Civil Rights & Social Justice). It is possible that FDM changed its practice of not paying recruits during the training period sometime between 2014, when Park worked for FDM Group, and 2017 when the brochure was published.

164. *Graduates*, FDM GROUP, https://www.fdmgroup.com/en-us/us-graduates/ (last visited Sept. 18, 2018) (emphasizing in their "Careers" program that participants "[w]ork on-site with prestigious clients, gaining hands-on commercial experience," but does not specify whether that is true of the training period or the subsequent two-year period) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

165. *See Park*, 2017 WL 946298, at *3 ("The training, as described in the

standard,[166] somehow magically makes them something other than employees. Then, after completing what FDM itself insists is a highly valuable training, the new hire is offered at job as an IT and business consultant for $23,000 a year.[167] This is about the same as the average annual pay for food preparation and serving workers in the New York City area (where the plaintiff in FDM worked),[168] and less than the minimum salary required for an exempt employee (as FDM classifies the consultants[169]) under the FLSA and New York Labor Law.[170] It is unlikely that FDM would be able to pay so little for the services of trained consultants if they were free to walk out the door and ply their trade elsewhere.

But repayment obligations do not merely enable more intense exploitation within the labor process. They also extend the locus of exploitation beyond the workplace floor to the exit door, where the employer can extract payment by recouping part of the wages the

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Complaint, resembles what would be offered at a vocational school, 'including the clinical and other hands-on training provided by educational institutions' . . . providing skills that are marketable beyond any particular FDM client."). That conclusion is rather easy when the court does not even consider the economic value to FDM of the work that training participants perform, while accepting on FDM's mere say-so that the training is worth $30,000.

166. *See id.* at *2 (determining whether the trainee is an employee or intern by considering whether: (1) regular employees are replaced; (2) the trainee has an expectation of compensation; (3) the training sessions are like ones offered in vocational school; and (4) whether the employer received an immediate advantage from the trainee's work).

167. *Id.* at *3.

168. *See May 2017*, *Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates, New York-Jersey City-White Plains, NY-NJ Metropolitan Division*, BUREAU OF LAB. STAT. https://www.bls.gov/oes/current/oes_35614.htm#35-0000 (last updated Mar. 30, 2018) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

169. *Park*, 2017 WL 946298, at n.2.

170. The court observes that the plaintiff's "base rate of pay provides more than $11 per hour, exceeding the federal minimum wage of $7.25 per hour and the New York minimum wage of $8.75 per hour." *Id.* at *3. However, the employer treated the plaintiff as an exempt employee. *Id.* at n.2. Under the FLSA, exemption as an executive, administrative, or professional employee requires a minimum weekly salary of $455 (equivalent to $23,660/year). 29 C.F.R. § 541.600 (2018). Under New York law, the minimum salary for the executive and administrative exemptions (but not for the professional exemption) is even higher. In 2014, (when the plaintiff in FDM Group was employed) it was $600/week (equivalent to $31,200/year). N.Y. COMP. CODES R. & REGS. tit. 12 §142-2.14(4)(i) & (ii) (2017).

employee has already received for labor already performed, or by charging the employee for operating costs that the employer would otherwise have borne out of its own share of product.

Once again, FDM Group provides a good illustration. The employee in that case had to forfeit $20,000 when she left after working for a year.[171] The court justifies this heavy toll on the ground that it "approximat[ed] the damages FDM suffered by reason of breach of the Employment Agreement prior to the completion of the two-year contracted period."[172]

Yet, the premise of at-will employment is precisely that either party may terminate the relationship at any time, for any reason or none at all, without being liable for breach of contract.[173] An employer may not simultaneously retain the right to discharge an employee at will while binding the employee to a two year term.[174] Moreover, even assuming an employer should be entitled to recoup its training investment before a trained employee leaves (rather than treating that investment as a cost of doing business, as to which the employer bears the risk of loss),[175] FDM has effectively

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171. *See Park*, 2017 WL 946298, at *2 ("Consultant must pay a Termination Fee of . . . $20,000 in the event the Consultant leaves employment in the second year."). Neither FDM's website nor its recruitment brochure mentions the repayment obligation; rather, they refer obliquely to "a minimum of two years of commercial experience," without explaining that the two-year minimum is a one-sided commitment. FDM, *You Are the Next Generation of IT & Business Consultants*, FDMGROUP.COM, 13 (2017), http://www.fdmgroup.com/wp-content/uploads/FDM-US-Academy-Brochure.pdf (on file with the Washington & Lee Journal of Civil Rights & Social Justice); FDM, *Your Career Starts Here*, FDMGROUP.COM, https://www.fdmgroup.com/en-us/us-graduates/ (last visited Sept. 17, 2018) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

172. *Park*, 2017 WL 946298 at *4

173. *See* Murphy v. American Home Products Corp., 58 N.Y.2d 293, 300, 461 N.Y.S.2d 232, 448 N.E.2d 86, 89 (1983) ("[O]ur long-settled rule [is] that where an employment is for an indefinite term it is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even for no reason.")

174. *See* Dorman v. Cohen, 66 A.D.2d 411, 415, 413 N.Y.S.2d 377, 380 (1st Dept. 1979) (granting summary judgment in favor of defendants on plaintiffs' breach of contract claim where contract purported to bind defendants for a definite period while permitting termination at will by plaintiffs).

175. A common justification for training reimbursement obligations is that they give employers a greater incentive to provide training, by reducing the risk that employees would abruptly leave, taking the knowledge and skills they have gained with them. *See, e.g.*, *Heder v. City of Two Rivers*, 295 F.3d 777, 781 (7th

enjoyed a double recovery. First, the court permits FDM to deny new recruits the benefits and protections of employee status during the unpaid training period. Then, the company uses the Damocles sword of a hefty repayment obligation to insulate itself from labor market competition, enabling it to pay lower salaries—indeed, illegally low.[176] Finally, without any recognition that the company has already recouped its investment through the first two means, the court then permits FDM to demand tribute from the departing employee in an amount nearly equal to the total salary it paid her (and that strains credibility as a plausible valuation of FDM's training).

Under the prevailing at-will regime, employees who incur training, relocation or other costs to accept a job assume the risk that they may lose the job, and with it the value of their investments, at any time.[177] Repayment obligations allow

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Cir. 2002) ("[W]hy can't the employer bear the expense but require reimbursement if an early departure deprives the employer of the benefit of its bargain?"). That argument implicitly assumes that employee training is solely a function of employer investment, rather than a joint product of employer and employee investments. *See* Mark J. Garmaise, *Ties that Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J.L. ECON. & ORG. 376, 376–79, 383–85 (2009) (analyzing effect of noncompetes on both employee and firm investments in human capital). As such, it fails to take account of the effect of repayment obligations on employee behavior. Empirical research on noncompetes finds that they discourage employees from investing in their own training, as they are less able to convert their investments into higher compensation by taking (or threatening to take) their knowledge and skills elsewhere. *See id.* ("[E]nforceable noncompetition contracts encourage firms to invest in their managers' human capital, the contracts discourage managers from investing in their own human capital, and managers' investments have a greater effect than those of the firm."). The net result thus depends on the relative significance of employer and employee investments, which may vary across different situations. *See id.*

176. *But see Heder*, 295 F.3d at 781 (asserting that employer's hiring already-trained employees "must pay [for the training] indirectly, through a higher salary"). Where the employer directly pays for the training, the employer would be expected to pay a correspondingly lower salary. Having done so, the employer has, in effect, paid itself back for the cost of the training. If the employer then recoups that same amount from the employee, it receives a windfall.

177. *See, e.g.*, Whiteco Indus. Inc. v. Kopani, 514 N.E.2d 840, 847 (Ind. Ct. App. 1987) ("[I]f the contract is for an indefinite term, our law considers it to create employment at will."); *see also, e.g.*, Kurtzman v. Applied Analytical Indus., 493 S.E.2d 420 (N.C. 1997) ("North Carolina is an employment-at-will state."); Poff v. W. Nat. Mut. Ins. Co., 13 F.3d 1189, 1191 (8th Cir. 1994) ("Under Minnesota law, absent a contrary agreement by the parties, employment is

employers to shift additional risk on employees who wish to exercise their supposedly countervailing right to quit at will (on, in some cases, if the employer fires them). This includes uncertainty about the duration of the employment relationship (in the case of relocation and training expenses), as well as uncertainty about other events completely outside the employee's control, such as customer payments (in the case of commission and bonus clawbacks). Yet, it is precisely such uncertainty that is commonly held to justify the employer's claim on profits to begin with.[178]

IV. Proposed Solution: Apply a Rule of Reason and Require Evidence of Actual Expenditures or Advances

Courts or legislatures should adopt standards that guard against the use of post-employment repayment obligations as instruments of labor market monopsony and employee exploitation.

First, a "rule of reasonableness," analogous to the standard applicable to noncompetes, should apply to post-employment

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presumed to be at-will permitting an employer to dismiss an employee for any reason or for no reason at all."); Beyda v. USAir, Inc., 697 F. Supp. 1394, 1396 (W.D. Pa. 1988) ("In Pennsylvania employment is presumed to be at-will."). In a few cases, courts have recognized an exception to the at-will rule where an employee gives up secure employment and relocates to accept a new job in response to the employer's special recruitment efforts or assurances of security, only to be fired a short time after commencing work. *See, e.g.*, *News Printing Co. v. Roundy*, 409 Pa. Super. Ct. 64, 71 (1991) ("When sufficient additional consideration is present, an employee should not be subject to discharge without just cause for a reasonable time."); *see also, e.g.*, *Cashdollar v. Mercy Hosp. of Pittsburgh*, 406 Pa. Super. Ct. 606, 611–12 (1991) ("[A]n employee can defeat the 'at-will' presumption by establishing, inter alia, that the employee gave his employer additional consideration other than the services for which he was hired."); *Romack v. Pub. Serv. Co. of Ind.*, 511 N.E.2d 1024, 1025 (Ind. 1987) (ruling employment not at-will where employee quit job held for 25 years, purchased new home, and relocated family in reliance on employer's assurances of "permanent employment" during recruitment process).

178. *See* ROBERT L. HEILBRONER, THE NATURE AND LOGIC OF CAPITALISM 70 (1985) ("[T]he modern explanation of profit as the right of the capitalist to appropriate any residual, after he has paid out all wages and other costs of production including depreciation, for which he has hazarded his capital."); *see also* MARK OBRINSKY, PROFIT THEORY AND CAPITALISM 71–92 (1983) (reviewing Frank Knight's theory of uncertainty as the basis for profit as entrepreneurial income).

repayment obligations.[179] Notably, where contractual post-employment repayment provisions applied only if the employee went to work for a competitor, courts have treated the provisions as the functional equivalent of noncompetes and scrutinized them accordingly under the rule of reasonableness, holding that the employer's desire to protect its investments in training was not a valid business interest to support a noncompete. Yet, "competition neutral" post-employment repayment obligations can inhibit employee mobility and restrain labor market competition even more than traditional noncompetes. [180]

To prevent the use of post-employment repayment obligations as devices for gaining or bolstering superior bargaining power over employees, employers should be required to identify a legitimate business interest, and the terms of the repayment obligations should be reasonably tailored to protect that interest without unduly burdening the employee or restraining labor market competition. This would include limiting the duration that an employee must remain before being free of the repayment obligation, as well as limiting the amount of repayment liability in relation to the employee's wages or salary.

Factors that might be relevant to assessing the reasonableness of a repayment obligation could include:

- Whether the employee is hired at-will or enjoys some security against arbitrary termination by the employer (as under a collective bargaining agreement or individual contract);
- Whether the obligation is a non-negotiable, boilerplate clause in an agreement drafted by the employer or is the

179. *See* Heartland Securities Corp. v. Gerstenblatt, No. 99-CV-3694-WHP, 2000 WL303274, at *6–9 (S.D.N.Y. Mar. 22, 2000) (discussing characteristics of the "rule of reasonableness."); *see also* Brunner v. Hand Indus., Inc., 603 N.E.2d 157, 159–60 (Ind. App. 1992).

180. *See* Katherine V.W. Stone, *Knowledge at Work: Disputes over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721, 723 (2002) (explaining that the noncompete doctrine seeks to balance the employee interest in job mobility and the societal interest in free and competitive labor markets against the employer interest in protecting business assets and the judicial interest in enforcing contracts); *id.* at 739 ("[C]ourts should carefully scrutinize *any* efforts by employers to place restrictions on the portability of the employee's human capital.") (emphasis added).

product of real, knowing, and voluntary bargaining between the parties.[181]

- Whether the terms are presented to the employee before or after accepting employment.

In the case of training costs, reimbursement obligations should be permitted only for training that imparts general human capital (which would remain valuable to an employee who goes to work elsewhere and to the new employer), but not firm-specific human capital (which would have little or no value to employees after they leave).[182]

Some special requirements would also be appropriate to protect against exploitation:

- Limit the amount of repayment to a reasonable percentage of the employee's wages or salary, and prohibit repayment obligations altogether for low-wage workers, who are the most vulnerable to exploitation, particularly in monopsonistic labor markets. [183]

Require that repayment obligations be in writing, in clear terms, and (where included as part of a contract that includes other provisions) conspicuously placed and specifically signed by the employee.

Second, employers should generally not be permitted to rely on liquidated damages clauses, but should be required to support reimbursement claims with evidence of actual expenditures, costs, or other damages resulting from the employee's early departure. In most cases, the amount at issue will not be uncertain or difficult to calculate. And, because employees will typically be in no position

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181. In *Heder v. City of Two Rivers*, 295 F.3d 777, 778 (7th Cir. 2002), and *Milwaukee Area Joint Apprenticeship Training Comm. v. Howell*, 67 F.3d 1333, 1335–36 (7th Cir. 1995), for instance, the repayment obligations were the product of collective bargaining between the employers and labor unions representing the employees. In such circumstances, there is less concern about inequalities of bargaining power, and the union can extract corresponding benefits (in the form of higher wages or otherwise) in exchange for the repayment obligation.

182. *See* Gary S. Becker, *Investment in Human Capital: A Theoretical Analysis*, 70(5) J. POLIT. ECON. 9 (Oct. 1962) (distinguishing general and firm-specific human capital); *see also* David Donaldson and B. Curtis Eaton, *Firm-Specific Human Capital: A Shared Investment or Optimal Entrapment?*, 9 CANADIAN J. ECON. 462 (1976) (challenging Becker's argument that employers share investments in firm-specific human capital with employees).

183. *Cf.* Krueger & Posner, *supra* note 20 (proposing blanket prohibition against noncompetes for low-wage workers on these grounds).

to assess the cost or value of training, there is too great a risk of puffing, if not outright deceit in employer's representations. At a minimum, if liquidated damages are ever allowed, courts must take care to apply the established legal standard, and not merely take boilerplate recitations and the employer's unsupported assertions at face value.

V. Conclusion

Post-employment repayment obligations expose employees to significant financial risk if they exercise their fundamental right to quit a job at-will. By deterring employees from leaving, such provisions give employers even more power over employees, leaving workers even more vulnerable to exploitation while they remain in the job. By permitting employers to demand payment as the price of leaving, they extend the site of exploitation to the exit door.

Common-law courts have for over a century scrutinized noncompete agreements and denied enforcement where the terms are unreasonable. A similar framework should apply to other post-employment obligations, ensuring that the terms are reasonably drawn to protect a valid employer interest, without imposing unjust burdens on employees or erecting excessive barriers to labor market mobility. Furthermore, employers should not be permitted to impose post-employment repayment obligations under the guise of liquidated damages, but should be required to establish the basis for any amounts they seek to recoup for relocation expenses, training costs, or advanced payment of employee compensation. If courts decline to apply these established common law principles to post-employment repayment obligations, legislatures should adopt remedial measures.

VI. Appendix[184]

A. Letter from Company to Employee

Thanks for taking the time earlier today to discuss your resignation and obligations to {COMPANY}. During our conversation, you indicated you will not accept a different placement with another {COMPANY} client but will resign prior to completing your two year commitment. As I mentioned, attached is a copy of your employment agreement. The definitions on page one contain the amount of the Termination Fee and sections 4.2 and 4.3 address your obligation for payment of the fee under your circumstances of resignation. Since you are now in your second year of employment with {COMPANY}, the Termination Fee is $20,000 rather than $30,000. You will need to pay this fee in full by your last day on December 3rd.

As I mentioned, the early termination fee is a liquidated damages amount that compensates {COMPANY} for the damages it sustains for your failure to comply with your two-year commitment, particularly since {COMPANY} has to make representations to its clients for the availability of {COMPANY}'s consultants for a two-year period. That is how {COMPANY} is able to retain the business with competitive rates to clients. The damages fee represents lost costs of investment for training, lost revenue/profits for the remainder of your two-year commitment period, potential reputational damage to the client, lost business, etc. The amounts provided in the agreement are good faith estimates of such damages at the time you entered into the contract.

B. Letter from Employee's Attorney to Company General Counsel

This firm has been retained by {EMPLOYEE}, who until recently was employed by {COMPANY}. He advises me that you have been persistently calling and e-mailing {EMPLOYEE},

184. This Appendix presents correspondence regarding an employer's claim against a former employee for reimbursement of training expenses. Stuart Lichten (one of the authors here) represented the former employee in this matter. The names of the company, the former employee, and a company manager have been redacted.

seeking a monetary payment in the form of what you describe as a "termination fee." Since {COMPANY} has no reasonable basis for demanding such a fee, I request that you cease your collection efforts.

Your claim that {EMPLOYEE} somehow "violated" his Employment Agreement is unfounded. {EMPLOYEE} was employed "at will." Section 1 of the Agreement describes the term as until "terminated by the Parties." Section 4.1 of the Agreement states, "The Company may terminate this Agreement without cause at any time and at its sole discretion by giving written notice to that effect." Any contention that {EMPLOYEE} breached the Agreement by resigning before the end of two years, but that {COMPANY} was not required to employ him for any period of time, would obviously fail for lack of mutual obligation, lack of consideration, and under the circumstances, unconscionability. *See Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 300, 461 N.Y.S.2d 232, 235, 448 N.E.2d 86, 89 (1983) ("where employment is for an indefinite term it is presumed to be a hiring at will which may be freely terminated by either party at any time"); *Dorman v. Cohen*, 66 A.D.2d 411, 415, 413 N.Y.S.2d 377, 380 (1st Dep't 1979) (agreement "terminable at will only by plaintiffs and as to defendants would be binding for the full five-year term" is "illusory for lack of mutuality of obligation"). As {EMPLOYEE} was not in breach, there can be no damages.

Even if {EMPLOYEE} were somehow in breach of the Agreement, the liquidated damages provision is unenforceable. In New York, such provisions are only "valid if 'the damages flowing from a breach are difficult to ascertain,'" and the "'amount is a reasonable measure of the anticipated probable harm.'" *BBDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 396, 690 N.Y.S.2d 854, 861, 712 N.E.2d 1220, 1227 (1999) (citing *City of Rye v. Public Serv. Mut. Ins. Co.*, 34 N.Y.2d 470, 473, 358 N.Y.S.2d 391, 393, 315 N.E.2d 458, 459 (1974)). If "the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced." *Truck Rent-A-Center v. Puritan Farms 2nd*, 41 N.Y.2d 420, 425, 393 N.Y.S.2d 365, 369, 361 N.E.2d 1015, 1011 (1977).

{COMPANY} can satisfy none of these requirements. There is no reason why the costs of "training" {EMPLOYEE} would be difficult to ascertain, other than that they are infinitesimal. A

"termination fee" of $20,000 cannot possibly be a reasonable measure of harm where {EMPLOYEE} was only paid $23,000 in basic salary the first year, and an annual rate of $25,000 in basic salary the second year. {COMPANY} seeks to penalize {EMPLOYEE} almost his entire first year's basic pay. *See Novendstern v. Mt. Kisco Medical Group*, 177 A.D.2d 623, 576 N.Y.S.2d 329 (2d Dep't 1991) (one year's gross medical fees would be so disproportionate to the loss as to constitute unenforceable penalty); *Ford v. Cardiovascular Specialists, P.C.*, 103 A.D. 3d 1222, 959 N.Y.S.2d 352 (4th Dep't 2013) (150 percent of annual income unenforceable penalty). Any "training" cost to {COMPANY} is surely outweighed by the amount earned in profit by {COMPANY} from the exploitation of {EMPLOYEE}'s labor.

The Employment Agreement {EMPLOYEE} was compelled to sign is unconscionable and plainly unenforceable. An entry-level employee should not have to bankrupt himself to escape his corporate employer. I suggest you deploy your resources elsewhere.

C. Response from Company General Counsel

Thank you for the letter on behalf of your client {EMPLOYEE}. It probably makes the most sense to set up a call to discuss, but in the meantime, I'd like to point out a few issues and give some background before we talk to make sure we're on the same page since it appears you are not familiar with {COMPANY}'s business.

First, you need to understand that the two-year commitment is the key to {COMPANY}'s successful business model. {COMPANY} provides training in its in house training academy followed by work experience through placements with {COMPANY}'s client base for graduates who would not on their own normally be able to get this training and work experience with the type of clients {COMPANY} has. This is the very reason graduates choose {COMPANY}. In exchange for the training at no cost to the employee, {COMPANY} requires a two-year commitment from the employee in order to recover its investment plus a return and also to offer competitive rates to clients. Importantly, based on the employees' contractual commitments, {COMPANY} makes representations to its clients that the consultants are available for a two-year period. The quality of

consultants, the two-year availability that allows for continuity of services and the competitive rates are what makes {COMPANY}'s model so desirable with clients, which in turn provides for more work experience opportunities for graduates working through {COMPANY}. All of this is driven by the two-year commitment. When the employee/consultant does not honor that two-year commitment, then {COMPANY} is often in breach of its contractual arrangement with its clients and can lose significant business or spend time and money to replace a consultant on the client site often with a "no charge" period. Accordingly, the early termination fee is to compensate {COMPANY} for damages due to the employee's failure to complete the two-year commitment. Yes, {EMPLOYEE} could leave whenever he wanted (he is not in indentured servitude), but he needed to comply with his contractual obligation to pay the early termination fee. He has wholly failed to do so. {COMPANY} is very transparent to all candidates interested in {COMPANY} as to the obligations. {EMPLOYEE} knew his obligations before he started with {COMPANY} and he knew them when he chose to resign early.

Second, the liquidated damages provision is fully enforceable. At the time of entering the contact, the damages {COMPANY} potentially could have suffered for {EMPLOYEE}'s failure to complete his two year commitment were in excess of the liquidated damages amount of $20,000 (and in fact are in excess of $20,000), so the contractual damages amount is certainly a reasonable measure of the anticipated probable harm. The liquidated damages do not just simply represent the costs of training (which are certainly not infinitesimal as you state). While the liquidated damages fee does in part represent lost costs of investment for training, it also represents lost revenue/profits for the remainder of his two year commitment period, potential reputational damage to the client, lost business, costs of replacement, etc. The liquidated damage amount provided in the contract is a good faith estimate of such damages at the time he entered into the contract. It is certainly reasonable and enforceable. Additionally, I don't follow your circular logic of arguing that {EMPLOYEE}'s base salary somehow determines what {COMPANY}'s damages are. {COMPANY}'s damages are separate and independent from {EMPLOYEE}'s base salary. While a comparison can be used by a court to determine reasonableness, the salary does not determine

the damages. In other words, if for example {COMPANY} charged "one year's salary" as liquidated damages for potential losses of $5,000 then that would not be reasonable. I note that in the Ford case you site, 150% of annual income and bonus would have been approximately $555,000 which was grossly disproportionate to evidence of potential damages for the alleged breach. A similar result was reached in *Novendstern*. In both cases the court appears to have then allowed proof of actual damages. Your reliance on these cases is not persuasive and is certainly not the situation with the matter at hand where damages are in excess of {EMPLOYEE}'s salary, but even if you are correct, then {COMPANY}'s proof of actual damages would be in excess of the liquidated damages amount.

Additionally, while you point out {EMPLOYEE}'s base salary, you fail to point out that he also was paid a daily performance bonus of $88 for each day working on a client site. This daily bonus increased his second year. Before he started training, the salary and daily bonus were all clearly explained as was the two year commitment and early termination fee. If {EMPLOYEE} didn't like any of that, he was not obligated to work for {COMPANY}. But once he made that contractual commitment, {COMPANY} represented his availability for two years to its clients.

Third, regardless of the contractual and legal obligations in this regard, {COMPANY} also just feels cheated and dishonored. {COMPANY} met its obligation to {EMPLOYEE} by providing training and work experience, but {EMPLOYEE} is now refusing to pay his contractual early termination fee and has injured {COMPANY}'s relationship with its client. It is frustrating from {COMPANY}'s standpoint when {EMPLOYEE} knew his obligations at the very beginning, signed his contract and has never complained of the termination fee or the two year commitment. He knew {COMPANY}'s model and his obligation, but is now simply trying to avoid the consequences of actions.

Lastly, even if he was not happy at {COMPANY}, there is no excuse for being unprofessional and avoiding a discussion about his contractual obligation. In an effort to help the situation, {COMPANY} offered to find him another placement with a different client, but he refused without explanation and simply just left. For some reason he sent the following rather abrupt email after what I perceived to be a cordial phone conversation with me:

I intend to work until December 3, 2015, assuming that the company can maintain a professional work environment. I have nothing further to say regarding any other issue.

Regards,

{EMPLOYEE}

Despite this representation to {COMPANY} (which {COMPANY} then in turn represented to its client) that {EMPLOYEE} would work a notice period through the 3rd of December, he failed to show up at work. {EMPLOYEE} had also indicated on a phone call with me that he would send me his reasons for his resignation, but he never did. This conduct has made it very difficult for {COMPANY} to explain to its client why {EMPLOYEE} left his placement and has damaged {COMPANY}'s relationship with this client. So {COMPANY} finds it ironic that {EMPLOYEE} demanded a professional work environment while he himself has not done so. Part of {COMPANY}'s training teaches consultants professional skills and how to properly conduct themselves in a professional environment on a client site. Being honest, communicative and honoring contractual commitments are all skills in that regard. Allowing {EMPLOYEE} to avoid his contractual obligation in this matter will not serve him well in his career. {COMPANY} expects him to honor his commitment.

Therefore, despite your comment that "{COMPANY}has no reasonable basis for demanding such a fee," the above clearly shows otherwise.

I hope this helps some with the background and will aid our discussion to resolve this matter. As you can tell by this lengthy email, this is an important matter to {COMPANY} in which we will deploy appropriate resources.

D. Response from Employee's Attorney

The company's insistence on an entry level employee paying a "termination fee" to merely move on with his life is not only legally unenforceable, it is morally repugnant. I will try to stick to the legal arguments in my response.

First of all, this is an "at will" employment contract, a critical distinction with your example, which seems to suggest a promise by the employer to employ the employee for two years. The Term is defined as "the minimum period of the longer of [whatever that

means] (i) two years . . . and (ii) completion of the project . . . or until otherwise terminated by the Parties", which means there is no term at all.

Driving home the point, the agreement states, "The Company may terminate this Agreement without cause at any time and in its sole discretion."

Either this is an employment contract with a two year term or it is an at will employment agreement. It cannot be both. If this were an employment contract with a two year term, this would be a different situation, at least as to liability.

Even if this could be construed as a two year contract, with mutual commitments to a two year employment period, a breach by an employee does not result in the kinds of damages sought by {COMPANY}. An employee's failure to meet contractual obligations is generally not redressable in an action for damages. The employer cannot receive tort like damages, and is generally not entitled to lost profits. Any obligation on the part of an employee to pay a certain type of damages in the event of a breach must clearly and specifically state those obligations in the agreement. This agreement does not specify a type of damages, but merely states that the termination fee is intended to "compensate the company for the damages it will sustain due to the Employee's breach."

Furthermore, the liquidated damages provision is unenforceable for the reasons laid out in my initial response.

You refer to the unpaid mandatory training {EMPLOYEE} was required to attend. Not only could he "receive the training and walk whenever he wanted without paying anything," the training requirement itself violates the Fair Labor Standards Act and state law, an issue, in addition to {COMPANY}'s failure to pay overtime, we will certainly raise, perhaps on a class basis, if this matter is litigated. The training in this case was not a master's degree from Harvard, which might be noncompensable. It was mandatory, held during normal work hours, and directly related to {EMPLOYEE}'s job.

Finally, you describe {EMPLOYEE}'s conduct as a "complete lack of professionalism." On November 12, 2015, {EMPLOYEE} received a letter from someone named {NAME}, who informed him that unless {EMPLOYEE} paid the company $20,000 by December 3, 2015, {COMPANY} would "deduct your final wages [sic] in order

to partially settle your liability." Such a deduction would plainly violate state law. In other words, the company was about to steal {EMPLOYEE}'s wages for his last 15 days of work. {COMPANY}'s conduct was beyond unprofessional; it was thuggish. {EMPLOYEE} was forced to react accordingly.

In the end, your interesting use of language ("provide training," "give you job experience") betrays a fundamental misunderstanding of the dynamics of the workplace. Employees have very few rights under this legal and economic system, but some of the few they have include an entitlement to be paid for their labor, and the freedom to quit whenever they want. {COMPANY}'s business model, which apparently presumes that the employer is doing the employee a favor by allowing him to work for the company, and that therefore the employee owes the company more than just an honest day's work for an honest day's pay, represents a degradation of the worker to which even the current legal environment has not yet descended. {EMPLOYEE} is not interested in furthering that business model, and in fact, we would be happy to help hasten its demise by filing an answer and counterclaim to any action.