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Blog Post

Does Your Clawback Need a Manicure?

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You've wined and dined and trained and invested in your new hire, and now they're leaving you in the midst – before you were ready – can you still get the ring back, or in this case, "clawback" your training and other related expenses? Based upon a recent inquiry by the Consumer Financial Protection Bureau (CFPB or Bureau), your clawback may end up needing a manicure. The CFPB, which "is charged with monitoring markets for consumer financial products and services to ensure that they are fair, transparent, and competitive," currently has employer repayment agreements under its microscope – and the end result could mean a major clipping.

The CFPB recently published a Request for Information seeking feedback from the public on the inner workings and impact of what the Bureau has called "employer-driven debts." According to the CFPB, employer-driven debts include standard repayment agreements between employers and employees for reimbursement of training costs upon a "premature" departure; and between employers and independent contractors for the advancement of equipment and supplies essential for the completion of services. The CFPB has expressed concern that employer-driven debt could be harmful to consumers, including the impact on household finances, uncertainty about collection and the potential for default, and inaccurate credit reporting. Yet, at the pinnacle of this inquiry, is the impact on competition and the fluidity of movement by

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workers among employers. The CFPB intends to explore the depths of which it can "use its supervision, enforcement, research, rulemaking and consumer complaint functions with respect to employer-driven debt." The period for public commenting has closed. As we await potential rulemaking or other ramifications of the CFPB's inquiry, it is the best time for employers to review their repayment agreements with their workers to ensure that their clawbacks remain sharp.

Evaluating Reasonableness of Employer-Driven Debt Provisions

In this era of "The Great Resignation" and "Quiet Quitting," what is an employer to do to protect against high worker turnover? Workers at companies of all sizes and industries are changing their attitudes about how, when, and where they want to work, and moving between jobs at alarming rates. Employers are simultaneously grappling with recruiting, hiring, training, and retaining the most qualified individuals in a tight labor market with rising business costs and inflation impacting their bottom line. As part of that effort, companies are paying more attention to the types of protections they have in place to level the playing field.

Noncompete, nonsolicitation, and nondisclosure provisions in employment agreements are some of the most popular protections employers use to protect their investments in their workforce. To bolster their protection against the proverbial revolving door of workers, employers also commonly try to recoup training costs and other expenses when workers exit the turnstyle sooner than anticipated – before employers have fully realized a return on their investment. These repayment agreements are now taking center stage. Will the CFPB ultimately take action to clawback these clawbacks? The CFPB expressed its interest in finding out if consumers had a "meaningful choice," what the terms and conditions are in these types of agreements, and whether the agreements would keep employees from seeking another job. The CFPB solicited information regarding pricing terms, how the agreement was disclosed to the worker, and whether charges for training or equipment and supplies were "dubious" or fairly reflective of the intrinsic value of the training or equipment the worker received. If the CFPB attempted to halt or limit the use of these reimbursement provisions in employment agreements, it could have a chilling effect on the way employers, hire, train, and retain employees.

Recent Court Challenges to Repayment Agreements

Even before this recent CFPB inquiry, clawback agreements – including training repayment agreements – have been under attack across the country in class and individual court actions. To date, courts have generally, but not always, enforced these provisions as less onerous than restrictive covenants (noncompetition, nonsolicitation, nondisclosure obligations) in protecting a company's legitimate business interests. There has been a growing trend challenging these provisions on behalf of workers, who are often not shy about expressing their displeasure with their employer's actions on social media websites. Most recently, claimants have characterized reimbursement agreements for training and equipment expenses as "unlawful kickbacks" to the employer. Fortunately, courts have not uniformly agreed with that contention.

For example, in a 2018 class action lawsuit in New York, a consultant argued that a termination fee in her agreement was an illegal kickback under the Fair Labor Standards Act (FLSA). In that case, the consultant had completed a training program that lasted between two and six months, and was valued at up to $30,000 which the consultant was not required to pay. The consultant was required to execute an employment agreement that provided if the consultant did not complete the minimum two-year placement at a financial institution, she was then required to pay a termination fee of $30,000 if she left early within the first year, and $20,000 in the event she left the second year. The consultant resigned before the start of her second year, and paid the $20,000 after submitting her resignation. The consultant argued that the $20,000 she had to pay was an illegal kickback in violation of the FLSA. The court disagreed with the consultant's characterization of the termination fee as an illegal kick back and stated that the agreement showed a liquidated damages arrangement.

As further illustration, in 2019, a federal court in Illinois similarly found that an employment agreement containing a "training cost reimbursement provision" did not violate the FLSA. The financial advisors in that case were enrolled in a 17-week training program that included travel and preparing them to pass training exams that required a sizeable investment for the company. The terms of the agreement required the advisors to reimburse the employer $75,000 if they terminated their employment during their first year of employment and reduced by $9,375 for each full quarter year of service. The class of financial advisors argued the provision placed an illegal condition on their pay and the enforcement of the provision reduced their compensation below the minimum wage. The employer argued that the provision did not violate the FLSA because it was a loan to cover the cost of training they received. Ultimately, the court held the reimbursement was a contractual debt owed and not a kickback in violation of the FLSA.

While the recent decisions do not signal that courts will allow these lawsuits challenging these types of provisions in employment agreements to proceed as possible violations of the FLSA, employers need to consider whether the repayment agreement should be presented as a loan or salary advance that is "forgiven" after a stated amount of time, or a penalty or liquidated damages provision when a worker separates ahead of schedule. The former approach is customarily viewed as FLSA compliant regardless of minimum wage and salary deduction considerations, whereas the latter may be more problematic. The characterization and mechanics of recoupment may have an impact beyond minimum wage and salary basis considerations under the FLSA, including tax implications, and the potential of unintentionally creating an implied employment contract. Moreover, changing attitudes in today's workforce and the CFPB's latest inquiry in its Request for Information is enough to put employers on notice that action from the CFPB could impact this valuable tool employers use to maintain workplace stability.

Repayment Agreements: Investment Shield or Recruitment Sword

Employers should take the time now to sharpen their clawbacks and make sure any repayment provisions appear fair and are reasonably reflective of the actual cost or value of training and other investments by the company. Special care is needed to make sure repayment agreements do not violate the FLSA, are consistently applied, and not otherwise overbearing or unconscionable. Employers should also consider the impact on its corporate culture if workers believe they are forced to stay in their jobs in fear that they cannot afford to leave because they are unable to repay the costs and expenses in their employment agreements. Or worse, the optics in the court of public opinion if a company were to take legal action to enforce a repayment provision against a lower wage earner. Employers should also consider that the cultural impacts of these policies may not improve retention and may even harm it. Competitors looking to recruit top talent may tout that they do not have similar policies, and may even offer to cover these expenses as part of the compensation package in order to attract candidates bound by repayment agreements.

Employers should carefully look at their workforce as a whole and appropriately assess the time and money actually spent investing in recruiting, hiring, and training their employees. For low-skilled workers who are not highly compensated, employers should consider the ability of the worker to repay the expenses in the event the worker were to terminate earlier than agreed upon to avoid the perception of proliferating onerous employer-driven debt. While these provisions are a useful resource in allowing an employer to protect its investments in human capital, consumer advocacy groups argue that these types of arrangements unduly restrict workers from freely moving from job to job. Employers need to pick their battles carefully.

Some Repayment Agreements May Be Out of Bounds

Companies should be mindful that some states have laws banning or severely limiting worker reimbursement or repayment provisions. For example, in Connecticut, there is a law prohibiting employers from requiring, as a condition of employment, an employee or prospective employee from executing an "employment promissory note." The law defines employment promissory note as an agreement requiring the "employee to pay a sum of money if the employee leaves...before the passage of a stated period of time" and includes agreements that state payment constitutes a "reimbursement for training previously provided to the employee." The law does not prohibit agreements requiring the employee to repay advanced money; to pay for any property the employer sold or leased to the employee; requiring educational personnel to comply with terms or conditions of sabbatical leaves granted by the employer; or part of a program agreed to by the employer and its employees' collective bargaining representative. Additionally, a fairly recent California law requires acute care hospital employers to reimburse job applicants and employees in direct patient care positions for their educational program and training costs.

As with many other issues, there may not always be a one-size-fits-all approach for multijurisdictional employers. Employers should carefully weigh and balance their interest in recouping worker retraining costs and expenses with the need of workers, who may already be financially strained, to have career fluidity and a “meaningful” choice. Employers should consult with a labor and employment attorney if they are considering implementing an agreement requiring workers to reimburse training costs, equipment, or other expenses related to the education and training of their workforce. For those repayment agreements already in place, it is optimal timing for review and revision and/or strategic decision-making regarding enforcement efforts. In today’s highly competitive job market, companies are under enormous pressure to increase profitability and to hire, train, and retain the most qualified workforce. Employers should ensure their approach in implementing these types of agreements is careful and thought out to prevent any backlash among their workforce and to curb the perception of an aggressive and/or toxic work environment. For information or guidance regarding revising your clawbacks, contact your Akerman labor and employment attorney.

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