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Recouping Training and Development Costs Using Preemployment Agreements

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Abstract The dollars associated with training and development investments for organizations are considerable. Employers are unable to recoup these expenditures if workers leave the firm before it has had an opportunity to realize the benefits of sueh training. To assist businesses in maximizing their return on investments in human capital, it is suggested that training and development professionals and legal eounsel examine the applicability of preemployment agreements to reeover their training expenses. Such eost-sharing agreements—provided they are clear and narrowly written, reasonable, moderate, and serve legitimate business interests—are permissible contracts that require employees to continue in service for a period of time or reimburse the organization an agreed-upon sum if they leave before an agreed-upon time.

Key words recouping training costs · reducing training costs · preemployment agreements · reducing training expenses

> Why should an employer provide valuable and costly training to employees who will end up working for someone else?

At one time employers would invest considerable dollars in employees' futures—by funding their training and education—with confidence that they were also investing in their company's futures. However, unlike in the past when there was little risk or fear of losing

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the trained individual to another employer or principal, firms now face significant turnover and turnover costs (SASHA Corporation n. d.)[1] in part because of lower levels of employee commitment and loyalty (Bridges and Harrison 2003), and because of higher levels of employee mobility.[2] Such trends have led growing numbers of organizations to the belief that training and development activities may represent investments in employees' *marketability* (Quarles and Brady, LLP and Affiliates 2001).

Once the bonds of long-term employment are broken, employer-sponsored training in skills becomes a public good or, even worse, a potential liability if the employee leaves the company with trade secrets and employer-specific skills. Knowledge of specific business operations and/or a specialty or highly technical knowledge which is only known by an employee of that business makes that worker very attractive to competitors. Hiring a person with business and technical knowledge saves a new employer the time and expense of training while providing competitors reluctant to invest in training a "free ride" because they can recruit well-trained employees without having to assume the cost of the training.

Interestingly, Lynch (1992) found on-the-job training raises wages at the current employer but not at future employers, whereas off-the-job training raises wages at future employers but not at the current employer. In a similar vein, Lengermann (1996) and Loewenstein and Spletzer (1998) found training raises future wages more for workers who switch employers than for workers who remain with the employer initially providing the training. This differential return is especially high for training received at vocational institutes or business schools, or in the form of seminars outside of work. Thus, employer-provided training offers skills that are useful at firms other than the one providing the training and portable across employers (Baron *et al.* 1999). This leads to increased employee job mobility, a reluctance of employers to invest in worker training and development, and a search by organizations to limit substantial training investments and costs.

Training Costs

Training received by workers is costly. Employer investment in such training can take many forms: proprietary training curricula built by the employer specifically for its employees, funding commitments for employees to attend classes taught by third parties, and apprenticeship programs are a few examples of the more common methods (Cappelli 1999). More specific training activities may include tuition reimbursement programs, traditional on-premises classroom instruction, audiocassettes, satellite/broadcast television, teleconferencing and video-conferencing, and computer-delivered education (CD-ROM/DVD/Diskettes), just to name a few (Galvin 2003). In 2003 an in-depth study was made involving training expenses for *Training Magazine's* Training Top 100 companies (Galvin 2003). The report revealed that these firms invested more than $6 billion in workforce development initiatives for a second consecutive year and, on average, these companies provided 65 h of training per employee per year reflecting 4.6 percent of payroll. More

[1] SASHA Corporation (n. d.) estimates that the average turnover cost for an $8.00/h employee to be $9,444. This figure includes direct costs such as advertising, sign on bonuses, headhunter fees and overtime, and indirect costs such as recruitment, selection, and training, and decreased productivity while current employees pick up the slack.

[2] For example, the U.S. Department of Labor reported in 2004 that employees work a median of 4.0 years for an employer (U.S. Department of Labor, Bureau of Labor Statistics, News 2004).

recent data collected by Sugrue and Kim (2004) for the American Society of Training and Development employed a sample of 344 U.S. organizations and found that annual training expenditure per employee was about $820 and that organizations provided 26 h of formal learning per employee. These are conservative figures since they do not reflect informal (on-the-job) training, which is very difficult to measure. Nevertheless, several national surveys indicate that the amount of informal training is correlated with formal training (and almost always refers to classroom-based, off-the-job training such as workshops and seminars), and involves five to ten times more employee time (Reich *et al.* 2003). According to Lange (2003), American companies spend more money on education than do all the public school systems in the United States. In summary, training is a significant expense and efforts to ensure its efficiency and control its costs are mandated by senior management.

Approaches to Reducing Training Costs

Given the large sums of money involved in training, a number of approaches have been introduced over the years to reduce these costs. One such effort involves the decision to provide in-house programs versus outsourced programs. An in-house training or development program is conducted on the premises of the organization primarily by the firm's own employees. An outsourced training or development program involves having people from outside the organization perform the training. This approach might involve sending employees to training and development programs at colleges and universities, a consulting company's headquarters, or similar locations. "The primary advantage of outsourced programs is cost. Because the organization does not have to maintain its own training and development staff, or even its own training and development facilities, the cost is typically lower than would be possible with an in-house training and development program" (DeNisi and Griffin 2001, p. 275).

Decisions regarding in-house versus outsourced training programs as a cost reduction approach have been discussed and argued for years. In a more recent effort to reduce training costs, organizations have examined the contributions of technology. For example, Schriver and Giles (1999) reported a savings of over $1.5 million at two nuclear plants when management implemented its intranet to deliver training programs and qualification tests. Similarly, Cisco (2000) reported a savings of over $20 million in a 1 year period (a conservative figure primarily due to savings in travel costs) when the organization moved from traditional instructor-led training to training delivered through its network streaming video solution.

To protect their investments in worker development, employers have also looked to noncompetition clauses (noncompetes; Blake 1960) as a means of protection (Long 2005). However, the area of noncompetition law is in a constant state of flux and states are continually playing a perennial game of "catch-up" as market conditions impact employment patterns and practices (Long 2005). Such an environment has resulted in both employer confusion in predicting whether covenants will be upheld and court frustration at having to constantly revise employment law doctrine (Cappelli 1999). Moreover, courts have historically not favored noncompete covenants designed solely to protect an employer's investment in training (e.g., Clark Paper & Mfg. Co. v. Stenacher 1923; Kelsey-Hayes Co. v. Maleki 1991; USAchem, Inc. v. Goldstein 1975). Indeed, a 1990 study of 105 cases did not find the presence of an employer's investment in training significant enough to warrant discussion (Whitmore 1990).

Consequently, another approach organizations are utilizing to reduce significant training investments—and the focus of this paper—is utilizing preemployment agreements to

recover training costs should an employee leave or be dismissed before the organization has had an opportunity to realize the benefits of such training. These agreements incorporate the coneept of what Allerton (1998) eleverly calls "stay or pay" (p. 10). Sueh agreements offer a less risky, and more suitable, method for proteeting employer training investments.

Preemployment Agreements

Preemployment agreements require that job applieants sign eontracts promising to engage in or refrain from eertain behaviors in order to be considered for employment (Soper *et al.* 2004). There is generally little or no negotiation. Employers write contracts and applieants sign them. Employers typieally rejeet ehanges proposed by applieants unless the applieants or their skills are in great demand. In faet, if applieants request too many ehanges, employers may not hire sueh potential "troublemakers." In the absenee of an essential skill or aeute economie neeessity, employees are frequently plaeed in a "take it or leave it" situation. A possiblc faetor eontributing to the increased usage of preemployment agreements is that more organizations realize that their most valuable resouree is trained and skilled employees and the information they possess (Pfeffer 1994). As a means of proteeting their investment in human resources and thc information they possess, more firms are turning to employment agreements for self-protection.

Preemployment agreements and employment eontraets typically address one or more of the following topies: (1) non-diselosure of business information and trade seerets, (2) non-competition by the employee, (3) mandatory dispute resolution, 4) non-solicitation, and (5) training expense reimbursement (Soper *et al.* 2004). Preemployment contraets and preemployment agreements are not commonly used unless the employer has some proprietary or property business right that needs to be proteeted or is going to expend a substantial sum of money in training employees. The use of these provisions depends on the nature of the business and the interests the employer wishes to protect, and for that reason not every employment applieation or contraet contains all of these provisions.

Training Expense Reimbursement Preemployment Agreement

One such preemployment agreement involves training expense reimbursement. Such agreements provide for recoupment, in whole or in part, of training expenses from an employee, if the employee does not remain with the organization for a designated time period after completion of the training. These agreements have become inereasingly prevalent in preemployment contracts (Kraus 1993; Long 2005). These requirements are most typieally enforced if the employee is developing a new or updated skill. Training cost repayment agreements usually require employees to work for a period of one to several years to avoid being eharged for their training. Typically, they contain a repayment obligation that deereases in proportion to tlie employee's post-training service. Employees are credited with partial repayment in kind for each successive period that they remain on the job until the entire amount is diseharged.

The amount of reimbursement collectable under a training cost repayment agreement is subject to another potential limitation in addition to the constraints of restrictivc covenant law. The amount of repayment can be conceptualized as a stipulated estimate of damages that the employer is entitled to for the premature loss of the trainee's services. To be enforceable, the damage amount must satisfy the requirements for liquidated damages. One

requirement is that the amount reflect a reasonable projection or estimate of actual damages (National Conference of Commissioners on Uniform State Laws 1979).

Preemployment agreements are contracts governed by basic common law contract concepts. Even though states enact legislation which affects various and specific employment contract principles, basic common law contract theory still applies (Soper *et al.* 2004). A copy of such an agreement prepared by the authors is attached as Appendix A.

Agreements requiring employees to reimburse training costs if they quit prematurely appear to be generally consistent with public policy. The federal government itself negotiates a virtually identical form of agreement with medical students whose education it finances under the National Health Service Corps Scholarship Program (National Health Service Corps n. d.). The federal program requires students who do not fulfill their service obligations to pay treble training costs (42 U.S.C. 529(h)(e)(2)).

Similarly, the State of New York also requires that its Department of Social Service employees incur a service obligation or monetary repayment for individuals receiving training fellowships (New York Social Services Law 1970) and the same type of arrangement has long been endorsed in theory for the private sector. As the United States Court of Appeals for the First Circuit noted over 30 years ago, "Doubtless an employer who has provided specialized training to an employee through a course of studies or the like might reasonably contract with the employee for reimbursement if the employee should quit before the employer achieves any benefit" (Wilson v. Clarke 1972, p. 1219).

Courts and Preemployment Agreements

Courts have more recently begun enforcing covenants on the grounds that an employer paid for an employee's training to acquire skills and is thus entitled to prevent the employee from utilizing those skills on behalf of a competitor. Stone (2002) indicated that now employer-provided training is a frequently cited rationale for enforcing restrictive covenants by courts (e.g., Aero Kool Corp. v. Oosthuizen 1999; Am. Express Fin. Advisors v. Scott 1996; Nail Boutique, Inc. v. Church 1988; Outsource Int'l, Inc. v. Barton 1999; Overholt Crop Insurance Serv. Co. v. Bredeson 1989; Weber v. Tillman 1996) and may signal "that the long-standing judicial hostility to covenants may be on the wane" (Groth 2001, p. 78).

Other courts adjudicating the validity of these agreements have shown a willingness to enforce them (Booth v. EDS Corporation 1992; Heder v. City of Two Rivers, Wis. 2001; Milwaukee Area Apprenticeship Training Committee for the Electrical Industry v. Andrew A. Howell 1995; Orkin Exterminating Co. v. Foti 1974). For example, in Booth v. EDS Corporation, Booth was employed by EDS and voluntarily entered a three-phase development program. Before any employee entered phase two of the program, EDS required the execution of a promissory note for $9,000 to protect the company's investment in the employee's education. The note was to be repaid if the employee was terminated or resigned before completing 3 years of service and was forgiven if the employee stayed longer than 3 years. Before completing all of the program training and before the expiration of 3 years, Booth was terminated for dishonesty in reporting reimbursable expenses. Booth filed suit for wrongful termination and violations of the Federal Labor Standards Act. The defendant, EDS, sought recovery of $9,000 on its compulsory counterclaim. The trial court rejected all of Booth's claims against EDS and granted judgment in favor of EDS for the $9,000.00 for educational expenses. The court ruled that "[w]hen a contract is not ambiguous, it is enforced according to its terms" (Booth v. EDS Corporation 1992, p. 1094).

In *Heder v. City of Two Rivers, Wis.*, Christopher Heder was a fireman who was receiving paramedic training that was paid for by his employer, the City of Two Rivers. There was a written agreement that required Heder to repay the city's costs associated with his training if he should voluntarily resign within 3 years of the beginning of the training. The agreement also provided for liquidated damages in the amount equal to the overtime pay Heder received during his training. Heder was paid overtime pay when he took his paramedic training. Heder resigned 2.5 years after beginning his training, and the defendant, City of Two Rivers, under claim of offset, withheld funds from Heder's last paycheck and also withheld accrued vacation pay and sick-leave payments, and applied these withheld funds to what the City claimed Heder owed it for training expense reimbursement and the liquidated damage provision.

The court basically ruled that the agreement for training expense reimbursement was contractually permissible, but that the liquidated damage provision was not. The trial court applied the test of "reasonableness" to restrictive covenants in contracts and found that it is reasonable to recover costs and expenses for training and it is reasonable to expect the employee that receives training to work for the employer for a "reasonable" length of time after the training is completed. The court determined, however, that the liquidated damage provision was "not reasonable" because it did not represent actual training expenses (reimbursement for overtime payment) and the way that the overtime expenses were computed were violations of the Federal Labor Standards Act of 1938.

In *Milwaukee Area Joint Apprenticeship v. Howell*, a repayment clause in a training contract was upheld when it required an electrical student to repay the cost of his training to an apprentice training trust fund when he chose to work for an employer that did not contribute to the fund. The court specifically found that the repayment clause was not a restrictive covenant and did not prevent the apprentice from working. Likewise, in *National Training Fund v. Maddux* the court made a similar finding and required an employee to repay the cost of training after acquiring a new skill at his employer's expense, because the contract provision did not prohibit the employee from working for someone else. The agreement only required repayment if the employee ceased working for the employer with a set period of time. Finally, in *Orkin Exterminating Co. v. Foti*, the court found the agreement acceptable but ruled that a contract provision which provided for training but additionally prohibited an employee from being employed by a competitor was a restrictive covenant and hence not enforceable. The court found that an employer expense of $261.50 to furnish 1 day of training in 1970 did not justify restricting an employee from competing (working) in 1973 and 1974, since "the employer had long received the benefit of its investment through the employee's 2 years of managerial service afterwards" (p. 598).

Such agreements designed merely as penalties against the employee for the breach of a noncompete have also found some judicial support (see, e.g., Dental East, P.C. v. Westercamp 1988; Holloway v. Faw, Casson & Co. 1990). In *Dental East* the court enforced a noncompete that required a payment penalty if the employee, a dentist, chose to break the agreement for 1 year after termination, while in *Holloway* the court upheld a "fee equivalent remedy" that required an accountant to repay his former partnership in the event that the partner competed within a prescribed geographic area.

Nevertheless, there are limits to the judicial enforcement of preemployment agreements. For instance, in Brunner v. Hand Industries, Inc. (1992) an Indiana state court refused to uphold a repayment agreement because it was unreasonably restrictive. Brunner was an employee who had agreed to a 3-year repayment schedule during which time the amount to be repaid by the employee would increase with the amount of training provided by the employer. The court judged the agreement invalid because the employee potentially could

have been liable for an amount exceeding the total wages received throughout the employment. Thus, the court seems not to have rejected the repayment agreement per se but rather condemned the increasing scale of repayment amounts used by the employer. Perhaps a more conservative repayment arrangement would have been enforced.

States and Preemployment Agreements

States have also attempted to protect employer's investments in employee training expenses by enacting statutes. Florida, for example, allows restrictive covenants that require employees leaving to work for competitors to repay expenses for "extraordinary or specialized training" as "legitimate business interests," but requires proof that the terms of the repayment agreement are "reasonably necessary" to protect the employer's interests (Fla. Stat. Ann. 1997).

A Louisiana statute carved out an exception to its statute that entirely prohibited noncompetition clauses in employment contracts. The exception permits the employer to recover only in two areas: (1) expenses incurred in the training of an employee or, (2) expenses incurred in the advertising of an employee's association with said business. The Louisiana Statute restricted recovery to 2 years from the date of employment (La. Rev. Stat. Ann. Section 23: 921 1991).

Similarly, Colorado enacted legislation enforcing noncompetition agreements that "provid[e] for recovery of the expense of educating and training an employee who has served an employer for a period of less than 2 years" (Colo. Rev. Stat. Ann., Section 8-2-113(2)(c) 2003). It seems that the main emphasis of these statutes is to make enforceable restrictive covenants to reimburse training expenses if they are contained in employment contracts.

In summary, it appears that courts and state legislatures have recognized the importance of recoupment, in whole or in part, of training expenses from an employee if the employee does not remain with the organization for a designated time period after completion of the training.

Characteristics of Effective Preemployment Agreements

As is the case with the introduction of any new training and development policy, it is only prudent that businesses adopt such agreements anticipating that litigation may ensue. Two key elements of any training reimbursement contract involve the determination of the amount to be reimbursed to the firm and the duration of the obligation to remain with the employer. Organizations are encouraged to be both moderate and reasonable in calculating such figures and timetables and have a sound rationale for decisions made that would play well in court, if necessary.

Calculation of Amount Owed to Organization

Training cost repayment agreements should contain words indicating that employees are credited with partial repayment in kind for each successive period that they remain on the job until the entire amount is discharged. Such language assumes that the cost of the training be calculated and then prorated. The training cost analysis form (see Table 1) may be helpful in determining training expenses and includes key training components that will generally be included in any analysis. Similar frameworks can be

Table 1 Training cost worksheet.

Training cost components for a particular course or program
Student costs:
•Total number of students
•Training duration in hours
•Average student hourly wage and benefits
•Average lost productivity cost per student/per hour
•Training supplies and materials per student
Instructor costs:
•Instructor preparation time in hours
•Instructor hourly salary and benefits
•Number of scheduled training sessions
Travel costs:
•Total number of people traveling
•Training duration in days
•Airfare (or other transportation) per traveler
•Hotel costs per traveler/per day
•Rental car per traveler/per day
•Meal cost per traveler/per day
Training development costs:
•Labor hours required to develop one hour of training
•Instructor/developer hourly wage/cost
Facility costs:
•Facility cost per training event
•Refreshment for breaks
•Equipment costs to present training (e.g., DVDs, TV)
Informal training costs:
•Hours per week spent mentoring
•Number of weeks
•Average hourly pay rate of staff who mentor
•Hourly cost of reduction in productivity/sales
•Number of experienced employees who mentor
•Hours per weeks spent with mentor
•Waste
Miscellaneous costs:
•Registration fees for courses
•Course tuition for outside training programs
•Administrative costs for in-house programs
•Missed opportunity costs

Not all factors may be applicable to a given training course or program.

readily obtained from the internet and management training texts. Back-end computing software available to most organizations facilitates this process. For example, Oracle's (n. d.) software products (including Peoplesoft software) provide comprehensive financial budgeting software that allows businesses to manage training expenses and forecast the feasibility of effective training.

The point is that there is some systematic and logical procedure for determining training expenditures and that these expenditures are reasonable and proper based on the identified training factors and assumptions made therein. It is important for employers to remember that "the amount of any repayment for the cost of training should be commensurate with its actual original cost to the employer" (Kraus 1993, p. 51).

Duration of Obligation

Another key element in a training reimbursement agreement involves the duration of the obligation to remain with the employer—that is the time to amortize the costs determined in Table 1. This time period should be moderate and logically related to the actual time the training is expected to be utilized. With this in mind, research indicates that human resource programs usually benefit organizations over time (Gattiker 1995) and Sehmidt *et al.* (1982) reported that the payoffs of employer-paid training declined after 4 years. Hence, this 4-year time period may provide one rational indicator of a training recoupment period. Another useful metric for firms might be the cost-sharing formula used by the U. S. government requiring employees to remain with the government for a period at least equal to three times the length of the training period (5 U.S.C. Section 4108(1997)). Other time frames may be used, but what is important is to have a realistic justification for the time required to amortize the training thereby enabling employers more likely to defeat challenges indicating that the reduction of the training debt was not considered in "reasonableness" calculations. This is important because courts often use a balancing test whereby various policy considerations are weighed to determine the outcome best attuned to the interests of the employee, employer, and the general public (Bendinger v. Marshalltown Trowell Co. 1999). The focus of this test becomes the reasonableness of the restraint, considering the needs of employees, employers, and the public. For example, in All Stainless Inc. v. Colby (1974) the court determined enforceability by weighing "the reasonable needs of the former employer...against both the reasonableness of the restraint imposed on the former employee and the public interest" (p. 485).

Other Contract Considerations

The contract should be framed or positioned as an attempt by the employer to protect its investment in training as opposed to a penalty to intimidate the employee into continued service with the firm. Hence, the use of needlessly coercive language is discouraged. With this in mind, a set of important points is provided below that firms may find beneficial if incorporated in a legally defensible agreement that will not invite litigation and engender needless confusion. This list is supplied only as an agenda for management education professionals in discussing training reimbursement preemployment agreements with legal counsel and is not to be construed as legal advice. Based on previous litigation and research (e.g., Booth v. EDS Corporation 1992; Heder v. City of Two Rivers, Wis. 2001; Kraus 1993; Lester 2000; Long 2005; Stone 2002) it is important that organizations having preemployment agreements provide:

- A clear and narrowly written document including a provision that the document is a contract and that the applicant is encouraged to have his or her legal counsel review the agreement before signing;
- A sound, rational, and reasonable justification of contract specifics incorporating a number of considerations including damages, time limits, and how repayment will be enforced;
- An amortization or reduction in training expenses based upon the proportionate time of service of employee after the training is completed;
- Conditions of repayment that are explicitly stated and damages provided for in the agreement that are reasonably related to actual training costs to the employer and thus not economically excessive;

- Provisions that clearly stipulate that repayment would be sought only if the employee leaves without consent or is terminated for cause within a reasonable specified period after the training;
- An agreement disclaiming any guarantee of ongoing employment and expressly reserving a right of termination (assuming that a firm desires an at-will relationship)
- Language that does not violate any statute, public policy, or other state or local applicable law;
- Language that cannot he perceived as restricting, inhibiting, or prohibiting post-employment freedom of the employee;
- Language that protects a legitimate business interest—protecting employer investments in training;
- A specification that the only way wages may bc taken from an employee by the employer is through employee consent or an order of garnishment by a court of competent jurisdiction; i.e., thc contract docs not automatically allow the firm to simply deduct unreimbursed training expenses from a worker's last pay check;
- Language providing for attorney's fees and interest if an enforcement action is neccssary.

Other Methods of Training Cost Repayment Agreements

Two other approaches that organizations have used to protect themselves from the losses incurred when employees, who have received specialized or specific training paid for or provided by employers, leave the employment relationship before firms have realized the benefits of training from employees are the usc of continued scrvice agreements in the public sector and promissory notes or loans that generally represent the expenses incurred by private sector employers for training and continued service agreements.

Continued Service Agreements

Continued service agreements (see Appendix B) are provided for in Section 4108 of title 5, United States Code and apply to federal employees. This law provides that agency heads shall establish written procedures to protect the government's interest should employees fail to successfully complete training. Employees selected for training must sign an agreement to continue in service after training prior to starting the training. The period of service will equal at least three times the length of the training. With a signed agreement, the agency then has a right to recover training costs, except pay or other compensation, if the employee voluntarily separates from government service. The act is silent as to any recovery when the employee is terminated for cause. The act only addresses voluntary separation, not involuntary separation.

The agency shall provide procedures to enable the employee to obtain a reconsideration of the recovery amount or to appeal for a waiver of the agency's right to recover. The government may waive in whole or in part the right of recovery if it is shown that the recovery would be against equity and good conscience or against the public interest. For example, if an employee who is under a continued service agreement decides to voluntarily leave Federal service due to an impending reduction-in-force, the agency may determine that waiving its right to recovery would be in the public interest and release the employee from the agreement.

Promissory Notes and Loans

Some private sector employers have instituted employment policies or caused the insertion of specific provisions in employment contracts which not only require the repayment of training expenses but also require employees sign promissory notes or other similar documentation that the training expenses incurred by employers are to be treated as loans. These type of policies or provisions generally provide that no repayment is required as long as employees remain working for a certain time period. The basic legal concept is that the termination of employment before a specified date will trigger the indebtedness and give rise to a cause of action on the debt (Kraus 1993). Various courts have accepted this means of enforcement provided there is a valid and enforceable contract between the parties and the contract does not act as a restraint of trade.

In some instances, employers try to protect training investments by requiring that applicants and/or employees sign personal loan agreements or promissory notes (payable to the employer) which provide that the employees will repay the loan (cost of the training) if they do not work for the employer for a specific period of time. The notes or loans contain specific contract language that cancels the indebtedness if they do work for the specified time period. Conversely, if the employee fails to meet the requisite time requirement the notes become immediately due and payable (Kraus 1993; Sample 1997).

Some states, such as Michigan, provide that training programs which employers offer to fund employees' education with the understanding that the employees will repay, unless they remain with the employer for a specific period, do no violate provisions of the state Wage and Fringe Benefits Act prohibiting remuneration or consideration as condition of employment. This exception is based upon the fact that these programs are optional and not a condition of employment or continued employment (M.C.L.A., Section 408.478(1); Mich. Admin. Code r. 408.9011). Similarly, Minnesota (Minnesota Statutes Section 181.645 2002), and Connecticut (Connecticut General Statute Annotated. Section 31-51r) have enacted statutes which specifically forbid the use of promissory notes as a means of recovering training expenses from terminated employees. No states, however, have forbidden the contractual or agreement concept of recovery. Other states have not resorted to legislative enactments to address recoupment of training expenses, and have accepted the concept as merely a contractual term and condition. For example, in the case Labor Ready, Inc. v. Williams Staffing, LLC (2001) the employer was a manual labor staffing agency. Former workers signed employment contracts with various restrictive covenants which included the restriction not to share how the employees and staff were being trained (Labor Ready, Inc. v. Williams Staffing, LLC 2001). The staffing employees eventually left Labor Ready to work for a competitor. The court found that under Washington state law restrictive contractual covenants may be used to protect an employer's investment in employee training.

Concerns and Limitations

Firms have much to gain from the institution of employment agreements which offer protection for their investments in training employees. However, these agreements have far-reaching consequences to an organization with respect to attracting and recruiting new workers. For example, skilled and talented employees/applicants may be concerned about such agreements and as a result may move to firms with less restrictive employment considerations.

It should also be pointed out that such preemployment contracts do not automatically allow organizations to simply deduct training expenses from an employee's last check. Such actions may violate the minimum wage provisions of the Fair Labor Standards Act of 1938. This is what happened in the case of Heder v. City of Two Rivers, Wis. (2001) when the court ruled that the City of Two Rivers had violated the Act.

Additionally, there is a lack of uniformity throughout the United States in enforcing "recoupment of training expense provisions" in employment contracts. This has caused interstate employers a great deal of concern because while some states have limited the amount of recovery under such a provision, others have restricted the type of documentation that may be used to recover such expense, while other states have passed restrictive statutes forbidding the recovery of training expenses in defined areas. Conversely, most states do not have any statutory restriction whatsoever.

Interstate business employers are bound by the laws of the state in which the employee is working in interpreting such a contract provision. The interstate employer must know the restrictive statutes of each of the states in which it does business and should therefore draft employment contract provisions in accordance with applicable state laws.

Finally, no matter how well-drafted training recoupment provisions are, situations can arise that may stretch an organization's patience. Such was the case of Hensala v. Dept. of the Air Force (2001) which raised contract issues far beyond mere recoupment problems. This is an example of where the organization appeared to be correct in dismissing an employee but still was unable to collect for a repayment of a contractual loan agreement.

John Hensala enlisted in the U. S. Air Force in 1986 and received federal dollars for school under the Armed Forces Health Professional Scholarship Program and attended Northwestern University Medical School. Upon graduating in 1990 he was appointed an Air Force Reserve captain. He twice deferred active duty to complete a psychiatric residency and a fellowship in child psychiatry. In 1994 he notified the Air Force that he was willing to perform his required active duty service as agreed to under the scholarship program but also disclosed that he was gay and intended to live with his partner while serving. He was subsequently honorably discharged from the Air Force under the military's "Don't Ask, Don't Tell" policy.

The Air Force claimed that Hensala told his superiors he was gay to avoid active duty. A lower court agreed with the Air Force interpretation and the government demanded he repay the more than $71,000 cost of his medical education borne by taxpayers. He appealed the ruling insisting he had no reason to believe he would be automatically discharged though he did not deny telling his superiors he planned to live with his male partner on base. Hensala maintained he should not be held responsible for violating the terms of an education funding contract when he is ready and able to fulfill it but is being barred from doing so. The U. S. district court of the Northern District of California granted summary judgment for the government but on appeal the Ninth U. S. Circuit Court of Appeals ordered the case returned to the district court (Hensala v. Dept. of the Air Force 2003). As of September 20, 2006 there was no published decision by the federal district court with respect to the Hensala matter.

Conclusion

There appear to be contradictory forces at play in the modern workplace (Wrzesniewski and Dutton 2001). At the same time that workplaces are embracing less limiting practices such

as casual dress, non-traditional work hours, 4-day work weeks, telecommuting, job sharing, and flexible workplaces, other organizational forces are likely to dampen perceived opportunities for employee flexibility and autonomy.

Two such factors that enable firms and supervision to be more controlling and that have been increasingly adopted by organizations are enhanced use of technology and legal measures. New technology assists businesses in monitoring every aspect of a worker's life (Davies n. d.). For example, "Smart" ID badges track an employee's movement around a building; Telephone Management Systems analyze the pattern of telephone use and the destination of calls; and sophisticated medical tests analyze urine to detect drug use.

Similarly, legal considerations have encroached into practically every aspect of organizational life and firms find they must adapt to this increasing legalistic environment. From the erosion of the employment-at-will doctrine, through the labyrinth of equal employment regulations and the maze of compensation and benefits policies, to the significant impact of the recent Sarbanes–Oxley law, organizations are finding they must spend increasing resources on legal interpretation and compliance. Eyres (1996) has documented this increasing legal advance into the training and development area in her detailed review on training and the law in *The ASTD Training and Development Handbook*. Likewise, Noe *et al.* (2003) summarized a large number of legal issues that have surfaced with respect to training. Unfortunately, neither resource mentioned training cost recoupment or the use of preemployment agreements to recover such investments. While Allerton (1998) did mention recovery of training costs, she provided a scant 84 words to the topic.

Just as it would be foolhardy for organizations to try to stem the tide of technology applications, it would also be imprudent for organizations to ignore the intrusion of legal factors impacting organizations. With the U.S. now having over one million lawyers, up 400% in just 25 years (Alternative Legal Careers n. d.), it is certainly appropriate for them to lobby various governmental units for appropriate relief as well as being proactive in utilizing legal precedents to enhance their effectiveness and viability.

The answer to the question raised at the beginning of this paper is that organizations should *not* be expected to pay for such training. The loose connection of employees to today's employers along with the high cost of training encourages firms to raid other employers for skilled workers, free riding off of any training efforts of the original organization (Herzenberg *et al.* 1998). Businesses that provide employee training should be concerned with receiving a return on this substantial investment. Firms may lose a significant number of dollars when employees trained by the business resign soon after the training program is completed. This has led organizations to examine various legal approaches to protect their sizeable expenditures. Using preemployment agreements is only one method that can be used to reduce training costs. When employees accept such narrowly crafted agreements, they are put on notice that training is not an implicit term of the employment contract, but rather something that they are required to pay for by their continued employment.

Appendix A

Example of training reimbursement preemployment agreement. Consult competent legal counsel to determine if this form may be applicable to your organization.

This agreement entered into by (insert employer's full name) hereinafter called Employer, of (insert employer's mailing address) and (insert employee's full name), hereinafter called Employee, of (insert employee's mailing address), and _____.
Whereas, the Employer is willing to provide a position of employment to the Employee under the terms, conditions, requirements, and provisions contained in this contract, and
Whereas, the Employee is willing to perform the required services for the position of employment under the same terms, conditions, requirements, and provisions contained in this agreement, it is therefore agreed:
1. Employer will employ the employee to perform the following service:

(insert a brief job description)

and such other services and duties that may be assigned, which may be related or unrelated.

2. Employee agrees to perform faithfully, industriously, and to the best of the employee's ability, experience, and talents, all of the above services and duties, expressly or implied, to the satisfaction of the Employer.

3. Employee shall be compensated as follows:

(insert compensation information)

4. In addition to the foregoing, employee shall receive the following.

(insert the benefits or special provisions of the employment)

5. Employee's employment under this contract shall be for an unspecified term on an "at will" basis. This contract may be terminated at anytime by either party, upon two (2) weeks written notice. Failure to provide proper notice shall cause Employee to forfeit any and all accrued benefits as defined above and entitle said Employee only to outstanding compensation.

6. REIMBURSEMENT FOR TRAINING: Employer and employee agree that employee will hold the position of _____which will require additional training and/or education in order for the employee to properly perform the required duties of the position. To aid and assist the employee in performing the required position and to meet the educational and training requirement, Employer is willing to pay for and provide such training and education upon the condition that employee agree to continue employment with Employer for a period of ____ years. In consideration of the Employer providing such expenses, Employee agrees to reimburse the Employer, on a (monthly/yearly) pro-rated basis for the expenses the employer incurred should the employee be terminated, quit, resign or otherwise leave the position trained for within the time period provided for above.

7. NOTICES. All notices required or permitted under this Agreement shall be in writing and shall be deemed delivered when delivered in person or on the third day after being deposited in the United States mail, postage paid, addressed as follows:
Employer: as above
Employee: as above

Such addresses may be changed from time to time by either party by providing written notice in the manner set forth above.
8. ENTIRE AGREEMENT. This Agreement contains the entire agreement of the parties and there are no other promises or conditions in any other agreement whether oral or written. This Agreement supersedes any prior written or oral agreements between the parties.

9. AMENDMENT. This Agreement may be modified or amended, if the amendment is made in writing and is signed by both parties.

10. SEVERABILITY. If any provisions of this Agreement shall be held to be invalid or unenforceable for any reason, the remaining provisions shall continue to be valid and enforceable. If a court finds that any provision of this Agreement is invalid or unenforceable, but that by limiting such provision it would become valid or enforceable, then such provision shall be deemed to be written, construed, and enforced as so limited.

11. WAIVER OF CONTRACTUAL RIGHT. The failure of either party to enforce any provision of this Agreement shall not be construed as a waiver or limitation of that party's right to subsequently enforce and compel strict compliance with every provision of this Agreement.

12. APPLICABLE LAW. This Agreement shall be governed by the laws of the State of _____.

In witness whereof the undersigned have subscribed their signature on the _____ day of _____, 2005.

_____ _____

EMPLOYER EMPLOYEE

Appendix B

Air Force Continued Service Agreement for Civilian Employees (n. d.)

Air Force Continued Service Agreement for Civilian Employees

1. This agreement applies to all training that exceeds 80 hours or such designation period, 80 hours or less, as prescribed by the training circumstances and for which the Air Force approves payment for training costs prior to the commencement of such training.

2. I agree that upon completion of the Air Force sponsored training described below, I will work for the US Air Force for period equal to at least three times the length of the training period. (The length of full-time training is 8 hours for each day of training, up to a maximum of 40 hours a week.).

3. If I voluntarily leave the Air Force before completing the period of service shown in item 8 below, I AGREE to reimburse the Air Force for the tuition, travel, per diem, books and materials, fees, administrative overhead costs, and other related expenses (EXCLUDING SALARY) paid in connection with my training as shown in item 9 below. However, the amount of the reimbursement will be reduced on a pro-rated basis for the percentage of completion of the obligated service. (For example, if the cost of training is $3,000 and I complete two-thirds of the obligated service, I will reimburse the Air Force $1,000 instead of the original $3,000.)

4. I FURTHER AGREE that if I voluntarily leave the Air Force to enter the service of another federal agency or other organization in any branch of the government before completing the period of service agreed to in item 8 below, I will give my servicing civilian personnel office written notice of at least 10 workdays, during which time a determination concerning reimbursement will be made. If I fail to give this advance notice, I AGREE to pay the amount of additional expenses (5 USC 4109(a)(2)) incurred by the government in this training.

5. I understand that any amounts which may be due the Air Force as a result of any failure on my part to meet the terms of this agreement may be withheld from any monies owed me by the government, or may be recovered by such other methods as are approved by *law*.

6. I FURTHER AGREE to obtain approval from the Employee Development Manager responsible for authorizing training requests of any proposed change in my approved training program involving course and schedule changes, withdrawals or non-completions, and increased costs.

7. I acknowledge that this agreement does not in any way commit the government to continue my employment. I understand that if there is a transfer of my service obligation to another federal agency or other organization in any branch of the government, the agreements in items 1, 2, and 3 of this section will remain in effect until I have completed my obligated service with that other agency or organization.

8. Period of obligation Service is from _____ to _____, beginning on or about _____.

9. Projected costs are:
   a. Tuition
   b. Travel
   c. Per Diem
   d. Books and materials
   e. Fees
   f. Other related costs/Administrative overhead
   g. Total

10. Course Title
11. Training Facility
12. Projected dates of attendance
13. Employee's signature
14. Date
15. CPF Representative Signature
16. Date

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