Printed in U.S.A.
Vol. 117, No. 6

EMPLOYER TUITION ASSISTANCE: CURRENT APPROACHES AND THE APPLICATION OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Jordan Ti Krieger

ABSTRACT—American corporations are increasingly expanding tuition reimbursement programs, potentially improving access to higher education for American workers. Yet, despite their increasing availability, only 2% of employees, as a percentage of those interested in pursuing further education, are utilizing these reimbursement programs. For those employees who do make use of these reimbursement programs, they may face unexpected challenges to accessing judicial remedies if a dispute arises.

This Note takes an interdisciplinary approach to first explore employee risks and employer incentives under tuition reimbursement programs. On the employee side, a worker risks premature termination by expressing an interest in tuition reimbursement because her request could be seen as an intent to leave her current role. Moreover, an employee incurs a risk of frustrated expectations if she first pays, or takes on debt to pay, for tuition and the company terminates her prior to reimbursement. On the other hand, an employer's immediate profit incentives may not align with employee use of these programs, as employers may reasonably expect increased labor costs and reduced employee focus on her work.

With this theoretical background, this Note then investigates how current judicial doctrines apply to the adjudication of tuition reimbursement disputes. Given the strong presumption of employment relationships being at will, traditional contract and promissory estoppel doctrines are insufficient in resolving tuition reimbursement claims. Moreover, various federal and state statutes pertaining to antidiscrimination and employee benefits are equally insufficient for these purposes.

In light of these shortcomings, this Note advocates for the extension of the implied covenant of good faith and fair dealing into employment relationships when an employer offers a tuition reimbursement program. This would create parity in judicial treatment between commercial and employment contracts and privilege the objective expectations of both the employee and employer. Finally, this Note provides policy considerations as to why standardization of the implied covenant of good faith and fair dealing is preferable as a normative matter.

AUTHOR—J.D. Candidate, 2023, Northwestern University Pritzker School of Law; M.P.A., 2017, University of Wisconsin–Madison, La Follette School of Public Affairs. I am grateful to Professors Nadav Shoked and Michael Kang for their support and guidance. I also thank the thoughtful editors of the *Northwestern University Law Review*.

INTRODUCTION

American corporations play an increasingly important role in expanding worker access to health care, education, and insurance against illness, accidents, and disabilities. Spurred by a tightening labor market, an increasing number of companies have sought to expand benefits to attract and retain workers.[1] Most recently, companies have increasingly looked to tuition assistance programs to make higher education more accessible and decrease the student-loan burden on the American workforce. In fall 2021, Walmart, Amazon, and Target each announced an expansion of such tuition

[1] *See* Megan Leonhardt, *The Worker Shortage Is Pushing Companies to Offer More Perks and Benefits. Here Are the Most Common Ones*, FORTUNE (Feb. 22, 2022, 10:01 PM), https://fortune.com/2022/02/22/worker-shortage-companies-offering-perks-benefits-most-common/ [https://perma.cc/KYM6-8684] (proposing that sustained employee turnover has contributed to employers offering higher wages and better benefits).

payment programs,[2] and even more employers are considering contributions to help employees pay off student loan debt.[3]

In the American context, these tuition benefits are extremely important to individual workers—particularly those without a college degree.[4] Social science literature has established that postsecondary education increases lifetime earnings, employment security, and intergenerational upward mobility.[5] Yet, higher education has become increasingly unaffordable. The average cost of attending a four-year college increased by 497% between 1985 and 2018, well outpacing the rate of inflation.[6] In conjunction with rising prices, public financial support for higher education has declined. For instance, Pell Grants, the federal grant for low-income students, covered two-thirds of average college costs in 1975 but only one-quarter of the costs in 2018.[7] Moreover, state funding for public universities has declined recently: between 2008 and 2018, forty-one states spent less per student, with

[2] Press Release, Walmart, Walmart to Pay 100% of College Tuition and Books for Associates (July 27, 2021), https://corporate.walmart.com/newsroom/2021/07/27/walmart-to-pay-100-of-college-tuition-and-books-for-associates [https://perma.cc/2BC5-JN25]; Press Release, Amazon, Amazon to Pay Full College Tuition for Front-Line Employees (Sept. 9, 2021), https://www.aboutamazon.com/news/workplace/amazon-to-pay-full-college-tuition-for-front-line-employees [https://perma.cc/CV9M-YSLN]; Press Release, Target, Target Launching Debt-Free Education Assistance Program to More Than 340,000 Frontline Team Members (Aug. 4, 2021), https://corporate.target.com/press/releases/2021/08/Target-Launching-Debt-Free-Education-Assistance-Pr [https://perma.cc/6BM5-N5A5].

[3] Jessica Dickler, *Many Companies Are Offering Generous Tuition Assistance so Workers Can Go Back to College*, CNBC (Sept. 2, 2021), https://www.cnbc.com/2021/09/02/companies-offer-tuition-assistance-so-workers-can-go-back-to-college.html [https://perma.cc/DUC9-VUCU] (describing a 2021 study that found that 33% of mid- and large-sized employers were considering starting programs by 2023 to help employees pay off student loan balances and that 11% had already started programs or were doing so by 2022).

[4] This Note focuses on individuals with some or no higher education attainment. This is because many recently expanded tuition programs appear to focus on helping employees attain a diploma equivalent to a high school degree, college certification, or associate's or bachelor's degree. *See, e.g.*, WALMART, LIVE BETTER U FACT SHEET (2021), https://corporate.walmart.com/press-center/walmart-to-pay-100-of-college-tuition-and-books-for-associates [https://perma.cc/6CZ7-5P29] (listing eligible programs and claiming that expanded tuition assistance program will "mean[] approximately 1.5 million part-time and full-time Walmart and Sam's Club associates in the U.S. can earn college degrees or learn new trade skills without the burden of education debt"); Target, *supra* note 2 ("All U.S. part-time and full-time team members will be eligible for debt-free undergraduate degrees, certificates, [and] certifications . . . .").

[5] Elka Torpey, *Education Pays, 2020*, U.S. BUREAU OF LAB. STAT. (June 2021), https://www.bls.gov/careeroutlook/2021/data-on-display/education-pays.htm [https://perma.cc/7A27-M34A]; Sarah Reber & Chenoah Sinclair, *Opportunity Engines: Middle-Class Mobility in Higher Education*, BROOKINGS (May 19, 2020), https://www.brookings.edu/research/opportunity-engines-middle-class-mobility-in-higher-education/ [https://perma.cc/9WS2-96Z2].

[6] Erik Sherman, *College Tuition Is Rising at Twice the Rate of Inflation While Students Learn at Home*, FORBES (Aug. 31, 2020), https://www.forbes.com/sites/zengernews/2020/08/31/college-tuition-is-rising-at-twice-the-inflation-rate-while-students-learn-at-home/?sh=291ddde42f98 [https://perma.cc/P3RX-ME89].

[7] *Id.*

six states reducing per-student funding by more than 30%, after adjusting for inflation.[8] Reduced government support for higher education, along with rising tuition, has resulted in a cost burden shifting from the government to individual students.

For some students, this financial burden prevents them from attending college altogether. Up to 40% of low-income students who were accepted to college in the spring never show up in the fall.[9] As one Texas student, Brian Williams, put it: "We had no money for it . . . and I'm not trying to go into debt and pay that for the rest of my life."[10] Brian went on to work at Jimmy John's despite his acceptance to college and intention to attend. Similarly, when a New York high school student learned that a "subsidized government loan" was not the same thing as a grant and instead resulted in thousands in debt, she and her family decided that they could not afford the costs.[11]

For those who do enroll in college, the cost of attendance can create substantial hardship, particularly for those who do not finish. Millions of Americans have accumulated some college education, along with the corresponding debt, but did not attain a credential.[12] Notably, almost 40% of those with student loan debt did not finish college, leaving them, as Representative Alma Adams stated, facing "the worst of both worlds: all of the debt and no degree."[13]

Given the high costs of college and the importance of a college degree for individual earnings, company tuition reimbursement programs could help make higher education more affordable. As of 2019, over 90% of

8 Michael Mitchell, Michael Leachman & Matt Saenz, *State Higher Education Funding Cuts Have Pushed Costs to Students, Worsened Inequality*, CTR. ON BUDGET & POL'Y PRIORITIES (Oct. 24, 2019), https://www.cbpp.org/research/state-budget-and-tax/state-higher-education-funding-cuts-have-pushed-costs-to-students [https://perma.cc/XNP9-UX42].

9 Meredith Kolodner, *Why Are Low-Income Students Not Showing Up to College, Even Though They Have Been Accepted?*, THE HECHINGER REP. (Aug. 14, 2015), https://hechingerreport.org/why-are-low-income-students-not-showing-up-to-college-even-though-they-have-been-accepted/ [https://perma.cc/K6J3-8GMC] (noting that financial concerns are a significant contributor to students ultimately not attending a university despite acceptance to that university).

10 Elissa Nadworny, *'Losing A Generation': Fall College Enrollment Plummets for 1st-Year Students*, NPR (Dec. 17, 2020), https://www.npr.org/2020/12/17/925831720/losing-a-generation-fall-college-enrollment-plummets-for-first-year-students [https://perma.cc/QA2W-7R4J].

11 Kolodner, *supra* note 9.

12 Abigail Johnson Hess, *Millions of Student Loan Borrowers Don't Have a Diploma to Show for Their Debt*, CNBC (July 23, 2021), https://www.cnbc.com/2021/07/23/millions-of-student-loan-borrowers-dont-have-a-diploma-to-show-for-it.html [https://perma.cc/K3DC-FLNH]; Jill Barshay, *Federal Data Shows 3.9 Million Students Dropped Out of College with Debt in 2015 and 2016*, THE HECHINGER REP. (Nov. 6, 2017), https://hechingerreport.org/federal-data-shows-3-9-million-students-dropped-college-debt-2015-2016/ [https://perma.cc/L4ZU-MWVT].

13 Paul Specht, *Fact Check: How Many Student Loan Borrowers Failed to Finish College?*, WRAL (Feb. 21, 2021), https://www.wral.com/fact-check-how-many-student-loan-borrowers-failed-to-finish-college/19524091/ [https://perma.cc/6W8D-HW7F].

U.S. employers offer some sort of education benefit, with almost two out of three employers offering tuition assistance or reimbursement.[14] Moreover, employers are increasingly advertising and strengthening these tuition benefits in order to recruit and retain workers.[15] Yet, despite 80% of working adults having an interest in going back to school, just 2% of workers participate in tuition reimbursement programs.[16]

There are several possible reasons why employees do not take advantage of these programs. One explanation may be that many employees simply do not have the time to both work and attend classes. According to the Bureau of Labor Statistics, employees without a college degree work, on average, more hours per day than those with a college degree.[17] In 2019, the aggregate effect of this additional labor meant that the average high school graduate worked an additional 135.2 hours—or over three forty-hour work weeks—more than the typical college-degree holder over the course of the year.[18] Moreover, those without college attainment earn significantly less than those with a college degree.[19] These workers are also more likely to have caretaker responsibilities, all while having lower incomes and struggling to afford childcare.[20] Consequently, workers without a college degree may lack

14 *Most Employers Offer Educational Benefits, but Others Cite Cost and Complexity as Barriers*, HRDIVE (June 27, 2019), https://www.hrdive.com/news/most-employers-offer-educational-benefits-but-others-cite-cost-and-complex/557357/ [https://perma.cc/B8J3-M96Y].

15 Abigail Johnson Hess, *From Amazon to Walmart, Here's How College Tuition Became the Hot Corporate Benefit*, CNBC (Sept. 30, 2021), https://www.cnbc.com/2021/09/30/from-amazon-to-walmart-college-tuition-is-the-hot-corporate-benefit.html [https://perma.cc/6XGN-HR5A] ("[E]ducation benefits are 'a way to attract and retain talent.'").

16 *10 Tuition Reimbursement Statistics You Need to Know in 2022*, INSTRIDE (Sept. 3, 2021), https://www.instride.com/insights/tuition-reimbursement-statistics/ [https://perma.cc/6MPE-ECA7]. Additionally, only 40% of workers are even aware that their employer offers educational benefits. *Id*.

17 *Average Hours Employed People Spent Working on Days Worked by Day of Week, American Time Use Survey*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/charts/american-time-use/emp-by-ftpt-job-edu-h.htm [https://perma.cc/95RL-P2QC] (noting that high school graduates work, on average, 8.43 hours per weekday and 6.12 hours per weekend day compared to 7.91 hours per weekday and 4.04 hours per weekend day for those with at least a college degree).

18 *Id.* The 135.2-hour figure can be calculated by taking the difference between the daily hours worked by high school graduates, 8.43 hours, and the daily hours worked by college-degree holders, 7.91 hours, and multiplying this difference by the number of working days each year, which this Note assumes to be 260.

19 *Economic News Release: Usual Weekly Earnings of Wage and Salary Workers News Release*, U.S. BUREAU OF LAB. STAT. (Oct. 16, 2019), https://www.bls.gov/news.release/archives/wkyeng_10162019.htm [https://perma.cc/5TAN-LTG3] (noting that in the final quarter of 2019, high school graduates with no college degree had median weekly earnings of $749 a week, while those with a bachelor's degree had median weekly earnings of $1,383 per week).

20 *See, e.g.*, Jennie E. Brand & Dwight Davis, *The Impact of College Education on Fertility: Evidence for Heterogeneous Effects*, 48 DEMOGRAPHY 863, 864 (2011) (noting a correlation between higher college attainment and lower number of children, on average, and offering several theories addressing this gap).

the capacity to take advantage of these programs given their financial and family-related obligations.

Another reason employees may be deterred from utilizing these programs is the financial uncertainty of the arrangement and potential fear of premature termination. For those 2% of employees who do enroll in these reimbursement programs, they may face unexpected challenges in accessing judicial remedies if a tuition reimbursement dispute arises. At-will employment regimes in forty-nine of America's fifty states allow employers to fire employees at any time for almost any or no reason, including when an employee has relied on an employer's promise to reimburse tuition payments. Equitable remedies and state and federal antidiscrimination statutes have similarly provided inadequate bases for adjudicating these claims.

Yet, attaining a college degree can take years, especially for those attending part-time. Because over half of all students drop out of college because of its cost,[21] a sudden, multi-thousand-dollar expense could leave these employees unable to afford further schooling and dropping out before attaining the degree. Under the status quo, the risks of utilizing an employer-offered tuition reimbursement program outweigh the potential benefits.

Building from this context, this Note explores the current legal approaches and proposes an additional consideration not yet explored in legal scholarship. In particular, it argues that current approaches, such as breach of contract, promissory estoppel, and claims of statutory duties, are insufficient to adjudicate disputes arising from an employee's use, or attempted use, of an employer's tuition reimbursement program. Moreover, this Note argues that expanding the implied covenant of good faith and fair dealing into employment relationships, just as it applies in commercial contracts, would provide a better avenue to adjudicate such claims.

To develop these arguments, Part I briefly describes how tuition reimbursement programs operate and why employers offer them. Part II analyzes the disconnect between employee and employer incentives when an employee seeks tuition reimbursement. Part III explores the inadequacy of current legal approaches to disputes over an employee's use or attempted use of an employer's tuition reimbursement program. Finally, Part IV offers the alternative approach of standardizing the application of the implied covenant of good faith and fair dealing between commercial and employment contracts. This approach could provide a clear cause of action for employees who face frustrated expectations when an employer terminates or delays

[21] Jade Scipioni, *51% of College Students Dropped Out of School Due to Costs, Study Finds*, FOX BUS. (Jan. 9, 2018), https://www.foxbusiness.com/features/51-of-college-students-dropped-out-of-school-due-to-costs-study-finds [https://perma.cc/ATS7-JRWA].

payment under a tuition reimbursement program. Part IV concludes with several policy rationales as to why expanding the application of the implied covenant of good faith and fair dealing in the employment context makes sense as a matter of aligning incentives, reducing transaction costs, and fostering economic stability. This Note concludes that the application of the implied covenant of good faith and fair dealing in the employment context is warranted given the inadequacy of current law and as a matter of public policy.

I. CONTEXTUALIZING EMPLOYER TUITION REIMBURSEMENT

To understand how tuition reimbursement disputes arise, it is necessary to briefly examine how these reimbursement programs operate. Part I proceeds by first exploring potential rationales for why employers offer tuition assistance programs in the first place. It then describes these programs' general characteristics.

A. Upskilling, Talent Acquisition and Retention, and Market Signaling

Given the substantial cost of college, one might wonder why employers offer tuition reimbursement at all.[22] The appeal for employees is simple: it is an opportunity to gain additional skills, which could increase future wages and career opportunities. But for employers, there is a legitimate fear that an employee could benefit from this education and then take those skills elsewhere, leaving the employer unable to recoup its investment.[23] Employers could protect their investment through clawbacks, which require that an employee refund the employer should she depart within some specified length of time. But such stipulations can have unintended consequences; they can reduce overall utilization of reimbursement programs and create administrative costs.[24]

[22] This apparent dilemma has been pondered and discussed in economic scholarship. *See, e.g.*, Colleen Flaherty Manchester, *Investment in General Human Capital and Turnover Intention*, 100 AM. ECON. REV. 209, 209 (2010) (providing a partial description of economic scholarship relating to employer incentives for tuition assistance programs and accompanying drawbacks).

[23] This is because postsecondary education is seen as a general skill, meaning that an employee's skills obtained from education can used at any employer, including an employer's competitors. *Id.* (noting that tuition reimbursement programs support investment in an employee's general human capital skills because they provide skills that are transferable across employers and further describing the dilemma that employers may not theoretically be able to recapture their investment into tuition reimbursement programs). In contrast, a nongeneral, or firm-specific, skill would include things such as on-the-job training or learning skills specific to only one company's unique policies, software, or procedures. *See generally* Peter Cappelli, *Why Do Employers Pay for College?*, 121 J. ECONOMETRICS 213 (2004).

[24] Guild Education, an "edtech" company, assists with implementing tuition assistance programs for large U.S. companies such as Chipotle, Disney, and Walmart. *Disruptor 50 List 2021: 49. Guild*

Despite these concerns, employers may offer tuition reimbursement because they may benefit from upskilling, talent acquisition, employee retention, and positive public perception of the employer brand.[25] First, employers may offer tuition reimbursement to help their employees become more productive in the workplace through upskilling, leading to increased company profits.[26] Under this model, employers benefit from what can be separated into two distinct factors: increased employee knowledge and a "loyalty dividend." An employer's productivity increases when an employee

Education, CNBC (May 25, 2021, 5:55 AM), https://www.cnbc.com/2021/05/25/guild-education-disruptor-50.html [https://perma.cc/95TX-GFBH]. One of Guild Education's blog posts explains that "[c]lawbacks, or repayment agreements, give employers the right to pursue tuition funds from employees who do not meet their employer-defined program criteria. This can mean hitting a certain academic standard . . . or staying with the company for a certain period of time after finishing a program." Chloe Rittenhouse, *3 Best Practices When Designing an Equitable Employer Education and Upskilling Program*, GUILD EDUC., (Nov. 10, 2021), https://blog.guildeducation.com/best-practices-employer-education-program-no-clawbacks-equitable/ [https://perma.cc/3BV8-ZUE3]. However, the post also cautions companies against offering clawback provisions due to unintended consequences such as reduced employee utilization of these programs, in part because "when [clawback] policies are included, they put learners in a financial situation that can be risky and sometimes ruinous," and because some employees may hesitate to commit to an employer for the time period necessary to avoid triggering a potential clawback provision. *Id.* Peanut Butter, another platform that services employers offering student loan assistance, notes that there may be administrative costs to enforcing tuition reimbursement clawbacks as well, such as legal or collections costs when an ex-employee cannot or refuses to pay. David Aronson, *Employers Are Rethinking Tuition Reimbursement*, PEANUT BUTTER, (Nov. 24, 2017), https://www.getpeanutbutter.com/employers-are-rethinking-tuition-reimbursement/ [https://perma.cc/K93J-EYMN] ("[E]mployers often spend handsomely on legal costs of (securing and) enforcing [tuition reimbursement] clawback provisions.").

25 *See* Dickler, *supra* note 3. This Note adopts the definition of employer brand proposed by Tim Ambler and Simon Barrow, who define the term as the "package of functional, economic and psychological benefits provided by employment, and identified with the employing company." Tim Ambler & Simon Barrow, *The Employer Brand*, 4 J. BRAND MGMT. 185, 187 (1996). An employer brand helps distinguish a company from its competitors, causing a "differential effect on consumer response" and ultimately providing a competitive advantage to that company. *See* Christian P. Theurer, Andranik Tumasjan, Isabell M. Welpe & Filip Lievens, *Employer Branding: A Brand Equity-Based Literature Review and Research Agenda*, 20 INT'L J. MGMT. REVS. 155, 156–57 (2018). However, there are still limitations in the current literature on this impact. *Id.* at 170.

26 *See, e.g.*, Paul Lewis, *Upskilling the Workers Will Not Upskill the Work. Why the Dominant Economic Framework Limits Child Poverty Reduction in the UK*, 40 J. SOC. POL'Y 535, 537 (2011) (describing how employees benefit from upskilling in academic terms: "[f]rom the perspective of individuals, human capital theory suggests that greater human capital results in higher levels of marginal productivity, which equate with higher wages/total remuneration to labour," though Lewis challenges the popular underpinnings of this understanding). When a worker becomes more productive, basic economic theory suggests that their employer's profits increase, all else equal. NIGEL MEAGER & STEFAN SPECKESSER, INST. FOR EMP. STUD., WAGES, PRODUCTIVITY AND EMPLOYMENT: A REVIEW OF THEORY AND INTERNATIONAL DATA 8 (2011), https://www.researchgate.net/profile/Nigel-Meager/publication/263414861_Wages_Productivity_and_Employment_A_review_of_theory_and_international_data/links/0c96053ac33d686798000000/Wages-Productivity-and-Employment-A-review-of-theory-and-international-data.pdf [https://perma.cc/9WMB-BKMF] ("If productivity per unit of labour input (or per worker) increases, while wages remain constant, this will increase labour demand, because a further extension of production will increase profits.").

learns new skills or masters old ones.[27] For example, a frontline cashier who is reimbursed for business coursework can then apply those skills in her current role or in a more senior role at the company. As for the loyalty dividend, there is evidence that employee satisfaction, which is positively correlated with the availability of tuition reimbursement, increases productivity.[28] Because increased employee productivity is positively correlated with increased employer profits,[29] an employer may seek to offer tuition reimbursement when the expected value of an employee's increased productivity is greater than the cost of providing that reimbursement, all else constant.[30]

Second, tuition reimbursement may appeal to employers because it can help retain and recruit employees. To begin, tuition reimbursement programs can reduce turnover, at least when employees are enrolled in school.[31] Moreover, jobseekers and current employees have indicated that tuition

---

[27] Sandra E. Black & Lisa M. Lynch, *Human-Capital Investments and Productivity*, 86 AM. ECON. REV. 263, 263–65 (1996).

[28] *See Amid Great Resignation, Survey Finds Even Happy Employees Are Looking for New Opportunities; Tuition Benefits Can Increase Loyalty*, BUS. WIRE (June 8, 2022, 7:05 AM), https://www.businesswire.com/news/home/20220608005156/en/Amid-Great-Resignation-Survey-Finds-Even-Happy-Employees-Are-Looking-for-New-Opportunities-Tuition-Benefits-can-Increase-Loyalty [https://perma.cc/3L97-5UN3]; Christian Krekel, George Ward & Jan-Emmanuel De Neve, *Employee Wellbeing, Productivity, and Firm Performance: Evidence and Case Studies*, *in* GLOBAL HAPPINESS AND WELLBEING POLICY REPORT 2019, at 72, 79 (2019), https://s3.amazonaws.com/ghwbpr-2019/UAE/GHWPR19.pdf [https://perma.cc/DKZ7-R6XG].

[29] *See, e.g.*, Robert Shimer, *The Assignment of Workers to Jobs in an Economy with Coordination Frictions*, 113 J. POL. ECON. 996, 997, 1004 n.6 (2005) (concluding that "the most productive [worker] is in fact the most profitable [worker]" with profits being a function of cumulative worker productivity).

[30] Prominent economic scholars have argued that when education is sufficiently general, meaning the benefit of that education can be captured by other employers, it is the employee, not the employer, who bears the cost of that training. *See, e.g.*, GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION 20 (2d ed. 1975) (analyzing how general training affects productivity and where the costs and benefits of the training are internalized). This is because, in perfect competition, wages are equal to that employee's marginal product of labor. *See id.* As a college degree provides skills transferable to a plethora of employers,

> wage rates would rise by exactly the same amount as the marginal product and the firms providing such training could not capture any of the return.
>
> . . . [Thus,] firms would provide general training only if they did not have to pay any of the costs. Persons receiving general training would be willing to pay these costs since training raises their future wages. Hence it is the trainees, not the firms, who would bear the cost of general training.

Id.

[31] *See, e.g.*, George S. Benson, David Finegold & Susan Albers Mohrman, *You Paid for the Skills, Now Keep Them: Tuition Reimbursement and Voluntary Turnover*, 47 ACAD. MGMT. J. 315, 315 (2004) ("[P]articipation in tuition reimbursement reduces turnover while employees are in school."); *see also* Collen N. Flaherty, *The Effect of Tuition Reimbursement on Turnover: A Case Study Analysis* 1, 22 (Nat'l Bureau of Econ. Rsch., Working Paper No. 12975, 2007), https://www.nber.org/papers/w12975 [https://perma.cc/HMF8-5SV8] (finding, in a case study, that participation in a tuition reimbursement program reduced an employee's "probability of leaving within five years by over 50 percentage points").

benefits are an important factor in their job search. According to a 2018 survey, around 80% of responding employees reported that their employer's tuition assistance program increased their likelihood of staying, and 84% of respondents said tuition assistance was an important factor in their decision to accept the job.[32] A 2021 Gallup study commissioned by Amazon similarly found that upskilling is an important factor in talent recruitment and retention, with almost half of participants noting that they would be "extremely" or "very" likely to switch jobs for such an opportunity.[33] Finally, employers themselves have expressed that tuition assistance is beneficial for retention and recruitment efforts. The U.S. Chamber of Commerce, a leading lobbyist organization for American businesses, notes how tuition reimbursement can attract and retain talent.[34] And as one corporate communications manager put it, "[f]or young people facing rising tuition costs, educational benefits are a big draw."[35]

Third, companies may distinctly benefit from offering tuition assistance because of the signal it sends to the broader public. For instance, some researchers have linked student debt and unequal access to education as a product of racial injustice.[36] In a 2019 report, researchers found that "[t]wenty years after starting college, the median debt of White borrowing students has been *reduced* by 94 percent . . . whereas Black borrowers at the median still *owe[d]* 95 percent of their cumulative borrowing total."[37] As the public has pressured companies to pursue social goals,[38] these same companies may benefit from positive press and public opinion perception. Consequently, because normative (or performative) corporate conduct can

[32] *New Study Shows the Lasting Impact of Tuition Assistance*, BUS. WIRE (Jan. 8, 2018, 12:17 PM), https://www.businesswire.com/news/home/20180108006550/en/New-Study-Shows-Lasting-Impact-Tuition-Assistance [https://perma.cc/3RAA-K2YD].

[33] GALLUP, THE AMERICAN UPSKILLING STUDY: EMPOWERING WORKERS FOR THE JOBS OF TOMORROW 20 (2021), https://www.gallup.com/analytics/354374/the-american-upskilling-study.aspx [https://perma.cc/H3FD-WUJQ].

[34] Lauren Wingo, *How to Offer Employee Tuition Reimbursement*, U.S. CHAMBER OF COM. (Dec. 16, 2021), https://www.uschamber.com/co/start/strategy/employee-tuition-reimbursement [https://perma.cc/CE5J-6AVX].

[35] Abigail Johnson Hess, *Home Depot's Strategy for Hiring 80,000 New Workers: Help Them with Paying for School*, CNBC (Feb. 12, 2020, 2:20 PM), https://www.cnbc.com/2020/02/12/home-depot-is-hiring-80000-and-offering-up-to-5000-for-college.html [https://perma.cc/FNL9-J292].

[36] LAURA SULLIVAN, TATJANA MESCHEDE, THOMAS SHAPIRO & FERNANDA ESCOBAR, STALLING DREAMS: HOW STUDENT DEBT IS DISRUPTING LIFE CHANCES AND WIDENING THE RACIAL WEALTH GAP 11–12 (2019), https://heller.brandeis.edu/iere/pdfs/racial-wealth-equity/racial-wealth-gap/stallingdreams-how-student-debt-is-disrupting-lifechances.pdf [https://perma.cc/B2JB-CUJQ].

[37] *Id.* at 1 (emphases added).

[38] Ofer Eldar, *Designing Business Forms to Pursue Social Goals*, 106 VA. L. REV. 937, 939 (2020).

increase revenue due to increased customer loyalty,[39] the existence of tuition assistance programs can increase profits merely through consumer awareness.[40]

B. General Characteristics of Tuition Reimbursement Programs

Having addressed some rationales of why employers may offer tuition reimbursement, we now can examine these programs' characteristics. While there are federal requirements for tuition reimbursement programs,[41] state and local laws may impose additional requirements that create some variance in the structure of these programs.[42] Despite these variances, companies offering tuition reimbursement programs commonly impose an annual cap on reimbursement amounts[43] and a requirement that an employee obtain pre-approval from her supervisor or human resources office.[44] Some companies also require an employee to attain certain grades to be eligible for full reimbursement.[45] For instance, a grade of "A" might yield a full reimbursement, while a "B" might only net a 75% reimbursement, and a

---

39 Shlomit Azgad-Tromer, *The Virtuous Corporation: On Corporate Social Motivation and Law*, 19 U. PA. J. BUS. L. 341, 347 (2017).

40 Professor Peter Cappelli, director of the University of Pennsylvania Wharton's Center for Human Resources, offers a blunter critique of employer tuition assistance programs, noting, "[Employers are] doing this because it sounds great and it's cheap—almost no one can use them, they are all online/cut rate degree programs." Eric Rosenbaum, *Amazon, Walmart, Target Are Paying for College, but Money Isn't Everything in Education*, CNBC (Sept. 28, 2021), https://www.cnbc.com/2021/09/28/the-boom-in-low-wage-worker-free-college-is-about-to-get-tested.html [https://perma.cc/G46W-FJ4H].

41 *See* 26 U.S.C § 127 (requiring nondiscrimination rules and a written plan document).

42 Westlaw provides a template tuition reimbursement policy under its Practical Law content tab. The template is based on federal law and contains drafting notes that provide rationales for the common characteristics of tuition reimbursement policies. Practical Law Labor & Employment, *Tuition Reimbursement Policy*, WESTLAW https://1.next.westlaw.com/Document/I3a9a0d69ef1211e28578f7ccc38dcbee/View/FullText.html [https://perma.cc/P6DM-TMJB].

43 A common annual cap is at or around $5,000 per employee, which tracks the $5,250 maximum federal tax deduction that an employer may take for offering these benefits. Colleen Flaherty Manchester, *General Human Capital and Employee Mobility: How Tuition Reimbursement Increases Retention Through Sorting and Participation*, 65 ILR REV. 951, 953–54 (2012) ("The most common annual limit is $5,000, which is approximately equal to the tax-exempt limit."); 26 U.S.C. § 127(a)(2). However, it appears at least some major companies are removing annual limits if employees attend certain partner schools or programs. *See, e.g.*, Kathryn Underwood, *Target's Employee Tuition Program—Which Colleges Made the Cut?*, MKT. REALIST (Aug. 5, 2021), https://marketrealist.com/p/which-colleges-will-target-pay-for/ [https://perma.cc/CFG4-8PRH] (summarizing Target's announcement of its 2021 tuition plan to provide full tuition coverage for employees attending certain schools).

44 Mary Sharp Emerson, *How to Use—and Ask For—Employer Tuition Reimbursement Benefits*, HARVARD EXTENSION SCH. (Aug. 11, 2020), https://extension.harvard.edu/blog/how-to-use-and-ask-for-employer-tuition-reimbursement-benefits/ [https://perma.cc/CZ2A-JCUK].

45 Manchester, *supra* note 43 at 953–54.

grade below "C" might result in no reimbursement at all.[46] And some companies require an employee remain in "good standing" to receive reimbursement, even if an employee has already attained approval, enrolled in courses, and taken loans to prepay for tuition.[47]

Moreover, many reimbursement programs qualify an employer's legal duties. For one, tuition agreements often note that the reimbursement program does not constitute an employment contract between the employer and employee.[48] For instance, Starbucks—one of the first companies to provide large-scale tuition reimbursement—explicitly disclaims that its plan gives an employee "the right to be retained in the service of Starbucks or to interfere with the right of Starbucks to discharge any [employee] at any time regardless of the effect that such discharge shall have upon him or her under the Program."[49] Additionally, plans often contain a provision that a company retains the right to amend or terminate the tuition program at any time, and

[46] Emerson, *supra* note 44; *Tuition Reimbursement and Continuing Education Benefit*, EVERSANA, https://www.eversana.com/wp-content/uploads/2019/11/tuition-assistance.pdf [https://perma.cc/NDU8-NJ4H].

[47] Westlaw's template tuition reimbursement policy, for instance, notes that reimbursement seekers must be employed by the employer "for the duration of the course, from registration through completion of the course." WESTLAW, *supra* note 42. This potentially excuses an employer from having to reimburse an employee for tuition payments if it terminates an employee prior to the "completion of the course," as under the template, the reimbursement policy explicitly disclaims that the employee's at-will employment status and provides that the employer has "maximum discretion . . . to change, modify, or delete [the tuition reimbursement policy] at any time [with or without notice]." *Id.*; *see, e.g.*, *Tuition Assistance*, MCDONALD'S, https://www.archwaystoopportunity.com/tuition_assistance.html [https://perma.ccL4TB-T6AC] (noting that eligibility for tuition assistance requires "a performance rating of 'significant performance' or better."). Other employers require employees remain in "good standing." *See, e.g.*, EVERSANA, *supra* note 46 ("In order to be eligible for tuition reimbursement at the completion of your course . . . [t]he employee must be an employee in good standing.").

[48] *See* WESTLAW, *supra* note 42 ("[Employees] understand that neither this policy nor any other communication by a management representative or any other employee, whether oral or written, is intended in any way to create a contract of employment. I understand that, unless I have a written employment agreement signed by an authorized [EMPLOYER NAME] representative, I am employed at will and this policy does not modify my at-will employment status."). The Society for Human Resource Management, a professional human resources membership organization, also provides a sample educational reimbursement policy that explicitly disclaims any claim of the agreement creating a contract. *Educational Expense Agreement—HR Forms*, SOC'Y FOR HUM. RES. MGMT., https://www.shrm.org/resourcesandtools/tools-and-samples/hr-forms/pages/educational_expense_agreement.aspx [https://perma.cc/B62C-SWEF] (noting in the tuition reimbursement template that "[t]his educational expense agreement creates no contract of employment between you and [the company]").

[49] STARBUCKS, STARBUCKS COLLEGE ACHIEVEMENT PLAN PROGRAM DOCUMENT 6, https://starbucks.asu.edu/documents/program.pdf [https://perma.cc/9RHZ-P9CW].

note that the funds come from a company's general assets,[50] which exempts the plans from ERISA coverage.[51]

In some cases, these tuition reimbursement plans are conditioned on an employee's enrollment at certain partner schools, which can make it harder for employees to continue in a specific program should they be fired and their new employer not offer the same reimbursement for that school.[52] Consequently, how these tuition reimbursements are structured can frustrate the purported benefits of the assistance, leading to both employee risks and misaligned employer incentives.

II. EMPLOYEE RISKS AND EMPLOYER INCENTIVES UNDER EMPLOYER REIMBURSEMENT SCHEMES

This Part argues that the general structure of tuition reimbursement programs places onerous risks on tuition reimbursement participants. Generally, employees incur two main risks by asking to participate in an employer's tuition reimbursement program. First, by applying for tuition assistance, an employee signals to an employer that she may intend to leave her current role.[53] An employer may not want to invest in or promote an employee who it believes will likely leave her role or the company altogether. Moreover, an employer may assume that a worker who is in

[50] *See, e.g.*, *id.* at 4, 6 (stating that "Starbucks may amend or terminate the Program at any time in its discretion" and that Starbucks pays for tuition reimbursement out of "the general assets of the Employer"); *see also* WESTLAW, *supra* note 42, at 9 (containing clause that the employer "has the maximum discretion permitted by law to interpret, administer, change, modify, or delete th[e] [tuition reimbursement] policy at any time").

[51] According to the Department of Labor's regulations interpreting ERISA, ERISA's coverage of "employee welfare benefit plan . . . shall not include a scholarship program, including a tuition and education expense refund program, under which payments are made solely from the general assets of an employer." 29 C.F.R. § 2510.3-1(k). As this Note will further explain, this means that employees cannot use ERISA as a potential avenue to resolve tuition reimbursement disputes under current law.

[52] *See, e.g.*, Underwood, *supra* note 43 (explaining that tuition assistance programs are generally only available for specific institutions and degree programs); *see also* STARBUCKS, *supra* note 49, at 1 (applying a tuition benefit plan to one specific school, Arizona State University, and only through its online degree program).

[53] *Cf.* Scott E. Seibert, Maria L. Kraimer, Brooks C. Holtom & Abigail J. Pierotti, *Even the Best Laid Plans Sometimes Go Askew: Career Self-Management Processes, Career Shocks, and the Decision to Pursue Graduate Education*, 98 J. APPLIED PSYCH. 169, 169 (2013) (concluding, among other things, that "early career individuals with intrinsic career goals, who engaged in career planning, [and] who were less satisfied with their career . . . were more likely to intend to go to graduate school"). The same logic may apply here to employees seeking undergraduate education, since they are also seeking to gain new skills that may position them for new job opportunities requiring those additional skills. *See also* David B. Bills & Mary Ellen Wacker, *Acquiring Credentials When Signals Don't Matter: Employers' Support of Employees Who Pursue Postsecondary Vocational Degrees*, 76 SOCIO. EDUC. 170, 174–76 (2003) (providing descriptive statistics and summarizing that the main reason 38.5% of non-advanced degree holders participated in an employer-sponsored postsecondary vocational program was to "train for a new job/career" while 42% of these participants did so to "improve, advance, [or] keep up").

school will have less availability and may be less productive while on the job.[54] Thus, an employee could fear that her employer would terminate her prematurely, an outcome she need not fear if she had never asked for tuition assistance.[55]

Second, employees risk the consequences of frustrated expectations. Tuition reimbursement schemes require the employee to pay that semester's expenses first, though some companies are shifting to a direct-payment model.[56] Under this scenario, employees may reasonably fear that employers will not cover the expense. For one, employers can terminate employees before reimbursing them. Alternatively, employers can refuse to reimburse workers by finding that these workers failed to meet some metric set by the

---

[54] *See* Bills & Wacker, *supra* note 53, at 171 (summarizing the hypothesis that employers view academic-degree seekers, relative to vocational-degree seekers, as "more likely to be working students than employees taking classes, and [that] this weaker level of labor force attachment elicited less financial aid from their employers").

[55] Summary statistics compiled from polls of tuition reimbursement participants, along with personal narratives posted online, suggest that such premature termination is a genuine and plausible fear held by some employees. *See* Rittenhouse, *supra* note 24 (finding from a survey of companies that required some form of manager approval that "nearly a quarter of respondents indicated low company adoption of education benefits because the [manager approval] requirement left employees discouraged" and further noting that manager approval policies "stoke[] inequity and create[] discomfort [among employees]"). Though traditional news and scholarly coverage of employee psychology is scarce, based on queries posted on various internet forums, such premature termination, or fear of it, appears to occur. *See, e.g.*, *I Just Got Fired and My Employer Does Not Want to Pay Tuition Reimbursement for Which I Signed Up, and Only Wants to Pay 20%. Should I Accept or Prepare to Take Him to Court to Get the Full Amount?*, QUORA (Mar. 27, 2015), https://www.quora.com/I-just-got-fired-and-my-employer-does-not-want-to-pay-tuition-reimbursement-for-which-I-signed-up-and-only-wants-to-pay-20-Should-I-accept-or-prepare-to-take-him-to-court-to-get-the-full-amount [https://perma.cc/H4ZP-BNA8] (indicating that an employee was fired prematurely and they were accordingly denied full tuition reimbursement); Garrett Hastings, *What Is the Downside of Using Your Employer's Tuition Reimbursement?*, QUORA (Oct. 9, 2019), https://www.quora.com/What-is-the-downside-of-using-your-employers-tuition-reimbursement [https://perma.cc/N55X-234X] ("I used my former employer's tuition reimbursement program (thanks, Ernst & Young). Two weeks before tuition was due, they fired me. I had a 3.9 GPA, was working over 70 hours a week (24/7 responsibilities). So my 'tuition reimbursement' cost me about $30k."). One goal of this Note is to spur conversation in the academic literature, and particularly in legal scholarship, given the significant financial consequences that face American workers should a tuition reimbursement dispute arise. Until that conversation happens, this Note will take these posters at their word.

[56] Stephanie Hall, *Employer-Provided Tuition Benefit Programs: Is Guild as Good as It Gets?*, THE CENTURY FOUND., (Feb. 7, 2022), https://tcf.org/content/commentary/employer-provided-tuition-benefit-programs-guild-good-gets/?session=1 [https://perma.cc/QP73-N6GD] (noting that "[i]n some of these arrangements between employers and schools, students must pay tuition costs up front and request reimbursement from their employer, which means cash-strapped low-wage workers have little hope of using the benefit" and identifying employers that have announced tuition benefit plans featuring direct payments to education providers); WESTLAW, *supra* note 42 (proposing a clause in a template tuition reimbursement agreement that the employee "[is] required to pay all required tuition and fees at the time of [her] registration for the course."); *see, e.g.*, STARBUCKS, *supra* note 49, at 3–4 (stipulating that to be eligible for the Starbucks Tuition Benefit, Arizona State University must have billed the employee for the credit hours and explaining that Starbucks will include the value of the benefit in the employee's wages).

employer, such as participating employees having to remain in good standing.[57] As the case law will show, this risk of frustrated expectations has real consequences for everyday workers and their families.

Part II continues by exploring employers' incentives in administering these tuition assistance programs. The Part offers two narratives regarding employers' incentives to retain current employees. The first narrative is that employers will want to replace employees who seeks tuition reimbursement. As previewed above, an employer may believe that an employee who seeks tuition reimbursement does not intend to stay in the company, or at least in the same role. Thus, there is a reduced reimbursement incentive. The second narrative is that employers believe tuition reimbursement increases employee productivity and reduces overall costs, since the cost of tuition assistance is less than the cost of replacing an employee.[58] This Part then rejects this second narrative through the lens of loss aversion—namely, that an employer would prefer options that provide a certain benefit over an alternative option that provides greater expected benefit but that is uncertain to occur.[59]

---

[57] *See supra* note 47 and accompanying text; Hall, *supra* note 56 ("Some [employees] may be surprised to learn that if they leave their job or get terminated for any reason, they'll be on the hook for the cost of the tuition that was paid on their behalf."); *see, e.g.*, QUORA, *supra* note 55 (inquiring about the course of action to take following termination and reduction in tuition reimbursement); Hastings, *supra* note 55 (detailing a personal experience as an employee left on the hook for tuition following termination); Rittenhouse, *supra* note 24 ("Traditional tuition reimbursement perpetuates inequity by making employees float costs including tuition, fees and books. A direct pay, debt-free model ensures that these same employees don't incur the financial risk. The restaurant chain Texas Roadhouse, for example, announced in October that it would add tuition reimbursement as a work benefit. Though workers are later reimbursed by employers, this arrangement can shut out employees who are not high-earners, are unable or unwilling to shoulder debt, or do not have sufficient savings." (citing Ben Coley, *Texas Roadhouse to Help Employees with Tuition Costs*, FSR (Oct. 19, 2021), https://www.fsrmagazine.com/labor-employees/texas-roadhouse-help-employees-tuition-costs [https://perma.cc/S5AQ-HP79])).

[58] Kylie Ora Lobell, *Why More Employers Are Leveraging Tuition Assistance to Attract and Retain Employees*, SOC'Y FOR HUM. RES. MGMT. (Oct. 11, 2021), https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/why-more-employers-are-leveraging-tuition-assistance-to-attract-and-retain-employees.aspx [https://perma.cc/L75A-KMZ7].

[59] *See* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 263 (1979). Applying prospect theory to this case, the certain benefit is having the current employee providing services consummate to their skill level and training (and thus not likely to leave for another job), while the greater expected benefit is a more skilled employee that is also more loyal. However, this benefit carries the significant risk of an employee taking the additional skills and leaving the company, leaving the company worse off than before. Prospect theory suggests that companies may prefer the former, current benefit over the latter, even though this may be "irrational" since the expected value of the latter is likely higher.

A. *Employee Risks*

Employees incur two main risks when seeking tuition reimbursement from employers. When an employee initiates the reimbursement process, she risks that her company might negatively interpret that request as intent to leave her current position in the future. Plainly, a person seeking a college degree signals that she wants a job that requires a degree, which means a position that she does not hold or even a position outside of the company. Because these benefits do not modify an employee's "at-will" employment status, this leaves the employee vulnerable to termination at any given time, including during schooling. Moreover, an employee whose employer suspects will leave may be passed over for promotions or raises.[60] The second risk is reliance and frustrated expectations, which occurs when the employer fails to reimburse costs after the employee has paid, or incurred debt to pay, tuition.

The interpretation of the intent and frustrated expectations risk is best illustrated by analyzing a current reimbursement program. McDonald's offers tuition assistance of $5,250 for certain full-time managers if they notify their direct supervisor of their participation in the program and the manager remains in "'significant performance' or better, maintained throughout the course/program."[61] As to the interpretation of intent risk, a McDonald's manager working full-time would first approach her supervisor about enrolling in classes and make the request for the supervisor to pay $5,250 per year for the privilege. The supervisor may recognize that this full-time manager will have less availability to work and cover unexpected employee absences.[62] Already, the supervisor is left with the impression that she will have a manager who will cost her more in total compensation for fewer hours of availability. In addition, a supervisor may reasonably assume

[60] When an employer has incomplete information about an employee's intentions to stay with or leave the company, an employer could rely on heuristics and make those assumptions self-fulfilling. David Neumark, *Experimental Research on Labor Market Discrimination*, 56 J. ECON. LITERATURE 799, 806 (2018) ("In the case of men and women, for example, employers may initially assume that expected tenure is lower for women than for men, and therefore choose to invest less in women's human capital; this can give women less incentive to stay with the firm, leading to employers' expectations being fulfilled, and lower wages for women."). Since many college-degree seekers do so to advance in their career, an employer may similarly rely on this heuristic and assume that employees seeking tuition reimbursement do not intend to remain at the company, resulting in a similar self-fulfilling cascade described by Professor Neumark. *See also* Bills & Wacker, *supra* note 53, at 174–76 (noting that 38.5% of nonadvanced degree holders who participated in an employer-sponsored postsecondary vocational program did so to "train for a new job/career").

[61] MCDONALD'S, *supra* note 47, at 1.

[62] *See, e.g.*, Crystal Cox, *This College Student Had to Choose: Go to Class, or Go to Work So She Can Afford to Eat*, CNBC (Oct. 28, 2019), https://www.cnbc.com/2019/10/28/this-college-student-had-to-choose-go-to-class-or-go-to-work.html [https://perma.cc/5CZF-HHU3] (illustrating the difficulty of balancing education and work, and how spending time on one leads to spending less time on the other).

that individuals going back for higher education do so to seek higher wages.[63] This means that she will likely assume that the manager is not going back to school to return to the same position at the same pay rate.

More likely, the supervisor will infer that the manager is seeking to leave in the near to mid-future. This inference is supported by a recent Gallup survey of 86,000 students which found that almost six in ten students listed "work outcomes," such as higher pay and career advancement, as the primary reason they pursued higher education.[64] Given these circumstances, a supervisor may seek to replace this more costly employee when feasible. In effect, an employee who seeks to utilize a tuition reimbursement program may be putting themselves at risk of premature termination.

Moreover, a premature termination closely exemplifies reliance and frustrated expectations risks. Reliance, couched in contract law, generally means that one party depends on the statements or actions suggested by another, promising party.[65] Implicated here are essential reliance[66] and detrimental reliance.[67] Since a college course takes several months to complete, and a degree may take years,[68] termination during schooling may result in a sudden emergency expense of thousands of dollars due to the vanished reimbursement.

This emergency expense could push some toward financial insecurity. For instance, the Federal Reserve notes that 35% of Americans could not immediately afford a $400 emergency expense, with 12% having no way to cover the cost at all—including through alternative banking services like payday loans.[69] Because nearly half of all students drop out of college because of its cost,[70] a sudden $5,250 expense could result in low-to-moderate income students being unable to afford further schooling and

[63] *See* Michael Spence, *Job Market Signaling*, 87 Q.J. ECON. 355, 358 (1973) (detailing how obtaining education acts as a signal by the employee that they are more valuable).

[64] STRADA EDUC. NETWORK & GALLUP, WHY HIGHER ED? TOP REASONS U.S. CONSUMERS CHOOSE THEIR EDUCATIONAL PATHWAYS 2 (2018), https://news.gallup.com/reports/226457/why-higher-ed.aspx?thank-you-report-form=1 [https://perma.cc/JL98-BX5G].

[65] *Reliance*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[66] *Essential Reliance*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining essential reliance as "[r]eliance that causes a person to expect specified benefits and to perform as instructed by the contract.").

[67] *Detrimental Reliance*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining detrimental reliance as "[r]eliance by one party on the acts or representations of another, causing a worsening of the first party's position.").

[68] This is especially true when employers require full-time work, as McDonald's does, for its managers to receive tuition reimbursement. *See, e.g.*, MCDONALD'S, *supra* note 47, at 1.

[69] BD. OF GOVERNORS OF THE FED. RSRV. SYS., ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2020, at 33–34 (2021), https://www.federalreserve.gov/publications/files/2020-report-economic-well-being-us-households-202105.pdf [https://perma.cc/6SWL-YDBU].

[70] Scipioni, *supra* note 21.

dropping out before attaining their degree. If that student took out loans, then she joins the nearly 40% of students who are "fac[ing] the worst of both worlds: [having] all of the debt and no degree."[71]

B. Employer Considerations and Incentives

An employer's incentives, in practice, may not align with its employee utilizing a tuition reimbursement program. Most apparent is that employers would have to directly pay for the employee's tuition over the course of multiple semesters, or even years. Moreover, an employer may suspect that an employee may be less productive at work when she concurrently takes higher education courses.[72] Firms maximize profit when the wage rate is equal to the marginal revenue product of labor.[73] But here, an employer could reasonably infer that a worker seeking higher education may have more distractions and her dedication to the job may falter.[74] This, in turn, may reduce the employee's marginal product of labor. At the same time, the employee's wage rate essentially increases because of the cost of the tuition reimbursement.[75] To compensate for lost productivity, the employer may have to hire additional workers or spread out the workflow across existing employees. Consequently, an employer may seek to replace the employee who seeks tuition reimbursement with one who does not make her preference for seeking reimbursement known.

Alternatively, an employer may decide that tuition reimbursement could increase productivity and reduce recruitment costs due to decreased turnover.[76] For instance, an employee participating in a tuition

---

71 Specht, *supra* note 13.

72 The employer may also assume that productivity will also be lower upon an employee's completion of education, as an employee who is absent from the workplace in order to pursue higher education incurs the opportunity cost of forgone on-the-job experience and reduced team cohesion, relative to the scenario where the employee did not seek higher education, when reintegrating into to the workplace.

73 J. L. Stein, *The Predictive Accuracy of the Marginal Productivity Theory of Wages*, 25 REV. ECON. STUD. 182, 182 (1958).

74 *See, e.g.*, Jamal Lemond, *Employment Isn't Working for Students*, GA. STATE SIGNAL, (Oct. 29, 2019), https://georgiastatesignal.com/employment-isnt-working-for-students/ [https://perma.cc/N675-YK6U] (interviewing a hiring manager who noted disadvantages to hiring employees pursuing higher education including that "college students . . . come with the weirdest schedule request[s]").

75 The wage rate here is calculated as the salary or hourly wage plus the cost of tuition reimbursement divided by total hours worked.

76 *Weighing the Pros and Cons of Offering Tuition Assistance for Your Employees*, UNIV. OF MASS. GLOB. (Aug. 27, 2019), https://www.umassglobal.edu/news-and-events/blog/weighing-the-pros-and-cons-of-offering-tuition-assistance-for-your-employees [https://perma.cc/QCR6-6ZA6] (noting that tuition assistance can increase a company's return on investment through increased employee retention and increased employee productivity); Wingo, *supra* note 34 (describing that tuition reimbursement programs, along with other benefits, could result in reduced recruitment costs).

reimbursement program will want to stay at the company to continue receiving that assistance.[77] Since it takes years to complete a college degree, and even longer if one is attending part-time, the employer could reasonably expect the employee to remain at the firm for some time. Moreover, productivity could arguably increase. An employee may feel grateful for the reimbursement and seek to go "above and beyond" the level of service they previously provided.[78] Thus, tuition reimbursement could indirectly increase marginal earnings even before an employee graduates.[79] In addition to these internal incentives, employers will have to balance external factors. Given that employers compete for labor, employers may have to balance reputational costs as well, which could act as a market check on overly exploitative practices relating to reimbursement.[80]

But this alternative narrative seems less plausible. For one, social science literature has long documented loss aversion in decision-making, meaning individuals tend to prefer options that provide a certain gain over an alternative that provides a greater expected gain but is uncertain to occur.[81] In this specific context, there is a certain "loss" in terms of tuition payment and the benefits of additional employee skill and loyalty are not guaranteed.

In addition to loss aversion, there is another economic factor at play: the combination of time preference and discounting. Individuals prefer to

---

[77] BUS. WIRE, *supra* note 32 (summarizing a survey of 22,000 employees participating in a tuition assistance program and finding that "8 in 10 say tuition assistance makes them more likely to stay with their employer, regardless of any policy requiring them to stay").

[78] *Id.* (noting that "93% of respondents say that using their employer's tuition assistance program helped them develop the skills they needed to grow within their company" and that "85% [of employees] say the program has made them a more effective employee").

[79] *See, e.g.*, UNIV. OF MASS. GLOB., *supra* note 76 (citing a manager of human resources program who noted "[w]e benefit from offering tuition reimbursement because we end up with more engaged individuals on our staff").

[80] Companies do respond to external factors such as an employer's public reputation and reputation as measured through third-party ratings. *See* Aaron K. Chatterji & Michael W. Toffel, *How Firms Respond to Being Rated*, 31 STRATEGIC MGMT. J. 917, 933, 936 (2010) (concluding empirically that companies do respond to third-party ratings); *see also* Daniel B. Turban & Daniel M. Cable, *Firm Reputation and Applicant Pool Characteristics*, 24 J. ORGANIZATIONAL BEHAV. 733, 745–46 (2003) (finding empirically that an employer's reputation influences the size and quality of its applicant pool). Some commentators have seemed to argue that companies offer these tuition reimbursement programs largely for the programs' recruitment value and positive reputational benefit. *See, e.g.*, Rosenbaum, *supra* note 40; *see also* Hall, *supra* note 56 ("Tuition benefit programs garner positive press for corporations that pay employees so low that they must rely on public assistance to make ends meet."). If employers are offering these programs predominately for their recruitment value in a tight labor market, then whether anyone *actually* uses the reimbursement is less important than that people apply to work there under the impression that they *could* use it. From a purely economic lens, the best-case scenario for the company occurs when people apply under this impression and never use these programs, which serves the company's recruitment goals without incurring the additional costs of that reimbursement.

[81] *See* Kahneman & Tversky, *supra* note 59.

receive a service or a return on investment sooner rather than later.[82] Thus, service providers must compensate individuals with a "time premium" to account for receiving a service later. In the savings and investment context, for example, this time premium is represented by the real interest rate.[83]

Applied to the tuition reimbursement context,[84] it is unclear what the time premium must be for employers to account for the short-term expected loss in employee productivity. An employer may be impatient with an employee who has become less productive, and thus may have an incentive to replace her despite long-term expected returns—assuming the employer does not presume her intent to seek higher education indicates an intent to leave the position or organization. Arguably, the ideal outcome for employers would be the ability to advertise their tuition reimbursement program as a benefit and for employees to refrain from using the program. This could explain why only 2% of workers participate in tuition reimbursement programs despite such programs' increasing availability.[85]

Examining these employer–employee incentives around tuition assistance shows that there are substantial risks to employees looking to participate in tuition assistance programs. As Part III will show, these risks are not merely theoretical, but real and consequential for American workers.

III. CURRENT APPROACHES AND CASE LAW

Given the disconnect between an employee's interest in using tuition reimbursement programs and an employer's interest in maximizing profits,

[82] Gary S. Becker & Casey B. Mulligan, *The Endogenous Determination of Time Preference*, 112 Q.J. ECON. 729, 731–33 (1997).

[83] Jesús Clemente, María Dolores Gadea, Antonio Montañés & Marcelo Reyes, *Structural Breaks, Inflation and Interest Rates: Evidence from the G7 Countries*, ECONOMETRICS, Feb. 17, 2017, at 1–2 ("Following Fisher's (1930) study, which is very influential, this relationship can be stated through the well-known Fisher equation: $R_t = \pi^e_t + r_t$ where R represents the nominal interest rate, π^e is the expected rate of inflation and r is the (ex-ante) real interest rate. In simple economic models, this last variable is determined by deep structural parameters, such as investor preferences or the marginal efficiency of capital, and is often assumed to be constant over long horizons. According to [Fisher's Equation], moneylenders need a nominal interest rate that compensates them for the purchasing power lost over the duration of the loan, which is proxied by the expected inflation.").

[84] This application is appropriate because while companies pay for tuition reimbursement programs upfront, they do not see any of the potential benefits until the employee has completed the program and brought their new skills to bear at their job, which necessarily happens after the education has been paid for and finished, often several years before. Perhaps one can argue that the short-term time premium is captured by the reputational benefit that the employer experiences. While there is empirical evidence of this reputational benefit existing, there does not appear to be literature quantifying the value of this benefit. Absent this quantification, this Note acknowledges that the reputational benefit may be a factor in determining a company's time premium but hesitates to estimate the value of an unquantified reputational benefit relative to the more observable expected decline in employee productivity (i.e., reduced hours).

[85] INSTRIDE, *supra* note 16.

it is important to examine the current remedies for when an employee is not reimbursed by an employer. Part III.A first explores how courts have responded to arguments that these tuition reimbursement agreements constitute a modification of an existing employment contract or a separate contract. Because all states except Montana presume that employment relationships are "at-will,"[86] meaning an employee can be terminated at any time for almost any or no reason, these claims have not persuaded courts.

This Part then explores arguments made under a theory of promissory estoppel, an equitable remedy which, "in absence of a contract, creates obligations never explicitly assumed by the parties."[87] Some courts have found these estoppel arguments equally unpersuasive, with other courts noting that promissory estoppel cannot apply at all to at-will employment regimes. Parts III.B and III.C provide an overview of potential statutory grounds for a cause of action to adjudicate tuition reimbursement disputes and notes their shortcomings. Part III concludes that the current approaches do not provide a sufficient basis for employees to challenge disagreements relating to an employer's tuition reimbursement program.

A. A (No) Contract or Promissory Estoppel Approach

Most tuition reimbursement plans explicitly disclaim that they form an employment contract between the employer and employee. But even if a tuition reimbursement plan is silent as to whether a contract is formed, courts have been unreceptive to the idea of an implied contract and inconsistent in adopting promissory estoppel as a remedy to frustrated tuition reimbursement agreements.

Before exploring these cases, it is helpful to first center and imagine the scenario of a hypothetical job seeker. She comes across CarMax, a used car dealer that has been ranked among the "Fortune 100 Best Companies to Work For" list for seventeen consecutive years.[88] She looks at its website, which notes its "people-first culture" and "outstanding training."[89] She reads that "[a]s long as you have the desire, we can cultivate the skills you need to build an amazing career. Tuition reimbursement for eligible courses is another valuable part of our training."[90]

---

86 *At-Will Employment - Overview*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 15, 2008), https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx [https://perma.cc/YZD4-P9NU].

87 Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991).

88 *Top 10 Reasons CarMax Is a Great Place to Work*, CARMAX, https://careers.carmax.com/us/en/Top10 [https://perma.cc/2FVL-6DD4].

89 *Id.*

90 *Id.*

This job seeker has always wanted to go to college, but life has gotten in the way. She applies for the job at CarMax and is offered the position. When she becomes eligible, she applies and is approved for tuition reimbursement. What happens if, for some reason, she is terminated before her program ends? One would think that courts might point to some level of reliance upon the statements CarMax made about its tuition reimbursement program. After all, she started this program based on the representations of CarMax that "as long as [she had] the desire" they could "cultivate the skills [she needed] to build an amazing career."[91] Now, she is stuck with thousands of dollars in unforeseen debt and may not be able to complete her studies. In other words, one might say there was "[r]eliance by one party on the acts or representations of another, causing a worsening of the first party's position."[92]

1. *Tuition Reimbursement Agreements Do Not Modify the At-Will Employment Relationship*

But courts have generally been hesitant to find that a tuition reimbursement agreement constitutes a modification of the at-will employment relationship or forms a separate contract.[93] For instance, in *Dayton Power & Light Co. v. Henry*, the Ohio Court of Appeals found that an employee who is terminated may be forced to repay any tuition assistance provided by the employer because an employment contract is "simply revocable by either [the employer or the employee] 'at will,' . . . absent any contrary provision."[94] The court highlighted that the employer

[91] *Id.*

[92] *Detrimental Reliance*, BLACK'S LAW DICTIONARY (11th ed. 2019). While this example is hypothetical, the scenario has been discussed in policy circles. *See, e.g.*, Hall, *supra* note 56 ("[U]nder the status quo, employees can be drawn to job openings because of a list of benefits [including employer-provided tuition benefits] only to find their particular shift or location assignment doesn't qualify them at all, or the wait period to access the benefits is prohibitive. Likewise, frontline workers—many of whom have no prior experience navigating a postsecondary education market that thrives on information asymmetries—may not have time to do research or read the fine print. Some may be surprised to learn that if they leave their job or get terminated for any reason, they'll be on the hook for the cost of the tuition that was paid on their behalf."). In addition, there is discourse in online forums from posters who claim to have accepted tuition reimbursement only to be stuck with an unexpected bill due to termination. *See, e.g.*, QUORA, *supra* note 55 ("I just got fired and my employer does not want to pay tuition reimbursement for which I signed up, and only wants to pay 20%. Should I accept or prepare to take him to court to get the full amount?"); Hastings, *supra* note 55 (commenting that he was fired before tuition reimbursement).

[93] This may be because tuition reimbursement policies and agreements appear to explicitly condition that the agreement does not modify the at-will employment relationship or form a separate employment contract. *See, e.g.*, WESTLAW, *supra* note 42 (providing template language for tuition reimbursement, including the words "I am employed at will and this policy does not modify my at-will employment status" in bold type and underlined).

[94] No. 96-CA-0054, 1996 WL 631397, at *1–2. (Ohio Ct. App. Oct. 25, 1996).

made the following statement to employees: "After receiving educational reimbursement, you will hopefully utilize your new knowledge here at [employer]. Should you leave [employer], any reimbursement you have received within the previous three years must be returned to the Company."[95]

Although the court acknowledged that the employer, by terminating the employee, made it impossible for the employee to perform, the court held that the employee assumed the risk that she may be terminated prior to that performance and the risk that she may have to reimburse the employer because she signed the company's tuition reimbursement agreement.[96] Thus, the employee had to reimburse the employer as "restitution" because the employee "made an express promise that should she 'leave [employer]' before the three year term expired she would repay [employer]."[97] In this case, the employee was terminated after more than two years of employment.[98] Consequently, the employee faced the extraordinary burden of repaying two years of tuition reimbursement because she was terminated.

As another example, the Eighth Circuit found that, applying Minnesota law, company "pledges" expressing the importance of individual workers and advancement opportunities via its tuition assistance program do not automatically alter the at-will relationship by creating an offer for a unilateral contract,[99] which is an agreement where one party agrees to pay for the other party to perform. However, the court noted that a manual stating "sufficiently definite terms" could constitute a unilateral contract.[100] This, theoretically, leaves the door open to a scenario where plaintiffs could bring a contract claim to adjudicate their tuition reimbursement dispute.[101]

---

95 *Id.* at *1.

96 *Id.* at *1–2.

97 *Id.* at *2. As an aside, there is an apparent contradiction of holding the employee liable for tuition payments even though the terms of the agreement seem to imply that the employee must take the action to leave. Under this construction, to violate the terms of the agreement, it appears that the employee (subject) must leave (verb) the employer (employer), rather than merely cease to be employed.

98 *Id.* at *1.

99 Miller v. CertainTeed Corp., 971 F.2d 167, 171–72 (8th Cir. 1992).

100 *Id.* at 172.

101 For instance, the Fifth Circuit opened this door in a case revolving around fringe benefits more generally. *See* Zenor v. El Paso Healthcare Sys., Ltd., 176 F.3d 847, 864 (5th Cir. 1999) (holding that employment policies may alter an at-will nature employment relationship by creating a contractual right when those policies "specifically and expressly limit the employer's ability to terminate the employee . . . [and] alter that relationship 'in a meaningful and special way'" (quoting Figueroa v. West, 902 S.W.2d 701, 705 (Tex. App. 1995))). Since tuition reimbursement is one of many fringe benefits, it may be possible to extend this rationale to apply to reimbursement disputes. *See also* Vida v. El Paso Emps.' Fed. Credit Union, 885 S.W.2d 177, 181 (Tex. App. 1994) (reversing a grant of summary judgement by the trial court, stating that an employer's policies "specially and expressly" limited the employer's termination rights because the policies promised that "[n]o employee shall be penalized for using the grievance procedure").

2. *Promissory Estoppel's Inconsistent Application*

Moving further, fringe benefits, such as tuition reimbursement, health insurance, and childcare, have been inconsistently interpreted as giving rise to a promissory estoppel claim under an at-will employment agreement. Generally, promissory estoppel applies when "a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."[102]

For instance, in *Bryant v. MT Development Co.*, the plaintiff moved to Tennessee from Massachusetts based on the company's offer of salary and representations that the company would pay for moving expenses.[103] When the plaintiff was terminated months after the move, he sued for these expenses, salary, and tuition reimbursement benefits for his wife. The district court held that categorically, "Tennessee law does not allow promissory estoppel claims for breach of at-will employment agreements because doing so would undermine the at-will doctrine."[104] The court also held that these types of claims cannot constitute constructive fraud or negligent misrepresentation because these claims were limited to "false information about *present* or *past* events as opposed to *future* events."[105]

Federal courts have also held that employment contracts are presumed to be at-will, though the presumption can be rebutted by a promise of employment lasting for a clear and definite duration.[106] Yet, even this is a strict presumption to overcome. In *Stanaway v. AT&T Bell Laboratories*, the plaintiff accepted the employer's offer to join AT&T. As a part of the offer, AT&T agreed to pay for graduate education in computer science under its tuition benefits program, noting that "[a]cceptance of this offer signifies your intent to complete the study Program and to undertake full-time employment with us at that time."[107] With the encouragement of his supervisors, the plaintiff applied to multiple graduate schools and was ultimately accepted to Stanford University. A few months before the plaintiff was scheduled to begin classes, however, AT&T terminated him and informed him that it would not reimburse his tuition expenses. The court held that there was no promissory estoppel claim because there was "no unambiguous promise"

---

102 RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. L. INST. 1981).

103 No. 3:06-CV-0458, 2007 WL 2343682, at *2 (M.D. Tenn. Aug. 13, 2007).

104 *Id*. at *3; *see also Zenor*, 176 F.3d at 864 ("[I]t is questionable whether Texas law allows at-will employment to form the basis of a promissory estoppel claim."). *But see* Chapman v. S. Nat. Gas Co., No. 3:09-CV-224, 2011 WL 883918, at *6 (E.D. Tenn. Mar. 11, 2011) (disagreeing with *Bryant*).

105 *Bryant*, 2007 WL 2343682, at *4 (emphases added).

106 Stanaway v. AT&T Bell Lab'ys, No. 92 C 6061, 1993 WL 179775, at *3 (N.D. Ill. May 24, 1993).

107 *Id.* at *1.

that the employment would extend through the extent of the program.[108] Without the promised tuition reimbursement, the plaintiff looked for other employment opportunities instead of going to Stanford.[109]

Promissory estoppel may be an "extraordinary remedy."[110] Indeed, it may be so extraordinary, that its application in the tuition reimbursement context may be a nihility.

B. *ERISA's Application*

The Employee Retirement Income Security Act of 1974 (ERISA), a comprehensive federal regulatory scheme which covers Americans' retirement plans, health care insurance, vacation and holiday pay, and other benefits,[111] does not generally apply to tuition reimbursement programs under current doctrine. ERISA applies to most of the $35 trillion in assets held by Americans in their retirement accounts.[112] Additionally, around 157 million Americans rely on ERISA-governed, employer-sponsored health insurance.[113] That means more than 47% of the U.S. population relies on their ERISA-governed health insurance plans for their primary and emergency care needs.[114] In addition to these fringe benefits, ERISA's comprehensive scope covers "scholarship funds," though the ERISA statute does not define this term.[115]

Congress's silence on the definition of "scholarship funds" left the door open for the Department of Labor to define the term through agency rulemaking. With this opening, the Department has interpreted ERISA as having no application to tuition reimbursement programs when they are unfunded, meaning the program is paid for through the employer's

[108] *Id.* at *4.

[109] *Id.* at *2.

[110] Williams v. Medalist Golf, Inc., 910 F.3d 1041, 1047 (8th Cir. 2018) (categorizing promissory estoppel as appropriate only in "extreme" cases).

[111] 29 U.S.C. §§ 1001–03.

[112] Janelle Orsi & Jason Fernandes, *Rethinking Retirement Savings*, 134 HARV. L. REV. F. 348, 348 (2021) (noting that $35 trillion is more than one-third of the world's GDP and was larger than total federal government spending during the entirety of the Obama Administration).

[113] *See* KAISER FAM. FOUND., 2020 EMPLOYER HEALTH BENEFITS ANNUAL SURVEY 6 (2020), https://www.kff.org/report-section/ehbs-2020-summary-of-findings/ [https://perma.cc/XL6L-7ZVZ].

[114] *See* Brynn Epstein & Daphne Lofquist, *U.S. Census Bureau Today Delivers State Population Totals for Congressional Apportionment*, U.S. CENSUS BUREAU (Apr. 26, 2021), https://www.census.gov/library/stories/2021/04/2020-census-data-release.html [https://perma.cc/5AQB-9M6J] (finding the resident U.S. population to be 331,449,281 people according to the 2020 Census).

[115] ERISA's text states that it applies to "scholarship funds." 29 U.S.C. § 1002. While the statute does not define what constitutes "scholarship funds," one plausible reading of the term "scholarship funds" could be any funds going toward the payment of scholarships. *See id.* (defining many terms, but not "scholarship funds").

discretionary or general account rather than "funded" through a separate scholarship fund.[116]

It appears that most, if not all, courts have adopted the Department's interpretation, perhaps because of court deference to agency rulemaking under *Chevron* deference.[117] As one district court noted,

> [w]hile ERISA does consider scholarship funds to be welfare benefits, the Department of Labor has explained that employee welfare benefit plans do not include "a scholarship program, including a tuition and education expense refund program, under which payments are made solely from the general assets of an employer or employee organization."[118]

This court also held that the plaintiffs have the burden of establishing a prima facie case that the source of the funds used for tuition reimbursement was derived from a separate scholarship fund to be covered under ERISA.[119]

In the Fair Labor Standards Act context, another district court has treated tuition reimbursement programs as a "reimbursement of an expense incurred by an employee 'in the furtherance of his employer's interests . . . which are not made as compensation for his hours of employment.'"[120] If this reasoning was applied to ERISA, then tuition assistance would probably not constitute a welfare benefit because the assistance is not a compensable benefit, but a reimbursement for a cost incurred by an employee for the employer's benefit. Consequently, it does not appear that ERISA provides a cause of action to vindicate alleged wrongful denials of tuition reimbursements, at least when there is no separate fund specifically reserved for tuition assistance.

However, these exegeses are based on Department of Labor interpretations of "scholarship fund." While agency interpretations are "normally entitled to a high degree of deference," the "ultimate decisions on

---

116 29 C.F.R. § 2510.3-1(k) (clarifying ERISA's definition of a "welfare plan" as "not includ[ing] a scholarship program, including a tuition and education expense refund program, under which payments are made solely from the general assets of an employer or employee organization").

117 In brief, *Chevron* deference applies through a two-step framework established by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842–43 (1984). Under this framework, a court first determines whether a particular statutory provision is ambiguous. If a court determines that it is ambiguous, then it asks whether the agency's interpretation is "reasonable." If it is reasonable, then the court will defer to the agency's interpretation. Amy Semet, *Statutory Interpretation and* Chevron *Deference in the Appellate Courts: An Empirical Analysis*, 12 U.C. IRVINE L. REV. 621, 624 (2022) (describing *Chevron* analysis). However, different courts undertake different analyses of reasonableness, leading some scholars to argue for a uniform manner of statutory interpretation to help define "reasonableness." *Id.* at 630.

118 Finley v. M.W. Kellogg Co., 1998 U.S. Dist. LEXIS 23506, at *48–49 (S.D. Tex. Mar. 26, 1998).

119 *Id.* at *49.

120 White v. Publix Super Mkts., Inc., No. 3:14-CV-1189, 2015 WL 4949837, at *11 (M.D. Tenn. Aug. 19, 2015) (quoting the Fair Labor Standards Act, 29 U.S.C. § 207(e)(2)).

interpretations of [an] act are made by the courts."[121] Given this, and the declining practice of the Roberts Court in deferring to agency interpretations of federal law,[122] at least some courts may have additional runway to revisit the definition of scholarship fund to include these tuition reimbursement programs.[123] Under the scenario where courts were to read "tuition reimbursement" as a scholarship fund covered under ERISA, then perhaps the statute could provide a federal cause of action relating to employer administration of these programs.[124] However, under current doctrine, employees cannot rely on ERISA to successfully adjudicate tuition reimbursement disputes.

C. *Discrimination Lawsuits Relating to Tuition Reimbursement Programs*

Since relief for tuition reimbursement has generally failed when tied to breach of contract, promissory estoppel, and ERISA claims, plaintiffs appear to have generally sued for employer performance through state and federal antidiscrimination statutes. One benefit of relief under an antidiscrimination theory is that it overcomes a model tuition reimbursement agreement's

[121] *Id.*; *see also* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (confirming the judiciary's ultimate authority role in interpreting statutes but allowing consideration of agency interpretations based on their persuasiveness).

[122] Agency deference, established by *Chevron*, is increasingly at risk of significant overhaul or elimination by the Supreme Court. *See* Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 110–20 (2018) (summarizing criticisms of *Chevron* deference); *see also* Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting) ("I can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*."). Most recently, the Roberts Court in *West Virginia v. EPA* has seemingly continued to waiver from applying *Chevron* deference in favor of what appears to be a new "major questions" doctrine, leading at least one leading scholar to note that the decision "unquestionably raises questions about *Chevron*'s future applicability." David F. Engstrom & John E. Priddy, West Virginia v. EPA *and the Future of the Administrative State*, STANFORD L. SCH. BLOGS (July 6, 2022), https://law.stanford.edu/2022/07/06/west-virginia-v-epa-and-the-future-of-the-administrative-state/ [https://perma.cc/6BSP-ZQ7H] ("What makes the Court's decision so important is that, in contrast to these earlier efforts to nibble around *Chevron*'s edges, the 'major questions' doctrine mounts something closer to a full-scale frontal assault.").

[123] These courts would have additional runway because the reduced precedential value of *Chevron* would mean that courts would not have to defer to agency interpretations even if "reasonable." While it is beyond the scope of this Note to offer all normative and economic reasons why a court may wish to adopt a broader interpretation of scholarship fund, it contributes to this discussion by offering that ERISA's coverage over a seemingly broad number of fringe benefits provides some evidence that perhaps Congress intended for a broader reading that does not rest on the source of funding.

[124] It would also preempt state laws that impermissibly "relate to" ERISA plans. Generally, the Supreme Court has held that a state law is preempted by ERISA when it refers to, or has a connection with, employee benefit plans. *See* Letter from Louis J. Campagna, Chief, Div. of Fiduciary Interpretations, Dep't of Lab., to Am. Council of Life Insurers (Dec. 04, 2018), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/12-04-2018 [https://perma.cc/32EP-ML7T]; *see also* Jessica Frenkel, *With Great Power Comes No Responsibility: The Tragedy and the Irony of ERISA Preemption*, 88 U. COLO. L. REV. 1169, 1173 (2017) (discussing the ways in which ERISA's preemption causes harm to certain vulnerable groups).

presumption of at-will employment, as statutes prohibit termination based on animus toward a protected class. Unsurprisingly, tuition reimbursement claims that must be tied to an antidiscrimination statute present a higher burden for plaintiffs to meet before attaining relief relative to statutes permitting a more direct cause of action, such as those discussed above.

This Section begins by exploring state antidiscrimination statutes and the heightened burden plaintiffs must meet: plaintiffs must not only allege that tuition assistance is part of their compensation but must also establish that the tuition assistance was denied for some unlawful discriminatory purpose. Later, this subsection explores similar issues seen through federal civil rights and age discrimination statutes.

1. State Antidiscrimination Statutes

Though several plaintiffs have attempted to adjudicate tuition reimbursement disputes through state antidiscrimination statutes, it appears that such disputes are often brought in conjunction with other alleged employment actions that the plaintiffs viewed as discriminatory and sometimes supplement claims not based on discrimination.[125] Because of this, and because a court's reasoning sometimes applies to several claims without clearly defining which part of its analysis applies to which claim, this Note hesitates to draw broad conclusions about a plaintiff's chance of success resulting from these individual cases. Acknowledging this limitation, this Note proposes that from a theoretical and comparative-analysis perspective, it is more difficult for a plaintiff to prevail on a claim that requires proving additional elements, such as the elements contained in a state antidiscrimination statute, compared to a claim that does not.

Illinois's state antidiscrimination statute, the Illinois Human Rights Act (IHRA), provides an example of how a tuition reimbursement dispute may be more difficult to adjudicate through antidiscrimination law relative to a

[125] *See, e.g.*, Michael v. Robert Wood Johnson Univ. Hosp., 940 A.2d 310, 311 (N.J. Super. Ct. App. Div. 2008) ("In the course of our opinion we noted that plaintiff's claims of age discrimination and hostile work environment revolved around three discrete areas: the Hospital's vacation policy, its policy on tuition reimbursement, and her performance evaluations."); Owens v. Dep't of Hum. Rts., 936 N.E.2d 623, 626, 632 (Ill. App. Ct. 2010) (describing the plaintiff's claims under the Illinois Human Rights Act, 775 ILL. COMP. STAT. 5/2-102(A) (2022), that his employer denied his request for tuition reimbursement based on discrimination tied to race, age, and retaliation, and further describing that the plaintiff failed to follow the employer's policy in requesting approval for reimbursement); Mateza v. Polaroid Corp., No. 76-3379, 1981 WL 11479, at *65–67, (Mass. Super. Ct. July 30, 1981) (noting that "Plaintiff has alleged that women lacked equal access to Polaroid programs of company-sponsored courses and seminars, and tuition reimbursements for continuing education," and further alleged discrimination in job titles, among other things, and retaliation).

contract-based approach.[126] The IHRA prohibits unlawful discrimination in, among other things, "selection for training or apprenticeship" and the "terms, privileges, or conditions of employment."[127] Under Illinois law, courts analyze IHRA discrimination claims through a three-part test.[128] First, the plaintiff must establish a prima facie case of unlawful discrimination.[129] If she does so, only then does the employer have to provide, but not prove, a legitimate, nondiscriminatory reason for its action.[130] Following this, the plaintiff must then prove by a preponderance of the evidence that the employer's reason was a pretext for discrimination.[131]

In contrast with these elements, a plaintiff may find it easier to adjudicate a tuition reimbursement dispute through a standard breach of contract claim, were it available. Under Illinois law, the elements to establish a breach of contract claim are: "(1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of contract by the defendant; and (4) resultant injury to the plaintiff."[132]

Even a cursory comparison between these elements demonstrates that the heightened scrutiny that comes through state-level antidiscrimination claims to adjudicate an alleged tuition reimbursement agreement may not be the best fit for analyzing such disputes. As previously discussed, a business may have many incentives to deny a tuition reimbursement application, as it could reasonably be seen as the decision best suited to maximize profits.[133] What is clear here is the additional burden that a plaintiff establish an employer's subjective intent to engage in unlawful behavior, which is a

---

[126] This Note uses Illinois solely for illustrative purposes. Each state's antidiscrimination laws may vary, though they may have some overlap between each other and the federal antidiscrimination statutes. *See* Practical Law Labor & Employment, *State Anti-Discrimination Toolkit*, *Practical Law Toolkit w-026-5753*, WESTLAW, https://us.practicallaw.thomsonreuters.com/w-026-5753 [https://perma.cc/Y64Z-5QLK] (describing and comparing state and federal antidiscrimination laws).

[127] Under the IHRA, unlawful discrimination is defined as "discrimination against a person because of his or her actual or perceived: race, color, religion, national origin, ancestry, age, sex, marital status, order of protection status, disability, military status, sexual orientation, pregnancy, or unfavorable discharge from military service." Illinois Human Rights Act, 775 ILL. COMP. STAT. 5/1-103(Q) (2022). The IHRA prohibits "any employer to refuse to hire, to segregate, to engage in harassment as defined in subsection (E-1) of Section 2-101, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination, citizenship status, or work authorization status." *Id.* 5/2-102(A).

[128] This three-part test mirrors the federal three-part test for Title VII claims. Zaderaka v. Ill. Hum. Rts. Comm'n, 545 N.E.2d 684, 687 (Ill. 1989) (adopting the U.S. Supreme Court test for Title VII claims).

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] Burkhart v. Wolf Motors of Naperville, Inc., 61 N.E.3d 1155, 1159 (Ill. App. Ct. 2016).

[133] *Supra* Section II.B.

departure from the objective manifestation of intent approach taken in traditional contract contexts. For these reasons, it may be even harder for an employee to prevail on a state law claim, relative to the contract claim previously discussed.[134]

2. *Title VII of the Civil Rights Act Claims*

As with state discrimination claims, employees also struggle to successfully litigate tuition reimbursement disputes through Title VII of the Civil Rights Act (Title VII), which prohibits "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[135] To begin, the plaintiff must be a member of the protected class;[136] further, she bears the burden of producing a prima facie case of discrimination, along with the burden to rebut an employer's offering of a legitimate, nondiscriminatory rationale for the contested employment action as a pretext for unlawful discrimination.[137] Just as in the state law context, this burden is significantly higher than that of a contract claim.

For this Note's purposes, this analysis focuses on an additional factor that courts have required: that a plaintiff show she suffered "an adverse job action."[138] An adverse job action is one that "materially affects the compensation, terms, conditions, or privileges of employment."[139] While some courts have found that a denial of tuition reimbursement may satisfy this aspect of a Title VII claim,[140] others seem to find that such a denial does not necessarily constitute an adverse action on the "terms or conditions of her employment,"[141] even when tuition had been previously reimbursed to a plaintiff and other employees.[142] According to these courts, the availability

[134] *Supra* Section III.A.

[135] 42 U.S.C. § 2000e-2(a)(1).

[136] The implications of this are that it may limit the number of individuals who can even attempt to bring suits under Title VII.

[137] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973), describes the three-prong framework governing allocations of proof for a Title VII claim. In general, the plaintiff must first produce a prima facie case of discrimination. *Id*. Assuming plaintiff succeeds, the defendant must then articulate a legitimate, nondiscriminatory reason for the action. *Id.* Finally, the plaintiff must then show the reason offered was really a pretext for racial animus and discrimination. *Id.*

[138] *See, e.g.*, Lathem v. Dep't of Child. & Youth Servs., 172 F.3d 786, 792 (11th Cir. 1999).

[139] Campbell v. State Dep't of Educ., 892 F.3d 1005, 1012 (9th Cir. 2018) (quoting Davis v. Team Elec. Co., 520 F.3d 1080, 1089 (9th Cir. 2008)).

[140] Anderson v. Intel Corp., No. CV-19-00743-PHX-DWL, 2021 WL 1087127, at *12 (D. Ariz. Mar. 22, 2021) (listing and comparing cases).

[141] Beckham v. Nat'l R.R. Passenger Corp., 736 F. Supp. 2d 130, 148 (D.D.C. 2010).

[142] *Id.*; *Anderson*, 2021 WL 1087127, at *12 (rejecting plaintiff's contention that the "act of withholding of company benefits of reimbursing the educational costs incurred by the employee, is itself, an adverse employment action").

of a tuition reimbursement program alone cannot constitute the basis for a Title VII claim when the circumstances, viewed as a whole, indicate that future use of a reimbursement program are "merely aspirational" and not "concrete."[143] Moreover, to support a Title VII claim, courts have closely looked to a company's outlined policies and procedures, even when a company has departed from that language in practice.[144] As one court put it, these employers merely provided "gratuitous accommodations" for an employee and did not change their underlying policies or procedures.[145]

On the spectrum of availability, Title VII lawsuits to enforce an alleged entitlement to tuition reimbursement lie between ERISA and state law antidiscrimination claims. Based on current interpretations of ERISA and guidance from the Department of Labor, unfunded tuition reimbursement programs are precluded from serving as the tie to an ERISA cause of action.[146] In this sense, Title VII lawsuits may be more preferable for plaintiffs because at least some jurisdictions recognize the denial of tuition reimbursement as an "adverse employment action" giving rise to a Title VII suit.[147] However, it may be more difficult for plaintiffs to prevail under Title VII lawsuits relative to state law claims, given limited court interpretations of "adverse employment action" and its nexus to animus because of protected class status.

3. Federal Age Discrimination Claims

Federal age discrimination claims may present an even higher burden for plaintiffs seeking to be reimbursed for tuition expenses. A denial of tuition reimbursement could be the impetus for a claim under the Age Discrimination in Employment Act (ADEA),[148] which bars employers from discriminating against an individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[149] However, an ADEA claim may only be successfully pursued by

---

[143] Kowitz v. City of Portland, No. 3:16-cv-598-SI, 2019 WL 542271, at *4 (D. Or. Feb. 11, 2019).

[144] *Anderson*, 2021 WL 1087127, at *12 ("The failure to give [the plaintiff] what would essentially have been a gratuitous accommodation was not an adverse employment action." (quoting Campbell v. Haw. Dep't of Educ., 892 F.3d 1005, 1014 (9th Cir. 2018))).

[145] *Id.*

[146] *Supra* Section III.B.

[147] *See supra* note 142; Cunningham v. Consol. Edison, Inc., No. CV-03-3522, 2006 WL 842914, at *17 (E.D.N.Y. Mar. 28, 2006) ("Since tuition reimbursement, like wages, is money owed to the employee by the employer, a deliberate delay in tuition reimbursement is also an adverse employment action."). *But see* Helm v. Ancilla Domini Coll., No. 3:09-CV-546 JD, 2012 WL 33018, at *11–12 (N.D. Ind. Jan. 5, 2012) (finding that a reduction in tuition reimbursement was not a "*materially* adverse employment action" (emphasis added)).

[148] *See, e.g.*, Koonce v. Gaylord Hosp., Inc., No. 3:13–CV–00362 (VLB), 2015 WL 4603414, at *8–9 (D. Conn. July 30, 2015).

[149] 29 U.S.C. § 623(a)(1).

plaintiffs who are age forty and older.[150] Because 92% of undergraduate students are under the age of twenty-four,[151] the ADEA facially presents an imperfect vehicle to adjudicate tuition reimbursement claims.

An ADEA analysis is similar to a Title VII one, but differs in that it requires a plaintiff show that discrimination on the basis of age was the but-for cause of the adverse employment decision.[152] As the Second Circuit has noted, but-for causation under the ADEA requires the plaintiff to meet a "higher burden of proof than the burden of proof in a Title VII case."[153] Moreover, at least some courts have read the adverse employment requirement more strictly in the ADEA context relative to the Title VII one.

Given the high burden of proof required under the ADEA, it may be even more difficult for plaintiffs to prevail under this cause of action compared to the ones described prior. As the Supreme Court found, even when a factor motiving an employer's decision is "empirically correlated to age," a decision made pursuant to that alleged factor does not support a finding that there was disparate treatment under the ADEA.[154] For example, an ADEA claim has been found to fail when an employer expressly states that he or she prefers "recent graduates and post-doctoral candidates."[155] As the federal circuit courts have regularly held, even direct references to age may not be sufficient to support an ADEA claim.[156] As the Fourth Circuit held, general references relating to a company's preference to "attract newer, younger people" or "young blood" were insufficient to support an inference

---

150 *Id.* § 631(a).

151 Melanie Hanson, *College Enrollment & Student Demographic Statistics*, EDUC. DATA INITIATIVE (Apr. 22, 2022), https://educationdata.org/college-enrollment-statistics [https://perma.cc/6LQS-C4QC].

152 *Koonce*, 2015 WL 4603414, at *8 (stating that, in the ADEA context, a plaintiff must also show that age discrimination was the but-for cause of the complained employment action, "which is a higher burden of proof than the burden of proof in a Title VII case"); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973).

153 *Koonce*, 2015 WL 4603414, at *8; *see also* Delaney v. Bank of Am. Corp., 766 F.3d 163, 168–69 n.2 (2d Cir. 2014) (noting that the Second Circuit has "continuously applied a requirement of 'but-for' causation . . . in the ADEA context" and distinguishing between an employee's burden to establish pretextual age discrimination under the ADEA and that for ERISA and Title VII claims).

154 Hazen Paper Co. v. Biggins, 507 U.S. 604, 608–11 (1993). As explained above, participation in higher education, and thus tuition reimbursement programs, is empirically correlated with age. Hanson, *supra* note 151.

155 Sundaram v. Brookhaven Nat'l Lab'ys, 424 F. Supp. 2d 545, 576–77 (E.D.N.Y. 2006) (holding that the hiring of two younger employees and the employer's statement about preferring recent graduates did not support the plaintiff's ADEA claim because the employees were hired prior to termination and because "although recent graduates and postdoctorates will generally tend to be younger than those who received their degrees earlier, that factor is analytically distinct from age and is therefore a permissible consideration").

156 Mereish v. Walker, 359 F.3d 330, 336–37 (4th Cir. 2004) (noting that the Fourth Circuit "ha[s] consistently held, along with other circuits, that general or ambiguous remarks referring to the process of generational change create no triable issue of age discrimination").

of age discrimination and "merely reflected a truism of business life."[157] Consequently, the ADEA does not provide an adequate cause of action to adjudicate tuition reimbursement disputes.

4. *Summary of Current Approaches*

In summary, as for tuition reimbursement claims tied to an antidiscrimination statute, a plaintiff is most likely to succeed on a state law or Title VII claim relative to an ERISA or ADEA claim, though both are more difficult to maintain than a standard contract claim. ERISA is generally not available as a cause of action because the Department of Labor's interpretation of ERISA has distinguished between scholarship *funds* and unfunded tuition reimbursement programs, exempting these plans from ERISA's coverage.[158] Moving to the ADEA, that statute may present the most difficult avenue for relief for plaintiffs. This is because the ADEA analysis requires that a plaintiff show that age discrimination was the but-for cause of the adverse employment action.[159] Consequently, current causes of action are insufficient to adjudicate disputes related to tuition reimbursement. Given the increasing importance of these programs, a new approach is warranted.

IV. STANDARDIZED APPLICATION OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING AS A PROPOSED SOLUTION

The standardized application of the implied covenant of good faith and fair dealing in commercial contracts to employment contracts could alleviate the tensions between employees and employers in relation to tuition reimbursement programs. Generally, the implied covenant of good faith and fair dealing "focuses on the fulfillment of parties' reasonable expectations" at the time of contract formation.[160]

Part IV proceeds by introducing the background to the application of the implied covenant of good faith and fair dealing generally, because current scholarship has not explored its implications on tuition reimbursement. It

---

[157] *Id.* at 337 (summarizing and quoting from *EEOC v. Clay Printing Co.*, 955 F.2d 936, 942–43 (4th Cir. 1992)); *see also* Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 511–12 (4th Cir. 1994) (holding that statements such as "there comes a time when we have to make way for younger people" are "irrelevant" because "the statement in itself creates no inference of age bias" and "reflects no more than a fact of life and as such is merely a 'truism[]' that carries with it no disparaging undertones" (alteration in original) (quoting Smith v. Flax, 618 F.2d 1062, 1066 (1980))).

[158] 29 C.F.R. § 2510.3–1(k) (2021) ("For purposes of title I of the Act and this chapter, the terms 'employee welfare benefit plan' and 'welfare plan' shall not include a scholarship program, including a tuition and education expense refund program, under which payments are made solely from the general assets of an employer or employee organization.").

[159] Delaney v. Bank of Am. Corp., 766 F.3d 163, 168–69 (2nd Cir. 2014).

[160] Geysen v. Securitas Sec. Servs. USA, Inc., 142 A.3d 227, 240 (Conn. 2016).

then establishes a framework to discuss the scholarly debate over why the application of the implied covenant of good faith and fair dealing may make sense in the employment context generally and in the tuition reimbursement context specifically.

Through this framework, this Note argues that the application of the implied covenant of good faith and fair dealing provides a direct avenue to a remedy for employees who face frustrated expectations when an employer terminates or delays payment under a tuition reimbursement program. As a matter of policy, the application of the implied covenant to employment contracts would increase economic and judicial efficiency because it would better align employee and employer expectations, reducing the potential for conflict and litigation.

A. Judicial and Scholarly Arguments and Counterarguments Regarding Standardization

Courts have accepted and applied the implied covenant of good faith and fair dealing in a variety of commercial contracts, such as insurance, leases, and sales of goods.[161] Commercial contracts, in contrast to employment contracts, are not at will, but are "operative for a reasonable time" absent some explicit provision.[162] The *Second Restatement of Contracts* provides a strong articulation of the broad application of this implied covenant, noting that "[*e*]*very* contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."[163] As one influential scholar notes, the obligation of good faith in commercial contracts is an "ancient, although largely forgotten, principle" dating back to Roman and English common law.[164]

Despite this background, a majority of courts have determined that the implied covenant of good faith and fair dealing does not apply in the at-will

---

[161] Decker v. Browning-Ferris Indus. of Colo. 931 P.2d 436, 443 (Colo. 1997) (explaining that the application of an implied covenant of good faith and fair dealing arises in the insurance context because the "relationship between the insurer and the insured" creates a heighted reliance on the insurer from the insured due to the relationship's purpose to obtain "financial security" and the insured's "particular[] vulnerab[ility]" as a result of calamity (first quoting Farmers Grp., Inc. v. Trimble, 691 P.2d 1138, 1141 (Colo. 1984) (en banc); and then quoting Travelers Ins. Co. v. Savio, 706 P.2d 1258, 1273 (Colo. 1984) (en banc))); Magnan v. Anaconda Indus., 479 A.2d 781, 785–86 (1984) (listing cases applying the implied covenant in contexts including leases, insurance, and construction); Wilson v. Amerada Hess Corp., 773 A.2d 1121, 1128–29 (N.J. 2001) (listing cases applying the implied covenant to disputes arising from sales of goods).

[162] M&G Polymers USA, LLC v. Tackett, 574 U.S. 427, 441 (2015) (quoting 3 ARTHUR L. CORBIN, CONTRACTS § 553 (1960)).

[163] RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. L. INST. 1981) (emphasis added).

[164] E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 669–71 (1963).

employment context.[165] For instance, Mississippi explicitly provides that "at-will employment relationships are not governed by an implied covenant of good faith and fair dealing,"[166] even though in the commercial context Mississippi provides that "[e]very contract or duty . . . imposes an obligation of good faith in its performance and enforcement."[167] Other states, such as South Carolina, have found that the implied covenant of good faith and fair dealing does apply to at-will employment relationships, but insist that the "termination of the employee cannot form the basis of a claim that the employer breached the covenant of good faith and fair dealing."[168]

A minority of courts have already standardized the application of the implied covenant of good faith and fair dealing to employment contracts.[169] In general, these state courts have found that the implied covenant of good faith and fair dealing can coexist with the express terms of an at-will contract. While these courts have noted that the implied covenant does not supplant the at-will regime, they have read the covenant as prohibiting bad faith in some contexts, such as the payment of commissions.[170] Multiple courts have found that an employee can sustain a breach of the implied covenant of good faith and fair dealing claim by demonstrating that "[a]n employer's action or inaction . . . attempts to avoid the spirit of the bargain or . . . evinces a dishonest purpose."[171] The Second Circuit described the imposition of the implied covenant in terms of economic incentives, noting that "an [employer's] unfettered right to avoid payment of earned commissions . . . creates incentives counterproductive to the purpose of the contract itself in that the better the performance by the employee, the greater the temptation to terminate."[172]

The rationale for standardizing treatment of the implied covenant of good faith and fair dealing between commercial contracts and commission-based employment contracts is equally applicable to employer tuition reimbursement agreements for two main reasons. First, workers today are increasingly likely to view tuition assistance as part of a company's overall compensation package, rather than a gratuitous bonus lacking independent

---

165 NAT'L CONF. OF STATE LEGISLATURES, *supra* note 86; *see also* Hatfield v. Rochelle Coal Co., 813 P.2d 1308, 1310 (Wyo. 1991) (holding that "Wyoming does not recognize an implied covenant of good faith and fair dealing imposed upon an employer by virtue of his being a party to an employment contract").

166 Hartle v. Packard Elec., 626 So. 2d 106, 110 (Miss. 1993).

167 MISS. CODE ANN. § 75-1-304 (2022).

168 Hall v. UBS Fin. Servs. Inc., 866 S.E.2d 337, 343 (S.C. 2021).

169 NAT'L CONF. OF STATE LEGISLATURES, *supra* note 86.

170 Geysen v. Securitas Sec. Servs. USA, Inc., 142 A.3d 227, 239 (Conn. 2016).

171 *Id.* at 240 (listing cases).

172 Wakefield v. N. Telecom, Inc., 769 F.2d 109, 112–13 (2d Cir. 1985).

consideration.[173] This view will likely persist, as at least one study found that 80% of working adults have an interest in pursuing higher education.[174] Companies are aware of employee interest in pursuing higher education and benefit from advertising tuition reimbursement programs.[175] But as in the commissions context, employers and employees have misaligned incentives to actualize tuition reimbursement. It makes sense to apply the implied covenant to tuition reimbursement agreements because it can better align these parties' incentives.

Second, the synchronized application of the implied covenant of good faith and fair dealing to the employment context has support in scholarship. Professor Rachel Arnow-Richman argues that "employment at will is an implied term just like good faith—a provision supplied by law," and that the courts err by elevating the presumption of employment at-will over other implied duties.[176] Professor Steven J. Burton contends that as an economic matter, the doctrine of good faith performance, "like contract law generally, functions to support the market," and that courts should view good faith through the lens of forgone opportunity costs.[177] Under Professor Burton's approach, the burden would be on the promisor when she deviates from community norms because such a promisor "is in the best position to secure the expectations of both parties."[178]

The continued proliferation of tuition assistance programs and their publicity may reshape community norms because these benefits are part of the reasonable expectations of the parties when the agreement was reached.

[173] Employee benefits, which include education assistance, are considered by job seekers as a part of their potential compensation. *See, e.g.*, Craig A. Olson, *Do Workers Accept Lower Wages in Exchange for Health Benefits?*, 20 J. LAB. ECON. S91, S93, S113 (noting that under standard compensating wage theory, "workers who receive more generous fringe benefits are paid a lower wage than comparable workers who prefer fewer fringe benefits" and finding a 20% pay differential between positions with and positions without health insurance).

[174] INSTRIDE, *supra* note 16. Additionally, student loan debt is the second-highest consumer debt category, further indicating widespread demand for college learning. *See* Zack Friedman, *Student Loan Debt Statistics in 2021: A Record $1.7 Trillion*, FORBES (Feb. 2, 2020), https://www.forbes.com/sites/zackfriedman/2021/02/20/student-loan-debt-statistics-in-2021-a-record-17-trillion/?sh=14a070261431 [https://perma.cc/NDK5-V8E8].

[175] For instance, Target announced in a press release that it would offer "[a]ll U.S. part-time and full-time team members" access to its tuition assistance program, with the company further noting that "[Target] know[s] many [team members] would like to pursue additional educational opportunities." Press Release, Target Launching Debt-Free Education Assistance Program to More than 340,000 Frontline Team Members (Aug. 4, 2021), https://corporate.target.com/press/releases/2021/08/target-launching-debt-free-education-assistance-pr [https://perma.cc/N2WY-7M3K].

[176] Rachel Arnow-Richman, *Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination*, 66 FLA. L. REV. 1513, 1560 (2014).

[177] Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 403 (1980).

[178] *Id.*

The implied covenant of good faith and fair dealing is meant to secure these reasonable expectations. In other words, workers do not see tuition assistance as a gratuitous gift, but as part of their total compensation when a company advertises assistance as a benefit. When a person signs up, she reasonably assumes that she may use that benefit so long as she works, performing her side of the bargain. On this basis, recognizing an independent claim for an implied covenant to enforce tuition reimbursement agreements, just as they are for commissions, is advisable because it would provide a remedy for employees who can establish that an employer acted in a manner contrary to the "spirit of the bargain." Moreover, employers benefit from adopting this implied covenant because it may encourage more employees to make use of these programs by reducing an employee's financial risk that an employer will shirk on reimbursement.[179]

While this Note does not seek to resolve the ongoing debate regarding at-will employment,[180] it is important to understand some of the counterarguments in favor of at-will employment before responding to the claim that an at-will regime is economically efficient. Opponents have raised several concerns. One commentator fears that the covenant would derogate the settled presumption of at-will employment relationships.[181] Commentators contend the at-will employment presumption empowers personal autonomy and labor market efficiency,[182] and is administrable.[183] Yet another commentator argues that employment at-will regimes are

[179] As previously discussed, employees increase their marginal productivity through training such as through college coursework. *See supra* note 28 and accompanying text. An employer captures this increase in productivity through an increase in profits, all else equal. *See* Shimer, *supra* note 29, at 997. Reducing the financial risk of these tuition reimbursement programs could mean that more employees will utilize them. Rittenhouse, *supra* note 24 (finding that almost 50% of internal survey respondents "indicated low adoption of their employer education program because they could not afford to pay tuition upfront" and that when "the risk of debt [is] eliminated, it is possible to achieve higher engagement and participation rates"). When more employees receive reimbursement, and thus training, an employer's aggregate profit increases since more employees have increased their marginal productivity. *See* Shimer, *supra* note 29, at 997, 1004.

[180] *See, e.g.*, KATE ANDRIAS & ALEXANDER HERTEL-FERNANDEZ, ENDING AT-WILL EMPLOYMENT: A GUIDE FOR JUST CAUSE REFORM (2021), https://rooseveltinstitute.org/wp-content/uploads/2021/01/RI_AtWill_Report_202101.pdf [https://perma.cc/4V5N-A22G] (discussing the need for reform and options for ending at-will contracts).

[181] Monique C. Lillard, *Fifty Jurisdictions in Search of a Standard: The Covenant of Good Faith and Fair Dealing in the Employment Context*, 57 MO. L. REV. 1233, 1241 n.45 (1992).

[182] Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 951 (1984).

[183] *Id.* at 970; Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 696 (1994).

essentially unilateral contracts,[184] and that changes to an employer's policies do not change the employment relationship because the employer does not gain additional consideration from the employee by providing discretionary benefits.[185]

There are also counterarguments relating to the efficiency of at-will employment regimes.[186] In general, supporters of the at-will employment regime argue that it leads to economically efficient outcomes. For instance, Professor Richard Epstein, a leading supporter of the at-will regime, postulates that an overarching freedom of contract informs the default presumption against interference in at-will relationships.[187] This freedom is exercised by both parties in forming the employment relationship.[188] Because it is difficult to predict how employees and employers will get along, the ability to terminate the relationship at-will helps both parties should they be a poor fit for each other. Moreover, Epstein argues that an employee's threat to quit may mitigate excessively exploitative employer behavior.[189]

However, the at-will employment regime is not economically efficient because it assumes there are low transaction costs and overlooks the regime's externalities. Under the Coasean analysis in the law and economics tradition, markets render efficient outcomes when actors are rational and transaction costs are low.[190] When information asymmetries exist, transaction costs rise, making an efficient outcome less likely.[191]

---

[184] Lary S. Larson, *Why We Should Not Abandon the Presumption that Employment Is Terminable At-Will*, 23 IDAHO L. REV. 219, 225 (1986) (explaining that "[t]he master's promise to pay wages, whether written or oral, express or implied, is a continuing offer which is rendered enforceable by the servant's performance of the services requested").

[185] *Id.* at 233 (noting that an employer "having an established labor force, does not necessarily expect that every personnel policy or procedure that might be adopted will become an inducement to the further services of existing employees").

[186] This Note contends that while an at-will presumption provides an administrable and clear rule, it leads to potentially unfair outcomes that could undermine public trust in the judiciary. Moreover, it notes that the freedom-of-contract approach has been explicitly rejected by post-*Lochner* courts. *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 (1937) ("[F]reedom of contract is a qualified, and not an absolute, right.").

[187] Epstein, *supra* note 182, at 953 (noting that "[f]reedom of contract is an aspect of individual liberty" and that "[t]he desire to make one's own choices about employment may be as strong as it is with respect to marriage or participation in religious activities, and it is doubtless more pervasive than the desire to participate in political activity").

[188] *Id.* at 954.

[189] *Id.* at 966–67.

[190] *See generally* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15–19 (1960) (discussing the cost of market transactions).

[191] *See generally* Karl-Gustaf Löfgren, Torsten Persson & Jörgen W. Weibull, *Markets with Asymmetric Information: The Contributions of George Akerlof, Michael Spence and Joseph Stiglitz*, 104 SCANDINAVIAN J. ECON. 195, 197–206 (2002) (summarizing information-asymmetry literature).

There is reason to believe that serious information asymmetry exists when it comes to employee-employer bargaining. For instance, business executive Jesse Rudy has found that many employees believe that they are protected from termination, even though the at-will regime provides no legal basis for that protection.[192] Illustratively, his research found that 84% of his study participants believed that an employer could not fire them due to personal animus, while 77% believed that an employer could not fire them to replace them with an employee who would take a lower wage.[193] Considering the evidence that American employees do not believe they can be terminated for any or no reason at all, these workers may accept inefficient employment arrangements by failing to bargain for explicit protections or making financial and life plans based on incorrect assumptions about their job security.

Moreover, an at-will employment rule may not be economically efficient because it imposes substantive externalities. For instance, an employee who is terminated for reasons outside of her performance could create public costs through unemployment and transitional health care. On an individual level, job loss is associated with long-term reductions in earnings, adverse physical and mental health, and family disruption, among other things.[194] Notably, reemployment does not fully return an individual to their pretermination state of well-being.[195] Mass layoffs in particular can have further consequences. For instance, a 2020 study from the University of Pennsylvania linked auto plant closures across twenty-nine manufacturing counties with an 85% increase in opioid overdose mortality rates compared to eighty-three similar manufacturing counties which did not experience an auto plant closure.[196] When viewed holistically, the at-will regime is not necessarily economically efficient.

On balance, the implied covenant of good faith and fair dealing should be broadly available in tuition reimbursement adjudications because of the conflicting incentives present when an employee seeks to utilize such programs and the employer maintains a rational incentive to maximize

[192] Jesse Rudy, *What They Don't Know Won't Hurt Them: Defending Employment-At-Will in Light of Findings that Employees Believe They Possess Just Cause Protection*, 23 BERKELEY J. EMP. & LAB. L. 307, 352 (2002).

[193] *Id.*

[194] Jennie E. Brand, *Abstract* to *The Far-Reaching Impact of Job Loss and Unemployment*, 41 ANN. REV. SOCIO. 359, 359 (2015).

[195] John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Well-Being Analysis vs. Cost-Benefit Analysis*, 62 DUKE L.J. 1603, 1642–43 (2013).

[196] Atheendar S. Venkataramani, Elizabeth F. Bair & Rourke L. O'Brien, *Association Between Automotive Assembly Plant Closures and Opioid Overdose Mortality in the United States*, 180 JAMA INTERNAL MED. 254, 257–59 (2020).

profits by minimizing costs. Essentially, just as in the commission context, the structure of tuition reimbursement programs "creates incentives counterproductive to the purpose of the contract itself."[197] Thus, the more the employee utilizes the tuition benefit, "the greater the [employer's] temptation to terminate."[198] This is because the employer has already received the key benefits of the bargain, such as employee recruitment and positive marketing, yet remains on the hook for substantial tuition payments should they retain the employee.

While some companies have inferred that these tuition reimbursement programs can increase employee retention, the more reasonable inference that an employer might make is that an employee's pursuit of higher education indicates her intent to leave. After all, if an employee is already qualified for a position, then why would she want to invest additional time and effort to attain further education?

Even if we accept a company's alleged interest in employee retention and upskilling, the current structure of tuition reimbursement programs is not conducive to this marketed goal. Currently, a direct manager has discretion to support or frustrate an employee's tuition reimbursement request.[199] Yet, there may be a principal–agent problem between the direct manager and the corporation. In this context, the corporation could very well have an interest in their employee upskilling. A direct manager, however, may view an employee's pursuit of higher education as a threat to the manager's job security. Moreover, the manager will understand that the pursuit of higher education may make his or her job more difficult because of the reduced availability of the employee and the risk that the manager will have to replace that employee due to the employee's voluntary departure or because of reduced productivity. A supervisor has the rational, internal incentive to not make her job more difficult. Thus, the rational supervisor may, implicitly or expressly, seek to discourage the use of the company's tuition reimbursement program.

B. Policy Considerations Supporting Standardization

There are also several policy reasons to support parity standardize the treatment of commercial and employment contracts, at least in the tuition reimbursement context. These include reducing transaction costs in the

[197] Wakefield v. N. Telecom, Inc., 769 F.2d 109, 112–13 (2nd Cir. 1985).

[198] *Id.* at 113.

[199] *See* Anderson v. Intel Corp., No. CV-19-00743-PHX-DWL, 2021 WL 1087127, at *2 (D. Ariz. Mar. 22, 2021) (describing managerial discretion in implementing Intel's tuition reimbursement program).

employment relationship, ensuring the law adapts to societal change, and maintaining economic security.[200]

Courts can reduce transaction costs between employers and employees through standardization because enforcing an implied covenant of good faith and fair dealing merely adopts society's objective expectations in the employment context, rather than privileging the idiosyncratic tendencies of each of the 10.5 million employers operating in the United States.[201] When a company readily advertises its tuition reimbursement program, a prospective employee may reasonably assume she can make use of it as a part of her total compensation. Yet crabbed constructions of how these programs operate have increased transaction costs in employment relationships by imposing information-seeking costs on employees who investigate how these tuition reimbursement programs work for each prospective employer.

When these information-seeking costs are too great, employers and employees may fail to enter into otherwise beneficial employment relationships.[202] Even if these relationships do occur, imperfect information could create labor market frictions and inefficiency. For instance, an employee may take a position with a firm expecting to use its tuition assistance program. When she discovers the barriers in place to utilize that program, she looks for a new job and quits. In this scenario, the employer has incurred substantial training and onboarding costs and the employee has spent substantial time at a company at which she has no future. Consequently, extending the implied covenant of good faith and fair dealing to employment relationships can reduce transaction costs and increase labor market efficiency.

The roots and evolution of the at-will employment doctrine also support broader judicial adoption of the implied covenant of good faith and fair

[200] The Federal Reserve System (the Fed) is an example of this interest. In passing the Federal Reserve Act, Congress mandated that the Fed "promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates." In addition to these mandates, "Congress has tasked the Fed with promoting the stability of the financial system, promoting the safety and soundness of individual financial institutions, fostering the safety and efficiency of payment and settlement systems, and promoting consumer protection and community development." *Monetary Policy: What Are Its Goals? How Does It Work?*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (July 29, 2021), https://www.federalreserve.gov/monetarypolicy/monetary-policy-what-are-its-goals-how-does-it-work.htm [https://perma.cc/65CP-Z3EK].

[201] *Employment and Wages, Annual Averages 2020*, U.S. BUREAU OF LAB. STAT. (Sept. 1, 2021), https://www.bls.gov/cew/publications/employment-and-wages-annual-averages/current/home.htm [https://perma.cc/PV6Z-XQ9B].

[202] *See generally* Stewart J. Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245, 246, 270–71 (1987) (describing Coase's theorem and emphasizing that labor law seeks to minimize transaction costs of bargaining in part by imposing a duty of good faith in the collective-bargaining context).

dealing for elements of compensation, including tuition reimbursement. English common law, dating back to 1562, presumed that an employment contract was valid for a one-year term, and a departure from this presumption required "reasonable cause to do so" absent the express terms of the contract or industry custom.[203] American courts initially adopted this English rule, at least until the at-will doctrine became formalized in H.G. Wood's 1877 treatise, *Law of Master and Servant*, and adopted by prominent state courts in the late 1890s.[204]

If anything, this evolution shows that judicial treatment of employment relationships has changed in conjunction with societal context and historical change, with the adoption of the at-will doctrine coinciding with increased judicial affectation toward laissez-faire capitalism during the *Lochner* Era.[205] Today, the societal context of negotiating employment terms and compensation increasingly reflects a "take it or leave it" approach, with large employers essentially dictating the employment contract.[206] In this sense, there is no bargain to be had, at least for prospective employees. Because the social context in which the at-will doctrine developed has changed, courts should be less deferential to at-will employment arrangements. This, in turn, allows for courts to broaden the application of the implied covenant of good faith and fair dealing to express and implied terms of employment contracts, such as tuition reimbursement.

Independently, there is a compelling public policy interest in imposing an implied covenant of good faith and fair dealing in the administration of tuition reimbursement programs in the context of threatened student loan default on the broader U.S. economy. Student loans compose the second

---

[203] Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1030 (Ariz. 1985).

[204] *Id.* at 1035–36; Martin v. N.Y. Life Ins. Co., 148 N.Y. 117, 121 (1895) (adopting the at-will doctrine in New York).

[205] The *Lochner* Era generally refers to the Supreme Court's rulings from the 1890s through the 1920s. These *Lochner* Era rulings have often been criticized as the leading examples of judicial activism. The era is named after a Supreme Court case where the Court struck down a New York labor law because it violated due process and the alleged freedom of contract. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1385, 1391 (2001); *see also* Lochner v. New York, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting) ("This case is decided upon an economic theory which a large part of the country does not entertain . . . . But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*.").

[206] Samuel Bagenstos, *Lochner Lives On: Lochner Presumption of Equal Power Lives in Labor Law and Undermines Constitutional, Statutory, and Common Law Workplace Protections*, ECON. POL'Y INST. (Oct. 7, 2020), https://www.epi.org/unequalpower/publications/lochner-undermines-constitution-law-workplace-protections/ [https://perma.cc/E6FA-NJRG] ("Employees and employers are free to negotiate contracts that give the workers more job security, but in the overwhelming majority of cases they do not do so—a fact that leads defenders to conclude that workers prefer to be fireable at the will of their employer.").

highest consumer debt category, with borrowers owing a cumulative $1.7 trillion.[207] When borrowers struggle to make payments, they may decrease consumer spending on other goods, defer retirement savings, or struggle to purchase a home. For instance, a 2017 report from the Federal Reserve found that student loan debt contributed to 35% of the overall decline in homeownership rates among individuals aged twenty-eight to thirty between 2007 and 2015.[208] Student loan debt could even jeopardize retirement among older Americans. According to the Federal Reserve Bank of Philadelphia, borrowers aged fifty or older held 20% of all outstanding student loan debt, with borrowers between sixty and sixty-nine seeing the fastest growth in their debt balances.[209]

Although one can argue that these are essentially wealth transfers, with different entities benefiting from the same level of consumption, there are systemic implications from rising student loan debt when payments are not guaranteed. Student loans have been increasingly securitized and sold to investors through student loan asset-backed securities (SLABS).[210] An estimated $600 billion in SLABS have been issued since 1992.[211]

Traditionally, these investments were viewed as safe because federal loans were guaranteed by the federal government.[212] Moreover, these loans have generally been extraordinarily difficult to discharge via bankruptcy.[213] But the increasing popularity of refinancing federal student loans,[214] increasing judicial willingness to discharge student loan debt through bankruptcy,[215] and questionable loans made to private borrowers threaten these assumptions that SLABS investors may have relied on.[216] An implied

---

207 Zack Friedman, *Student Loan Debt Statistics in 2021: A Record $1.7 Trillion*, FORBES (Feb. 20, 2021, 8:30 AM), https://www.forbes.com/sites/zackfriedman/2021/02/20/student-loan-debt-statistics-in-2021-a-record-17-trillion/?sh=14a070261431 [https://perma.cc/9HXS-VSZE].

208 Natalie Kitroeff, *How Student Debt Can Ruin Home Buying Dreams*, N.Y. TIMES (May 25, 2018, 8:30 AM), https://www.nytimes.com/2018/05/25/business/how-student-debt-can-ruin-home-buying-dreams.html [https://perma.cc/AC95-KKZJ].

209 Charlie Gallagher & Sílvio Rendon, *CFI in Focus: Understanding Older Student Loan Borrowers*, FED. RSRV. BANK OF PHILA. (Sept. 22, 2021), https://www.philadelphiafed.org/consumer-finance/education-finance/understanding-older-student-loan-borrowers [https://perma.cc/3BWG-P5BR].

210 Samantha L. Bailey & Christopher J. Ryan Jr., *The Next "Big Short": COVID-19, Student Loan Discharge in Bankruptcy, and the SLABS Market*, 73 SMU L. REV. 809, 809 (2020).

211 *Id.* at 839.

212 *Id.* at 840.

213 *Id.* at 809.

214 *Id.* at 840–41.

215 *Id.* at 809.

216 *Id.* at 843 (noting that one student loan trust contained 40,000 loans to borrowers attending unaccredited programs including dog-walking school). Questionable loans may also impose risks to investors because of regulatory and litigation actions. *See, e.g.*, Stacy Cowley & Tara Siegel Bernard,

covenant of good faith and fair dealing in the administration of tuition reimbursement programs may offset some of these broader economic concerns by increasing the security of these debts being repaid. Moreover, such an approach is in line with traditional American norms of deference to market-based solutions between contracting parties.

CONCLUSION

Student reimbursement programs are becoming increasingly popular benefits offered by employers. But there are incentives at play that may cause employers to forgo reimbursement even after employees have paid for, or taken out loans to pay for, tuition. When this occurs, employees may be left with defeated expectations and decreased economic and job security.

Current approaches are insufficient to adjudicate allegations that an employer failed to uphold their end of the bargain. Claims for breach of contract generally fail because employment is presumed to be at-will and because courts have held that tuition reimbursement programs do not ultimately change the at-will relationship. Similarly, promissory estoppel has been shown to be an insufficient remedy because of deference to the at-will relationship and the heavy burden to establish the presence of an unambiguous promise.

Tuition reimbursement disputes tied to antidiscrimination statutory claims have also shown to be a poor fit. Claims based on Title VII and ADEA require one to be a member of a protected class, leaving groups of plaintiffs without an avenue to remedy the lost or revoked tuition benefits. Moreover, these claims require a plaintiff to show far more than a traditional breach of contract claim would require, making it less likely for plaintiffs to gain relief. While state civil rights and antidiscrimination statutes could provide a better avenue for relief, there is still the issue of fit between the alleged harm (denial of reimbursement) and the procedural vehicle to adjudicate the dispute. Finally, ERISA provides no cognizable claim for tuition reimbursement programs when they are paid for through a corporation's general account, as tuition reimbursement has been viewed as distinct from ERISA-governed scholarship funds.

In light of the shortcomings from current approaches, this Note advocates for the standardized application of the implied covenant of good

Navient Agrees to Cancel 66,000 Student Borrowers' Loans to Settle Claims of Predatory Lending, N.Y. TIMES (Jan. 13, 2022, 11:17 AM), https://www.nytimes.com/2022/01/13/business/navient-student-loans.html [https://perma.cc/N8TB-TAFU] (detailing a private student loan provider's $1.85 billion settlement deal with thirty-nine states to resolve allegations of predatory lending and illustrating that the provider knew that more than 90% of these private loans would default at certain schools, but that the loss would be offset by attracting more federally backed loans).

faith and fair dealing in employment relationships, at least for tuition reimbursement plans. This would create parity in judicial treatment between commercial and employment contracts and help address the incentives issue discussed above. Moreover, this standardization would be economically and judicially efficient because it privileges the objective expectations of the contracting parties at the time they entered into the reimbursement agreement. Finally, this Note provides several policy considerations, such as reducing transaction costs and maintaining economic stability, as to why the broad application of the implied covenant of good faith and fair dealing is preferable as a normative matter.