PRIVATE EMPLOYERS AND THEIR ROLE IN AMELIORATING THE STUDENT DEBT CRISIS

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I. INTRODUCTION

With the cost of education rising and an increased demand for employees with multiple degrees, student loans are becoming more prevalent

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and student loan debt is rising substantially.[1] However, there is a growing trend of employers offering student loan repayment benefits to employees who have student loan debt.[2] Many companies already have different programs that help students by paying a monthly portion to their loans once they become employees.[3] The Internal Revenue Service (hereinafter "IRS") recently released a private letter ruling (hereinafter "PLR") in which a taxpayer employer requested to introduce a program that ties an employee's 401(k) plan with a student loan repayment benefit.[4] Although the nature of a PLR does not allow this ruling to be used as precedent, this innovative program could be a pathway to more repayment benefit options. Furthermore, multiple key bills were before Congress in the past few years that, had they passed, would have allowed employers to constitute student loan repayment benefits as "education assistance."[5]

The purpose of this comment is to lay out the student loan debt problem and its effects on retirement saving. Further, the comment will explore the different methods private employers use to provide student loan repayment benefits to their employees. In Part II, section C, the comment will discuss what an IRS private letter ruling is and specifically look at the recent private letter ruling on student loan repayments and 401(k) benefits. Moreover, the comment will examine the different ways the government proposed to incentivize employers through this IRS private letter ruling and congressional bills. Finally, Part III will discuss how these programs are beneficial not only to the employees, but also to the employers. It will additionally consider whether these are solutions to the student loan problem and whether other employers should be following in the footsteps of those providing such benefit programs.

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[1] *See* Steve Goldstein, *Nine Out of 10 New Jobs Are Going to Those with a College Degree*, MARKETWATCH (June 5, 2018), https://www.marketwatch.com/story/nine-out-of-10-new-jobs-are-going-to-those-with-a-college-degree-2018-06-04.

[2] *See* Madison Alder, *IRS Clear Path for Student Loan Repayment Tied to 401(k)*, BLOOMBERG BNA (Aug. 22, 2018), https://www.bloomberglaw.com/document/XNG12BG000000?jcsearch=bna%25200000016557FADC0AA7E777FA3A5E0000#jcite.

[3] *See, e.g.*, Katie Lobosco, *Staples Will Give Workers $3,600 to Pay Student Loans*, CNN MONEY (Nov. 1, 2016), https://money.cnn.com/2016/11/01/pf/college/staples-student-loan-repayment-plan/index.html.

[4] *See* I.R.S. PLR 131066-17 (May 22, 2018), https://www.irs.gov/pub/irs-wd/201833012.pdf.

[5] *See, e.g.*, Higher Education Loan Payments for Students and Parents Act, H.R. 1656, 115th Cong., 1st Sess. (2018).

II. BACKGROUND

A. The Problem: Student Loans

Employees with college educations dominate the job market. For instance, employees with college degrees comprise nine out of ten jobs in the American economy.[6] These numbers do not appear to be stabilizing anytime soon.[7] Employers want workers who are better trained and better educated, especially in the fast-growing fields of science and technology.[8] The demand will continue to increase, and projections. for 2020 show that America will fall five million workers short with the requisite postsecondary credentials.[9] An estimated sixty-five percent of jobs will require postsecondary, or post-high school, education.[10] Employers are not alone in demanding higher education in their employees.[11] Educators and policy makers are pushing for more degrees, thus creating a larger pool of applicants with higher degrees to employers.[12] With forces insisting on all ends that incoming employees attend higher education institutes, there is little dispute that the longstanding, yet increasing, trend demanding higher education in the workforce is here to stay.

A look into the cost of post-high school education is necessary to frame the loan repayment problem. The annual cost for two-year public institutions in the 2015-2016 year was $9,914.[13] For private nonprofit and for-profit two-year institutions, on average students were paying $24,882 per year in 2016.[14] When looking at four-year institutions, public institutions in 2015 cost $19,204 per year and private institutions cost on average $39,534.[15] Just ten years prior, the costs for public institutions were $7,916 and $14,765 per year for two-year and four-year programs, respectively.[16] For private institutions, the average yearly rates in 2005 were $26,101 and $33,330 for

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6 Goldstein, *supra* note 1.

7 Goldstein, *supra* note 1.

8 Goldstein, *supra* note 1.

9 Anthony P. Carnevale, Nicole Smith & Jeff Strohl, *Recovery: Job Growth and Education Requirements through 2020*, GEORGETOWN PUB. POL'Y INST. 1, 2 (June 26, 2013), https://cew-7632.kxcdn.com/wp-content/uploads/2014/11/Recovery2020.ES_.Web_.pdf.

10 *Id.* at 3.

11 Doug Lederman, *Demand for Degrees Grows in Many Fields That Haven't Required Them*, INSIDE HIGHER ED (Sep. 9, 2014), https://www.insidehighered.com/news/2014/09/09/demand-degrees-grows-many-fields-havent-required-them.

12 *Id.*

13 National Center for Education Statistics, *Fast Facts: Tuition Costs of Colleges and Universities*, U.S. DEPT. OF EDU. (2019), https://nces.ed.gov/fastfacts/display.asp?id=76.

14 *Id.*

15 *Id.*

16 *Id.*

two-year and four-year programs, respectively.[17] Tuition seems to be on a never-ending increasing trend.

If the cost of education has been increasing, so has the amount of student debt. In the last decade, debt from student loans has almost tripled.[18] According to the Federal Reserve, the total student loan debt held by the United States is about $1.64 trillion.[19] The U.S. Department of Education reports that the average student loan debt is $33,654.[20] The average monthly payment on a student loan is $393.[21] These numbers reflect federal student loans; however, a small percentage of students take out only private loans and most of those who incur debt from private loans also have a federal student loan.[22]

Over $1.5 trillion in student loan debt is collectively owned by approximately forty-three million Americans.[23] With that being said, only 1,132,007 of these borrowers have been approved for public service loan forgiveness.[24] Student loan debt reaches all ages, including borrowers over the age of sixty who are still trying to pay off their obligation.[25] Each age group, under thirty (>30), thirty to thirty-nine (30-39), forty to forty-nine (40-49), fifty to fifty-nine (50-59), and sixty and over (60+), has experienced an increase in monthly payments and total student loan debt over the past five years.[26] Nearly seventy percent of graduates from a four-year college have some form of student loan debt.[27]

To summarize the problem: besides mortgage debt, student loan debt has become the highest consumer debt category in the United States, surpassing both credit card and auto loans.[28] For federal student loans, the

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17 *Id.*

18 Alicia H. Munnell, *IRS Ruling Allows 401(k) Student Loan Benefits*, MARKETWATCH (Nov. 14, 2018), https://www.marketwatch.com/story/irs-ruling-allows-401k-student-loan-benefits-2018-08-27.

19 *A Look at the Shocking Student Loan Debt Statistics for 2020*, STUDENT LOAN HERO (Jan. 15, 2020), https://studentloanhero.com/student-loan-debt-statistics/.

20 Matt Carter, *U.S. Student Loan Debt Statistics*, CREDIBLE (Nov. 18, 2019), https://www.credible.com/blog/statistics/average-student-loan-debt-statistics/#average-student-loan-debt.

21 *Id.*

22 *Id.*

23 *Id.*; *see also* Zack Friedman, *Student Loan Debt Statistics in 2018: A $1.5 Trillion Crisis*, FORBES (June 13, 2018), https://www.forbes.com/sites/zackfriedman/2018/06/13/student-loan-debt-statistics-2018/#93081d57310f.

24 *See A Look at the Shocking Student Loan Debt Statistics for 2020*, *supra* note 19.

25 Friedman, *supra* note 23.

26 Friedman, *supra* note 23.

27 *See A Look at the Shocking Student Loan Debt Statistics for 2020*, *supra* note 19.

28 The Board of Governors of the Federal Reserve, CONSUMER CREDIT, (last updated April 7, 2020), https://www.federalreserve.gov/releases/g19/current/default.htm.

standard repayment period is approximately ten years.[29] This statistic can vary substantially. For instance, one study found that on average, it takes students from Wisconsin universities almost twenty years to pay off debt associated with obtaining their bachelor's degrees.[30] Studies also show that in 2017, one month before graduation, sixty-seven percent of graduating college students did not have a full time job secured post-graduation.[31] Students struggling to get a job right after graduation may defer their loans and then be forced to deal with piling interest. Student loan debt can quickly become a drowning, unmanageable burden with far-reaching effects into the future.

B. The Other Problem: Retirement Saving

The difficulty in repaying student loans juxtaposes a second problem: saving for retirement. Designed to incentivize individuals to save and invest their money responsibly, traditional 401(k) plans are the most popular form of employee retirement benefit and, for many employees, the only way to supplement their social security income.[32] For employees who have 401(k) options, such 401(k)s are likely to be the centerpiece of their personal retirement savings.[33] Section 401(k) of the Internal Revenue Code describes a type of cash or deferred arrangement ("CODA").[34] Usually part of a profit-sharing or stock bonus plan, CODAs allow employees to have certain payments put in a trust under such a plan for the employee's benefit.[35] These amounts contributed may be in the form of bonuses in addition to a salary or as a portion taken out of the employee's normal salary.[36] Employees pay into these trusts to save away money for retirement, and employers may match an employee's contributions or pay a certain percentage to help the

[29] Allie Bidwell, *Student Loan Expectations: Myth vs. Reality*, U.S. NEWS & WORLD REPORT (Oct. 7, 2014), https://www.usnews.com/news/blogs/data-mine/2014/10/07/student-loan-expectations-myth-vs-reality.

[30] Abigail Hess, *This is the Age Most Americans Payoff their Student Loans*, CNBC (July 3, 2017), https://www.cnbc.com/2017/07/03/this-is-the-age-most-americans-pay-off-their-student-loans.html. The study is available here: https://drive.google.com/file/d/0B8LurBVUNQZfQVhYZWZvamlfd00/view.

[31] DOOR OF CLUBS, *67% of College Grads Don't Have Jobs Lined Up Yet*, STUDENT VOICES (Apr. 26, 2017), https://mystudentvoices.com/collegegradjobs-e581bdc078d2.

[32] Salvatore Papa, *The Current Crisis of I.R.C. 401(k): Is Providing Investment Advice the Proper Solution? The Misguided Focus on Investment Advice Instead of Investment Education*, 38 NEW ENG. L. REV. 371, 371-73 (2004).

[33] Ian Ayres and Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans*, 124 YALE L.J. 1476 (2015) at 1519,

[34] I.R.C. § 401(k)(2).

[35] I.R.C. § 401(k)(2)(A); Tax Management Portfolio: Cash or Deferred Arrangements 358-4th (BNA) § III.A (April 1, 2019). Hereinafter TMP 358-4th.

[36] TMP 358-4th, *supra* note 35.

employee build funds.[37]

Forty-two percent of Americans are at risk of retiring with less than $10,000.[38] Twenty-one percent of Americans have no funds at all tucked away for their future, and close to thirty-three percent have less than $5,000.[39] As a result, nearly seventy-eight percent of Americans say they are "extremely" or "somewhat" concerned that they will not have enough money for retirement.[40]

Several problems snowball and lead up to these shocking numbers, one being student loan debt. Paying back student loans now intersects with saving for retirement.[41] Millions of people in the United States over the age of sixty still have student loan debt, and that number has quadrupled over the last fifteen years.[42] Just last year, Americans over the age of fifty owed more than $260 billion in student loans, forcing them to continue working well into their retirement years.[43] Researchers have found that approximately sixty percent of households with student debt are at a risk of falling behind in retirement.[44] For households without student debt, that number falls just below the fifty percent mark.[45] The American Student Assistance conducted a survey in which sixty-two percent of respondents said they deferred on saving for retirement as a direct result of their student loan debt.[46] The director of personal finance at Morningstar, however, stated that when faced with whether to save up for retirement or pay back student loans, new graduates should be doing both.[47] When faced with such challenges and not much help from the government, assistance graduates need could lie within

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37 Papa, *supra* note 32, at 371.

38 Kathleen Elkins, *Here's How Much Families Have in Retirement Savings – and How Much They Actually Need*, CNBC MAKE IT (Apr. 23, 2018), https://www.cnbc.com/2018/04/23/how-much-us-families-have-in-retirement-savings-and-how-much-they-need.html.

39 Kathleen Elkins, *1 in 3 Americans Have Less Than $5,000 Saved for Retirement – Here's Why So Many People Can't Save*, CNBC MAKE IT (Aug. 27, 2018), https://www.cnbc.com/2018/08/27/1-in-3-americans-have-less-than-5000-dollars-saved-for-retirement.html.

40 *Id.*

41 *Retirement Delayed: The Impact of Student Debt on the Daily Lives of Older Americans*, American Student Assistance (2017) https://file.asa.org/wp-content/uploads/2018/08/14141828/retirement-delayed-2017-1.pdf at 1.

42 Annie Nova, *Another Challenge in Retirement? Student Loans*, CNBC (Nov. 14, 2018), https://www.cnbc.com/2018/11/14/more-older-people-are-bringing-student-debt-into-their-retirement.html.

43 *Id.*

44 *In Every Issue: Legislative Highlights*, 35-3 ABIJ 10 (2016).

45 *Id.*

46 *Retirement Delayed*, *supra* note 41, at 4.

47 Lorie Konish, *Paying Down Student Loans vs. Saving for Retirement: Here's How to Prioritize*, CNBC (July 28, 2018), https://www.cnbc.com/2018/07/27/paying-down-student-loans-vs-saving-for-retirement-heres-how-to-pri.html.

their employers.

C. IRS Private Letter Ruling ("PLR")

1. What is an IRS PLR?

IRS policy is "to answer inquiries of individuals and organizations regarding their status for tax purposes and the tax effects of their acts or transactions, prior to the filing of returns or reports that are required by the revenue laws."[48] A PLR from the IRS is a written statement issued to a taxpayer "in response to a written inquiry from an individual or an organization about its status for tax purposes or the tax effects of its acts or transactions, prior to the filing of returns or reports that are required by the revenue laws."[49] These statements interpret and apply "the tax laws to the taxpayer's specific set of facts and is given when appropriate in the interest of sound tax administration."[50] Various Associate Chief Counsels generally issue PLRs directly to the specific taxpayer who makes the request.[51]

Revenue Procedure 2018-1 Section Seven outlines the general instructions for requesting a PLR.[52] A PLR request must include: statement of facts and support data, documents and foreign law, requested rulings, analysis of material fats, whether the same issue is in an earlier return, whether the same or similar issue was previously ruled on or requested or currently pending, statement of authorities supporting and contrary to the taxpayer's view, statement identifying pending legislation, deletion statement for disclosure, procedural matters, a signature, and a penalties of perjury statement.[53]

The IRS has full discretion to decide whether to make a ruling or not.[54] While the IRS is open to inquiries, federal regulations specify that a letter ruling will only be issued when it is appropriate, according to the interest of sound tax administration.[55] PLRs are not precedential and they apply only to the taxpayer who made the specific request.[56] A PLR's "conclusions as to the tax consequences arising from a particular set of facts must be honored

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48 MICHAEL SALTZMAN, IRS PRACTICE AND PROCEDURE § 3.03[3][a] (2002), at 3–37.

49 MICHAEL SALTZMAN & LESLIE BOOK, IRS PRACTICE AND PROCEDURE ¶ 3.03[1], at S3-18 (2nd ed. 2013).

50 *Id.*

51 *Id.*

52 *See Internal Revenue Bulletin: 2018-1*, §7, IRS, (Jan. 2, 2018), https://www.irs.gov/irb/2018-01_IRB#RP-2018-1.

53 MICHAEL SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 3.03[4], at 3–60 (2nd ed. 2002).

54 SALTZMAN, *supra* note 48, at 3–37.

55 SALTZMAN, *supra* note 48, at 3–37 (quoting 26 C.F.R. 601.201(a)).

56 SALTZMAN, *supra* note 48, at 3–31.

by a district office in the determination of tax liability of the taxpayer who requested the ruling."[57]

The Associate Chief Counsels issue rulings on several matters, including income and gift tax matters, estate tax matters, employment and excise tax matters, and administrative provisions.[58] There are some tax areas that require rulings. The National Office must issue a ruling on "prospective or future transactions where the Code or the regulations require it to make a determination."[59] Two areas in which rulings are required are: "(1) issues relating to alcohol, tobacco, and firearms taxes, and (2) employee plan and exempt organization issues."[60] In the employment context, the National Office will issue a PLR on prospective transactions and transactions that have already been completed, before or after the taxpayer files the tax return.[61]

Once taxpayers find that their request is one in which the Service may issue a ruling, they must decide if they want to request a ruling.[62] "[A] favorable ruling will provide taxpayers with a measure of certainty as to the tax consequences of a particular transaction, unless, of course, the facts surrounding the transaction turn out to be materially different from those previously stated in the ruling request."[63] This favorable ruling may be a selling point for a transaction, while avoiding any controversy with an agent on a future audit concerning this issue, and making the taxpayer more attractive in regards to the request.[64] Aside from these obvious benefits of a favorable ruling, the process itself is advantageous for a taxpayer.[65] The Service can interact with the taxpayer according to his request either by recommending changes to assist the taxpayer or warning the taxpayer of any dangerous or potentially illegal activity.[66]

Disadvantages of filing a ruling request include costs, the time it takes to receive a ruling, and, of course, receiving an unfavorable ruling.[67] If the taxpayer receives an unfavorable ruling, they would then have to adjust their plan. Even if the taxpayer withdraws the request prior to the IRS issuing a ruling, the request might alert the National Office to contact the district office

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57 SALTZMAN, *supra* note 48, at 3–31.

58 SALTZMAN & BOOK, *supra* note 49, at S3–23.

59 SALTZMAN, *supra* note 48, at 3–39, 3–40.

60 SALTZMAN, *supra* note 48, at 3–40.

61 SALTZMAN, *supra* note 48, at 3–41.

62 MICHAEL SALTZMAN, IRS PRACTICE AND PROCEDURE § 3.03[3][b], at 3–46 (2nd ed. 2002).

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id*.

67 *Id.* at 3–47.

to audit or examine the taxpayer.[68] Another potential disadvantage of a PLR is disclosure and a lack of confidentiality.[69] Congress added Section 6110 to the Internal Revenue Code (IRC), constituting an exclusive remedy regarding disclosure of rulings and related materials.[70] Now, "the text of any ruling, determination letter, technical advice memorandum, or Chief Counsel advice" must "be open to public inspection after identifying details and other confidential data have been deleted."[71] Congress exempts some categories of information from disclosure.[72] The National Office, before disclosing a ruling, will inform the taxpayer of the information they will disclose.[73] The taxpayer then has ten days to respond, but no conference on any points of disagreement is allowed.[74] The taxpayer has twenty days, however, to request additional deletions.[75]

2. IRS PLR 131066-17

On August 17, 2018, the IRS released PLR-131066-17.[76] The IRS ruled that an employer's contributions toward the 401(k) plans of employees who make payments on their student loans are not violating the IRC's contingent benefit rule.[77] The IRC's contingent benefit rule "prohibits an employer from making any benefit – other than matching contributions – contingent, directly or indirectly, on an employee's making, or not making, elective deferrals under the 401(k) plan."[78] According to the PLR, employees who make repayments on their student loans, instead of contributing to their 401(k) plan, will no longer lose the benefit of an employer's matching contributions the employer would otherwise make if the employee was regularly contributing to their 401(k) plan.[79]

68 SALTZMAN, *supra* note 48, at 3–47.

69 SALTZMAN & BOOK, *supra* note 49, at S3–25.

70 SALTZMAN, *supra* note 48, at 3–49.

71 SALTZMAN, *supra* note 48, at 3–49. Background materials must also be made available to the public.

72 SALTZMAN, *supra* note 48, at 3–50. Names, addresses, trade secrets, commercial or financial information, any invasion of personal privacy, and account information are among some identifying details that are exempt.

73 SALTZMAN, *supra* note 48, at 3–51.

74 SALTZMAN, *supra* note 48, at 3–51.

75 SALTZMAN, *supra* note 48.

76 *See* I.R.S. PLR 131066-17 (May 22, 2018), https://www.irs.gov/pub/irs-wd/201833012.pdf.

77 Richard Chargar et al., *Tips for Offering Student Loan Benefits Under 401(k) Plans*, LAW 360 (Sep. 24, 2018).

78 *Id.*; I.R.C. 401(k)(4)(A) (2019).

79 I.R.S. PLR 131066-17 (May 22, 2018) https://www.irs.gov/pub/irs-wd/201833012.pdf; Chargar, *supra* note 77.

As mentioned above, due to the nature of a PLR, this ruling applies only to the employer who made the request.[80] The PLR does not specify who made this request; however, such a PLR is an example for other employers who wish to provide similar benefits to their employees in similar factual circumstances.[81] According to the PLR, the employer taxpayer provided a 401(k) plan to its employees that matched five percent of "eligible compensation for each pay period in which the employee made an elective deferral of at least [two] percent of their eligible compensation."[82] The employer's benefit plan allowed employees to opt out of the matching five percent and instead receive five percent of nonelective contributions to their 401(k) plan when they make a payment of at least two percent of their compensation toward their student loan repayment.[83] The new program also includes a true-up matching contribution.[84] This means if the employee does not make a payment toward their student loan of at least two percent of their compensation for a particular pay period, but instead the employee makes an elective contribution of at least two percent of his or her compensation, the employer would still make a matching contribution of five percent of the employee's compensation.[85] This way, the employee can receive either a nonelective contribution or a true-up matching contribution.[86]

The program is based on voluntary enrollment and an employee may opt out at any time.[87] The employer's contributions are subject to all plan qualification requirements, such as "eligibility, vesting, and distribution rules, contribution limits, and coverage and nondiscrimination testing."[88] The employer will deposit the nonelective and true-up matching contributions into the employee's account after the end of the plan year as long as the employee is still employed and there is not a case of death or disability.[89]

The employer taxpayer needed approval from the IRS for such a program because sections 401(k)(4)(A) and 1.401(k)-1(e)(6) of the Income

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80 *See supra* Section II.C.1; Chargar, *supra* note 77.

81 *See* I.R.S. PLR 131066-17 (May 22, 2018), https://www.irs.gov/pub/irs-wd/201833012.pdf; Chargar, *supra* note 77.

82 *Tips for Offering Student Loan Benefits Under 401(k) Plans*, *supra* note 77; *see also* I.R.S. PLR 131066-17 (May 22, 2018), https://www.irs.gov/pub/irs-wd/201833012.pdf.

83 *Tips for Offering Student Loan Benefits Under 401(k) Plans*, *supra* note 77.

84 I.R.S. PLR 131066-17 (May 22, 2018), https://www.irs.gov/pub/irs-wd/201833012.pdf, at 2; *Tips for Offering Student Loan Benefits Under 401(k) Plans*, *supra* note 77.

85 *Tips for Offering Student Loan Benefits Under 401(k) Plans*, *supra* note 77.

86 I.R.S. PLR 131066-17 (May 22, 2018), https://www.irs.gov/pub/irs-wd/201833012.pdf, at 2.

87 *Id.*

88 *Id.*

89 *Tips for Offering Student Loan Benefits Under 401(k) Plans*, *supra* note 77.

Tax Regulations state that cash or deferred arrangements cannot be conditioned on another benefit.[90] Because employees could continue to make contributions to their 401(k) plan while participating in the program, the IRS allowed the nonelective contributions to be contingent on student loan repayments.[91]

Essentially, this PLR allows employees who would otherwise not be able to make contributions to their own 401(k) plans because of the need to repay substantial student loans, the opportunity to begin their retirement savings.[92] Employees who take part in this program will not have to sacrifice their 401(k) benefits.[93] Instead, this particular employer can now link an employee's student loan repayment to their 401(k) plan.[94]

Additionally, employers are more and more interested in offering student loan repayment help and benefits because it is an incentive for the employee to continue working for the employer.[95] In 2017, American Student Assistance conducted a survey of 500 people between the ages of twenty-two and thirty-three.[96] According to the survey, eighty-six percent of employees said they would stay with their employer for five years, if the employer helped pay off their student loans.[97] If employers are looking to increase their retention rates, this might be an attractive incentive for them to offer their employees.

Although there seem to be benefits to both employees and employers, only about four percent of employers offer some type of student loan repayment benefit plan to their employees.[98] This private letter ruling from the IRS can be a way to encourage other employers to begin offering such programs.

D. Congressional Bills

As previously discussed in Section C, only about four percent of organizations offer taxable financial aid to help employees pay back their student loans.[99] On the contrary, close to half of organizations provide some type of tax-exempt educational assistance, such as payment toward tuition

90 I.R.S. PLR 131066-17 (May 22, 2018), https://www.irs.gov/pub/irs-wd/201833012.pdf, at 2-3.

91 *Id.* at 3; *Tips for Offering Student Loan Benefits Under 401(k) Plans*, *supra* note 77.

92 *See* I.R.S. PLR 131066-17 (May 22, 2018) https://www.irs.gov/pub/irs-wd/201833012.pdf, at 1-3.

93 *Id.*

94 *Id.*

95 Alder, *supra* note 2.

96 Alder, *supra* note 2.

97 Alder, *supra* note 2.

98 Alder, *supra* note 2.

99 *In Every Issue: Legislative Highlights*, 38-3 ABIJ 10 (2019).

and materials.[100] One problem with providing student loan debt repayment benefits is that these payments are considered compensation, taxable income to the recipients, and employees cannot claim a deduction for the payments.[101] Several bills have been introduced in the previous congressional session of 2017 that address employer aid with respect to their employees' student loan repayments and, in particular, allow this aid to benefit from the same tax advantages that section 127 provides.[102] Although these bills have all failed, they indicate the government's will and ability to help with the student loan repayment crisis.

1. 115th Congress 1st Session H.R. 795

At the time of this writing, the Employer Participation in Student Loan Assistance Act has 127 sponsors.[103] Its purpose is to amend the IRC of 1986 to extend the exclusion for employer-provided education assistance to employer payments of qualified education loans.[104] This bill would essentially have expanded IRC section 127 to include student loan repayment benefits as tax-exempt education expenses.[105]

Congress added Section 127 to the IRC in the 1978 Revenue Act.[106] The legislative history indicates that Congress added this section for three reasons: (1) "under then-current law, inequitable treatment meant that the higher the level of job held by an employee, the more likely it was that the employee would qualify for exclusion under the 'job-related' test," (2) this "job-related distinction added to the complexity of the tax system for the IRS, the employer, and the employee," and (3) "the law operated as a disincentive to initial training, retraining and career advancement because it required out-of-pocket payments for employer-provided educational assistance from those least able to pay."[107]

Section 127 provides a benefit to the employees by allowing them to exclude any amounts paid by employers toward educational assistance programs that help with its employees' education.[108] In addition, employees would not have to include in their income the assistance received from the

[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] Employer Participation in Student Loan Assistance Act, H.R. 795, 115th Cong. § 1 (2017).
[104] *Id.*
[105] *Id.*
[106] Tax Management Portfolio: Employee Fringe Benefits 394-5th (BNA) § III.A.1 (March 5, 2018) [hereinafter TMP 394-5th].
[107] *Id.*
[108] I.R.C. § 127(a)(1) (2020).

employer, such as free classes provided by the employer.[109] Qualified educational assistance programs include help with an employee's tuition, fees, books, supplies, and any equipment an employee may need for their education.[110] The education includes most types of instruction or training the employee is undergoing.[111]

The specifics of this bill would have expanded the definition of "educational assistance" to include "[t]he payment of an employer, whether paid to the employee or to a lender, of principal or interest on any qualified education loan . . . incurred by the employee."[112] Section 127 currently does not allow for contributions toward a lender or any payment toward a student loan or its interest as "educational assistance," and this bill proposed to allow employees to exclude these contributions from their income.[113] The bill also included a denial of double benefit by making some minor changes to Section 221(e)(1) and Section 127(c)(1)(B).[114]

Essentially, the Employer Participation in Student Loan Assistance Act would have allowed employers to make up to $5,250 tax-free contributions per employer toward their student loans.[115] H.R. 795 would in turn have incentivized employees to make payments toward their student loan debt because the employers would make an additional monthly contribution.[116] The bill would have expanded the scope of education assistance to reach not only current educational needs, but also loans incurred for education expenses.

2. 115th Congress 1st Session H.R. 1656

H.R. 1656 was introduced in 2017 and is referred to as the Higher Education Loan Payments for Students and Parents Act.[117] It would have amended the IRC to incentivize employers to establish student loan repayment programs.[118] This allows employers to make contributions to

109 TMP 394-5th, *supra* note 106, at § III.A.2.a.
110 TMP 394-5th, *supra* note 106, at § III.A.2.b.
111 TMP 394-5th, *supra* note 106, at § III.A.2.b.
112 Employer Participation in Student Loan Assistance Act, H.R. 795, 115th Cong. § 2(a)(B) (2017).
113 I.R.C. § 127(a)(1) (2020).
114 Employer Participation in Student Loan Assistance Act, H.R. 795, 115th Cong. § 2(a)(B) (2017).
115 Amanda Eisenber, *Advocates Urge Employers to Fight for Student Loan Legislation*, BENEFIT NEWS (Sep. 20, 2017), https://www.benefitnews.com/news/advocates-urge-employers-to-fight-for-student-loan-legislation.
116 *Id.*
117 Higher Education Loan Payments for Students and Parents Act, H.R. 1656, 115th Cong. § 1 (2017).
118 *Id.* at § 2(a)(B).

certain qualified tuition programs on behalf of their employees' children.[119] Specifically, the amendment would have expanded the tax exclusion of education assistance programs provided by employers to exclude from an employee's income: "the payment by an employer of principal or interest on any qualified education loan [and] . . . any qualified dependent 529 contributions."[120]

Section 529 governs qualified tuition programs.[121] These programs allow a person to "purchase tuition credits or certificates on behalf of a designated beneficiary that entitle the beneficiary to a waiver or payment of the beneficiary's higher education expenses" or "make contributions to an account that is established for the sole purpose of meeting qualified higher education expenses of the designated beneficiary of the account."[122] The "qualified dependent 529 contribution" is a contribution made toward an employee's child's tuition, as long as the child has not turned nineteen at the time of the contribution or the child is a student under the age of twenty-four.[123]

H.R. 1656 would have provided a business tax credit for employers who provide higher education assistance.[124] This is calculated as "[fifty] percent of the student loan repayment expenditures of the taxpayer for the taxable year and . . . [fifty] percent of the qualified dependent 529 contributions made by the taxpayer for the taxable year."[125] Like H.R. 795, this bill attempted to extend current educational assistance on behalf of an employee's child, for instance, to payment toward a student loan of the same.[126]

3. 115th Congress 1st Session H.R. 108

Introduced in 2017, this bill sought to amend the IRC to allow a credit for employers who are providing student loan repayment for their employees.[127] Qualifying employer-provided student loan repayment credits would be ten percent of "all qualified student loan repayments of the

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119 *Id.* at § 45S(c)(d).
120 *Id.* at § 2(a).
121 I.R.C. § 529 (2020).
122 Tax Management Portfolio: Exclusion of Scholarships and Other Receipts for Education 518 (BNA) § III.A (November 13, 2017) [hereinafter TMP 518].
123 Higher Education Loan Payments for Students and Parents Act, H.R. 1656, 115th Cong. at § 45S(d)(2) (2017).
124 *Id.* at § 45S(a).
125 *Id.*
126 *Id.*
127 Student Loan Repayment Assistance Act of 2017, H.R. 108, 115th Cong. § 45S (2017).

taxpayer for such a taxable year."[128] Qualifying programs are those in which the employer provides an amount under a student loan repayment program for an employee of no more than $500 a month.[129] H.R. 108, unlike H.R. 795 and 1656 which proposed to add student loan repayments to education assistance programs, applied to employers who already offer student loan repayment benefits.

E. Employers Who Already Offer Student Loan Repayment Benefits

1. Abbott Laboratories

Abbott Laboratories introduced its Freedom 2 Save Program in 2018.[130] Employees who qualify for the company's 401(k) plan and who are also using two percent of their eligible pay to repay student loans, "may receive the equivalent of the company's traditional [five] percent 'match' deposited into their 401(k) plans, without any 401(k) contribution of their own."[131] This appeals to employees who do not contribute to their retirement due to student loan debt.[132] The plan is very similar to that outlined in the PLR request.

This appears to be the first time the IRS has approved contributions conditioned on an employee payment independent of the retirement plan.[133] Abbott takes pride in this, and their Executive Vice President of Human Resources, Steve Fussell, addressed the issue of student loan debt and Abbott's hope to alleviate financial concerns for its employees.[134] Abbott employees have also expressed excitement for the program, particularly young hires who emphasize that paying off their student loans is their number one goal.[135] Employees who plan to participate in Abbott's educational assistance programs to obtain their master's degree also intend to use the new Freedom 2 Save program. Such benefits are enticing to recent

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128 *Id.* at § 45S(a).

129 *Id.* at § 45S(b).

130 *Abbott Announces Freedom 2 Save Program for Employees to Address Student Debt*, PR NEWSWIRE (Jun. 26, 2018), https://www.prnewswire.com/news-releases/abbott-announces-freedom-2-save-program-for-employees-to-address-student-debt-300671964.html.

131 Will Hansen, Jeffrey Holdvogt, & Mark Iwry, *Student Loan Repayment Benefits: Options and Issues for Qualified Retirement Plans*, A.B.A. 2019 Midyear Tax Meeting (Jan. 19, 2019).

132 *Id.*

133 Alexia Elejadle-Ruiz, *Abbott 401(k) Program to Help Employees Who Have Student Debt Could Become National Model*, CHICAGO TRIBUNE (Aug. 31, 2018), https://www.chicagotribune.com/business/ct-biz-irs-student-loan-perk-0902-story.html.

134 *Id.*

135 *Abbott Announces Freedom 2 Save Program*, *supra* note 130.

graduates.[136]

Forbes applauds Abbott's pioneer program.[137] Through this program, if an engineer begins working at Abbott for $70,000 a year with an expected annual raise of 3% and market returns on 401(k) investments average 6% per year, then in ten years, aside from having paid off much of the employee's student loan debt, the employee will have $54,000 saved for retirement in his or her 401(k) plan.[138] That amount would otherwise not be there if it were not for this plan, and if it was, the employee probably had to sacrifice making payments toward student loan debt.

2. Aetna, Inc.

Aetna is another company that offers some type of student loan repayment benefit to their employees. Aetna matches eligible full-time employee's payments up to $2,000 a year with a cap of $10,000.[139] Additionally, they offer to match eligible part-time employees' payments up to $1,000 a year with a $5,000 cap.[140] In order to qualify, an employee must have received a U.S.-based undergraduate or graduate degree within three years of applying for the program.[141] This program began in January 2017 and currently an estimated 4,000 employees are eligible to participate.[142]

3. Staples, Inc.

Differing from Aetna's matching program, Staples offers a flat $100 a month payment to eligible employees for their student loan repayment as additional compensation.[143] Employees can only receive these monthly payments for three years.[144] This program began in November 2016 and Staples only offered this benefit to "top performers."[145] Staples has, however, stated that they plan to extend the program to other employees in

136 *Abbott Announces Freedom 2 Save Program*, *supra* note 130.

137 Anne Fisher, *Abbott's New (Tax-Deferred) Twist on Helping Employees Pay Student Loans*, FORBES (Jul. 25, 2018), forbes.com/sites/annefisher/2018/07/25/abbotts-new-tax-deferred-twist-on-helping-employees-pay-student-loans/#7e7962777a7a.

138 *Id.*

139 Eisenberg, *supra* note 115.

140 Eisenberg, *supra* note 115.

141 *Fact Sheet: Aetna Program to Help Thousands of Employees Repay Student Loans*, CVS HEALTH (Aug. 10, 2016), https://news.aetna.com/news-releases/fact-sheet-aetna-student-loan-repayment-program/.

142 *Id.*

143 Katie Lobosco, *Staples Will Give Workers $3,600 to Pay Student Loans*, CNN MONEY (Nov. 1, 2016), https://money.cnn.com/2016/11/01/pf/college/staples-student-loan-repayment-plan/index.html.

144 *Id.*

145 *Id.*

the future.[146] A third party administers Staples' Student Loan Repayment Plan.[147]

4. PricewaterhouseCoopers

PricewaterhouseCoopers claims to be the pioneer and the first in the industry to offer a student loan repayment benefit.[148] Their benefits program pays $1,200 a year towards an employee's student loan, which can reduce student loan principal and interest obligation by as much as $10,000.[149] This benefit has the potential—and has—reduced the payoff period of an employee of their student loan debt by up to three years.[150]

PricewaterhouseCoopers offers the program for a maximum of six years.[151] An example of this program follows. For a $35,000 loan at 3.4% interest rate with a term of ten years, the assumption is that the individual will continue to pay an extra $100 a month even after the six-year cap.[152] Over a ten-year period, the individual will save a total of $10,675; They will save $1,675 in interest, and the time for the repayment is reduced by two years and six months.[153] PricewaterhouseCoopers not only offers flat payment support like Staples, but they also emphasize that this program will encourage the employee to continue with this schedule after the program ends.[154]

The reaction from employees for this program is highly positive. One associate calculated that this program will cut one year off of her payoff period and states that this benefit is "a light at the end of the tunnel" and a relief to know she will be able to pay off her loans.[155] Because student loan repayment benefits by employers are scarce, companies such as PricewaterhouseCoopers are using these benefit programs to lure and retain

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[146] *Id.*

[147] *Staples Implements New Student Loan Repayment Plan for Sales Associates and High Performers*, BUSINESSWIRE (Nov. 1, 2016), https://www.businesswire.com/news/home/20161101005240/en/Staples-Implements-New-Student-Loan-Repayment-Plan.

[148] *Employee Benefits*, PRICEWATERHOUSECOOPERS, https://www.pwc.com/us/en/careers/why-pwc/employee-benefits.html (last visited Mar. 24, 2020).

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] PRICEWATERHOUSECOOPERS, *supra* note 148.

[155] Jessica Mai, *A Billion-Dollar Company is Trying a New Perk to Attract Millennials: Paying Employees' Student Loan Debt*, Business Insider (Mar. 17, 2016), https://www.businessinsider.com/pricewaterhouse-coopers-student-loan-debt-2016-3.

incoming employees.[156]

III. ANALYSIS

A. Is this the Solution to the Problem?

The trend of employers who offer student loan repayment benefits has taken off over the last two years.[157] However, we are far from it becoming common practice that employers implement a program to offset student loans. Student debt repayment benefits could boost recruitment and retention of employees.[158] In competitive job markets, and for some employees, the reality might be that the employee must decide and choose from a sea of employers. Some employers believe that a big factor in employment decision-making is whether the employer will help lighten the burden of the employee's student loan debt.[159] Most students admit that they would have no problem committing to an employer if said employee had some type of benefit program to help the student pay their debt.[160] Aside from boosting morale, a program, such as the one Abbott Laboratories and PricewaterhouseCoopers implemented, garnered attention in the media and created good public relations.[161] Being a leader in offering student debt repayment benefits makes an employer more appealing.

Employers now have several options when it comes to student loan repayment benefit programs. These programs can promote consolidation and refinancing of the debt.[162] Employers can choose to pay directly to the employee or reimburse the employee later, which will then be taxable.[163] Tying the benefit to an employee's retirement plan in the form of an additional contribution or match replacement, as described in the PLR, allows the employer to provide the benefit on a tax-free basis.[164] Employers would otherwise be paying into the employee's 401(k) plan; if they have already allocated the matching contributions of their employees, it does not make a difference if the employee is paying into their 401(k) plans or with

156 Jena McGregor, *PwC to Help Employees Pay Back Their Student Loans*, WASH. POST (Sept. 22, 2015), https://www.washingtonpost.com/news/on-leadership/wp/2015/09/22/pwc-to-help-employees-pay-back-their-student-loans/?noredirect=on&utm_term=.5957fb4dda73.

157 *See* Alder, *supra* note 2.

158 *Fidelity Launches New Program for Employers to Help Workers Pay Off Student Debt*, FIDELITY (Sept. 14, 2017), https://www.fidelity.com/about-fidelity/employer-services/fidelity-launches-new-program-employers-to-help-pay-off-student-debt

159 *Id.*

160 *See* Alder, *supra* note 2.

161 *See* McGregor, *supra* note 156; Fisher, *supra* note 137.

162 Hansen, *supra* note 131, at slide 4.

163 Hansen, *supra* note 131, at slide 4.

164 Hansen, *supra* note 131, at slide 8, 10.

respect to their student loans. Most of the employers who provide such programs have not disclosed any particulars of whether they offer these benefits in return for some type of promise of continued employment. The assumption for the employer who requested the private letter ruling is that they do not require any sort of commitment because the employer allows their employees to join and back out of the program whenever they want.[165] If they back out, they would lose these contributions they would otherwise receive. However, it is not difficult to imagine that a company like Staples who deposits $100 a month for three years for their employees to pay for their student loan debt to require that such employees would have to remain for at least five years.[166] If employees are willing to enroll, this could be an excellent way for employers to increase their retention rates. Furthermore, if the program, like in Staples, is eligible for only certain employees, such as top performers, such a program could cause a healthy competition in the workplace and even boost work ethic, another win for the employer.[167]

PricewaterhouseCoopers offered an example that their program can help students offset their student loan debt by over $10,000.[168] Like Staples, PricewaterhouseCoopers pays their employees $1,200 a year, or $100 a month toward their student loan debt for a maximum of six years.[169] However, for a $35,000 loan, at a 3.4% interest rate,[170] the monthly payments from the employer are just barely paying off the interest. Along with a two-and-a-half-year reduction of the time period to pay off the loan, these numbers PricewaterhouseCoopers presented assumes that the employee, after the employer stops giving them the benefit in six years, will continue to set aside an extra $100 a month to put toward the payment they are already making.[171] Setting aside this amount is not the reality for many people, and the assumption does not seem fair. Certainly, anything helps in this situation; but to think that PricewaterhouseCoopers is reducing $10,000 from a $35,000 loan is deceiving. Yes, the company will be freely giving the employee over $7,000 to put toward their student loan debt repayment over the six years, but this is just truly paying for the interest of those six years.

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165 *See* I.R.S., *supra* note 4.
166 Lobosco, *supra* note 143.
167 Lobosco, *supra* note 143.
168 *See* PRICEWATERHOUSECOOPERS, https://www.pwc.com/us/en/careers/why-pwc/employee-benefits.html, *supra* note 148.
169 PRICEWATERHOUSECOOPERS, https://www.pwc.com/us/en/careers/why-pwc/employee-benefits.html, *supra* note 148.
170 PRICEWATERHOUSECOOPERS, https://www.pwc.com/us/en/careers/why-pwc/employee-benefits.html, *supra* note 148.
171 PRICEWATERHOUSECOOPERS, https://www.pwc.com/us/en/careers/why-pwc/employee-benefits.html, *supra* note 148.

This problem may have no solution, but these types of assistance programs are a step in the right direction to offset heavy additional costs to those trying to pay off the loan and make ends meet. Proposed congressional bills such as H.R. 795 and 1656 continuously failed to garner enough support to bring them to a vote, and the burden is falling increasingly on employers to help employees and incentivize them to pay off their student debt.

B. Issues with the IRS PLR

One of the biggest issues of this PLR is whether it can cause problems to an employee's 401(k) plan. The Employee Benefit Research Institute conducted a study in 2016, finding that families with employees between the ages of forty-five and fifty-four who had "no student loan debt had a median defined contribution plan account balance that was" almost three times bigger than those employees who have student loan debt.[172] Put into perspective, a normal employee would make a contribution to their 401(k) plan, and the employer would match it to a certain degree, meaning the employee receives two separate contributions. In this private letter ruling, the employee is now no longer making 401(k) contributions and instead is putting the money towards paying off their loans.[173] The employer is then making a matching contribution into the 401(k) to incentivize the employee to pay off their loans and not worry about missing payments toward their 401(k).[174] However, while the employee is chipping away harder at their student loan debt, their 401(k) plan is only receiving one contribution.

The ideal candidates in this situation are recent graduate-employees who are living back home with their parents. They have no familial obligations. Assuming their parents allow them to live rent-free, they have minimal bills to pay. Perhaps they want to make more contributions toward their student debt to pay it off quicker, yet they want to continue contributing to their 401(k) plan. The key to this private letter ruling, however, is the voluntary system. Employees can make extra contributions toward their student loan debt, or they can contribute to their 401(k), or they can do both.[175] The most important part is that it is flexible, and the employee can choose where he wants to allocate his resources. This program just ensures he will never lose the constant flow of cash into his 401(k) plan, as the employer will always match the payments, regardless of where they go, into the employee's 401(k).[176]

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[172] Chargar et al., *supra* note 77.
[173] I.R.S., *supra* note 4.
[174] I.R.S., *supra* note 4.
[175] I.R.S., *supra* note 4.
[176] I.R.S., *supra* note 4.

Administering the program is also no easy feat.[177] If employers are paying directly into student loan debt, they would need to track the loans, which can come from various sources.[178] Tracking such payments could be difficult, as employers would need receipts, proof of payments, and assurances that these payments by the employees are going toward student loans. Furthermore, nonelective contributions, such as these benefits, are subject to nondiscrimination in favor of high paying employees, according to IRC section 401(a)(4).[179] In other words, any type of benefit plan cannot discriminate in any way against employees, regardless of their salary. This nondiscrimination is something an employer would have to pay special attention to when formulating their plan.

The program in the private letter ruling leaves open the question of whether the program would apply only to the loan holder, or if it would also apply to student loan debt of dependent family members such as spouses, children, or grandchildren. Many people hold student loan debt that funded the education of their spouse, children, or grandchildren. The program in the private letter ruling does not specify whether the program will cover loans incurred on behalf of spouses, children, and grandchildren.[180]

C. Different Kinds of Benefit Programs

This comment has thus far outlined the different types of student loan repayment benefit programs that employers offer. In some programs, like the one in the private letter ruling, the employee pays the money toward their student loan debt, and the employer matches the entire or a percentage of that contribution toward the employee's 401(k) plan.[181] Other employers, doing what seems to be more common, simply pay a lump sum to the employees to help them pay off their debt.[182]

It seems that the program outlined in the private letter ruling is more enticing to a future employee. The employers who offer a lump sum of $100 to the employee does so with limited time, sometimes three years, sometimes six.[183] The normal student loan repayment term is approximately ten years, but those who hold student loan debt can attest that it oftentimes takes much more than that; sometimes double that amount.[184] Some repayment plans allow federal student loan holders to extend their payments up to twenty or

177 Hansen, *supra* note 131, at slide 7.
178 Hansen, *supra* note 131, at slide 6.
179 Hansen, *supra note* 131, at slide 9.
180 Chargar et al., *supra* note 77.
181 I.R.S., *supra* note 4.
182 *See, e.g.*, companies such as Staples, Aetna, etc.
183 *See* companies such as Staples, Fidelity, etc.
184 Bidwell, *supra* note 29.

twenty-five years.[185] The flexibility of the private letter ruling is ideal for employees. An employee's spending increases and decreases depending on which phase of life they are experiencing, such as buying a house or having children. Perhaps an employee wants to pay off their loan as soon as possible, or maybe another employee would prefer to only make these special contributions toward their student loans every other month and focus more on their retirement. Either way, having a constant flow of money to the 401(k) takes a little bit of the burden off the backs of those who feel like they are drowning in debt and cannot save for their future.

IV. CONCLUSION

Employers who provide student loan repayment benefits are, thankfully, a growing trend. Some even refer to student loan repayment programs as "the hottest employee benefit of 2018," attesting that employees, especially recent graduates, care more about assistance with their student loan than vacation time.[186] The government should help to incentivize employers to continue offering these programs by re-introducing and passing congressional bills like H.R. 795 and 1656 that provide different benefits and tax exclusions for employers.[187] These bills would allow such contributions towards an employee's student loan debt or a match replacement to their 401(k) plan to fall under the benefits of section 127. This would, in turn, minimize all employers' needs to individually request a PLR from the IRS, saving time and money. Additionally, the issuing of the IRS private letter ruling is a strong model for other employers.[188] Their program has extensive benefits that inform an employee who is struggling to choose whether they want to pay for their past debt or start saving for their future that they no longer have to pick one or the other. More companies should begin to offer these types of benefits to their employees to work towards decreasing the current student debt and combatting this crisis. Americans need to be able to attend college, receive higher education, and not have to sacrifice their retirement in doing so.

[185] Carter, *supra* note 20.

[186] Zack Friedman, *Student Loan Repayment Is the Hottest Employee Benefit of 2018*, FORBES (Oct. 18, 2018), https://www.forbes.com/sites/zackfriedman/2018/10/18/student-loan-repayment-employee-benefits/#40ba2a52566f.

[187] *See, e.g.*, Higher Education Loan Payments for Students and Parents Act, H.R. 1656, 115th Cong. § 2 (2018).

[188] *See generally* I.R.S., *supra* note 4.